

1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

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4 State of Minnesota **JURY TRIAL**
5 Plaintiff, **VOLUME XIII**
6 vs. **Court File No 82-CR-17-242**

7
8 Stephen Carl Allwine,
9 Defendant.

10 - - - - -

11 The above-entitled matter came duly on for
12 Jury Trial before the Honorable B. William Ekstrum,
13 one of the Judges of the above-named Court, on the
14 25th day of January, 2018, at the Washington County
15 Judicial Center, City of Stillwater, County of
16 Washington, State of Minnesota.

17 * * *

18 A P P E A R A N C E S

19 Fred A. Fink, Jr. and Jamie Kreuser,
20 Assistant Washington County Attorneys, appeared as
21 counsel for and on behalf of the State.

22 Kevin DeVore, Esq., appeared as counsel
23 for and on behalf of the defendant, who was
24 personally present.

25

1 (Whereupon, the following proceedings were
2 duly had of record:)

3 DEPUTY: All rise for the jury.

4 (The jury returned to the courtroom.)

5 THE COURT: Everyone please be seated.

6 Members of the jury: Thank you for your
7 patience. I was dealing with a matter relating to
8 this case. We are now ready to get started.

9 Prosecution, next witness.

10 BY MR. FINK:

11 Q State would call Jeffrey Gerwig.

12 THE COURT: Please come up to the witness
13 chair. Before you sit down, please raise your right
14 hand to be sworn.

15 JEFFREY GERWIG,

16 having been first duly sworn, was examined
17 and testified on his oath as follows:

18 THE CLERK: Please be seated. State your
19 full name and spell your last.

20 THE WITNESS: Jeffrey Charles Gerwig,
21 G-E-R-W-I-G.

22 THE COURT: You may proceed.

23 MR. FINK: Thank you.

24 DIRECT EXAMINATION

25

1 BY MR. FINK:

2 Q Where do work, sir?

3 A At Great Lake Coins and Collectibles in
4 Burnsville.

5 Q What kind of place is that?

6 A Almost similar to a pawn shop, but it's --
7 we buy precious metals; gold, silver, coins, things
8 like that.

9 Q Could you slow down a little bit?

10 A Sure.

11 Q The court reporter has to take everything
12 down.

13 How long have you worked there?

14 A Over three years. Three and a half years.

15 Q So you were working there in January and
16 February of 2016?

17 A That's correct.

18 Q When someone comes in, for instance, to
19 sell precious metals, what is the process that you
20 go through?

21 A Well, first we look at it to make sure
22 it's authentic or whatever. Then we will, you know
23 quote a price. If the price is acceptable to the
24 person selling, following all of the guidelines of
25 taking an ID, making a copy of that and having the

1 customer sign, and writing the check, and making an
2 invoice for what we purchased.

3 Q What's the automated pawn system?

4 A It's set up by the state. It's basically
5 everything we purchase has to be entered into this.
6 It's used by the police to check to see if things
7 are stolen. And every city is different, but in
8 Burnsville, we have to hold items for two weeks
9 after they're purchased.

10 Q For the ability for the person to buy them
11 back?

12 A Yeah. So if a person had something stolen
13 from their house, or you know wherever, they would
14 maybe give a description of that to the police
15 officer in their city. The police officer would
16 check the system to see if something matching that
17 description had been sold. They will call us, put
18 it on hold. Then after that, we have to hold it
19 until the police come in and investigate.

20 Q You said you take the driver's license
21 number down?

22 A We do. I don't enter them in, personally,
23 into the APS system. It's done by the owner's wife.
24 But we get all of the information, the ID and
25 everything, and then she enters it in.

1 Q Okay. The APS system is the Automated
2 Pawn System?

3 A That's correct. Yep.

4 Q Now, were you working at that Great Lakes
5 Coin on January 7th of 2016?

6 A I was.

7 MR. FINK: May I approach the witness?

8 THE COURT: You may.

9 BY MR. FINK:

10 Q Showing you what's marked as Exhibits 92
11 and 93; if you would take a look at those, please?

12 A Yes. This would be our standard -- this
13 is the form I was referring to when we fill out the
14 information about what was purchased. And this
15 would be the print sheet from the APS, Automated
16 Pawn System.

