

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND

vs.

Criminal Trial 07-1664X

KEITH A. WASHINGTON,

Defendant.

/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Trial on the Merits)

Volume VII of IX

Upper Marlboro, Maryland

Wednesday, February 20, 2008

BEFORE:

HONORABLE MICHAEL P. WHALEN, Associate Judge

(and a jury)

APPEARANCES:

For the State of Maryland:

WILLIAM D. MOOMAU, ESQUIRE
JOSEPH L. WRIGHT, ESQUIRE
RAEMARIE ZANZUCCHI, ESQUIRE

For the Defendant:

VINCENT H. COHEN, JR., ESQUIRE
MICHAEL STARR, ESQUIRE

Cindy S. Davis, RPR
Official Court Reporter
Post Office Box 401
Upper Marlboro, Maryland 20773

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P R O C E E D I N G S

(The jury was not present upon convening.)

THE DEPUTY CLERK: Criminal trial 07-1664X, State of Maryland versus Keith A. Washington.

MR. MOOMAU: William Moomau present for the State. Your Honor, good morning.

MR. WRIGHT: Joseph Wright on behalf of the State.

MS. ZANZUCCHI: Raemarie Zanzucchi on behalf of the State.

MR. COHEN: Good morning, Your Honor, Vincent H. Cohen, Jr., on behalf of Mr. Washington.

MR STARR: Good morning, Your Honor. Michael Starr, also on behalf of Mr. Washington, who is present.

THE COURT: Good morning. Are we ready to bring the jury in?

MR. MOOMAU: Yes. Can we approach for one moment?

(Counsel approached the bench and the following ensued.)

MR. MOOMAU: I anticipate the defense is going to have two witnesses. The second one will be their expert.

Dr. Locke, I did ask him to come back, to be in the courtroom. He's already testified. He is an expert in the field of forensic pathology. I'd just ask that he be permitted to stay as an expert, for the purpose of potential rebuttal, based on the testimony of Dr. Arden or, at least,

1 that I can ask him some questions after Dr. Arden testifies
2 on direct, to assist me in my cross-examination.

3 MR. COHEN: No objection, Your Honor. We actually
4 agreed to that earlier.

5 THE COURT: Okay.

6 MR. MOOMAU: Excuse me?

7 MR. COHEN: I said no objection. We actually
8 thought that that was proper earlier, and so we don't have an
9 objection now.

10 THE COURT: Anything else?

11 MR. COHEN: I have two things. Scheduling. We're
12 actually only going to call one witness, Your Honor, and it
13 is going to be Dr. Arden. I figured that it would probably
14 be better, in an abundance of caution so that the Court is
15 not surprised and we're not running back and forth to the
16 bench, I don't understand -- genuinely, I don't understand
17 the argument that the State is making in terms of what he can
18 testify and what he can't testify to.

19 So what I suggest is allow the defense to make a
20 proffer to the Court about how the evidence will come in, and
21 then see if there is any objection from the State, and then
22 we can just make it a little faster.

23 Your Honor, I think the issue that the State may
24 have is how the question is going to be asked regarding the
25 hypotheticals that we intend to ask Dr. Arden.

1 Just to be, again, in full candor with the Court, I
2 intend to give him a hypothetical scenario, act it out with
3 other defense counsel and our paralegal, and then ask him, do
4 you have an expert opinion as to whether or not the evidence
5 that you reviewed in this case is consistent with the
6 hypothetical that was demonstrated to you.

7 MR. STARR: When he says act out, he means putting
8 people in position, Your Honor.

9 MR. COHEN: It's not going to be dramatic. We're
10 going to be positioning folks where Mr. White said that the
11 people were, and there will be no attribution to whose
12 scenario or version is whom's or anything like -- I mean,
13 they'll be able to tell, because they heard the testimony,
14 but we're not going to connect it to anyone's testimony. I
15 don't know of any other way to do it, to be candid, Your
16 Honor.

17 MR. MOOMAU: So you're going to present scenarios
18 consistent with what, I guess, Robert White has testified to,
19 the placement of people, without saying his name.

20 MR. COHEN: Yes. Different scenarios.

21 MR. MOOMAU: It's going to be difficult, Your
22 Honor, because no one knows the exact position that people
23 were in. No one was taking measurements there.

24 Of course, when someone is getting shot, for them
25 to do a reenactment, there's no guarantee that that's where

1 people were standing. It would be speculative, it would be
2 prejudicial and improper, because you just don't know how
3 people were standing and situated and where they were
4 located. And it would be putting the expert testimony on
5 that, and there would be no way for the State to rebut that.

6 MR. COHEN: Your Honor, in response to that, I
7 believe Mr. White, and I believe through cross-examination as
8 well, he stepped down and he described it, testimonally,
9 where everyone was positioned, and then also stepped down and
10 demonstrated where he was and what happened when he was shot.

11 Also, there was an impeachment done in which he
12 stated that Mr. Washington was at the master bedroom door,
13 and he was on the second step when he was shot. And, as you
14 know, Ms. Martin, our private investigator, made a
15 measurement from that position to the second step, which was,
16 I believe, eight feet, five and three-quarter inches.

17 MR. STARR: And he also said, Your Honor, in his
18 direct testimony that he was standing in front of Mr. Clark,
19 facing him, when Mr. Clark was shot. And in the grand jury
20 he said that he had walked out in front of him and was
21 looking back. The grand jury is under oath, obviously, and
22 it's admissible as substantive evidence. So he did clearly
23 say -- he said he was in-between -- he also used that
24 phraseology, in-between Mr. Clark and Mr. Washington when
25 Mr. Clark was shot.

1 So the body positioning is clear. I mean, that's
2 clearly in the record, as well as him having said that
3 Mr. Washington was at the master bedroom door.

4 MR. COHEN: Also, Your Honor, with respect to the
5 surrender position, I think Mr. White testified that
6 Mr. Clark's hands were in the surrender position.

7 THE COURT: It's a little bit difficult for me to
8 know exactly -- I mean, I know what you are saying and if you
9 are -- number one, it depends on the hypothetical questions
10 and whether there's an adequate basis to use them based on
11 substantive, factual testimony. You know that, so I don't
12 have to say anything about that.

13 In terms of the -- and I don't know if it's fair to
14 call it reenactment, so to speak, but in terms of the
15 positioning and who, exactly, how many different positions
16 are you going to have?

17 MR. COHEN: If I understand the Court, how many
18 scenarios am I going to do?

19 THE COURT: Yes.

20 MR. COHEN: Okay. I'm going to do one scenario in
21 which Mr. White is in-between Mr. Clark and Mr. Washington.
22 I'm going to do a second scenario in which Mr. White is
23 behind Mr. Clark, catching him on the second step and laying
24 him down. And then I'm going to do the third scenario in
25 which Mr. Washington is in the crouched position, Mr. Clark

1 and Mr. White are on both sides, and demonstrate how he came
2 up shooting. So three scenarios total.

3 THE COURT: And the position of Mr. White is going
4 to be based on the measurement of the private investigator
5 from the master bedroom to the first step?

6 MR. COHEN: Yes.

7 THE COURT: And that scenario will be the two
8 scenarios? In other words, in essence, the first, I guess,
9 being when he was walking out, where he reached when he was
10 walking out, Mr. White?

11 MR. COHEN: I'm not sure I follow the Court.

12 THE COURT: You're going to do three scenarios.

13 MR. COHEN: Yes, sir.

14 THE COURT: The first one, specifically, is going
15 to be which scenario?

16 MR. COHEN: The first one is going to be where
17 Mr. White is in-between -- as he testified, he was
18 in-between --

19 THE COURT: Walking out from the bedroom, in front
20 of Mr. --

21 MR. STARR: Facing him.

22 MR. COHEN: Yes, with Mr. Clark's hands up in the
23 surrender position.

24 THE COURT: And how are you going to do the
25 measurements on that one?

1 MR. COHEN: I'm not going to measure that one. I'm
2 not going to have measurements on that one. I'm going to
3 have Mr. Washington behind Mr. White in that scenario, and
4 ask if that is consistent.

5 THE COURT: You mean you're going to have
6 Mr. Washington positioned --

7 MR. COHEN: I'll be Mr. Washington. I'm sorry.

8 THE COURT: Behind Mr. White, who is in front of
9 Mr. Clark; is that what you're saying?

10 MR. COHEN: Your Honor, if you don't mind -- I
11 mean, I'm not hiding anything. I can do it right now.

12 MR. MOOMAU: Judge, my objection is we do not
13 know -- and Robert White wasn't for sure how everyone was
14 situated. The jury heard that testimony. They heard the
15 defendant's testimony, Robert White's testimony. Now they're
16 going to come in here and do a reenactment -- that's what I'm
17 calling it -- with the expert's stamp of approval, telling
18 the jury this is how it was. I'd object to that.

19 MR. COHEN: We don't intend to do that. We intend
20 to offer a hypothetical to the jury and have him say whether
21 it is consistent with the forensic and medical evidence that
22 he reviewed.

23 Let me just show the Court. Mr. Ramirez will be
24 Mr. Clark, Mr. White will be Mr. Starr, and I will be
25 Mr. Washington. That's the first scenario.

1 The second scenario is Mr. Carlos will be
2 Mr. Clark, Mr. Starr will be Mr. White, and then I will be
3 Mr. Washington, eight and a half feet from Mr. White. And
4 he'll be on the second stair, Mr. White will be.

5 And Mr. White will then -- I'll say Mr. Clark gets
6 shot. Mr. White catches Mr. Clark and lays him down, and
7 we'll go through the scenario as he did, and I can do it for
8 Your Honor if you'd like. And then the question after that
9 is do you have an expert opinion as to whether or not the
10 evidence that you reviewed in this case is consistent with
11 the hypothetical that was demonstrated to you?

12 And the last hypothetical is I'll be
13 Mr. Washington, Carlos will be Mr. Clark, who is on the left;
14 Mr. White is on the right. I'll be in this position. I will
15 come up, as Mr. Washington did. And then I will ask do you
16 have an expert opinion as to whether or not the evidence that
17 you received in this case is consistent with the hypothetical
18 that was demonstrated to you.

19 MR. STARR: And the point of the first one -- the
20 Court had asked about the distance on the first one. The
21 point is Mr. White -- and correct me if I'm wrong --
22 Mr. White being in-between Mr. Washington and Mr. Clark. The
23 distance is used on the second hypothetical.

24 MR. MOOMAU: And with the second one,
25 Mr. Washington never said he came up and started shooting.

1 He said he was shooting crouched down.

2 THE COURT: For purposes of the use of
3 demonstrative evidence, which I'm assuming you would agree
4 that this would be a so-called reenactment, correct?

5 MR. STARR: Well, not reenactment. It's a
6 hypothetical.

7 THE COURT: It's not a hypothetical. A
8 hypothetical is a question. A hypothetical is not a
9 reenactment of what -- there's some differences or difficulty
10 in lack of measurements of people when they testify, other
11 than one that you're talking about, about the first step.

12 So it would be my belief, based on what you're
13 saying, that that would not be substantially similar to what
14 may have taken place because of the differences and the
15 unavailability of exact distances and numbers about how far
16 they may or may not have been or how far in front, how far
17 behind. That's a difficult thing to assess.

18 In the light of considering that, I mean, it has to
19 be, to some extent, helpful to enable and enhance the jury's
20 understanding of the situation. Because I think the
21 differences here would not do that, and they would have a
22 tendency to confuse, possibly, but also mislead the jury.

23 The jury has heard the accounts directly from the
24 witnesses, in which there is always dispute or differences in
25 perceptions of these events as they take place during the

1 act, and it's hard to testify alone after what happened in
2 those situations.

3 I think that province on the reenactment is best
4 left to the jury's interpretation of what they heard, and I
5 think any reenactment, with the probative value with that
6 margin of error or margin of difficulty factor, would not
7 outweigh the prejudicial impact that that may have on the
8 jury, and I don't believe that it would give them the ability
9 to enhance their understanding of what took place.

10 Now, obviously, the use of hypothetical questions,
11 factually based on what the testimony portrayed and what the
12 exhibits may have shown or demonstrated, you can use,
13 certainly, hypothetical questions to your expert, but it is
14 my belief that they could not be posed to the expert to say,
15 as a result of X, Y, Z, is that testimony consistent with the
16 representations made by Robert White or Corporal Washington.
17 I don't believe that's appropriate. I don't believe that
18 that can be done.

19 If the questions are posed factually, to say in
20 your review of Exhibit Number 1, 5, 6, 8, are you saying -- I
21 mean, about a close-distance shot, the distance it could be
22 received, fired, the position of the bodies as you understand
23 it, given the discrepancies in distance that may have taken
24 place, could those shots have been fired from that distance
25 with that kind of obstruction. But I don't see it at all

1 enhancing about any potential reenactment. They can't be
2 done based on the testimony as I've heard it.

3 MR STARR: Do I understand the Court to be saying
4 that verbal hypothetical questions, without the type of
5 physical demonstration that we were talking about, are
6 permitted? Because what we intend to do --

7 THE COURT: I just said that, yes.

8 MR. STARR: We just wanted to make sure. We work
9 pretty hard not to run afoul of your rulings.

10 THE COURT: No, no, no, and I appreciate it.
11 You've always paid very close attention to those aspects and
12 it's appreciated.

13 You know, it depends on the form of the question
14 and the facts that are put in in the hypothetical, whether
15 there's a basis for it or not. What I'm saying is that he
16 can't opine as to the credibility of the witnesses.

17 MR. STARR: We're not going to attribute the
18 hypotheticals to any witness.

19 MR. COHEN: Let me make sure I understand Your
20 Honor. You said that there has to be a basis for the
21 hypothetical. I'm not sure I understand --

22 THE COURT: It has to be in evidence to make your
23 hypothetical.

24 MR. COHEN: If I can ask the Court --

25 THE COURT: You need a few moments to --

1 MR. COHEN: We will, but just if I could ask one
2 more question before we go and do that. When evidence is
3 elicited in the form of a demonstration from a witness, how
4 does the Court propose that form a hypothetical from
5 something that was demonstrated, without demonstrating it to
6 the expert witness? Does the Court understand my question?
7 And I'm not trying to be funny. Because that's the problem
8 that we have here. Mr. White stepped down from the stand and
9 demonstrated portions --

10 THE COURT: As did Mr. Washington.

11 MR. COHEN: Yes, sir. And that's why I'm
12 attempting to show what the demonstration was, and the jury
13 can actually decide whether what I do is correct or wrong, or
14 Mr. Moomau can cross the witness and say, well, look, would
15 it be consistent, would the evidence be consistent if this
16 scenario happened and give another scenario that he thinks is
17 more consistent than ours.

18 That's the problem that we're having here. The
19 evidence was shown in a demonstrative format.

20 THE COURT: I think that in terms of your
21 hypothetical questions, you could put in crouched down, man
22 on either side, walking in front of him, and you give him the
23 dimensions of the size of the representative individual, all
24 of which is in testimony and evidence that that can be done.

25 But I think it would be unfair to -- and I believe

1 this is a facet of demonstrative evidence of a sort,
2 reenactment that would not be fair to any of the parties in
3 this as a result of the disparity, so to speak, in all of the
4 testimony and the facts associated with it, that it could not
5 be portrayed as substantially similar and wouldn't enhance, I
6 believe, the jury's -- I think it would have a tendency to --
7 possibly have a tendency to confuse and mislead them, and I
8 don't believe the probative value would be outweighed based
9 on such demonstration by unfair prejudice.

10 But I believe you can form hypothetical questions
11 on facts that have been testified to, giving description and
12 measurements and size of people.

13 MR. COHEN: I hope you're right, Your Honor. Can
14 we have leave to do that?

15 THE COURT: Yes.

16 MR. WRIGHT: One other issue, Your Honor. I did
17 speak with Kevin King yesterday about the situation, and he
18 told me this. He showed me the gentleman that he's referring
19 to, and that is the gentleman that is sitting in the
20 courtroom today, with a blue shirt on and a multicolored blue
21 and white tie.

22 He said that the gentleman kept making loud
23 commentary every time Mr. Washington said something, i.e.,
24 police can do this, police can do that. He kept saying yeah,
25 yeah, yeah. Kevin King said he looked at the man, and the

1 gentleman looked back at him with like a "what" type of
2 attitude; what are you saying? King realizes -- clearly
3 realizes who he was, as a victim in the other case itself.
4 Kevin King was --

5 MR. STARR: Who realized who was?

6 MR. WRIGHT: This gentleman sitting out here. I
7 don't even know his name. I guess he's a police officer. He
8 realized who Kevin King was. He kept mouthing to him yeah,
9 yeah, yeah, that Keith Washington is correct in all of his
10 testimony. Kevin King basically says to him stop. The
11 gentleman says something in response to him, and that's how
12 the situation went on and ended.

13 And I guess I can also say that yesterday he was
14 looking at me for a while, as if he knew me. So I went up to
15 him and asked him his name. He commented I have nothing to
16 do with this case; don't talk to me and gave me quite a bit
17 of attitude when I just asked him his name yesterday. That's
18 the same gentleman that Kevin King was actually referring to.