17 Q For the record, the first one you referred
18 to was Exhibit 92?

19 A That's correct. Yep.

20 Q And the second one is Exhibit 93?

21 A Yes, sir.

22 Q Were you present when that transaction --

23 A I was, yep.

24 Q -- was made?

25 A I was.

1 MR. FINK: Move 92 and 93 into evidence.

2 MR. DEVORE: No objection.

3 THE COURT: They are received.

4 BY MR. FINK:

5 Q Were you also working at Great Lake Coins
6 on February 11th of 2016?

7 A I believe so, yes.

8 MR. FINK: Approach?

9 THE COURT: You may.

10 BY MR. FINK:

11 Q Showing you what's marked Exhibit 94 and
12 95; please take a look at those?

13 A Yes. Same thing. And this one actually
14 is in the --

15 MR. DEVORE: Objection, no question, Your
16 Honor.

17 THE COURT: Hold on. Hold on. He's
18 handed you the exhibits. He's got to ask you a
19 question before you answer. So right now the
20 exhibits are in front of you.

21 Go ahead, counsel.

22 MR. FINK: Thank you.

23 BY MR. FINK:

24 Q What is Exhibit 94?

25 A Purchase Order, similar to Exhibit 92,

1 just the standard form that we use any time we
2 purchase something from the public.

3 Q Okay. What is Exhibit 95?

4 A This is a print sheet from the Automated
5 Pawn System.

6 Q Both of those -- actually, both of those
7 deal with a sale of what to Great Lakes Coins?

8 A Exhibit 92 is for --

9 Q Let's do 94 and 95 first, okay.

10 A Sure. Exhibit 94 would be for the sale of
11 what we call 90 percent silver coins. It's old
12 circulating US silver. Could be quarters, could be
13 half dollars. Anything that was issued prior to
14 1964 is sold for its silver value. There's no
15 collectible value, it's just a silver bullion item.

16 Q And who paid for those coins?

17 A Stephen Allwine.

18 MR. FINK: I move 94 and 95 into evidence.

19 MR. DEVORE: No objection.

20 THE COURT: Received.

21 BY MR. FINK:

22 Q Now, back to 92 and 93, do those also
23 indicate a transaction of sorts?

24 A Yes. Exhibit 92 is for what we call
25 silver bullion. These are more of a refined product

1 in like a bar form, ten ounce bars. So it would
2 basically be the same purchase, you know, item.
3 It's bought and sold just for its silver value.
4 Kind of an investment vehicle.

5 Q And who negotiated that transaction with
6 Great Lakes Coins?

7 A Stephen Allwine.

8 Q How much did he receive on the January
9 transaction?

10 A Exhibit 92 transaction, he received
11 \$5,600.

12 Q How much did Stephen Allwine receive on
13 the February 11th transaction?

14 A He received \$4,200.

15 Q He was identified by virtue of his
16 Minnesota Driver's License?

17 A That's correct.

18 MR. FINK: May I retrieve the exhibits,
19 Your Honor?

20 THE COURT: You may.

21 MR. FINK: That's all, Your Honor.

22 THE COURT: Cross.

23 CROSS EXAMINATION

24 BY MR. DEVORE:

25 Q Mr. Gerwig, do you remember talking to

1 officer -- or Sergeant McAlister from the Cottage
2 Grove Police Department?

3 A I believe so, yes.

4 Q Long time ago?

5 A Yep.

6 Q He indicated in his report that you were
7 not working on the January date. Were you working
8 or were you not working that date?

9 A The January, which would be the first
10 exhibit, 92?

11 Q Yes.

12 A I was working, as a matter of fact. I did
13 not make the purchase.

14 Q Oh.

15 A But I work as the -- basically the -- I
16 guess you'd say the manager of the office. And I
17 specifically remember that purchase because even
18 though he sold us 300-ounces, the man who made the
19 purchase actually mistakenly paid him for
20 400-ounces. So an extra \$1,600. So I specifically
21 remember that being a manager of the store. When
22 the owner comes back, he wonders where his extra
23 \$1,600 went. Fortunately, it wasn't me that did the
24 purchase, but I specifically remember that one and I
25 was there that day.

1 Q So that was a pretty good investment for
2 that person?

3 A Absolutely.

4 MR. DEVORE: No further questions.

5 THE COURT: Anything?

6 MR. FINK: No redirect, Your Honor.

7 THE COURT: You may step down.

8 THE WITNESS: Thank you.

9 THE COURT: Next witness.

10 MR. FINK: Call Stephanie Hrico.

11 THE COURT: Please come up to the witness
12 chair. Before you sit down, raise your right hand
13 to be sworn.

14 STEPHANIE HRICO,
15 having been first duly sworn, was examined
16 and testified on her oath as follows:

17 THE CLERK: Please be seated. State your
18 full name and spell your last name.

19 THE WITNESS: Thank you. My name is
20 Stephanie Hrico. It's H-R-I-C-O.

21 THE COURT: You may proceed.

22 MR. FINK: Thank you.

23 DIRECT EXAMINATION

24 BY MR. FINK:

25 Q How are you employed?

1 A I currently work for a company called RJ
2 Lee Group.

3 Q What does RJ Lee Group do?

4 A RJ Lee Group is a material analysis
5 company. We have the ability to analyze a very wide
6 range of samples. Everything from concrete, to
7 pharmaceuticals. I, specifically, work in the
8 forensic science department where I analyze gunshot
9 residue.

10 Q How long have you held that position?

11 A Almost seven years.

12 Q What are your duties?

13 A I am responsible for receiving evidence,
14 processing that evidence, documenting the contents
15 of the evidence, analyzing the evidence for gunshot
16 residue analysis using a scanning electron
17 microscope. Putting that report together. Sending
18 the report and evidence back to the client.

19 Q What education do you have that qualifies
20 you for this position?

21 A I have a Bachelors in Biochemistry from
22 Duquesne University. As well as a Masters in
23 Forensic Science and Law.

24 Q What organizations do you belong to?

25 A I am a member of the Mid-Atlantic

1 Association of Forensic Scientists. As well as
2 American Society for Trace Evidence Examiners.

3 Q What specific training have you received
4 to analyze for gunshot residue?

5 A I have taken courses on trace evidence
6 analysis at Duquesne University. Additionally, I
7 have undergone RJ Lee Group's training program on
8 gunshot residue analysis. As well as their training
9 program on the operation of the scanning electron
10 microscope, which is the instrument used to analyze
11 gun shot residue analysis.

12 During my training, I was required to read
13 all standard operating procedures, as well as
14 related articles on gunshot residue. I had to
15 analyze 250 samples independently. Those results
16 were then confirmed by another trained analyst in
17 the field. Following my training, I passed a
18 competency exam and every year I continue to be
19 proficiency tested.

20 Q Have you testified in court on gunshot
21 residue?

22 A Yes, I have.

23 Q About how many times?

24 A I have testified approximately 50 times.

25 Q In what courts?

1 A I have testified for the states of Texas,
2 Arizona, Nebraska, Iowa, North Dakota, Tennessee,
3 Michigan, Florida, Pennsylvania, Delaware, Maryland,
4 New York, New Hampshire.

5 Q Okay. I think you can stop.

6 Could you tell the jury, please, what
7 gunshot residue is?

8 A In the broadest sense of the term, gunshot
9 residue is all particulate expelled from a firearm
10 during discharge.

11 When I talk about gunshot residue, I am
12 specifically referring to the primer residue. So
13 for me to say that a particle is characteristic of
14 gunshot residue, or highly specific to the discharge
15 of a firearm, I have to see two things about that
16 particle.

17 The first thing that I look for is the
18 correct elemental composition. So I need to see the
19 elements of lead, barium and antimony in that
20 particle.

21 The second thing I look for is the correct
22 shape or morphology. The particle itself has to
23 have round or smooth edges, as if it's heat treated
24 since the discharge of a firearm is a heat reaction.

25 Q How does one acquire gunshot residue on

1 their person?

2 A So when we find gunshot residue on a
3 subject, we can say that that gunshot residue got
4 there one of three ways. Either that person
5 discharged the firearm, or that person was in the
6 vicinity of the firearm being discharged, or that
7 person came into contact with a surface that has
8 gunshot residue on it.