19 I guess I just wanted to put on the record that my
20 investigation into it is that Kevin King was sitting there
21 and listening to all of his commentary during the testimony.
22 I do know, in fact, that I had a run-in with him yesterday.
23 I just didn't bring it to the Court's attention because I
24 didn't really realize who the guy was. Now I'm realizing
25 it's the same person Kevin King was talking about. So I just

1 wanted to put that on the record.

2 I'm not sure who he is, actually, still. I do not
3 know his name. I assume the defense does. But I think he is
4 clearly a supporter of Mr. Washington and of the defense
5 itself.

6 MR. STARR: The only response I'd have, very
7 briefly, is just that the gentleman is -- I put his name on
8 the record yesterday. I don't recall it right now. I think
9 it was Edward Robertson. He says he didn't know who Kevin
10 King was; he didn't know he was a complainant in the other
11 case and never seen him before.

12 THE COURT: Okay. Thank you.

13 (Counsel returned to trial tables and the following
14 ensued.)

15 THE COURT: Alright, Sheila, you can bring the jury
16 back.

17 (The jury entered the courtroom at 9:50 a.m.)

18 THE COURT: Good morning, ladies and gentlemen of
19 the jury. Did anyone, again, after you recessed yesterday
20 afternoon and until your return to the courthouse this
21 morning, find yourself in a position where you may have
22 heard, read or seen any media accounts of anything that may
23 have been associated with this case or the circumstances of
24 what you've heard during the course of this trial? The Court
25 sees no affirmative response to that question. Thank you.

1 MR. COHEN: Thank you, Your Honor. The defense
2 calls Dr. Jonathan Arden.

3 THE DEPUTY CLERK: Defense Exhibits 25 through 31
4 were marked for identification.

5 (Defense Exhibit Nos. 25 through 31
6 were marked for identification.)

7 **JONATHAN ARDEN, M.D.,**

8 a witness produced on call of the defense, having first been
9 duly sworn, was examined and testified as follows:

10 THE DEPUTY CLERK: Please state and spell your
11 first and last name for the record.

12 THE WITNESS: Dr. Jonathan Arden, J-o-n-a-t-h-a-n,
13 A-r-d-e-n.

14 **DIRECT EXAMINATION**

15 BY MR. COHEN:

16 Q. Good morning, Dr. Arden. I'm over here. Where did
17 you attend college, Dr. Arden?

18 A. I attended for two years at the Johns Hopkins
19 University in Baltimore, and then two years at the University
20 of Michigan in Ann Arbor, Michigan, where I received my
21 bachelor of science degree.

22 Q. Did you receive any honors from your undergraduate
23 studies?

24 A. Yes. My bachelors degree came with what they term
25 "high distinction." That's the equivalent of what is

1 commonly called magna cum laude.

2 Q. Where did you receive your medical training?

3 A. I attended the University of Michigan Medical
4 School, also in Ann Arbor, Michigan, where I received my M.D.
5 or doctor of medicine degree in 1980.

6 Q. And, after medical school, did you complete any
7 residencies?

8 A. I did. I completed two residency training
9 programs. The first of those was in the field of anatomic
10 pathology. That was a three-year training program at the New
11 York University Medical Center in New York City.

12 I followed that with a one-year training program in
13 the field of forensic pathology. That took place at the
14 Office of the Chief Medical Examiner for the State of
15 Maryland. That's the office in Baltimore.

16 Q. And that office where you did the one-year
17 residency, the Office of the Chief Medical Examiner, is that
18 the same medical examiner's office that did the autopsy in
19 this case?

20 A. Yes, sir.

21 Q. Can you explain to the ladies and gentlemen of the
22 jury what forensic pathology is?

23 A. Forensic pathology is what they call one of the
24 subspecialties within anatomic pathology. First of all,
25 pathology, in general, is the medical specialty that studies

1 the changes in the form or the function of the human body or
2 its components. And by changes, I mean the effects of
3 diseases and/or injuries.

4 Anatomic pathology, which we need to define to get
5 to forensic pathology, is the study of the changes of the
6 anatomy, the actual structures of the body, and that can
7 include things that you can see with the naked eye or hold in
8 your hand. It also includes changes that you can only see in
9 the microscope.

10 Within that field of anatomic pathology, we then
11 come to the question of forensic pathology. Forensic
12 pathology is the specialty or subspecialty, to be precise,
13 that takes the practice of medicine, and, particularly, the
14 practice of anatomic pathology, and applies it to the
15 investigation and certification of certain types of deaths.

16 The kinds of deaths that are particularly in the
17 purview of forensic pathology are, first and foremost, any
18 deaths that we would classify as violent. A violent death
19 simply means any death or any injury plays any role in
20 causing that death.

21 In addition to violent deaths, forensic pathology
22 deals with deaths that occur suddenly, unexpectedly, such as
23 people who die in public or without medical attention.

24 Q. And, Dr. Arden, you said that you investigate and
25 certify deaths. What does that mean?

1 A. The process by which the forensic pathologist goes
2 about drawing the conclusions about how and why a person died
3 involve those two steps, in broad generality, investigating
4 and certifying.

5 Investigating starts with getting the background of
6 that person and the circumstances of death. Now, depending
7 upon the type of death, investigation may be a very medical
8 process. For instance, it may involve looking at the medical
9 records, the medical history of the person, to try to put
10 together a picture of how that person lived, how that person
11 got sick, that kind of thing.

12 In circumstances of violent death, especially,
13 investigation frequently includes investigation of the scene
14 and the circumstances of death, and that may incorporate
15 police investigation. For instance, if there's been a
16 violent episode, whether that involves one person killing
17 another, it could involve a car crash, but there may well be
18 police investigation.

19 Sometimes the medical examiner, either personally
20 or through an investigator for the medical examiner's office,
21 will also do investigation at the scene of death, looking at
22 the body, looking at the circumstances, the surroundings,
23 that sort of thing.

24 You then take this background investigation as a
25 forensic pathologist and couple it up with the medical

1 examination of the body, frequently an autopsy examination,
2 and you then put the two pieces together, the investigative
3 materials and the medical materials, put them together to
4 make conclusions about what we call the cause of death and
5 the manner of death. That was the other word, certify,
6 because you render those conclusions, cause of death and
7 manner of death, on the death certificate, which is where the
8 word certification comes from.

9 Q. Do you rely on forensic lab reports as a forensic
10 pathologist?

11 A. Very frequently, a forensic pathologist does rely
12 upon various kinds of laboratory reports, forensic lab and
13 others, yes.

14 Q. Which type of forensic lab reports do you rely on?

15 A. It depends upon the circumstances of the nature of
16 the individual case, but the types of forensic labs that
17 forensic pathologists will frequently rely upon are, first of
18 all, toxicology. That's the laboratory science that studies
19 whether there are any foreign substances in the body or in
20 its components, things like drugs, alcohol, poisons, those
21 kind of things.

22 Another kind of forensic laboratory that is
23 frequently used is the DNA laboratory, because DNA testing is
24 sometimes very important as far as putting together the
25 circumstances of death and injury.

1 Sometimes there are other forensic labs that are
2 more like when you think of like a crime lab kind of
3 discipline, things like ballistic labs that test for gunshot
4 residues. Those can be important in making your forensic
5 conclusions.

6 There may be other crime lab functions, such as
7 trace evidence, transfer of hairs, fibers, paint chips, those
8 kind of trace evidence from person to person or person to
9 scene or scene to person, those kinds of things.

10 So those are, in general, the types of forensic
11 labs that are commonly used by forensic pathologists.

12 Q. Is it fair to say that you rely on those lab
13 reports?

14 A. Yes, sir.

15 Q. Now, with respect to trace evidence, have you
16 testified regarding trace evidence in the past?

17 A. I've testified as a medical examiner and a forensic
18 pathologist regarding recovery of trace evidence, and I have
19 relied upon laboratory reports to incorporate into my
20 opinion. So, yes, I've testified in that sense about trace
21 evidence.

22 To be clear, I have not testified as the person who
23 tests the trace evidence. I'm not the laboratory scientist
24 or technician, but I have testified concerning the recovery
25 and interpretation of trace evidence.

1 Q. Have you testified in a similar manner, as you
2 stated, with respect to trace evidence and with respect to
3 ballistic evidence?

4 A. Yes, sir.

5 Q. And what about crime scene evidence as well?

6 A. That as well, yes, sir.

7 Q. And do you frequently rely on death scene or crime
8 scene evidence as a forensic pathologist?

9 A. Yes, sir.

10 Q. Such as what? What type of crime scene and death
11 scene evidence do you rely on?

12 A. Well, the type of evidence that I rely on from
13 death scenes includes the appearance of the body at the scene
14 of death, whether there are other related pieces of evidence,
15 such as blood spatter or blood trails, what the condition of
16 the surroundings look like, how the decedent relates to those
17 conditions and those surroundings.

18 And some of that, depending upon the circumstances,
19 may come from police reports. Some of them may come from
20 reports generated by the medical examiner's office, if that
21 office has its own investigators, and, on some occasions in
22 my career, it has involved me personally going to that scene
23 and making those observations myself.

24 Q. Have you testified after listening to or receiving
25 or reviewing testimonial evidence?

1 A. Yes, sir.

2 Q. In which cases and in what capacity?

3 A. It's hard to remember specific individual cases,
4 but I can tell you that I have either been present to listen
5 to testimony to make a part of the evidence that I've
6 considered, or I have read transcripts of testimony in many
7 cases.

8 One comes to mind. Early in my career, when I was
9 working in Delaware, I actually had the unusual experience
10 where I was the medical expert called by the State. This was
11 a case on the Eastern Shore of Maryland, and there was
12 another pathologist who was the expert called by the defense,
13 and the judge actually had both of us sit through the entire
14 trial, so both of us had seen and heard all of the evidence
15 that we then used to incorporate into our opinions. There
16 have been other examples as well.

17 Q. Did you frequently rely on medical records as a
18 forensic pathologist?

19 A. Yes, sir.

20 Q. Have you testified on medical records before?

21 A. Yes, sir, I have.

22 Q. Dr. Arden, are you licensed to practice medicine?

23 A. I am.

24 Q. In which states do you hold a medical license?

25 A. I hold medical licenses in Maryland, Virginia,

1 Delaware, New York, and the District of Columbia.

2 Q. Are you board certified?

3 A. Yes, I am.

4 Q. What are your board certifications in?

5 A. I'm board certified in both anatomic and forensic
6 pathology.

7 Q. Can you let the ladies and gentlemen of the jury
8 know what board certification means.

9 A. Each of the medical specialties in this country has
10 a governing board. In my case, it's the American Board of
11 Pathology. Each of those boards puts together certain
12 standards for education and training that you have to fulfill
13 and that you make application to that board, documenting your
14 credentials and so on. And then you sit for an examination
15 that is composed by members of that board in the individual
16 field, such as in anatomic pathology and in forensic
17 pathology.

18 So after going through the requisite education and
19 training and making application and paying the fee and then
20 sitting for the exam and, of course, passing the exam, they
21 then certify that you have met the requirements or the
22 qualifications in that field. And so they provide you with a
23 certificate, and you're now deemed to be board certified by
24 the governing board of your specialty.

25 Q. Dr. Arden, do you belong to any professional

1 organizations?

2 A. Yes, I do.

3 Q. Which organizations are those?

4 A. The National Association of Medical Examiners.

5 Q. Do you hold any positions in that organization or
6 have you in the past?

7 A. I do currently hold positions in that organization.

8 Q. What are those positions?

9 A. I'm currently on the board of directors of the
10 National Association of Medical Examiners. I'm actually in
11 my sixth year. That will be my final year on the board.

12 I'm now in my third year of having been elected by
13 the board of directors to be on the executive committee,
14 which is the smaller group that handles the day-to-day
15 governance of the organization.

16 I'm also chair of one of the committees within that
17 organization.

18 Q. What professional activities have you participated
19 in regarding your profession?

20 A. During the course of my career, I've participated
21 in a number of different professional activities. I've
22 served on several different child fatality review panels,
23 including one in New York City that I actually started under
24 a grant, and I chaired that panel.

25 In Washington I served also -- I chaired, as well,

1 the Fatality Review Panel for the Mentally Retarded and
2 Developmentally Disabled Population.

3 I was appointed by the governor of New York to be
4 on the Domestic Violence Fatality Commission, that operated
5 for about two years in the late '90's.

6 I served on what was called the Environmental
7 Clearance Committee. This was a multidisciplinary group that
8 did the work, literally, to clear the postal facility in
9 Washington after the anthrax scare, so that it was deemed
10 safe for occupation and use again.

11 I've done a fair amount of lecturing and teaching
12 as well. I'm sure that I -- my CV has a whole list of these
13 things, but those are some of the highlights as far as
14 professional activities.

15 Q. With respect to continuing medical education, have
16 you taken part in any continuing education in the field of
17 forensic pathology?

18 A. Yes, sir.

19 Q. What education?

20 A. I've attended the meetings of the National
21 Association of Medical Examiner for at least the past five or
22 six years, almost every one of those meetings, and those have
23 an educational component to them.

24 I've also attended several of the courses offered
25 by the Armed Forces Institute of Pathology in the past couple

1 of years. There was an anatomic pathology review course.
2 There was a course on dental identification I took last year;
3 a course on neuroradiology, the specialized imaging studies
4 of the brain and nervous system. So those are the types of
5 things I've done.

6 Q. Doctor, after your residencies, where were you
7 employed?

8 A. I was employed as a government medical examiner,
9 for a period of 20 years, in four different offices. I first
10 was employed in the Medical Examiner's Office for Suffolk
11 County, New York. That's the eastern half of Long Island. I
12 was there for a little less than two years.

13 I was then an assistant medical examiner for the
14 State of Delaware for a period of three years.

15 When I left Delaware, I joined the Office of the
16 Chief Medical Examiner for the City of New York, where I
17 spent nine years. During the time I was in New York City, I
18 went from -- my initial position was a senior level medical
19 examiner, and I was promoted to deputy chief medical
20 examiner. I was then made the acting first deputy chief
21 medical examiner, which made me the second in command to that
22 system. At some point, after a few years, they lifted a
23 hiring freeze, so they made me the first deputy chief instead
24 of the acting deputy chief.

25 And then when I left New York City, I spent about

1 five and a half years for the Chief Medical Examiner for
2 Washington, D.C.

3 After that I spent about a year and a half with a
4 part-time appointment for the medical examiner system in
5 Virginia.

6 And I've also, since then, built my consulting
7 practice, which is my current employment and is my own
8 company. It's called Arden Forensics. I do consulting work.

9 Q. Dr. Arden, you told us about your employment as a
10 medical examiner. Can you let the ladies and gentlemen of
11 the jury know about how many autopsies did you perform as a
12 medical examiner?

13 A. I haven't kept an exact count, but I know I've
14 performed over 2,300 forensic autopsies myself. I know I've
15 examined at least another 500 decedents externally, without
16 doing the full autopsy, but for the purpose of producing
17 death certificates.

18 Q. How many would you say that you've supervised in
19 your supervisory positions that you held?

20 A. Again, I can estimate. I was supervising the
21 office in the Borough of Brooklyn for about eight and a half
22 years, in New York City. We were very busy.

23 I supervised the Washington, D.C., office for about
24 five and a half years. During that time period, those two
25 offices did somewhere in the neighborhood of 18,000 to 28,000

1 autopsies.

2 Q. What about regarding investigating and opining on
3 manner of death? How many times and cases did you do that
4 in?

5 A. Well, in terms of investigating, I've investigated,
6 either as the primary medical examiner or as the supervisor
7 participating, several thousand deaths myself. As far as
8 opining about cause and manner of death, well, every one of
9 those death certificates I issued has such opinions
10 incorporated in it. I don't know if you mean in terms of
11 testimony or in terms of issuing certificates.

12 Q. Issuing certificates.

13 A. It's got to be at least 3,000 times I've issued
14 death certificates.

15 Q. How many times, Dr. Arden, would you say you've
16 testified as an expert in forensic pathology?

17 A. Again, I haven't kept an exact count during most of
18 my career, during the time when I was working for
19 governments, but it's been over 500 times that I've testified
20 as an expert in forensic pathology.

21 Q. In what jurisdictions?

22 A. I've testified as an expert in forensic pathology
23 in several jurisdictions in Maryland, here in P. G. County
24 previously, Montgomery County, Baltimore City. I forget
25 which county it was, but the trial I mentioned on the Eastern

1 shore was a Maryland jurisdiction. I've also testified in
2 Washington, D.C. I testified in several counties in
3 Virginia. I've testified in New York City and New York
4 State, Massachusetts, Connecticut, New Jersey. I think it
5 adds up to about 15 states or so total that I've testified
6 in. I've also testified in several federal courts and in
7 several military court marshals.

8 Q. Have you ever been presented as an expert and not
9 been qualified as an expert?

10 A. No, sir.

11 Q. And you stated that you testified before as a
12 forensic pathologist for the Prince George's County state's
13 attorney's office; is that correct?