9 Q Now, how do you test for the presence of
10 gunshot residue?

11 A We use a scanning electron microscope to
12 look for gunshot residue.

13 Q What does that do?

14 A Basically, these samples are loaded into
15 that microscope.

16 The microscope will aim a beam of
17 electrons at the sample, and the interaction of that
18 beam of electrons with the electrons on the sample
19 will allow me to do two things. It's going to
20 display this particle magnified thousands of times
21 on a computer screen. That's how I am able to look
22 at the shape or the morphology.

23 In addition to that, it's actually going
24 to tell me what that particle is made out of. It's
25 going to tell me what elements are in the particle.

1 That's how I am able to look for elements of the
2 lead, barium and antimony.

3 Q And do you confirm the results of the
4 scanning electron microscope?

5 A Yes. So the microscope is a two part
6 analysis. The first part is an automated analysis.
7 So once I place the samples into the microscope,
8 it's actually going to scan back and forth across
9 the surface of that sample, and it's going to mark
10 the location of any particles that contain lead,
11 barium or antimony. I am going to go back to that
12 microscope and I am going to confirm that what the
13 instrument found is correct.

14 Q How do you do that?

15 A So I am able to control the microscope
16 with a computer, and I am able to bring up an
17 individual particle. So the microscope, say it
18 found a particle that contained lead, barium and
19 antimony in the particle. So I am able to bring
20 that particle back up, and I am able to look at that
21 particle and the microscope will tell me what
22 elements are in that particle.

23 Q Now, directing your attention to
24 November 18th of 2016, did you have the occasion to
25 received a gunshot residue kit containing two

1 samples from the Cottage Grove Police Department,
2 and purporting to be swabbed from right and left
3 hand of Stephen Allwine?

4 A May I reference my notes.

5 Q Certainly, if that will refresh your
6 recollection.

7 A Yes, it will.

8 THE COURT: And obviously, I do not want
9 you reading from your notes, but you can certainly
10 take a look and refresh your memory.

11 THE WITNESS: Thank you.

12 Yes I received two samples in this case.

13 BY MR. FINK:

14 Q From where?

15 A The samples were submitted from Cottage
16 Grove Police Department.

17 Q Did they indicate the source of the swabs?

18 A Yes. The first swab was taken from
19 subject Stephen Carl Allwine, the right hand. And
20 the second sample was taken from the subject's left
21 hand.

22 Q And did you test those swabs in the manner
23 that you just testified about?

24 A Yes, I did.

25 Q What were your findings?

1 A On the sample labeled to come from the
2 subject's right hand, I confirmed a total of one
3 particle characteristic of gunshot residue.

4 Q And that meaning that it was rounded and
5 contains lead, antimony and barium?

6 A That's correct.

7 Q Now, do you have an opinion to a
8 reasonable degree of scientific certainty whether
9 that particle from the right hand of Stephen Allwine
10 is gunshot residue?

11 A This is a particle characteristic of
12 gunshot residue. There was nothing about this
13 particle that made me think that it could have come
14 from a source besides gunshot residue.

15 MR. FINK: May I approach the witness?

16 THE COURT: You may.

17 BY MR. FINK:

18 Q I am showing you what's marked Exhibit
19 108, and ask you if you know what that is?

20 A Yes. This is the report that I produced
21 in relation to this case.

22 MR. FINK: Move 108 into evidence, Your
23 Honor.

24 MR. DEVORE: No objection.

25 THE COURT: It's received.

1 MR. FINK: That's all of the questions I
2 have of this witness.

3 THE COURT: Cross.

4 CROSS EXAMINATION

5 BY MR. DEVORE:

6 Q Good morning, Ms. -- is it Hrico?

7 A It's Hrioc.

8 Q Hrico. Good morning.

9 A Good morning.

10 Q Now, I just want to understand, you said
11 that there are three ways that somebody could have
12 GSR on their person. One, they could shoot the gun.
13 Two, they could be close proximity to a gun going
14 off. And three, they could have contact with the
15 surface with of GSR; is that correct?

16 A That is correct.

17 Q What kind of surfaces would have GSR on
18 them that somebody could come into contact with?

19 A Any surface that would have gunshot
20 residue. For example, a firing range might have
21 gunshot residue on surfaces. If you were to go to a
22 firing range and touch a counter or any area that
23 has gunshot residue on it it's possible that some of
24 those particles could be transferred to you.

25 Q What about somebody who recently shot a

1 gun, would they have GSR typically on their hand?

2 A Assuming that firearm was a good producer
3 of particles, it's possible that that person who
4 discharged the firearm would have gunshot residue on
5 their hands.

6 Q And if somebody else touched their hand,
7 could they also then have GSR on their hand?

8 A That is possible, yes.

9 Q You tested Amy Allwine's hands for GSR
10 too; is that correct?

11 A In this case, the subject is just labeled
12 as Allwine right hand, left hand.

13 Q Okay. Did your office do a test on the
14 GSR of Amy Allwine's hands.

15 A The only subject for testing we received
16 in this case is a Stephen Carl Allwine.

17 Q So if the medical examiner's report
18 indicates that the testing was done through RJ Lee
19 Group on Amy Allwine's test that wouldn't be
20 accurate?

21 A I am not aware of any additional testing
22 we did in this case. This is the only report that I
23 have with me at this time.

24 Q And how many people in your office do the
25 GSR testing?

1 A There are four of us capable of testing
2 for gunshot residue.

3 Q Are you like a supervisor, manager; what's
4 your position there?

5 A I am a scientist.

6 Q And so if you -- are you like assigned to
7 the Allwine case? So if more samples came in on
8 this case, would it go to you, or could it go to any
9 of the four scientists that are in your office?

10 A If we were made aware that we were
11 receiving additional evidence, that case would be
12 assigned to me.

13 Q Okay. So as far as you know, your office
14 did not test any GSR samples on Amy Allwine's hands?

15 A As far as I know.

16 Q Now, you said that a person could pick up
17 GSR by touching the skin of another person that had
18 GSR on their body, correct?

19 A A subject can pick up gunshot residue
20 through touching any surface that might have gunshot
21 residue on it.

22 Q Okay. Now tell me, you found one particle
23 of a substance that you associated with GSR on the
24 sample taken from the right hand of Mr. Allwine,
25 correct?

1 A That's correct. We found one particle on
2 the subject's right hand.

3 Q And you found no particles on the left
4 hand, correct?

5 A We did not find any particles
6 characteristic of gunshot residue, or any two
7 components particles on the subjects left hand.

8 Q So now describe for me, what does a two
9 part component that you had mentioned; what does
10 that mean?

11 A A two component particle can and will be
12 produced when a firearm is discharged. So a two
13 component particle contains just two of those three
14 elements. So a particle that's made of lead and
15 barium, or lead and antimony, or barium and
16 antimony.

17 Q So is it like a little one below the GSR
18 one particle that you're talking about?

19 A Yes. You can think of it that way.

20 Q Okay. How big of a particle are we
21 talking about?

22 A These --

23 Q Like the size of a dime, or what are we
24 talking about?

25 A No. These particles are very, very, very,

1 very small. If you imagine the width of your hair,
2 you can fit 20 to 100 of these across the width of
3 one human hair.

4 Q And when you've done -- you've done
5 probably hundreds of thousands of samples before?

6 A That's correct.

7 Q And what would you call a large amount of
8 GSR in a finding that you might have?

9 A That depends on where the sample was taken
10 from. I have looked at research samples where a
11 subject discharges a firearm and a sample is taken
12 immediately after and I have seen hundreds to
13 thousands of gunshot residue particles.

14 On the other end of that spectrum, I have
15 seen cases submitted to us where I see no gunshot
16 residue.

17 Q Isn't it true that the absence of gunshot
18 residue doesn't necessarily tell you whether a
19 person shot the gun, correct?

20 A That's correct. Somebody could discharge
21 a firearm and then have no gunshot residue on their
22 hands.

23 Q And isn't it also true that the presence
24 of gunshot residue on one's hand, doesn't
25 necessarily mean that they shot the gun; is that

1 true as well?

2 A That's correct. Like I said, there are
3 those three options. The person either discharged
4 the firearm. They were in the vicinity of the
5 firearm being discharged. Or they came into contact
6 with a surface that has gunshot residue on it.