14 A. Yes, sir.

15 Q. Do you remember in what capacity you testified in
16 that?

17 A. I was the chief medical examiner for Washington,
18 D.C., at the time. And if incidents occur in one
19 jurisdiction and then the death occurs in the other, the
20 medical examiner where the death occurs takes jurisdiction.
21 So we would frequently have examples of people who had
22 injuries in Prince George's County, who then died in a
23 hospital in Washington, D.C. We would handle the autopsy as
24 the medical examiner in Washington. And then, if there were
25 a trial that resulted from that, the trial would be in P. G.

1 County. So under those circumstances, I've been here before
2 to testify, called as a witness by the State.

3 Q. When you were called as a witness by the State,
4 what type of evidence did you rely on when you testified for
5 them?

6 A. I can't recall exactly what was used in the several
7 times that I did that, but it would have been the same kind
8 of evidence you inquired about earlier, autopsy reports,
9 photographs, crime scene investigation, probably at least
10 some forensic labs, maybe not all the labs we talked about
11 but some of them. All the same kind of information that's
12 commonly used and relied upon by forensic pathologists.

13 Q. Did you have the opportunity to testify in cases
14 where you didn't actually do the autopsy?

15 A. Yes, I've had that opportunity many times in my
16 career.

17 Q. Again, can you let the ladies and gentlemen of the
18 jury know what type of information you reviewed prior to
19 testifying in cases where you didn't actually complete the
20 autopsy.

21 A. Really, the same kind of information, depending
22 upon the nature of the individual case. It would typically
23 involve reviewing the autopsy report; the autopsy
24 photographs; sometimes personally examining the microscopic
25 slide from the autopsy, if that were important or necessary;

1 scene investigations; police reports; forensic lab reports;
2 sometimes medical records; sometimes prior testimony in
3 transcript form, depending upon the details of the case; but
4 all those kinds of things.

5 Q. In those cases, again, when you testified where you
6 didn't actually complete the autopsy, what type of opinions
7 did you render?

8 A. In general, I have rendered opinions concerning
9 cause of death, manner of death, interpretation of injuries,
10 the same kinds of opinions that forensic pathologists
11 typically give in testimony.

12 MR. COHEN: At this time, Your Honor, we would move
13 to have Dr. Arden qualified as a forensic pathologist and
14 request that the Court give him permission to testify to his
15 interpretation of the information he reviewed, including the
16 State's forensic and medical records, and give him the
17 opportunity to render his expert opinion in his field of
18 expertise.

19 MR. MOOMAU: Your Honor, the State agrees that he
20 can testify as an expert in the field of forensic pathology.

21 THE COURT: So accepted.

22 BY MR. COHEN:

23 Q. Dr. Arden, what documents and evidence did you
24 review in this case?

25 A. I reviewed the autopsy report for Brandon Clark. I

1 also saw the autopsy photographs for Mr. Clark. I saw the
2 medical records for Mr. Clark, the medical records for
3 Mr. White, including his toxicology report, medical records
4 for Mr. Washington. I saw photographs and a diagram of the
5 scene of the shooting.

6 I was provided with various forensic laboratory
7 reports, some of them from the Prince George's County
8 laboratories, and at least one of them from the federal ATF
9 laboratory.

10 I was shown a stipulation concerning some of the
11 evidence, as far as which pieces of evidence came from which
12 person and so on.

13 I reviewed a three-page statement given by
14 Mr. White. I think it was disseminated publicly.

15 I received transcripts from -- I guess these were
16 what we call daily transcripts, the testimony -- I believe it
17 was just yesterday from Dr. Locke and Dr. Khan.

18 Oh, I also examined the CT scans, the specialized
19 x-ray imaging from Mr. White. I believe that was everything.

20 Q. Did you review any emergency medical reports at
21 all?

22 A. Oh, yes. Actually, in addition to the emergency
23 room records, there were the EMS records concerning
24 Mr. Washington.

25 Q. So now, Dr. Arden, focussing your attention on the

1 information relating to Mr. Brandon Clark that you reviewed,
2 what information in Brandon Clark's medical records was
3 significant in analyzing the evidence that you relied on for
4 your expert opinion?

5 A. The autopsy report contained information that was
6 significant to me, in part because it painted a picture of
7 him, things like his size, height and weight, and more
8 specifically, because the autopsy report documented the
9 nature of his injuries, at least as they were at the time of
10 his death.

11 Q. And that's with respect to the autopsy report.
12 With respect to any information in Mr. Brandon Clark's
13 medical records that was significant, what did you review and
14 what did you rely on?

15 A. The significant information to me in the medical
16 records of Mr. Clark were really the descriptions of the
17 injuries and the observations of those injuries during his
18 treatment. Because that gave a picture of the injuries as
19 they appeared when they were fresh, as opposed to their
20 appearance later on, after the delay before he died and,
21 thus, the difference between the medical records and the
22 autopsy, as far as the information regarding the nature and
23 the locations of the injuries.

24 Q. With respect to forensic evidence, what was
25 significant as it related to Brandon Clark that you analyzed

1 and relied on with respect to the forensic evidence?

2 A. The forensic evidence relating to Mr. Clark
3 included some gunshot residue testing concerning his
4 clothing, and there was also another laboratory report
5 concerning fibers, one of the types of trace evidence that
6 potentially relates to Mr. Clark as well.

7 Q. Now, with respect to gunshot residue information
8 that you reviewed, what did you learn from that gunshot
9 residue information?

10 A. One of the laboratory reports indicated that there
11 were gunshot residues on the clothing relating to Mr. Clark's
12 gunshot wound to the abdomen, and the conclusion in that
13 laboratory report was that the gunshot residue that was
14 present, relating to that entrance wound, indicated that the
15 muzzle of the gun was in the range of approximately 12 to 24
16 inches from the clothing surface at the time the shot was
17 fired.

18 Q. You said you reviewed a fiber transfer report or
19 trace evidence report. What did you learn and rely on from
20 that fiber transfer report?

21 A. There was a trace evidence report that showed that
22 there were fibers recovered from the upper-body clothing of
23 Mr. Washington that matched, in many respects, the fibers
24 taken from the pants worn by Mr. Clark during the night of
25 the shooting. So I think the best way to say that is that

1 the fibers that were recovered on the upper-body clothing of
2 Mr. Washington were consistent with the fibers from the pants
3 of Mr. Clark.

4 Q. Dr. Arden, focussing your attention on the
5 information that you reviewed regarding Robert White, what
6 information in Robert White's medical records was significant
7 in analyzing evidence that you relied on for your expert
8 opinion?

9 A. The evidence for Mr. White's medical records
10 actually parallels what I told you about the evidence that I
11 used from Mr. Clark's medical records. Mr. White's medical
12 records also included the information as to the locations and
13 the nature of his injuries, from which one can make
14 assessments of the type of injuries, the location of
15 injuries, the pathways of bullets within his body, that sort
16 of thing.

17 Q. With respect to forensic evidence regarding Robert
18 White, what was significant in your review of the forensic
19 evidence, and what did you rely on in your expert opinion?

20 A. Again, the ballistics or gunshot residue testing
21 concerning Mr. White was significant, as for as my analysis
22 and my opinions. Again, the gunshot residue test, the lab
23 report that I saw demonstrated that there was gunshot residue
24 relating to the clothing defect that matched with the gunshot
25 wound to his right knee, and the conclusion in that report

1 was that the gun was approximately 3 to 12 inches away from
2 the surface of the clothing at the time that that shot was
3 fired.

4 Q. Were there any other reports, any DNA reports that
5 you reviewed with respect to Robert White as well?

6 A. Yes. Actually, there was a DNA report I neglected
7 to mention that. The DNA report also had information that
8 was important to me in that it demonstrated a transfer of
9 Mr. White's DNA onto the gun of Mr. Washington.

10 Q. Dr. Arden, taking your attention to information
11 that you reviewed regarding Keith Washington, what
12 information in Keith Washington's medical records was
13 significant in analyzing the evidence that you relied on for
14 your expert opinion?

15 A. Mr. Washington's medical records from the EMS and
16 from the emergency room demonstrated areas of injury that he
17 had received and their treatment offered for those injuries
18 as well.

19 Q. Dr. Arden, in reviewing the medical records and
20 forensics pertaining to Mr. White, can you give an expert
21 opinion with reasonable medical certainty regarding the
22 toxicology report that you reviewed with respect to
23 Mr. White? Is that test reliable, first of all?

24 A. Yes, sir. There is a toxicology report in the
25 medical records for Mr. White, and it is the kind of thing

1 that I commonly rely upon, and so, yes, I believe it's
2 reliable.

3 Q. And when was that test taken; do you know?

4 A. Yes. The toxicology report for Mr. White showed
5 that the sample was taken on January 24th, the night of his
6 admission to the hospital.

7 Q. Do you know about what time that evening it was
8 taken?

9 A. I'd have to look at the report. My recollection is
10 that it was somewhere in the neighborhood of about 9:30 p.m.

11 Q. Let me show you what has been marked and entered
12 into evidence as Defense Exhibit 5. Take a look at that.

13 A. Yes, sir.

14 Q. After reviewing Defense Exhibit 5, do you now know
15 what time the test was conducted of Mr. White regarding
16 toxicology?

17 A. Yes, sir.

18 Q. What time was it?

19 A. It actually shows 2133 hours. So that's 9:33 p.m.

20 Q. And what were the results of that toxicology
21 testing?

22 A. This toxicologist testing reflects screening tests
23 of the urine of Mr. White, and the testing was negative for
24 PCP, which is phencyclidine.

25 It's negative for benzo. That refers to

1 benzodiazepines. That's a class of medications that includes
2 things you know as Librium, Valium, Xanax; usually
3 antianxiety type medications.

4 It's negative for amphetamines; negative for THC,
5 the active ingredient in marijuana; negative for opiates.
6 That's the category of drugs that includes the true
7 narcotics, morphine, heroin, codeine, those types of things.
8 Negative for barbiturates; negative for methadone, and it
9 shows positive listed under cocaine.

10 Q. In reviewing the toxicology report pertaining to
11 Mr. White, can you give an expert opinion with a reasonable
12 degree of medical certainty if the cocaine was ingested and,
13 if so, when was the cocaine was ingested?

14 A. I can give you --

15 MR. MOOMAU: Objection.

16 THE COURT: Approach the bench please.

17 (Counsel approached the bench and the following
18 ensued.)

19 MR. MOOMAU: He's not a toxicologist.

20 MR. COHEN: He's a medical doctor. Khan relied on
21 the same exact --

22 THE COURT: I don't know where you're going with
23 it.

24 MR. COHEN: I was just going to ask him that
25 question and I'm done.

1 THE COURT: You were going to ask him what
2 question?

3 MR. COHEN: I forgot now, Your Honor.

4 MR. MOOMAU: If cocaine was ingested and when.

5 MR. COHEN: If he can give an expert opinion with a
6 reasonable degree of medical certainty if cocaine was
7 ingested and, if so, when.

8 THE COURT: I don't recall -- and correct me if I'm
9 wrong -- Dr. Khan giving any opinion as to the time period in
10 which it may have been taken or used otherwise; do you?

11 MR. MOOMAU: He never testified about time period.

12 THE COURT: I mean do you recall?

13 MR. COHEN: I don't recall him testifying to that,
14 Your Honor, but our response to that would be that that
15 shouldn't hinder us from --

16 THE COURT: I understand that, but Dr. Khan, as
17 well, wasn't a toxicologist. I don't know if being an expert
18 in forensic pathology would give him the knowledge and
19 experience to be able to testify, from looking at a lab
20 report, to know when cocaine may be ingested. You may have
21 to qualify him more in that area. His testimony was that he
22 relies on reports in his determination of cause and manner of
23 death.

24 MR. STARR: Very briefly, Your Honor.

25 MR. COHEN: If that's your ruling, Your Honor,

1 we'll move on.

2 THE COURT: Okay, thank you.

3 (Counsel returned to trial tables and the following
4 ensued.)

5 BY MR. COHEN:

6 Q. Dr. Arden, in reviewing the medical records
7 pertaining to Mr. Washington, can you give an expert opinion
8 with a reasonable degree of medical certainty on the cause of
9 Mr. Washington's injuries?

10 MR. MOOMAU: Objection.

11 THE COURT: Sustained.

12 BY MR. COHEN:

13 Q. Dr. Arden, I'm going to give you a hypothetical
14 scenario and then, once I'm finished, I will ask your expert
15 opinion.

16 MR. COHEN: Prior to doing so, Your Honor, may we
17 approach?

18 THE COURT: Please.

19 (Counsel approached the bench and the following
20 ensued.)

21 MR. COHEN: Court's indulgence for one moment. I
22 am going to ask Dr. Arden to consider in his expert opinion
23 that soot and smoke that was found on the clothing of
24 Mr. White. I just wanted to alert the Court.

25 MR. MOOMAU: That was never confirmed. She put a

1 question mark by her finding of that.

2 THE COURT: Let me read this. But the inquiry is
3 proper as long as there is evidentiary support for the facts
4 which the expert is told to assume the voracity of in
5 evaluating and rendering his or her opinion. So overruled.

6 MR. MOOMAU: That was unconfirmed smoke and soot
7 and he impeached --

8 THE COURT: She testified on the stand that what
9 she observed through the naked eye appeared to be soot and
10 smoke, but that it could not be confirmed through her tests.

11 You can do whatever you want on cross-examination,
12 but I believe that, based on what I'm reading in the case of
13 Kruszewski versus Holz, 265 Md. 434, and in my understanding
14 of Maryland Rule 5-703(a), that was part of her testimony.

15 MR. MOOMAU: He is not a firearms expert either, as
16 far as to how soot and smoke gets on clothing.

17 THE COURT: He doesn't have to be. He relies on
18 those reports in rendering his opinion, as much does the
19 medical examiners that you use.

20 MR. COHEN: There's one more issue, Your Honor.
21 Will I be permitted to ask him if he knows what a contusion
22 is, and ask him if a contusion is consistent with trauma?
23 I'm proffering it to the Court just so there's not an
24 objection and we have to come back up here.

25 MR. MOOMAU: A contusion consistent with trauma?

1 THE COURT: Is a contusion consistent with trauma;
2 is that your --

3 MR. COHEN: I misspoke. Can a contusion be
4 considered trauma or the result of trauma.

5 THE COURT: He's going back, I believe.

6 MR. MOOMAU: He's going back to Washington's
7 records. He's not a treating doctor. He doesn't treat
8 patients. He's a forensic pathologist.

9 THE COURT: The nurse already testified that a
10 contusion could be considered as trauma.

11 MR. COHEN: That was a doctor, I think.

12 THE COURT: Doctor or nurse.

13 MR. STARR: Dr. Dixon.

14 MR. MOOMAU: They didn't find any evidence of it.

15 THE COURT: I'm not saying that they didn't.

16 MR. MOOMAU: Relevance.

17 THE COURT: Overruled.

18 (Counsel returned to trial tables and the following
19 ensued.)

20 BY MR. COHEN:

21 Q. Dr. Arden, if I can go back very quickly. What is
22 a contusion, Dr. Arden?

23 A. Contusion simply means a bruise. So a bruise or a
24 contusion is the injury that results from impact to an area
25 that breaks some of the small blood vessels and allows blood

1 to escape into the surrounding tissues.

2 Q. And is a contusion consistent with trauma?

3 A. Well, more than consistent. A contusion is a form
4 of trauma. A trauma simply means injury. So a contusion is
5 a type of trauma; particularly, it is a blunt impact type of
6 trauma.

7 Q. Dr. Arden, before I give you the hypotheticals I
8 want you to consider --

9 MR. COHEN: Court's indulgence.

10 BY MR. COHEN:

11 Q. Dr. Arden, I'm going to show you three photos, and
12 I'm going to ask you to assume -- there's actually a
13 stipulation between the State and the defense that the first
14 picture I'm going to show you is a document identified as
15 CN8C, which is a white Fruit of the Loom T-shirt, size triple
16 extra large, that was recovered from Robert White. Can you
17 take a look at that.

18 A. Yes, sir.

19 Q. I'm going to need you to assume, for purposes of
20 the hypothetical that I give you, that soot and smoke was
21 observed at the defect on this shirt.

22 A. Yes, sir.

23 Q. And with respect to CN8A, there's a stipulation
24 that says that this item is a dark blue Arrow sweater, size
25 double extra large, that was recovered from Robert White.

1 Can you take a look at that.

2 A. Yes, sir.

3 Q. And what I'm going to ask you to assume, for
4 purposes of this hypothetical, is that soot and smoke was
5 found at the defect on that item.

6 A. Yes, sir.

7 Q. With respect to item identified as B/C, there's a
8 stipulation that that's a pair of blue jeans with a brown
9 belt that belonged to Robert White. And, again, with respect
10 to that item, I'm going to ask you to assume that soot and
11 smoke was recovered from the defect in the pants area, the
12 upper pants area of that item as well.

13 A. Yes, sir.

14 Q. Now, the first scenario or hypothetical, Dr. Arden,
15 that I'd ask you to consider is if Mr. Clark has his hands up
16 in a surrender position, facing Mr. Washington, and Mr. White
17 is facing Mr. Clark, in-between Mr. Clark and Mr. Washington,
18 and Mr. Washington fires his gun, do you have an expert
19 opinion as to whether or not the evidence that you reviewed
20 in this case, with that hypothetical scenario, is consistent?

21 A. I have such an opinion.

22 Q. And what is that opinion?

23 A. My opinion, and all the opinions are with
24 reasonable medical certainty, is that the scenario that
25 you've just set out for me, laid out for me, is not

1 consistent with the gunshot wounds on either Mr. White or
2 Mr. Clark.

3 Q. And why is that?

4 A. Well, first of all, regarding Mr. White, in the
5 scenario that you just offered to me, he has his back facing
6 to Mr. Washington when Mr. Washington shoots. Mr. White has
7 three gunshot wounds, all of which enter from his front. So
8 he could not have been shot from behind.

9 We also have, potentially, in the scenario given
10 me, if I only assume what you've told me, there is nothing in
11 that scenario that accounts for the transfer of DNA from
12 Mr. White onto the gun of Mr. Washington.

13 There is nothing -- well, moving on to Mr. Clark in
14 that same scenario. We now have -- if I understand the
15 scenario correctly, we have Mr. Clark facing Mr. Washington,
16 hands up in a surrender position, but in front of him. In
17 other words, between him and Mr. Washington is now Mr. White.
18 And so that says to me that he is shielded from
19 Mr. Washington. So he would have to be shot through
20 Mr. White in order for that to account for any of his wounds.

21 And again, in order for him to be shot through
22 Mr. White, Mr. White would have had to have been shot in the
23 back, with entrance in the back and exit in the front, which
24 was not the case.

25 We also have the issue that this scenario, as

1 you've laid it out for me, does not account for the fact that
2 Mr. Clark had, according to the forensic testing, ballistic
3 testing, gunshot residue related to his gunshot to the
4 abdomen, placing the gun approximately 12 to 24 inches away.

5 We also do not have relative positioning, in the
6 scenario you've just given me, that reasonably accounts for
7 the trajectory of the gunshot wound in Mr. Clark's abdomen,
8 which was going decidedly downward and to his right and
9 relatively less forward to backward, following that pathway.

10 And we also have nothing in the scenario that
11 you've offered me that accounts for the transfer of the
12 fibers, which, as I said, were consistent with Mr. Clark's
13 pants going to Mr. Washington's upper-body clothing.

14 Q. In the second scenario, Dr. Arden, I need you to
15 assume one other fact. I'm going to show you -- if you can
16 step down. Just step up a little bit.

17 Dr. Arden, I'm going to need you, for purposes of
18 this next scenario, to assume that the distance from this
19 master bedroom doorway to the second step is eight feet, five
20 inches.

21 A. Yes, sir. Shall I resume the stand?

22 Q. Yes, please. Now, Dr. Arden, in this scenario, if
23 Mr. Washington is standing at the front of that master
24 bedroom, which is about eight feet, five inches from the
25 second step, and Mr. Washington shoots Mr. Clark when

1 Mr. Clark is at the top of the stairs on the second floor,
2 with his hands up in the surrender position, do you have an
3 expert opinion as to whether or not the evidence that you
4 reviewed in this case is consistent with that hypothetical
5 scenario?

6 MR. MOOMAU: Objection.

7 THE COURT: Sustained. Come on up to the bench
8 please.

9 (Counsel approached the bench and the following
10 ensued.)

11 MR. MOOMAU: That's inconsistent with the
12 testimony. That's not where White said Clark was shot.

13 MR. COHEN: Show it to him.

14 MR. STARR: First of all, Your Honor, he clearly
15 testified, as I think the Court and all parties will
16 recollect, that he caught Mr. Clark to keep Mr. Clark from
17 falling down the steps when Mr. Clark was shot at the top of
18 the steps.

19 THE COURT: Show me where it says that he was
20 shot -- you said they have something -- because that's not my
21 recollection of the testimony.

22 MR. COHEN: It's second step. I thought you were
23 talking about distance, Your Honor.

24 THE COURT: And where Washington was supposedly
25 positioned.

1 MR. STARR: It's in here, Judge. I'm sorry. I'm
2 just locating it.

3 MR. MOOMAU: That's not where he said Clark was
4 shot at.

5 THE COURT: What I have in my notes, and somebody
6 can -- and I have it where the defendant was. When he was on
7 the second or third step, he did not know where the defendant
8 was.

9 MR. COHEN: Well, that's a different issue that
10 we're looking up. That we have the answer to. He said that
11 Mr. Washington, when he was shot, was at the front of the
12 master bedroom. I was looking for the second step.

13 MR. MOOMAU: There's never been any testimony that
14 Brandon Clark was on the second step when he was shot.

15 MR. STARR: That's not what Mr. Cohen asked the
16 witness. The question is whether Brandon Clark was at the
17 top of the steps, such in a position -- because this is what
18 Mr. White testified to, that if he didn't catch him, Brandon
19 Clark would have fallen down the steps. That's what he
20 testified to. Robert White said that, that he caught Brandon
21 Clark to prevent him from falling down the steps, with his
22 legs on the second step.

23 THE COURT: That's not in the hypothetical about
24 trying to catch him from falling down, correct?

25 MR. COHEN: No. I thought I said that already.

1 THE COURT: Or close to the top of the steps. How
2 are you going to phrase it?

3 MR. STARR: Standing at the top of the steps on the
4 second floor.

5 MR. MOOMAU: That wasn't the question I heard.

6 THE COURT: Well, that is now the question.

7 (Counsel returned to trial tables and the following
8 ensued.)

9 BY MR. COHEN:

10 Q. Mr. Arden, taking you back to the second scenario.

11 MR. COHEN: Court's indulgence, for one moment.

12 BY MR. COHEN:

13 Q. Just had to get my place, Dr. Arden. I'm sorry.
14 Second scenario. And, please, again, assume that that
15 distance is eight feet, five inches.

16 A. Yes, sir.

17 Q. As well as the soot and smoke that we talked about
18 earlier.

19 A. Yes, sir.

20 Q. If Mr. Washington is standing at the master
21 bedroom, which is about eight feet, five inches from the
22 second step, and Mr. Washington shoots Mr. Clark when
23 Mr. Clark is at the top of the stairs, on the second floor,
24 with his hands up in the surrender position, do you have an
25 expert opinion as to whether or not the evidence that you

1 reviewed in this case is consistent with that hypothetical
2 scenario?

3 A. I do have such an opinion.

4 Q. What is your opinion?

5 A. My opinion is that the evidence in this case is not
6 consistent with the hypothetical scenario you have just
7 offered.

8 Q. Why is that?

9 A. First of all, the relative positioning of the two
10 people, that is, Mr. Washington, the shooter, and Mr. Clark,
11 the one who is shot, does not account for the trajectory of
12 at least one of his gunshot wounds, the gunshot wound that
13 Mr. Clark had -- excuse me. I was about to use Mr. White's
14 gunshot wounds. I apologize. It does not account for the
15 trajectory of Mr. Clark --

16 MR. MOOMAU: Objection.

17 BY MR. COHEN:

18 Q. I'll read the scenario again because it's very
19 long. If Mr. Washington is standing at the master bedroom,
20 which is about eight feet, five inches from the second step,
21 and Mr. Washington shoots Mr. Clark, when Mr. Clark is at the
22 top of the stairs on the second floor, with his hands up in
23 the surrender position, do you have an expert opinion as to
24 whether or not the evidence that you reviewed in this case is
25 consistent with that hypothetical scenario?

1 A. I do.

2 Q. What is your expert opinion?

3 A. My opinion is that the hypothetical scenario is not
4 consistent with the gunshot to Mr. Clark.

5 Q. Why is that?

6 A. First of all, we have the forensic evidence,
7 concerning the gunshot wound to the abdomen of Mr. Clark,
8 that shows the gunshot residues are consistent with the
9 muzzle being 12 to 24 inches away from the surface of the
10 clothing where he was shot in the abdomen, and that is much
11 closer than the eight foot, five inch approximate distance in
12 the hypothetical scenario.

13 Second of all, the relative positioning, as you've
14 described with Mr. Clark facing Mr. Washington with his hands
15 up in the surrender position, is not consistent with the
16 trajectory of the gunshot wound to the abdomen.

17 Third of all, this scenario does not account for
18 the transfer of fibers that are -- the transfer of fibers
19 consistent with the pants of Mr. Clark that were detected on
20 the upper-body clothing of Mr. Washington.

21 Q. Another scenario, Dr. Arden, and, again, assuming
22 the distances that I asked you to for the soot and smoke. If
23 Mr. Washington is standing at the master bedroom door, which
24 is about eight feet, five inches from the second step, and
25 Mr. Washington shoots Mr. Clark, and then Mr. White catches

1 Mr. Clark, lays him down, and Mr. Washington then shoots
2 Mr. White, do you have an expert opinion as to whether or not
3 the evidence that you reviewed in this case is consistent
4 with that hypothetical scenario?

5 A. Yes, sir, I do.

6 Q. What is your expert opinion?

7 A. My opinion is that the scenario you have just
8 offered me is not consistent with the medical and forensic
9 evidence that I've reviewed.

10 Q. And why?

11 A. First of all, the distance of approximately eight
12 feet, five inches from the bedroom door to the second step is
13 inconsistent with the ballistics evidence, the gunshot
14 residue evidence, of Mr. White, where he had -- regarding the
15 clothing hole related to the gunshot in his right knee,
16 gunshot residue that was interpreted to mean that the muzzle
17 of the gun was between three and 12 inches from that location
18 when gun was fired. So that residue and the distance
19 interpreted from that residue is inconsistent with the
20 hypothetical situation.

21 That hypothetical also does not account for the
22 transfer of DNA from Mr. White onto the gun of
23 Mr. Washington. So those two factors render it inconsistent.

24 Q. With respect to soot and smoke --

25 A. Yes, actually, the soot and smoke testimony that

1 you've asked me to assume concerning the defects in the
2 clothing related to the lower abdomen gunshot wound of
3 Mr. White are also inconsistent. The soot and smoke gunshot
4 residues would not be expected to be deposited from such a
5 distance of eight feet or more. In fact, the typical range
6 of deposition of gunshot residues --

7 MR. MOOMAU: Objection.

8 THE COURT: Sustained.

9 BY MR. COHEN:

10 Q. Dr. Arden, the third scenario. If Mr. Washington
11 is crouched down, with Mr. Clark and Mr. White on either side
12 of him, punching down, and Mr. Washington fires from side to
13 side as he rises, do you have an expert opinion as to whether
14 or not the evidence that you reviewed in this case is
15 consistent with that hypothetical scenario?

16 MR. MOOMAU: Objection.

17 THE COURT: Approach the bench, please.

18 (Counsel approached the bench and the following
19 ensued.)

20 MR. MOOMAU: I do not remember any testimony that
21 he said -- that Mr. Washington said he was rising when he
22 fired those shots. The description that he gave and the
23 scenario he gave, he was knelt down, and that's when he
24 pulled his gun out and started firing. He didn't say he was
25 rising up. Unless I missed something, that's how I

1 remembered it.

2 MR. COHEN: No offense to state's counsel, but he
3 is missing something. Mr. Washington's demonstration was
4 that he was firing from side to side as he was rising, and he
5 actually did the body movement of standing up while he was
6 firing. So you may be correct about the testimonial
7 evidence, but that's exactly what he demonstrated.

8 THE COURT: I have everything in that hypothetical
9 that you gave, including punching down on either side of him,
10 but he did not testify that he was in any way raising when he
11 fired the shot. And his testimony was, on cross-examination,
12 similar; that, when down, he shot both sides. So there's
13 nothing about rising that I can see.

14 MR. COHEN: Your Honor, I actually --

15 THE COURT: Even when I observed the demonstration
16 of it, I don't recall seeing him pulling up and rising. He
17 just said he was down, crouched, and he was being struck and
18 hit down, and he fired on both sides, and he showed how he
19 did that. That did not appear to me to be as he was rising.

20 MR. COHEN: Your Honor, for the record, we did not
21 say the testimonial evidence is what he said. We said that,
22 through a demonstration, he said he was rising.

23 THE COURT: I didn't see that. I'm not permitting
24 that because I didn't see him rising when he was giving that
25 demonstration, and there has been no testimony about that.

1 You can rephrase the question to comport with his
2 testimony, but from what I observed from his demonstration
3 and from what I heard in the testimony, there was nothing
4 about rising.

5 MR. COHEN: Is it fair for me to ask the witness to
6 assume that fact --

7 MR. MOOMAU: Objection.

8 MR. COHEN: Hold on; let me ask the question.

9 THE COURT: You can cross-examine on that issue,
10 but even the facts are in dispute.

11 MR. MOOMAU: Object. There is no evidence.

12 THE COURT: That's true, having said that.

13 MR. COHEN: Your Honor, we are proffering that
14 that's what happened. The State is proffering that it
15 doesn't. The Court's notes don't have it. And I'm not -- I
16 don't mean, quote, don't have it --

17 THE COURT: If you show me any transcript of
18 anything about his rising, I'll be happy to look at it.

19 MR. COHEN: What I'm proffering to the Court is
20 that he did it in a demonstration.

21 THE COURT: Well, let me ask you this question.
22 I'm not trying to put you on the spot. You've been getting
23 dailies of the transcripts. Do you have anything on that?

24 MR. COHEN: Your Honor, we didn't get daily on
25 Mr. Washington. So we don't -- I would obviously give it to

1 the Court if I had it.

2 THE COURT: That's okay. Let me see if we can ask
3 the reporter if she can -- I don't even know when to tell her
4 just to begin. But I don't think you're going to see -- my
5 notes reflect -- and I would have put that down, the
6 testimony was that he was rising.

7 MR. COHEN: But what I think our point is, Your
8 Honor, is he said there's no evidentiary basis, the State
9 says there is no evidentiary basis. What we have here now is
10 the State's memory about a demonstration, refuted by the
11 defense, who says that he was doing it, and the Court does
12 not have the demonstration written down. So I don't
13 understand how there is no evidentiary basis. We're saying
14 that that's what he did. That's what we remember him doing.

15 THE COURT: It's not part of the testimony. Do you
16 agree that that was not part of the testimony?

17 MR. STARR: The demonstration is part of the
18 testimony.

19 THE COURT: One question at a time. For purposes
20 of the record, do you agree that there was no testimony when
21 he provided testimony about his rising?

22 MR. COHEN: We're not trying to be difficult, Your
23 Honor. It's our position that -- he asked me a question,
24 Mr. Moomau -- that as part of the testimony, Mr. Washington
25 stepped down from the stand and demonstrated what happened.

1 He did not say, necessarily, that he was rising, but he
2 demonstrated that he was rising.

3 THE COURT: That wasn't my question to you. My
4 question was, during the time of any of his testimony, while
5 on the stand or while demonstrating, are you saying that he
6 used the term "rising" at any point? Is that what you recall
7 or -- that's what I'm asking.

8 MR. COHEN: Do I recall it right now, standing in
9 front of Your Honor? No, I can't say that I do recall that
10 he said that. I do recall, vividly, that he did that.

11 And I don't think that I should be -- it goes to
12 the exact same thing that we approached the Court on before.
13 Mr. White did a demonstration and it was -- I had requested
14 yesterday that the demonstration be put on the record and
15 described. It wasn't done. That wasn't done. Now we're in
16 the situation where our memory is different from the State's
17 memory, and the Court doesn't have it in their notes.

18 I don't think that that means that there's no
19 evidentiary basis for us to at least allow the expert to
20 assume that fact. If he's asked to assume it and the jury
21 didn't see it, then that's our problem. Then jury can say --

22 MR. MOOMAU: The Court has been taking thorough
23 notes throughout this whole trial. There's no record of that
24 demonstration of him saying he was rising or rising. The
25 Court doesn't remember it. I don't remember it. There's

1 no -- those facts are in dispute. There's nothing to do a
2 hypothetical for because it's assuming facts that are not in
3 evidence. There's no record of it being in evidence. It
4 would be prejudicial and it's unfair. It would be an attempt
5 to make the jury believe that's what the testimony was, and
6 both the Court and the State remember that it wasn't that
7 way.

8 THE COURT: On this one, gentlemen, I agree.
9 That's the trouble with demonstrative reenactments of all
10 kinds. Even if they were to be provided with a description,
11 they wouldn't suit or fit what the jury saw on many
12 occasions, if not most occasions.

13 It is my belief from my notes that he never used
14 the term "rising" when he fired, and that his demonstration
15 showed him crouching and firing both to the left and to the
16 right, and it didn't appear to me -- and I certainly can be
17 wrong, but it didn't appear to me that he was rising when he
18 used that demonstration or that he said it or that he gave
19 the impression by any of the physical manifestations that
20 that was the case.

21 So as to the rising, you're not going to be
22 permitted to use that terminology because I believe it is not
23 a fact that is currently in evidence.

24 MR. COHEN: Even with the hypothetical?

25 THE COURT: Correct. Because there has to be some

1 fact in evidence. I didn't see it and I didn't hear it,
2 about him rising. I'm not permitting you to do that.

3 MR. COHEN: May I have a minute, Your Honor?

4 THE COURT: Yes.

5 MR. COHEN: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 (Counsel returned to trial tables and the following
8 ensued.)