7 MR. DEVORE: I have no further questions.
8 Thank you.

9 THE COURT: Any redirect?

10 MR. FINK: No, Your Honor.

11 THE COURT: You may step down.

12 THE WITNESS: Thank you.

13 MR. FINK: May I retrieve the exhibit?

14 THE COURT: You may. All right. Next
15 witness.

16 MS. KREUSER: Thank you, Your Honor. The
17 state calls Ayako Chan-Hosokawa.

18 THE COURT: Please come forward to the
19 witness chair. Before you sit down, please raise
20 your right hand to be sworn.

21 AYAKO CHAN-HOSOKAWA,
22 having been first duly sworn, was examined
23 and testified on her oath as follows:

24 THE CLERK: Please be seated. State your
25 full name and spell your last name.

1 THE WITNESS: Ayako Chan Hosokawa, C-H-A-N
2 hyphen H-O-S-O-K-A-W-A.

3 THE COURT: You may proceed.

4 MS. KREUSER: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MS. KREUSER:

7 Q Good morning.

8 A Good morning.

9 Q What is your current occupation?

10 A I am forensic toxicologist?

11 Q Where are you currently employed?

12 A NMS Labs located outside of Philadelphia.

13 Q And how long have you been a forensic
14 toxicologist?

15 A I have been a forensic toxicologist since
16 2012. October of 2012.

17 Q How long have you worked for NMS Labs?

18 A Since June of 2008.

19 Q What did you do at NMS Labs before you
20 were a forensic toxicologist?

21 A I was the lab analyst handling specimen
22 and using the instrument.

23 Q Did you hold any other jobs prior to NMS
24 Labs?

25 A Yes.

1 Q Can you explain what those were?

2 A Yes. I was also the lab analyst for Quest
3 Diagnostic for about year.

4 Q Now, what are your duties at NMS Labs as a
5 forensic toxicologist?

6 A As forensic toxicologist my duties
7 includes the review of the analytical data that's
8 generated within our laboratory, and to review those
9 reports, and issue the report to the client. I am
10 also involved in the quality assurance aspect of the
11 testing. So the testing development, testing
12 evaluation, and the quality of the test results
13 issued to our client.

14 Q What kind of lab is NMS; what does it do?

15 A We are privately owned company
16 specializing in toxicology testing. So we have a
17 clinical client, a forensic client. Our role is to
18 analyze the component of the human specimen, such as
19 blood and determine the presence of drugs.

20 Q Can you describe for the jury your
21 education and training that ultimately led to you
22 becoming a forensic toxicologist?

23 A Yes. I have two degrees. I have a
24 Bachelors of Science in Chemistry from Richard
25 Stockton College of New Jersey. I also have a

1 Masters of Science in Chemistry from the University
2 of the Minnesota.

3 Q Are you a member of any professional
4 organizations?

5 A Yes, I am.

6 Q What are they?

7 A I belong to three professional groups.
8 One is Society of Forensic Toxicologists. I am also
9 part of -- I'm sorry, the Association --
10 International Association of Forensic Toxicologists.
11 And I am also part of the American Academy of
12 Forensic Sciences in Toxicology Section.

13 Q Now, back in November of 2016, did NMS
14 Labs receive a blood sample and a gastric sample
15 from the Ramsey County Medical Examiner?

16 A I believe we received in December of 2016.

17 Q Okay. Who were the samples from?

18 A What do you mean?

19 Q The source of the sample, the human
20 person.

21 A It was obtained from Amy Allwine.

22 Q Now, blood by its name is pretty
23 self-explanatory, but can you explain what is
24 gastric contents?

25 A Sure. It's the water base acidity in

1 nature. It's the content that everybody has in the
2 stomach.

3 Q Now, once at NMS Labs, were these two
4 samples tracked based on the standard operating
5 procedure of NMS Labs?

6 A Yes, they were.

7 Q Can you explain how that is done?

8 A Sure. Once a sample is received, it's
9 assigned a specific numbers, or work order numbers.
10 It is the eight digit numbers that is assigned to
11 specific cases, and those are assigned at the time
12 of receipt after reviewing the paperwork from the
13 client.

14 We use that specific work order number
15 throughout our process. So everything is tracked by
16 that number. There is no other information really.
17 We bill until the lab stops.