9 THE COURT: Before we begin, if you don't mind,
10 we're going to give the jury a ten-minute recess at their
11 request.

12 (A brief recess was taken at 11:10 a.m.)

13 THE COURT: Can I bring the jury back in?

14 MR. MOOMAU: I'm ready, Your Honor.

15 MR. COHEN: Yes, Your Honor.

16 (The jury returned to the courtroom at 11:25 a.m.)

17 THE COURT: Yes, sir.

18 MR. COHEN: No further questions. Thank you,
19 Dr. Arden.

20 THE WITNESS: Thank you.

21 **CROSS-EXAMINATION**

22 BY MR. MOOMAU:

23 Q. Good morning, Dr. Arden.

24 A. Good morning, sir.

25 Q. Dr. Arden, you are the, I guess, owner and operator

1 of Arden Forensics?

2 A. Yes, sir.

3 Q. And where do you operate your business? What is
4 your location?

5 A. McLean, Virginia.

6 Q. How many employees do you have?

7 A. Two, including me.

8 Q. And your other employee?

9 A. My wife, actually. She does the administrative
10 aspects of the business.

11 Q. Is your business located -- you have a business in
12 your home?

13 A. Yes, sir.

14 Q. Now, sir, with Arden Forensics, do you still do
15 autopsies?

16 A. I do.

17 Q. You don't do them in your home though; do you?

18 A. No, sir.

19 Q. You would go to like a funeral home or a hospital
20 or some place which would be appropriate.

21 A. Yes, sir.

22 Q. And you do those for, say, medical malpractice
23 cases?

24 A. I'm asked to do private autopsies sometimes related
25 to medical malpractice cases, sometimes simply related to

1 families want an explanation or an answer. So some of them
2 do involve litigation; some of them don't.

3 Q. I've agreed and it's been stipulated to, you
4 testify commonly as an expert in forensic pathology, correct?

5 A. Yes, sir.

6 Q. Now, you do advertise your business and your
7 services on your website, correct?

8 A. Yes, sir.

9 Q. And you list a number of areas of expertise on your
10 website, correct?

11 A. Yes, sir.

12 Q. Autopsies, brain injury, burns, child abuse, elder
13 abuse, gunshot wounds. Serial killers, you list that as an
14 area of expertise, correct?

15 A. Yes, sir.

16 Q. Have you testified as a serial killer expert?

17 A. All of the areas of expertise are listed within the
18 confines of being a forensic pathologist. I have testified
19 concerning serial killer. In fact, I was the only medical
20 examiner who worked on what I believe is, to date, the only
21 serial killer in the State of Delaware. So I do have some
22 experience being a medical examiner and examining the victims
23 of or testifying to the results of a serial killer.

24 Q. Examining the bodies of the victims of serial
25 killers, correct?

1 A. Yes, sir.

2 Q. You list your areas of expertise as trial
3 preparation also, correct?

4 A. Yes, sir.

5 Q. Suicide.

6 A. Yes, sir.

7 Q. And, sir, on your website, you also advertise the
8 names of murder victims upon whom you have conducted
9 autopsies, correct?

10 MR. COHEN: Objection, Your Honor.

11 THE COURT: Sustained.

12 BY MR. MOOMAU:

13 Q. Sir, you're not an expert in DNA, correct?

14 A. Correct.

15 Q. And you're not a firearms expert, correct?

16 A. Correct.

17 Q. And you are not a fiber transfer expert, correct?

18 A. Again, within the confines of the training and
19 experience of being a forensic pathologist, I have some
20 knowledge of things like fiber transfer. I am not -- in
21 fact, I think I stated this earlier. I am not a laboratory
22 expert as far as the analysis of the fibers; that's correct.

23 Q. Sir, you testify and you work as a consultant,
24 correct, in the field of forensic pathology?

25 A. Yes, sir.

1 Q. And part of that -- part of your workload is
2 criminal cases, working with criminal cases, correct?

3 A. Yes, sir.

4 Q. And of those criminal cases, a percentage of them
5 would be -- well, the great majority of them are working with
6 the defense, correct?

7 A. Yes, the great majority. Not a hundred percent but
8 the majority. I do occasionally work for the prosecution,
9 although they much less frequently have the need for an
10 outside consultant.

11 Q. And your hourly rate of payment, sir, what is that?

12 A. \$400 an hour for consulting activities.

13 Q. And for appearing in court today, your rate?

14 A. My usual court appearance fee is a flat \$4,000.

15 Q. And in addition, you get reimbursed for expenses,
16 correct?

17 A. If there is substantial travel, yes.

18 Q. How many hours of review or consultation have you
19 put in with this case up until today?

20 A. Actually, I don't know. I haven't counted it up
21 yet. I haven't rendered any invoices, so I don't know.

22 Q. Well, can you give us an estimate?

23 A. The best I can estimate -- and, again, it is only
24 an estimate because I have not reviewed the records -- it's
25 probably in order of five to ten hours.

1 Q. So it's either somewhere between \$2,000 and \$5,000,
2 in addition to the \$4,000 for today's appearance.

3 A. Again, these are only estimates, because I have
4 records of this and I haven't reviewed it, but if it's ten
5 hours, it's 4,000, not 5,000.

6 Q. I apologize. Somewhere between \$2,000 and \$4,000
7 of hourly pay, correct?

8 A. As best as I can estimate, yes.

9 Q. Sir, you testified that you worked as the chief
10 medical examiner for the District of Columbia for
11 approximately five years?

12 A. Yes, sir.

13 Q. And prior to that you were -- you weren't the chief
14 in New York City but, what, a deputy chief?

15 A. When I finished I was the first deputy chief
16 medical examiner.

17 Q. And in those positions -- I mean, you used the
18 number 18,000 as far as autopsies, New York and the District.
19 Does that mean like the total number of autopsies that came
20 through the offices when you were there?

21 A. I specifically said how many autopsies I had
22 supervised, and I mentioned that I had supervised the office
23 in Brooklyn for eight and a half years and the office in
24 Washington for five and a half years. If you estimate
25 approximately what our annual autopsy load in each of those

1 places was, then that gets to approximately 18 to 20,000
2 autopsies that were done, broadly, under my supervision.

3 Q. And I was just trying to clarify that. But they
4 were under your supervision.

5 A. Yes, sir.

6 Q. And some of those you may have done yourself.

7 A. Yes, sir.

8 Q. And some of those you may have been present,
9 watching other medical examiners do the autopsies, correct?

10 A. Yes, sir.

11 Q. Now, when you were a deputy or an assistant medical
12 examiner or the chief in Washington, D.C., did you have other
13 employment, such as consulting work that you could do on the
14 side or that you did on the side?

15 A. At various times during my government employment, I
16 did some consulting work, as you say, on the side. Actually,
17 I did very little of it when I was in Washington, but I did
18 some of it over a number of years.

19 Q. Were there limitations of the type of work you
20 could do?

21 A. Not really the type of work. The limitations
22 largely were where I could consult. Clearly, it would not be
23 reasonable for me to consult within the jurisdiction that I
24 also was employed as a medical examiner. But other than
25 that, I don't think there were any restrictions.

1 Q. You had to avoid conflict, correct?

2 A. Yes, sir.

3 Q. Or you couldn't do some consulting work and be in a
4 position where it would, I guess, put you in a -- where it
5 would oppose your responsibilities as a medical examiner for
6 either the District or in New York, correct?

7 A. Oppose or compromise my official duties, yes,
8 that's correct.

9 Q. And when you were the chief medical examiner for
10 the District of Columbia, you were accountable for the
11 operation and the management of the office there, correct?

12 A. Yes, sir.

13 Q. And that is what you were paid to do.

14 A. I guess you could say it that way, yes.

15 Q. And part of what you were paid to do was to perform
16 or supervise the conduction of autopsies, correct?

17 A. Yes.

18 MR. COHEN: Your Honor, I'm going to object. May
19 we approach?

20 THE COURT: Okay.

21 (Counsel approached the bench and the following
22 ensued.)

23 MR. COHEN: I'm not sure that question was
24 improper, Your Honor. What I'm trying to find out is if we
25 can -- I don't know where the State is going with this. When

1 there's been something that could surprise the Court or
2 surprise people, there's always been a proffer given, and I
3 don't know where he's going with respect to these questions
4 about the D.C. Medical Examiner's Office and conflicts and
5 that sort of thing.

6 THE COURT: I don't know where he's going either.

7 MR. MOOMAU: I just intend to ask him questions
8 about, you know, his operation and management of the office
9 there.

10 THE COURT: If that's all there is.

11 MR. COHEN: Okay. Thank you, Your Honor.

12 (Counsel returned to trial tables and the following
13 ensued.)

14 BY MR. MOOMAU:

15 Q. Dr. Arden, repeating the question. You may have
16 answered it. I can't remember right now. Part of your
17 duties there at the District of Columbia Medical Examiner's
18 Office was to conduct and/or supervise autopsies, correct?

19 A. Yes, sir.

20 Q. And it was also to make sure that autopsy reports
21 were prepared for each autopsy that was conducted, correct?

22 A. Yes, sir.

23 Q. And whether you did the autopsy or not, you were
24 still accountable for the accuracy of the autopsy report,
25 correct?

1 A. Ultimately, I was responsible for the operation of
2 the agency, and I guess you could say that includes the
3 accuracy of the autopsy reports. I wasn't held personally
4 accountable for every autopsy that had testimony attached or
5 something like that, but I was the director.

6 Q. As you testified, you would actually go to court
7 and testify about autopsies performed in your office,
8 correct?

9 A. Yes, sir.

10 Q. And you would even testify in some cases where you
11 hadn't performed the autopsy or even supervised it, correct?

12 A. When I was the medical examiner?

13 Q. Yes.

14 A. Well, certainly, I testified in cases where I did
15 not personally perform the autopsy. I'm not sure if there
16 were any that you could say I didn't supervise -- it's
17 possible that there was some autopsy I testified to that was
18 done before I was chief medical examiner. So in that sense,
19 that would be something I didn't supervise.

20 Q. But if a medical examiner in your office had left
21 and wasn't available or was across the country or somewhere,
22 either you or another medical examiner would -- it was common
23 practice to send those persons to court to testify about the
24 autopsy, correct?

25 A. Yes, sir.

1 Q. How many deputies did you have working underneath
2 you when you were in the District of Columbia?

3 A. It varies, depending upon staffing loads, but I
4 generally had a deputy chief medical examiner during part of
5 that time, and I had up to a maximum of five deputies.

6 Q. Sir, when you were the chief medical examiner for
7 the District of Columbia, there was an inspection done upon
8 your management of the office by the Office of the Inspector
9 General for the District of Columbia, correct?

10 A. Yes, sir.

11 MR. COHEN: Objection, Your Honor. May we
12 approach?

13 THE COURT: Certainly.

14 (Counsel approached the bench and the following
15 ensued.)

16 MR. COHEN: The OIG's report is irrelevant, Your
17 Honor.

18 THE COURT: Irrelevant to what?

19 MR. COHEN: To whatever it's going to be used for.
20 Relevant to the case.

21 THE COURT: You called this man as an expert in the
22 field of forensic pathology, and I believe they have a right
23 to cross-examine him about his time period when he was chief
24 medical examiner for the District of Columbia and that's what
25 they're doing. I mean, how is that irrelevant?

1 MR. COHEN: I don't think the report goes to his
2 credibility, Your Honor. I don't think the results of the
3 report go to his credibility.

4 THE COURT: I don't know what it is.

5 MR. COHEN: I know you don't know what it is, but.

6 MR. MOOMAU: He's testified that he's an expert in
7 forensic pathology. Part of that was running the office in
8 D.C. I'm allowed to cross-examine him on that.

9 THE COURT: Yes, I believe he is. That report is
10 not going in.

11 MR. MOOMAU: I understand. It might have to be
12 used to refresh his memory, but it's not going in.

13 THE COURT: I have to go on question by question.

14 MR. COHEN: Your Honor, just for the record, we
15 haven't seen the report. We haven't been given the report.
16 We have not been given the report.

17 THE COURT: What obligation of that is the State to
18 give it to you?

19 MR. COHEN: I just wanted to put on the record that
20 we were not given a copy of the report by the State.

21 THE COURT: Did you request the expert report?

22 MR. COHEN: We made an overall request --

23 THE COURT: And this isn't their expert, correct?

24 MR. COHEN: You're right, Your Honor.

25 THE COURT: Thank you.

1 (Counsel returned to trial tables and the following
2 ensued.)

3 BY MR. MOOMAU:

4 Q. Dr. Arden, repeating the question, during your
5 tenure as chief medical examiner for the District of
6 Columbia, there was an investigation done of your management
7 by the Office of the Inspector General for the District of
8 Columbia, correct?

9 A. Yes. Technically, it's an inspection.

10 Q. And isn't it true that the inspection team -- or
11 the executive summary of that report was the inspection team
12 found poor management of the Office of the Chief Medical
13 Examiner operations and personnel, significant health and
14 safety problems, a lack of written policies and procedures
15 for all tasks and responsibilities, and low employee morale?

16 A. That's what the report stated, yes.

17 Q. In addition to that report, there were other
18 allegations against you by deputy medical examiners, correct?

19 A. Yes, sir.

20 Q. And what did those allegations consist of?

21 A. In general, they claimed that I had harassed them.

22 Q. In what nature?

23 A. They claimed that I had made life unpleasant for
24 them, and some of them included what they termed as sexual
25 harassment.

1 Q. And was that all five deputy medical examiners?

2 A. Yes, sir.

3 Q. All five female deputy medical examiners, correct?

4 A. Yes, sir.

5 Q. Sir, you testified that it would have been improper
6 for you to take outside work while you were a chief medical
7 examiner for the District of Columbia, work that would be in
8 opposition to your work as chief medical examiner, correct?

9 A. Yes, sir.

10 Q. Sir, do you remember testifying in a case in the
11 District of Columbia, United States versus Edward McDonald,
12 after you left the Office of the Chief Medical Examiner?

13 A. I don't recall the case by name. I don't doubt
14 that you've got a proper citation, but I don't remember what
15 case that is.

16 Q. Do you remember testifying in a case where you
17 actually came back and testified and disagreed with findings
18 in an autopsy which was performed when you were the chief,
19 correct?

20 A. I do recall coming back and testifying in which I
21 disagreed in some interpretation. I don't recall if I
22 specifically disagreed with the findings. I was called as a
23 defense witness, if I recall the case you're alluding to. I
24 was called as a defense witness involving an autopsy that had
25 been done during my time as chief medical examiner.

1 Q. And you couldn't have done that while you were with
2 the chief medical examiner's office; could you?

3 A. Correct.

4 Q. But you felt that after they terminated your
5 employment, you could come back and do that, correct?

6 A. Actually, they didn't terminate my employment. I
7 did resign. But at the time that I was no longer employed, I
8 no longer had that conflict, and so it was a completely
9 different situation and it was reasonable.

10 Q. You just had the conflict as long as they were
11 paying you.

12 A. As long as I was employed by the District
13 government, then that created a different set of
14 circumstances and a potential different set of conflicts,
15 depending on what I was doing. So, yes, while I was
16 employed, it put obligations and limitations on what I could
17 do.

18 Q. Now, you are not a treating physician; are you?

19 A. Correct.

20 Q. How long has it been since you've been a treating
21 physician?

22 A. I pursued a career in pathology since I left
23 medical school. So I have not worked as a treating physician
24 in an official capacity since I left medical school.

25 Q. But as a forensic pathologist, you testified that

1 you do rely on the reports you receive from treating
2 physicians, such as emergency medical room doctors, trauma
3 nurses, correct?

4 A. Yes, sir.

5 Q. And you trust that the observations they make are
6 accurate, correct?

7 A. Well, I won't vouch for the accuracy of every
8 single thing I see in a medical record. I generally trust
9 that their records are fair and accurate. But depending on
10 what is contained in those records, there are times that I
11 doubt their accuracy or I do not necessarily believe
12 everything in every record. As a general rule, unless there
13 is evidence to the contrary, I usually trust them and think
14 that they are accurate.

15 Q. Well, you testified to Mr. Cohen's questions that
16 you rely on those. I mean, you either rely or you don't
17 rely. So by relying, you trust them, correct?

18 A. By relying upon them, I trust what I have looked at
19 and I believe. I tend -- as I said, I tend to believe that
20 most of those records, under most circumstances, are
21 accurate, and if I believe that they are accurate, then I
22 rely upon them. If there is a specific portion of a medical
23 record that I have reason to doubt, then perhaps I will not
24 rely upon that portion.

25 Q. And you testified that you reviewed Keith

1 Washington's medical records, correct?

2 A. Yes, sir.

3 Q. And you testified about what trauma is. Trauma can
4 be a scratch, correct? Or trauma can be a bruise or a
5 contusion, correct?

6 A. Yes, sir.

7 Q. Did you ever talk to -- or do you know the names of
8 the emergency medical people that saw Keith Washington?

9 A. I don't recall the names, no, sir.

10 Q. You never talked to any of them; did you?

11 A. That's correct.

12 Q. As a medical examiner in some of these cases you've
13 been talking about, in the past you have talked with
14 emergency medical room personnel; haven't you?