18 Q So this, in essence, preserves the
19 integrity of the samples?

20 A Correct.

21 Q Was that done in this case?

22 A Yes.

23 Q How do you know that?

24 A We have what is called chain of custody
25 documents. They are every individual who is

1 involved in the testing or who received the sample,
2 would have to use our specific log in information.
3 Will scan that sample which has a bar code and an
4 eight digit number that I just talked about.

5 So every person who is in contact with
6 testing portion of it, or the actual sample itself,
7 their name is tracked and the reasoning of that
8 contact we have documented.

9 Q Now, your testimony is that NMS Labs tests
10 for the presence of drugs, correct?

11 A Correct.

12 Q And these blood and gastric samples, for
13 what were they being examined?

14 A For this specific case, I was requested to
15 test for scopolamine.

16 Q What is scopolamine based on your training
17 and experience as a forensic toxicologist?

18 A So scopolamine belongs to a drug class
19 antinmemonic or anticholinergics. It basically it
20 just works in the brain or other part of the body to
21 specific receptors that can be found throughout our
22 body like gastric intestinal tract, skin, eyes, like
23 brain, like central nervous system depressant. We
24 have a lot of receptors throughout our body, and it
25 specifically works on that receptor. It is the

1 naturally occurring alkaloid that is found in plants
2 like Jimson weed. But right now, it is available in
3 the U.S. as a prescription as well.

4 Q So that goes to my next question. Is
5 scopolamine legal in the United States?

6 A It is legal, correct.

7 Q How can one obtain scopolamine in the
8 United States, legally?

9 A With prescription.

10 Q Now, why is -- what is the most common
11 use, or the reason to use the drug scopolamine?

12 A It is most commonly prescribed to prevent
13 motion sickness. Nausea and vomiting associated
14 with motion sickness. It can also be used for other
15 disease or treatment for other reason as well.

16 Q How is it most commonly administered?

17 A So for the motion sickness, the prevention
18 of the nausea vomiting associated with motion
19 sickness, mostly it's prescribed as a transdermal
20 patch. So it's a wearable patch that you wear
21 behind your ear. But it's also available as a
22 capsule or tablet as well.

23 Q Okay. So let's take each sample in turn
24 starting with the blood, if that's all right with
25 you.

1 What is the methodology that NMS employs
2 when analyzing a blood sample for scopolamine?

3 A Scopolamine concentration and
4 identification was determined using tandem mass
5 spectrometry, liquid chromatography, tandem mass
6 spectrometry. We abbreviate it as LCMSMS.

7 Q Can you explain this procedure?

8 A Sure. It is the separation and the
9 detection instrumentation that is commonly used in
10 forensic sciences. The liquid chromatography
11 portion separate a drug of interest from other
12 component that might be present in the blood and
13 LSMSMS, the tandem mass spectrometry portion
14 identify the detected peak of that identify what
15 this peak might be.

16 Q And I think you may have hit on this, but
17 I am just going to verify. Is this method a
18 commonly accepted method of testing within your
19 field?

20 A Yes, it is.

21 Q Now, relating to the actual process of
22 this test, what is NMS Lab's standard operating
23 procedure to actually do the test?

24 (The court reporter asked for the question
25 To be repeated.)

1 BY MS. KREUSER:

2 Q Yes. In performing this test, and getting
3 a result on the blood test, can you explain the
4 calibration testing procedure that NMS takes in
5 order to do the actual test?

6 A Sure. So rather than just analyzing
7 patient sample, our protocol is to run calibration
8 standard which contain a known amount of drugs
9 present in them, so we have something like scale to
10 compare it to.

11 We also run positive controls and negative
12 controls. As you can imagine, negative has no drugs
13 in them, so if there is any present in the negative
14 control, we have to fail the batch to repeat.

15 Postive control has the quantitative
16 requirement. Usually it's 20 percent plus/minus, so
17 we have to hit that target concentration to be
18 analytically qualified to be able to report that
19 findings.

20 Q Okay. And once findings are made, can you
21 explain the next step in the process?

22 A Sure. The analyst were to review that,
23 the data, that's generated by the instrument, and
24 there are secondary analysts that review the first
25 analysts' work. So there is check and balance

1 throughout the laboratory process to make sure we
2 are not reporting false results.