15 A. I don't know actually. It is possible that I have
16 talked to emergency room personnel at some point in my career
17 about some case. I can't recall a specific example, but it's
18 possible.

19 Q. If it was important to your conclusion, you would
20 try to give them a call, right?

21 A. It depends upon the nature of the evidence and the
22 nature of the conclusion. If I have medical records in front
23 of me that appear to be reasonable and to answer my questions
24 or to provide me the information I need, then I don't
25 necessarily call the physician every time I have that

1 circumstance.

2 If there is something unclear, uncertain, then
3 there may be occasions when I do actually pick up a phone and
4 try to call that physician.

5 Q. Sir, you believe it's important for persons
6 conducting autopsies to document what they see, correct?

7 A. Yes, sir.

8 Q. That would be any doctor, what they see, they
9 document, correct? That's important.

10 A. It's important to document the observations in an
11 autopsy, yes, sir.

12 Q. Well, even a treating physician, it would be
13 important also, correct?

14 A. It's important -- your question asked about
15 autopsies. It's important for treating physicians to
16 document the important -- the pertinent observations that
17 they make in their records, yes.

18 Q. Sir, do you do written reports for cases where
19 people hire you as a consultant?

20 A. Sometimes I do.

21 Q. Did you do one in this case?

22 A. No, sir.

23 Q. In the cases that you sometimes do them, is that
24 when you are asked to do them?

25 MR. COHEN: Objection, Your Honor.

1 THE COURT: Approach.

2 (Counsel approached the bench and the following
3 ensued.)

4 THE COURT: Relevance as to the last question?

5 MR. MOOMAU: The last question was?

6 THE COURT: Do you do them only upon request of the
7 attorneys.

8 MR. MOOMAU: I was just -- I asked him did he --
9 did I ask him if he did one in this case?

10 THE COURT: Yes, and he said no.

11 MR. MOOMAU: And then he said he does them
12 sometimes.

13 THE COURT: Right.

14 MR. MOOMAU: Now I was going to ask him under what
15 circumstances do you do them.

16 THE COURT: Well, that's fine, but not the way you
17 phrased that. That objection is sustained.

18 MR. COHEN: That question has been asked and
19 answered as well.

20 THE COURT: I'm sustaining the form of that
21 question.

22 (Counsel returned to trial tables and the following
23 ensued.)

24 BY MR. MOOMAU:

25 Q. Dr. Arden, under what circumstances do you prepare

1 written consultation reports?

2 A. If the person who is retaining me requests the
3 report, usually relating to whether there is a requirement
4 for a report in a particular case or circumstance, then I
5 prepare a report. If I do an autopsy, I prepare a report.

6 Q. Sir, in this case you have repeated what is
7 contained in a number of reports that you received. The DNA
8 report. You testified about Robert White's DNA being on the
9 swabs that were taken from Keith Washington's handgun,
10 correct?

11 A. Yes, sir.

12 Q. But there was two other person's DNA unknown on
13 that handgun; weren't there?

14 A. I believe so, yes.

15 Q. I mean, do you know that or not?

16 A. I don't know if there were two other persons. If
17 it would help, I can look at the report.

18 Q. Go ahead.

19 A. I know that there was other DNA found. I just want
20 to be very specific as to your question.

21 Q. Did you find the spot, sir?

22 A. Yes, sir. The answer to your question is that the
23 report reflects that there are two types of DNA present which
24 did not relate to Mr. Washington or Mr. White.

25 So the only nitpicking I was doing there -- I don't

1 mean to be annoying to you, sir, but you said DNA from two
2 other persons, I believe, in your question. I don't know
3 that this can be concluded that it necessarily represents two
4 other persons.

5 There are two other what they call loci areas of
6 testing of the DNA that came from somebody else. I don't
7 know that that necessarily means two other persons, but at
8 least one other person who was not Mr. Washington and was not
9 Mr. White.

10 Q. And you would defer to the testimony of the DNA
11 expert who testified about that, correct; what that meant?

12 A. Other than what I've said, yes, sir.

13 Q. Well, you're not a DNA expert, correct?

14 A. I'm not a DNA expert. I have some familiarity with
15 DNA as a forensic pathologist. It's among the kinds of
16 laboratory tests that I frequently have to review or
17 incorporate. But, again, in terms of being a DNA expert, as
18 someone who does the testing and does the reports, that's
19 correct, I am not such an expert.

20 Q. And comes to court to testify about.

21 A. Yes, sir.

22 Q. And you will agree that none of Brandon Clark's DNA
23 was on that particular -- on the swabs from that handgun; was
24 it?

25 A. Correct.

1 Q. And there are many scenarios in which DNA can be
2 transferred, correct?

3 A. Yes, sir.

4 Q. It can be transferred by that gun being used to
5 nudge somebody that's down, correct, if that person has
6 bodily fluids, such as sweat, on there?

7 MR. COHEN: Objection.

8 THE COURT: Overruled.

9 THE WITNESS: If nudging of the person with the gun
10 caused the gun to come into contact with bodily fluids or
11 skin cells, then that is a possible way in which a transfer
12 of DNA could occur.

13 Q. I'll give you a hypothetical. Say you have a
14 heavy, sweaty furniture mover who has been moving furniture
15 all day and he's sweating and he's laying on the ground, and
16 a person has a handgun and comes up and rubs that against him
17 or nudges them with the handgun, cannot DNA be transferred to
18 the gun that way?

19 A. It's within the realm of possibility. If there
20 were enough sweat that had come through the clothing to
21 deposit material on the gun, it is one of the possibilities.

22 MR. MOOMAU: Court's indulgence, please.

23 BY MR. MOOMAU:

24 Q. Sir, you testified about the firearms testing or
25 the report in this case. Do you have a copy of that report?

1 A. Yes, sir.

2 MR. COHEN: Your Honor, may we approach briefly?

3 THE COURT: Certainly.

4 (Counsel approached the bench and the following
5 ensued.)

6 MR. COHEN: This is my concern. Mr. Moomau just
7 asked a question in which he assumed a fact that wasn't in
8 evidence. He put it into a hypothetical, and I objected and
9 the Court allowed him -- let me just put it on the record,
10 Your Honor. And I objected --

11 THE COURT: The opponent's cross-examination is not
12 subject to such a restriction that the hypothetical or
13 question on cross-examination be based on evidence in the
14 case. The case is called Kruszewski versus Holz, 265 Md.
15 434.

16 In addition, there was testimony by Mr. White given
17 that, when he was on the floor, he felt some nudging in his
18 side.

19 MR. COHEN: With his eyes closed, for the record.

20 (Counsel returned to trial tables and the following
21 ensued.)

22 BY MR. MOOMAU:

23 Q. Sir, what is the standard that you, as an expert in
24 the field of forensic pathology, are held to before you can
25 render an opinion? The legal standing.

1 A. In a criminal case?

2 Q. Yes, sir.

3 A. The phrase is reasonable medical certainty.

4 Q. To a reasonable degree of medical certainty,
5 correct?

6 A. Yes, sir.

7 Q. You reviewed the firearms examination report of
8 Susan Lee in this case, correct?

9 A. I reviewed the firearms examination report, and I
10 have to refresh my recollection -- yes, it's from Susan Lee.

11 Q. And she states opinions in that report, correct?

12 A. Yes, sir.

13 Q. Opinions that she's willing to put in writing,
14 correct?

15 A. Yes, sir.

16 Q. Opinions that she felt she had confirmed by her
17 testing, correct?

18 A. Yes, sir.

19 Q. Opinions to a reasonable degree of certainty within
20 her area of expertise, correct?

21 A. That's how I understand it, yes, sir.

22 Q. The findings dealing with smoke were not such
23 findings, though, to that standard; were they?

24 A. My understanding was that was offered in testimony.
25 And, again, I didn't witness her testimony. I presume that

1 expert testimony offered fulfills the standard that is
2 necessary to a reasonable medical or, in her case, scientific
3 certainty if it were allowed by the Court.

4 Q. So if she said it wasn't confirmed, you would
5 accept that, correct?

6 A. If she said that, yes.

7 Q. And if she said when she saw the whatever, it could
8 have been smoke, and she put a question mark by it, you would
9 accept that, correct?

10 A. Yes, sir.

11 Q. Because if you had a question about something, you
12 would put a question mark by it. That would be one way you
13 would question the accuracy of it, correct?

14 A. Yes, sir.

15 Q. And, sir, isn't it true that the outer shirt of
16 Robert White, according to Susan Lee, did not have gunpowder
17 residue on it?

18 MR. MOOMAU: May I approach, Your Honor?

19 THE COURT: Please.

20 BY MR. MOOMAU:

21 Q. Sir, Ms. Lee found that picture of CN8A, which is
22 part of State's Exhibit 101, the outer garment of Robert
23 White did not have gunpowder residue on it, correct?

24 MR. COHEN: Objection, Your Honor.

25 THE COURT: Grounds?

1 MR. COHEN: Mischaracterization of her testimony.

2 THE COURT: Approach.

3 MR. MOOMAU: Can I withdraw and re-ask the
4 question?

5 THE COURT: Okay.

6 BY MR. MOOMAU:

7 Q. Do you have Susan Lee's report?

8 A. I do, sir.

9 Q. Can you look at item CN8A.

10 A. Yes, sir.

11 Q. I'm looking on the second page, halfway down.

12 A. Yes, sir, I have it.

13 Q. And didn't she find the presence of gunpowder
14 residue on that?

15 A. I'm sorry?

16 Q. Excuse me; you're right. Talking about his pants,
17 item B/C. Do you see that?

18 A. Yes, sir.

19 Q. There was the presence of gunpowder residue on
20 that, correct?

21 A. Yes, sir.

22 Q. And the distance was, she concluded, three to 12
23 inches.

24 A. Approximately between three inches and 12 inches,
25 yes, sir.

1 Q. And she did not find any on the shirt, correct, the
2 white shirt, CN8A?

3 MR. COHEN: Objection, Your Honor.

4 THE COURT: Grounds?

5 MR. COHEN: Mischaracterizing her testimony.

6 THE COURT: Approach, please.

7 (Counsel approached the bench and the following
8 ensued.)

9 MR. COHEN: I truly think Mr. Moomau may be
10 mistaken but, CN8A, she did find soot and smoke; CN8C, she
11 did find soot and smoke; and B/C, she found soot and smoke.

12 THE COURT: She observed, by the naked eye, what
13 appeared to be soot and smoke, but it wasn't confirmed by her
14 testing, correct? Am I correct or incorrect on that?

15 MR. MOOMAU: Correct.

16 MR. COHEN: I think you're correct on that, Your
17 Honor.

18 THE COURT: So phrase it a different way.

19 MR. MOOMAU: I was getting to that but -- I just
20 mixed them up.

21 (Counsel returned to trial tables and the following
22 ensued.)

23 BY MR. MOOMAU:

24 Q. Dr. Arden, referring to item CN8A on Susan Lee's
25 report. Isn't it true that she microscopically and

1 chemically analyzed that for the presence of gunshot residues
2 and found none, correct?

3 A. Yes, sir.

4 Q. And that was the outer garment he was wearing.
5 Isn't that your understanding, correct?

6 MR. COHEN: Objection, Your Honor.

7 THE COURT: Grounds.

8 MR. COHEN: No grounds for him to know what layer.

9 THE COURT: He's asking if he knows.

10 MR. COHEN: Okay, I'm sorry.

11 THE WITNESS: I don't know what order he was
12 wearing the garment in.

13 BY MR. MOOMAU:

14 Q. And you testified that because there was
15 unconfirmed smoke on the T-shirt that he had on, it's
16 evidence of close-range firing to the shirt, correct?

17 MR. COHEN: Objection, Your Honor.

18 THE COURT: I'm going to sustain the form of that
19 question.

20 BY MR. MOOMAU:

21 Q. Mr. Cohen asked you about smoke and soot on the
22 shirt, correct?

23 A. Yes, sir.

24 Q. And because of that, you formed an opinion,
25 correct?

1 A. That was one basis for my opinions, yes, sir.

2 Q. Was there any basis for your opinion that the
3 sweater didn't have any evidence of gunpowder residue on it?

4 A. No, sir.

5 Q. You didn't use that as part of your opinion.

6 A. No, sir.

7 Q. Okay. And for Brandon Clark's clothing -- and,
8 Dr. Arden, you also reviewed Susan Lee's report in regard to
9 item CN4J, Brandon Clark's pants, correct?

10 A. Yes, sir.

11 Q. And didn't she also find in her report, she
12 examined a bullet hole there microscopically and chemically
13 for the presence of gunshot residues and didn't find any;
14 isn't that correct?

15 A. Yes, sir.

16 Q. But she did find the presence of gunshot residues
17 on his shirt; didn't she? Item CN4I.

18 A. According to the report I have here, CN4I is not a
19 shirt.

20 Q. Right. Those are a pair of sweat pants, but for
21 shirt he had on, which was --

22 MR. MOOMAU: Court's indulgence, please.

23 THE COURT: Certainly.

24 BY MR. MOOMAU:

25 Q. CN4G -- no, excuse me. For his shirt, she found

1 that the shot was 12 to 24 inches, correct? That's what you
2 had testified to.

3 A. Yes, sir.

4 Q. Or the end of the muzzle from the garment, correct?

5 A. Yes, sir.

6 Q. So there's evidence that some of these shots were
7 fired at close range from Susan Lee's report and some of them
8 weren't, correct?

9 A. No. There's evidence that some of them were fired
10 from close range, and there is a lack of evidence to
11 determine that any of the others were. That doesn't prove --
12 especially if you read the language at the end of her report,
13 the absence of residue does not prove that the shot was not
14 at closer range. But it certainly does bear on the question
15 that there was no gunshot residues related to the other
16 apparent bullet holes in the clothing.

17 Q. Well, you testified that you rely on the findings
18 of ballistic experts, correct?

19 A. Yes, sir, sometimes.

20 Q. I didn't hear you qualify it like that in your
21 direct examination.

22 A. I think I did actually say that I use some of these
23 reports some of the time, depending upon the circumstances of
24 the case.

25 Q. Sir, under the first scenario that Mr. Cohen

1 presented to you, I believe you testified that the wounds to
2 Robert White were not consistent with him being located in a
3 position between the shooter and Brandon Clark; is that
4 correct?

5 A. No, sir.

6 Q. Excuse me?

7 A. I said no, sir.

8 Q. What was that?

9 A. I said that the gunshot injuries to Mr. White were
10 not consistent with him being -- not just located between
11 Mr. Washington and Mr. Clark, but specifically facing away
12 from Mr. Washington.

13 Q. But when the shooting started, you don't know how
14 Robert White's body was positioned; do you?

15 A. All I did was respond to the hypothetical. I don't
16 have independent knowledge other than that, no, sir.

17 Q. And under the hypothetical, you were presented with
18 facts as if the three shots sustained by Robert White were
19 all at the same time, correct? Bam, bam, bam.

20 A. It wasn't specified in the hypothetical. It would
21 certainly imply to me that's these shots all occurred
22 relatively quickly or in close proximity in time, yes.

23 Q. Under the hypothetical, it was implied to you that
24 Brandon Clark and Robert White were shot instantaneously, all
25 at the same time.

1 A. No, it wasn't implied to me that it was
2 instantaneous. It certainly was my inference that the shots
3 occurred relatively quickly, one to the next. It certainly
4 did not appear, in the hypothetical that we're talking about,
5 shot, a long pause, another shot, an hour, another shot. But
6 instantaneously, no. Probably all relatively quickly, one to
7 the next.

8 Q. Well, the circumstances that you're inferring would
9 mean that -- would not include Brandon Clark being shot
10 twice, Robert White being shot twice, a pause, Robert White
11 stumbling down the hall, and then Mr. Washington coming back
12 out and shooting again; would it?

13 MR. COHEN: Objection, Your Honor.

14 THE COURT: Overruled.

15 BY MR. MOOMAU:

16 Q. That's not the circumstances that you were aware
17 of, correct?

18 A. Those are not the circumstances that were presented
19 to me in the hypotheticals that I answered.

20 Q. Sir, you've testified that the location of Brandon
21 Clark's gunshot wound to his abdomen was decidedly downward
22 and to the right, correct?

23 A. Not the location; the trajectory.

24 Q. Trajectory. I apologize. What was the location of
25 that gunshot wound?

1 A. Upper, left abdomen.

2 Q. And where did it end up?

3 A. In the right ileac region.

4 Q. And is that right ileac region still pretty much in
5 the abdomen area?

6 A. It's either the lowest part of the abdomen or it
7 could also -- actually, by the time you get to ileac, it
8 really is pelvis rather than abdomen.

9 Q. And, sir, the chest wound to Robert White, that
10 shot is also downward, correct?

11 A. Yes, sir.

12 Q. Sir, isn't a likely scenario for that meaning that
13 the gun was fired from a point above where those wounds were?

14 A. That is one possible scenario.

15 Q. Now, sir, during the presentation of the scenarios,
16 it doesn't take into account the reactions of persons who are
17 being shot at or shot, correct?

18 A. There were no elements in the hypotheticals posed
19 to me that included reactions by the participants.

20 MR. MOOMAU: That's all the questions I have, Your
21 Honor.

22 MR. COHEN: Court's indulgence.

23 THE COURT: Want to approach the bench for a
24 minute?

25 (Counsel approached the bench and the following

1 ensued.)

2 THE COURT: I don't know how long you're going to
3 take, but I know that the jury has been twitching.

4 MR. COHEN: Excuse me?

5 THE COURT: I said I don't know how long any
6 redirect will take, but I know that the jury is getting antsy
7 for lunch.

8 MR. COHEN: We would suggest having the jury break
9 now, Your Honor. I do have some redirect.

10 MR. MOOMAU: I'd rather get the direct over with so
11 we can start on our rebuttal after lunch.

12 THE COURT: How long do you think you're going to
13 be?

14 MR. COHEN: It depends on what he says in response,
15 Your Honor. Twenty, 30 minutes. I don't know. We would
16 request a break.

17 THE COURT: Then I'm recessing for lunch. I'm not
18 going to hold the jury here, and they're not going to be
19 happy about it. I understand all of the balancing back and
20 forth. But, yesterday, they wanted a break and we didn't
21 give them one. I don't want to do that two days in a row.

22 (Counsel returned to trial tables and the following
23 ensued.)

24 THE COURT: Ladies and gentlemen, we're going to
25 break for the noon luncheon recess. I'm going to ask you all

1 again to return to the main jury lounge. I'm going to give
2 you a little bit more time. We've run a little bit late, as
3 you can see. We don't seem to be able to time these things
4 appropriately for you. But I asked you early on, if you
5 remember, to give us, please, some flexibility. But I'm gong
6 to ask you to come back to the main juror's lounge at quarter
7 to two. Sheila will bring you back down here.

8 Again, during the noon luncheon recess, please
9 don't put yourself in a position where you would hear, see or
10 read any accounts of any matters that have been brought forth
11 as a result of this trial. You are not entitled to speak to
12 each other or anyone at lunch or at any break about any
13 aspect of this trial. As well, if you observe any of the
14 witnesses or parties in this case or the lawyers, please
15 remove yourself from that spot, move to another spot where
16 you wouldn't be in a position to overhear anything which they
17 may be talking about.

18 Again, thank you.

19 (At 12:20 p.m. a luncheon recess was taken.)

20 -oOo-

21 **AFTERNOON SESSION**

22 1:45 p.m.

23 THE DEPUTY CLERK: Criminal trial 07-1664X, State
24 of Maryland versus Keith Washington.

25 MR. MOOMAU: Good afternoon, Your Honor. William

1 Moomau present for the State.

2 MS. ZANZUCCHI: Raemarie Zanzucchi for the State.

3 MR. COHEN: Good afternoon, Your Honor. Vincent H.
4 Cohen, Jr., on behalf Keith Washington.

5 MR. STARR: And Michael Starr for Mr. Washington.
6 Mr. Washington is present.

7 THE COURT: Doctor, if you want to retake the
8 stand.

9 MR. COHEN: May I, Your Honor?

10 THE COURT: Sure. Are we ready for the jury?

11 MR. MOOMAU: Yes, Your Honor.

12 MR. COHEN: Yes.

13 (The jury returned to the courtroom at 1:50 p.m.)

14 MR. COHEN: May I, Your Honor?

15 THE COURT: Yes, sir.

16 **REDIRECT EXAMINATION**

17 BY MR. COHEN:

18 Q. Good afternoon, Dr. Arden.

19 A. Good afternoon, sir.

20 Q. Before lunch Mr. Moomau asked you a series of
21 questions regarding what you were an expert in and what you
22 are not an expert in. Do you remember that series of
23 questions?

24 A. Yes, sir.

25 Q. But you relied in this case, in giving your expert

1 opinion, on the State's experts and their reports, correct?

2 A. Yes, sir.

3 Q. Specifically, you relied on the State's DNA expert
4 report.

5 A. Yes, I did.

6 Q. And you relied on the State's firearms expert
7 report, correct?

8 A. Correct.

9 Q. And you relied on the State's expert's fiber
10 transfer report as well, correct?

11 A. Yes, I did.

12 Q. Remember Mr. Moomau asking you about the standard
13 that you need to testify to with respect to criminal cases?

14 A. Yes, sir, I do.

15 Q. Do you remember that standard that you stated?

16 A. I do.

17 Q. Can you state it again for the ladies and gentlemen
18 of the jury?

19 A. I termed it as reasonable medical certainty, and I
20 believe Mr. Moomau paraphrased it in another common way of to
21 a reasonable degree of medical certainty.

22 Q. And the expert opinion that you gave, in response
23 to scenarios that I described to you, they were based on a
24 reasonable degree of medical certainty, correct?

25 A. Yes, sir.

1 Q. Remember the series of questions that Mr. Moomau
2 asked you about how many times you testified for the defense?
3 Do you remember those series of questions?

4 A. Yes, sir.

5 Q. Dr. Arden, let the ladies and gentlemen of the jury
6 know how many times, approximately, that you testified for
7 the prosecution.

8 A. Well, I spent 20 years as a government-employed
9 medical examiner, and almost all of my testimonial
10 appearances during that time were in criminal cases, called
11 by the prosecution, as part of my duties as a medical
12 examiner. Since I started doing full-time consulting, I have
13 testified a total of almost a hundred times.

14 So prior to that -- my best estimate, by the way,
15 is that in my career I testified over 500 times. So the
16 preceding 400 or so times were almost all on behalf of the
17 prosecution or being called by the prosecution, I should say.

18 Q. Mr. Moomau referenced an inspector general report.
19 Do you remember that reference?

20 A. Yes, sir.

21 Q. How many times have you been qualified as an expert
22 after that report was rendered, approximately?

23 A. In the neighborhood of a hundred times.

24 Q. Do you remember Mr. Moomau's questions about
25 drafting a written report?

1 A. Yes, sir.

2 Q. You don't know of any requirement that you needed
3 to draft a written report in this case; do you?

4 MR. MOOMAU: Objection.

5 THE COURT: Overruled.

6 THE WITNESS: That's correct.

7 BY MR. COHEN:

8 Q. And, in fact, no request was made of you to draft a
9 written report, correct?

10 A. That's correct.

11 Q. Do you remember Mr. Moomau's questions about the
12 DNA and the possibilities of how DNA was transferred to the
13 gun? Do you remember those questions?

14 A. Yes, sir, I do.

15 Q. And you testified that there were different ways in
16 which DNA can be transferred?

17 A. Yes, sir.

18 Q. Is one of those ways through direct physical
19 contact?

20 A. Yes, it is.

21 Q. Do you remember the scenario that Mr. Moomau gave
22 you, the hypothetical about sweat and poking and that sort of
23 thing?

24 A. Yes, sir.

25 Q. Which is more direct or indirect, the manner in

1 which Mr. Moomau described through his scenario or his
2 hypothetical or by direct physical contact?

3 MR. MOOMAU: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: Direct physical contact of the
6 person, such as the skin with the gun, is a much more direct
7 method and a more likely method to transfer DNA.

8 BY MR. COHEN:

9 Q. Do you remember when Mr. Moomau was asking you
10 about whether the hypotheticals I gave you accounted for
11 movements of the people that I described to you in my
12 hypotheticals? Do you remember that?

13 A. Yes, sir.

14 Q. And let me ask you a question regarding those sets
15 of questions. How can people's reactions to being shot
16 affect the trajectory?

17 A. In broad terms, if a person moves relative to the
18 position of the gun, then you change your orientation to the
19 path of the bullet, so you can then change the location where
20 you might be shot, you can change the trajectory that the
21 bullet would follow if the gun stayed in the same position.

22 Q. And you led me to my next question. If the shooter
23 of the gun was being assaulted while the gun was fired, would
24 that affect the trajectory?

25 A. Assaulted as in physically struck?

1 Q. Yes, I'm sorry. Being beaten.

2 A. I think in general terms it would affect
3 trajectories. If you were being struck, it would certainly
4 be hard to maintain a single position. You might move in
5 response to being struck; you might move to avoid being
6 struck; you might move because the blow moves you. So, yes,
7 all of those things could change relationships and
8 trajectories.

9 Q. Mr. Moomau asked you a question about this same set
10 of -- gave you a similar scenario. How can someone being
11 bent over, who is shot, how is the trajectory affected when
12 they're hit with a bullet?

13 A. When a forensic pathologist describes trajectory,
14 first of all, just so we have the same frame of reference, we
15 describe the trajectory, which is the direction of the wound
16 through the body, relative to the body in what's called
17 normal anatomical position.

18 So you imagine the body that you are describing, or
19 the body that has the trajectory, standing up, facing you,
20 with the palms facing forward. The reason for this is that
21 if anyone describes a trajectory to you using terms like up
22 or down, right or left, front or back, it is always relative
23 to the body of the person who is injured. And so it is his
24 left or right, it is his front or back. And to avoid
25 confusion, most importantly, up and down relates to the

1 person standing upright.

2 So we use the same setup, if you will, to describe
3 the direction so that we're all talking the same language.

4 Now, of course, we know -- to get back to your
5 question, we know that when people receive injuries like
6 gunshot wounds, they are not always standing perfectly
7 upright, facing you with the palms facing forward. We don't
8 live in normal anatomical position. So if you move the
9 person who is getting injured, if you tilt the person or bend
10 the person over, because I think you actually asked about
11 bending, then the trajectory in the body is not the same as
12 the trajectory relative to the ground when you stand the
13 person back up into normal anatomical position.

14 The best way I can illustrate this is if I use me
15 as the victim, and I face you and somebody shoots me, with a
16 gun parallel to the floor, at about my chest height, and the
17 bullet enters the front of my chest, it will go straight
18 backwards relative to me. It will go from front to back.
19 And I'm setting up the situation so it doesn't go left to
20 right it doesn't go up or down.

21 Take that same horizontal bullet, horizontally
22 traveling bullet, parallel to the floor, and you bend me
23 forward, as in your question of bending over, and the bullet
24 strikes me in the upper part of the chest, as I'm
25 demonstrating now, it will follow a course parallel to the

1 floor, and go, let's say, through my body.

2 But when you then -- and I'm pointing -- for the
3 record, I'm pointing at myself, with the horizontal bullet,
4 with my index finger, if you then stand me up in that normal
5 anatomical position, notice how my finger is pointing now.
6 The bullet actually goes downwards, once it enters my body,
7 because I was bent forward at the time that the horizontally
8 traveling bullet struck.

9 So now, the trajectory that gets described, such as
10 in an autopsy report, for instance, will be a trajectory
11 that's going front to back and downward. The same bullet,
12 travelling the same horizontal course through space, striking
13 me in the same part of the body, but coming up with two
14 different results depending on whether I am upright in front
15 of you or leaning forward.

16 So that's the kind of effect you get from changing
17 trajectory if you keep the bullet path the same and you bend
18 the person over.

19 Q. Mr. Clark's wounds, were they traveling downward?

20 A. Mr. Clark --

21 Q. His chest wound; I'm sorry.

22 A. Mr. Clark's -- actually, Mr. Clark didn't have a
23 chest wound. He had an abdominal wound.

24 Q. Mr. Clark's abdominal wound?

25 A. Mr. Clark's abdominal wound, indeed, was traveling

1 downward. Of course, that's not the only component. You
2 have to think in three dimensions. So front to back or back
3 to front, right to left or left to right, and upward or
4 downward, depending upon the case. But, specifically,
5 regarding upward and downward, Mr. Clark's abdominal wound
6 was traveling downward.

7 MR. COHEN: Thank you, Dr. Arden.

8 MR. MOOMAU: No recross, Your Honor.

9 THE COURT: Thank you, Doctor.

10 THE WITNESS: Thank you, Your Honor.

11 MR. COHEN: May we approach, Your Honor?

12 THE COURT: Certainly.

13 (Counsel approached the bench and the following
14 ensued.)

15 MR. COHEN: We are just going to move in some
16 exhibits at this point, Your Honor, and I think Mr. Starr has
17 redacted some.

18 MR. STARR: And then we'll rest. We've redacted
19 some of the exhibits. Obviously, there are portions that
20 aren't admissible. And I can, you know, go through those
21 very quickly with the State. I'm sorry we didn't do it over
22 the lunch break.

23 THE COURT: I don't want to sent them back out
24 again.

25 MR. STARR: What we can do then, I can move them in

1 on the record and say that it's subject to redaction.

2 MR. MOOMAU: What exhibits are you talking about?
3 We have to redact more than one thing.

4 MR. STARR: Exactly. I can go through exactly what
5 they are. As for as defense exhibits, the first one --

6 THE COURT: Let me check with this list and see
7 what exhibits they are. Which exhibits are you talking
8 about?

9 MR. STARR: The first, Your Honor, is Defense
10 Exhibit 2, which was a copy of the civil lawsuit. I've
11 redacted that to reflect only the portions that were read in
12 court, because the rest, I think we agreed, was not
13 admissible.

14 MR. MOOMAU: I'm going to object to the civil
15 lawsuit. I'm going to see what you haven't redacted.

16 MR. STARR: I can show it to the Court. Just for
17 the record, we covered up and removed all of the language
18 that the Court ruled was inadmissible and everything that
19 wasn't read in open court. So the document is just what was
20 read before the jury by both sides.

21 MR. MOOMAU: I'm objecting to the admissibility of
22 it. I don't see anything --

23 (Court reporter instructs counsel to speak into
24 microphone.)

25 MR. MOOMAU: I think it's prejudicial. I don't

1 believe it's relevant. They've questioned him about it and
2 there's been testimony about it. I don't see no need for it
3 to come in.

4 THE COURT: Under what theory does the document
5 come in? You've had the ability to impeach his issue on
6 this. How does that document come in?

7 MR. STARR: Well, first of all, the State's
8 objection that I heard was a relevance objection. It's
9 clearly relevant because the questioning was allowed.

10 As far as the Court's question --

11 THE COURT: Right.

12 MR. STARR: I'm going to answer your question. I'm
13 responding to two people.

14 As far as the Court's question as to how the
15 document comes in, Your Honor, it's evidence of exactly what
16 was testified to in court. It is the lawsuit. It is the
17 document. I mean, it is exactly what these people filed or
18 was filed, and it's evidence that was admitted for purposes
19 of bias, and the documentary evidence that demonstrates the
20 bias is admissible -- extrinsic evidence of bias is
21 admissible.

22 The State argues prejudice. There is nothing
23 prejudicial because there's not a single word on the redacted
24 exhibit that wasn't spoken in front of the jury.

25 THE COURT: My question, more specifically, is,

1 having exercised your proper right as an impeachment tool,
2 using that document as to the issue of motive and bias, which
3 I ruled you could do, how does that document come in as
4 substantive evidence as opposed to impeachment evidence?

5 MR. STARR: I'm not saying that it comes in as
6 evidence offered for the truth. I mean substantive -- as I
7 take it -- what we're saying is this. I think evidence that
8 is used to impeach is admissible. The issue is just what
9 portions of the documents come in and for what purpose it's
10 being admitted. There's no truth asserted in the document
11 other than just the demands in the lawsuit and who filed it,
12 which everyone agrees to. It's extrinsic evidence of bias
13 and it's admissible. The foundation has been laid.

14 MR. MOOMAU: Your Honor, the lawsuit wasn't denied.
15 They admitted to that. This is extrinsic evidence,
16 collateral.

17 MR. STARR: There's all sorts of evidence that's
18 been admitted by the State, that was not denied by the
19 defense.

20 THE COURT: I'll handle the objections as they're
21 posed. I believe that the State's objection in this light,
22 based on that fact, that you were entitled to impeach him and
23 you did, that that document does not come in, and I sustain
24 the State's objection.

25 MR. STARR: The next one would be Defense Exhibit

1 Number 6, Your Honor, which I've redacted, again consistent
2 with the Court's ruling and what was done in open court.
3 I'll show it to the Court for the record. And I'd also like,
4 Your Honor, the lawsuit to be attached as part of the
5 appellate record.

6 THE COURT: Absolutely.

7 MR. STARR: And I do want to put on the record the
8 cases, including the cases cited in our pleadings, do say
9 that bias may be proved through extrinsic evidence and is not
10 collateral.

11 THE COURT: Well, it's either impeachable evidence
12 or it's substantive evidence. You had the right to impeach
13 based on that lawsuit.

14 MR. STARR: But it's substantive evidence of bias.
15 That's my argument.

16 THE COURT: I sustained that.

17 MR. STARR: The next document is a redacted version
18 of Defense Exhibit Number 6. I'm showing it to the Court,
19 and I'd like it attached to the record as well.

20 This is a document that Mr. White signed in the
21 hospital and that his mother witnessed. It was testified to
22 by Mr. White. And it shows when -- this was not an
23 impeachment document. It shows when he had communications
24 with Mr. Winkelman and what they were.

25 MR. MOOMAU: He never denied that he had --

1 THE COURT: What grounds are you asking to keep it
2 out?

3 MR. MOOMAU: It's not an inconsistent statement.
4 He never denied that he did it. It's irrelevant. They
5 impeached him on it. They asked him questions about it.

6 THE COURT: Six is admitted over objection of the
7 State.

8 MR. STARR: The next, Your Honor, is Defense 4,
9 which was the grand jury transcript of Mr. White. This was
10 testimony under oath, which is admissible for the truth,
11 because it was under oath, and admissible as substantive
12 evidence. I've redacted it. I can show it to the Court and
13 the State, and it has only exactly those portions that were
14 read in open court.

15 MR. MOOMAU: Can I see that?

16 MR. STARR: Yes.

17 MR. MOOMAU: I'll have to look at Robert White's
18 transcript with -- the grand jury testimony. I don't think
19 he ever denied that he said any of these things to the grand
20 jury. Did he?

21 MR. STARR: Well, on some of them he did, but
22 that's not the issue. They are admissible as substantive
23 evidence for the truth because they were under oath.

24 THE COURT: If there's any inconsistency.

25 MR. STARR: And there was an inconsistency on every

1 one of them. That's why I did it.

2 THE COURT: Let me do this then, because we're not
3 going to be able to -- I will admit it subject to both of you
4 having the opportunity to sit down and read it and determine,
5 the best that you can, if there are inconsistencies. If not,
6 then I'll rule on each one.

7 MR. STARR: So subject to review for accuracy.

8 THE COURT: Yes.

9 MR. STARR: And then we had some -- I don't know if
10 they appear on the list, but we had some stipulations
11 regarding cell phone records, which are 26, 27, and 28. Ours
12 doesn't go all the way up, so we don't have --

13 THE COURT: I don't know what these things are.
14 But you have -- on the stipulations, we have listed 25, 26,
15 27, 28, 29, 30, 31.

16 MR. STARR: Yes. These are all signed by the
17 State.

18 MR. MOOMAU: You want that one in?

19 MR. STARR: Yes.

20 MR. MOOMAU: Okay. Your Honor, 25, I did
21 stipulate. The reason for that stipulation was so nobody
22 would have to call chain of custody witnesses. I don't see
23 the need to have it admitted in trial. I mean, I had an
24 agreement with them early on that we weren't going to have to
25 call everyone that handled a piece of evidence to have it

1 come in, and that's simply what that was. I don't see how
2 that adds anything as far as the trial is concerned.

3 THE COURT: With regard to Exhibit Number 25 --

4 MR. STARR: We can withdraw it. That's fine.

5 THE COURT: What about 26, 27, 28, 29, 30, and 31?

6 MR. MOOMAU: With 26, I agreed with that. These
7 are phone records the State provided to the defense.

8 Twenty-seven, same thing. Twenty-eight, 29.

9 And Robert White, he didn't remember some of these
10 convictions. I agree -- I mean, I represent to the Court
11 that's what they were.

12 And the toxicology, I'd like to have Brandon
13 Clark's on there too. It's been admitted.

14 THE COURT: We're doing Defense Exhibits now.

15 MR. MOOMAU: Well, it's in evidence anyway.

16 MR. STARR: There's more underneath of that.

17 THE COURT: Thirty-one.

18 MR. STARR: That's another cell phone record
19 stipulation.

20 THE COURT: Hold on. Now, I'm trying to go on the
21 State's exhibits one at a time to get this going. They've
22 withdrawn 25. I'm looking at 26, 27, 28, 29, 30, and 31.

23 MR. STARR: We move for all those to be admitted.

24 MR. MOOMAU: Well, are you going to do a like
25 stipulation on Brandon Clark's cell phone?

1 MR STARR: We'll read it and consider it. It's
2 already in.

3 MR. MOOMAU: Where's that stipulation I did on the
4 authenticity of the medical records? Is that in?

5 MR STARR: I don't recall. I'm not trying to be
6 difficult. I'm just working through our list.

7 THE COURT: Bear with us, ladies and gentlemen.

8 MR. MOOMAU: Your Honor, these are okay. I'll
9 stipulate to 30 and 31.

10 THE COURT: Twenty-six, 27, 28, 29, 30, and 31.

11 MR. MOOMAU: Yes.

12 MR. STARR: After I move those in, may I read them
13 to the jury?

14 THE COURT: You want to read them to the jury?

15 MR. COHEN: Yes, I'd like to do that.

16 MR. MOOMAU: You going to go through all the phone
17 records?

18 MR. STARR: No, just the stipulation. I'm just
19 going to read what's on the paper.

20 THE COURT: In closing argument, you mean?

21 MR. STARR: I can do it in closing argument.
22 That's fine.

23 THE COURT: Probably may be easier.

24 MR. STARR: If that's --

25 THE COURT: If they're in evidence.

1 MR. STARR: If that's the Court's preference.

2 THE COURT: Well, what number is it?

3 MR. MOOMAU: State's 84.

4 THE COURT: State's 84 is not in. Let me see what
5 this is. Eighty-four is not in.

6 MR. STARR: We're in the defense case.

7 THE COURT: They asked if it was in. I told them
8 no. I gave you the records to go on over. Any other?

9 MR. STARR: Your Honor, it will only take a few
10 minutes, but if the Court will allow us to read the
11 stipulations. There's only a few of them. They're short.

12 MR. MOOMAU: I don't see the need to read them now.
13 I think that can be done in closing argument.

14 THE COURT: We can probably give it to them to
15 read. But why would you --

16 MR. COHEN: So that the closing is not interrupted
17 with the reading of the stipulation. That's why we want to
18 do it now, before we close.

19 MR. MOOMAU: The Court is going to instruct the
20 jury about the stipulations. I don't mind the Court going
21 through and just saying what we've stipulated to.

22 MR. STARR: We'll withdraw it. We'll do it that
23 way. I'll do it in closing.

24 THE COURT: Are those the ones you wanted me to
25 consider thus far?

1 MR. STARR: Yes. Our last one is what?
2 Thirty-one?

3 THE COURT: That was admitted. You've got them all
4 now?

5 MR. STARR: Yes.

6 THE COURT: She's going to go run that in the
7 computer for you and give you an updated copy so you can
8 check on it before we do anything further.

9 MR. COHEN: These are not marked, so I don't know
10 when this happened.

11 THE COURT: What aren't marked?

12 MR. COHEN: The grand jury transcript.

13 MR. STARR: The State was going to look at that for
14 accuracy.

15 THE COURT: That's number 4.

16 MR. MOOMAU: Can we get a copy of that transcript
17 too?

18 THE COURT: You need a copy of the transcript?
19 Sure. I'm assuming you want all this prior to closing
20 argument, right?

21 MR. MOOMAU: We need to look at that to see what
22 comes in, as to what he admitted to and what he did not.

23 THE COURT: Before it's published to the jury, you
24 mean?

25 MR. MOOMAU: Yes. None of it might be.

1 THE COURT: I'll have Sheila Xerox a copy the first
2 chance we can, before that comes in.

3 MR. MOOMAU: To the extent that I can, I'm going to
4 move in State's Exhibit 84, the stipulation that was signed.

5 MR. STARR: I mean, it's coming in in our case.
6 We're in the defense case.

7 THE COURT: He's just asking.

8 MR. MOOMAU: Let's talk about medical records.
9 They reviewed them.

10 MR. STARR: We're going to object to it coming in
11 in our case.

12 THE COURT: That's sustained. I gave you an
13 opportunity to review everything before. It's not even a
14 part of the case.

15 MR. STARR: So what we do is I'll just move --
16 aside from the one that the Court denied in front of the
17 jury, move for the admission of these exhibits, and then we
18 will rest.

19 THE COURT: Now, do you want me to recess them so
20 we can go back and go over instructions?

21 MR. STARR: We're going to need to. And the MJOA
22 as well.

23 THE COURT: This is all presuming -- what are you
24 doing?

25 MR. MOOMAU: Probably another rebuttal witness.

1 THE COURT: Okay. Then let's start.

2 (Counsel returned to trial tables and the following
3 ensued.)

4 MR. COHEN: Your Honor, subject to the discussion
5 at the bench, the defense moves for the admission of Exhibits
6 3, 6, Exhibit 5 as well, Your Honor, and Defense Exhibits 26,
7 27, 28, 29, 30, and 31; 26 through 31, the stipulations.

8 MR. MOOMAU: Your Honor, the State would just renew
9 everything we -- the statements that were made at the bench
10 with regard to those exhibits.

11 THE COURT: Okay, 3, 6, 5, 26, 27, 28, 29, 30, 31,
12 defense, admitted.

13 (Defense Exhibit Nos. 3, 5, 6, and
14 26 through 31, previously marked for
15 identification, were received in
16 evidence.)

17 MR. COHEN: With that, Your Honor, the defense
18 rests.

19 MS. ZANZUCCHI: Your Honor, at this time the State
20 would call Officer Jeremy Webb.

21 **JEREMY WEBB,**
22 a witness produced on call of the State, having first been
23 duly sworn, was examined and testified as follows:

24 THE DEPUTY CLERK: Please state and spell your
25 first and last name for the record.

1 THE WITNESS: Jeremy Webb, W-e-b-b.

2 **DIRECT EXAMINATION**

3 BY MS. ZANZUCCHI:

4 Q. Good afternoon. Are you currently employed?

5 A. Yes, ma'am.

6 Q. Where are you employed at?

7 A. I'm employed with the Prince George's County police
8 as a county police officer.

9 Q. How long have you been employed there?

10 A. Four years.

11 Q. What exactly do you do?

12 A. I am an evidence technician with the evidence unit.

13 Q. Were you called to the Washington home on the night
14 of the shooting, on January 24, 2007?

15 A. No, I was not.

16 Q. When did you go to Mr. Washington's home?

17 A. It would have been January 31, 2007, at
18 approximately 8:15 in the evening.

19 Q. This was seven days later?

20 A. Correct.

21 Q. For what purpose were you called to
22 Mr. Washington's home?

23 A. I was called to execute a search warrant for
24 numerous items of clothing that belonged to Mr. Keith
25 Washington.

1 Q. Do you know if any items of clothing worn by
2 Brandon Clark or Robert White, the two deliverymen, were
3 selected on January 24, 2007?

4 A. I do not know.

5 Q. Did you go to the home of Mr. Washington and
6 collect any items of clothing of Robert White or Brandon
7 Clark?

8 A. No, I did not.

9 Q. What items of clothing did you collect from
10 Mr. Washington's home?

11 A. If I can refer to my notes, please?

12 Q. Yes.

13 A. On the night of January 31, 2007, I collected the
14 following items: Item number JW3, which is one vest, Old
15 Navy, size L, brown;

16 Item JW4, one pair of boots, size 10R, tan;

17 Item JW5, one shirt, long sleeve, Winchester
18 Sportsman, size men's M, camouflage, and one pair of jeans,
19 Levis 550, size W32/L32, blue in color.

20 Q. And these clothing items were the clothes that
21 Mr. Washington was wearing on January 24th?

22 A. That is what I was instructed as, yes.

23 Q. Where did you collect these items from?

24 A. Item JW3, the Old Navy vest, was found upstairs in
25 the master bedroom, between the bed and the closet, on the

1 floor next to a pile of clothes.

2 Item JW4, the pair of boots, were found upstairs in
3 a spare bedroom, on the floor at the foot of a bed.

4 Item JW5, the long-sleeve camouflage shirt, was
5 found in a laundry room, inside a white hamper with other
6 clothes.

7 And item JW6, the pair of jeans, was found actually
8 on Mr. Washington at the time of our execution of the search
9 warrant.

10 Q. During the seven days, from the time of the
11 shooting until you collected the clothing items, do you know
12 if these items had been secured at all?

13 A. No, they had not. They had actually -- for those
14 seven days, there is no form of chain of custody, if you
15 would. They were accessible by anybody in the house.

16 MR. STARR: Objection, Your Honor.

17 THE COURT: Sustained.

18 MS. ZANZUCCHI: Your Honor, may I approach the
19 witness?

20 THE COURT: Please.

21 BY MS. ZANZUCCHI:

22 Q. I'd like to show you what's been previously marked
23 as State's Exhibit 113 and 114.

24 MS. ZANZUCCHI: Let the record reflect I'm showing
25 the defense.

1 BY MS. ZANZUCCHI:

2 Q. Can you please describe to the jury what State's
3 Exhibit 114 is?

4 A. This would be a photograph that I took of the white
5 hamper where I retrieved item JW5, the camouflage shirt.

6 Q. And can you please describe where this shirt was
7 located.

8 A. It was mixed in with a number of other clothing
9 items inside of the hamper.

10 Q. I'd like to now show you what's been marked as
11 State's Exhibit Number 113. Can you please describe to the
12 jury what this picture reflects.

13 A. This would be a picture that I took of the vest
14 that I recovered, item JW3. It's laying on the floor, next
15 to a pile of laundry.

16 Q. And when did you take these photos?

17 A. I took them on the night of January 31, 2007.

18 Q. Do these photos clearly and accurately depict the
19 items of clothing that you recovered on that day?

20 A. Yes, they do.

21 MS. ZANZUCCHI: Your Honor, at this time I'd like
22 to move State's Exhibits 113 and 114 into evidence.

23 MR. STARR: No objection.

24 THE COURT: 113, 114, State, admitted without
25 objection.

1 (State's Exhibit Nos. 113 and 114,
2 previously marked for
3 identification, were received in
4 evidence.)

5 BY MS. ZANZUCCHI:

6 Q. Do you know of any reason at all why
7 Mr. Washington's clothes were not collected on the night of
8 January 24, 2007?

9 MR. STARR: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: I do not.

12 MS. ZANZUCCHI: No further questions.

13 **CROSS-EXAMINATION**

14 BY MR. STARR:

15 Q. Officer Webb, good afternoon.

16 A. Good afternoon, sir.

17 Q. When you went to Mr. Washington's home, you would
18 agree with me that he cooperated with you completely,
19 correct?

20 A. For the small instance of time that I dealt with
21 him, yes.

22 Q. And you were asked to go recover the clothes on
23 January 31st, correct, and that's the day that you were
24 asked, correct?

25 A. Correct.

1 Q. And you went on the same day that you were asked,
2 correct?

3 A. Correct.

4 Q. You didn't get asked by somebody and then wait a
5 few days; you went as soon as they asked you, right?

6 MS. ZANZUCCHI: Objection. Asked and answered.

7 THE COURT: Overruled.

8 THE WITNESS: Yes, I did.

9 BY MR. STARR:

10 Q. As far as you know, that's the first time any
11 officer was asked to go and collect those clothes, correct?

12 MS. ZANZUCCHI: Objection. Beyond the scope.

13 THE COURT: If he knows. If you know, sir, you can
14 answer it. If you don't know --

15 THE WITNESS: I couldn't tell you. It was the
16 first time I was asked.

17 BY MR. STARR:

18 Q. Now, you were shown -- I'm going to start by
19 showing you what's been admitted at this point as State's
20 Exhibit 114. Do you recognize that?

21 A. Yes, sir. It's the picture I described before of
22 the hamper with the clothing.

23 Q. Let me ask you this. Did you have any reason to
24 believe that any of Brandon Clark's clothes were in that
25 hamper?

1 MS. ZANZUCCHI: Objection.

2 THE COURT: If he knows, once again.

3 THE WITNESS: I don't know.

4 BY MR. STARR:

5 Q. I'm going to show you the other photo which was
6 just admitted, which is State's Exhibit 113. What's that?

7 A. That would be the other photograph that I described
8 from before of item JW3, the vest laying next to the pile of
9 clothing.

10 Q. And this is a pile of clothing that was laying
11 there when you got there on January 31st, correct?

12 A. Yes, sir.

13 Q. Now, as far as you know, are any of clothing items
14 in this picture clothing items that belonged to Brandon
15 Clark?

16 A. I don't know.

17 MR. STARR: No more questions.

18 MS. ZANZUCCHI: The State has nothing further for
19 this witness.

20 THE COURT: Officer, thank you. Appreciate it.

21 MS. ZANZUCCHI: Your Honor, the State rests with
22 that.

23 MR. COHEN: Nothing from the defense, Your Honor.

24 THE COURT: Thank you. Ladies and gentlemen, that
25 is the conclusion of all of the evidence in this case. We're

1 going to have to take a recess and put together some
2 instructions for you. That may be a little bit of time, but
3 it is certainly necessary, as you can well imagine. I know
4 that you're getting very tired of that jury deliberation
5 room. Please bear with us, and we will get through this as
6 quickly as we can. Thank you.

7 (The jury was excused from the courtroom at 2:35
8 p.m.)

9 THE COURT: Did anyone leave this with me? I'm
10 going to be grateful for it if you have but, if not, I'm
11 going to return it to you.

12 MR. MOOMAU: I did, Your Honor. May I approach?

13 THE COURT: Counsel, would you like to join me in
14 chambers?

15 MR. COHEN: Yes, Your Honor.

16 (The trial was recessed at 4:00 p.m.)
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REPORTER'S CERTIFICATE

I, Cindy S. Davis, an Official Court Reporter for the Circuit Court for Prince George's County, Maryland, do hereby certify that I stenographically recorded the proceedings in State of Maryland versus Keith A. Washington, criminal trial 07-1664X, on February 20, 2008, before the Honorable Michael P. Whalen, Associate Judge.

I further certify that the page numbers 1 through 131 constitute an official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have affixed my signature this 23rd day of June, 2008.

Cindy S. Davis, RPR

Official Court Reporter