3 Q Now, to your knowledge, was a report
4 prepared of the findings on the blood test?

5 A Yes.

6 Q May I approach?

7 THE COURT: You may.

8 BY MS. KREUSER:

9 Q Ms. Chan-Hosokawa, I am showing you what's
10 been marked as Exhibit 132; what is that exhibit?

11 A It is the litigation support package
12 prepared by NMS Lab.

13 Q In reference to the blood test?

14 A Correct.

15 Q And have you had a chance to review that
16 report?

17 A Yes, I have.

18 Q And that's a true and accurate copy of the
19 report generated by NMS Lab?

20 A Correct.

21 MS. KREUSER: Your Honor, I would offer
22 Exhibit 132.

23 MR. DEVORE: No objection.

24 THE COURT: 132 is received.

25

1 BY MS. KREUSER:

2 Q Ms. Chan-Hosokawa, did you as a forensic
3 toxicologist, verify by going through that
4 litigation packet on the blood testing, verify the
5 testing procedures done?

6 A Correct.

7 Q And did you find any error or inaccuracy
8 in those procedures?

9 A No, I did not.

10 Q And was a result achieved in the blood
11 test?

12 A Yes.

13 Q And what was that result?

14 A We reported scopolamine concentration of
15 16 nanogram per milliliter.

16 Q Thank you. Now, let's move on to the
17 gastric testing. Can you explain the methodology
18 that NMS employs when analyzing gastric contents for
19 scopolamine?

20 A We use the same technology as the blood.
21 We use -- we already talked about the names. I am
22 just going to use abbreviated versions. So it's
23 LCMSMS, that's the same technology that we use for
24 the blood, as well as the gastric.

25 Q What is NMS Lab's standard operating

1 procedure to actually do this test?

2 A I would say almost same as blood. Only
3 difference is that our method was evaluated for
4 scopolamine and others like blood, serum, urine.
5 But gastric is a little different compared to blood,
6 as you can imagine. It might behave differently
7 under extraction or instrumentation, so we actually
8 use gastric content within the sample submitted and
9 calibrate it on its own using the patient sample.
10 So we can account for the maybe matrix effect that
11 specifically gastric content might have rather than
12 blood. So we have internal calibration within the
13 specimen.

14 Q And was analysis done on the actual
15 testing procedure, and then a second review of that
16 analysis done as well as you testified earlier?

17 A Correct.

18 Q And was a report prepared of these
19 findings on the gastric contents?

20 A Yes.

21 MS. KREUSER: May I approach?

22 THE COURT: You may.

23 BY MS. KREUSER:

24 Q Ms. Chan-Hosokawa, I am showing you what's
25 been marked as Exhibit 133; do you recognize that

1 document?

2 A Yes.

3 Q What is it?

4 A It is the litigation support package for
5 the gastric content testing.

6 Q Okay. And is that a true and accurate
7 copy of the packet produced by NMS labs?

8 A Yes.

9 MS. KREUSER: Your Honor, I would offer
10 Exhibit 133.

11 MR. DEVORE: No objection.

12 THE COURT: Received.

13 BY MS. KREUSER:

14 Q Now, did you, as forensic toxicologist for
15 NMS Lab, also verify the testing procedure done on
16 the gastric content test?

17 A Yes.

18 Q And did you find any error or inaccuracy
19 in that test?

20 A No, I did not.

21 Q Was a result obtained on that test?

22 A Yes.

23 Q What was the result as to the gastric
24 contents?

25 A Scopolamine was determined at 140,000

1 nanogram per milliliter.

2 Q Now, you testified that the blood content
3 was 16 nanograms per milliliter, yet we have a
4 gastric content result of 140,000 nanogram per
5 milliliter, correct?

6 A Yes.

7 Q Are those two results consistent?

8 A Yes.

9 Q Can you explain how that is?

10 A Sure. When somebody ingests drugs, it has
11 to pass through the esophagus, and then goes through
12 your stomach. From there, it has to get absorbed
13 into membranes and it has to be distributed
14 throughout your body through blood. So it is common
15 to have a high concentration of the drug in the
16 stomach, because that might still account for the
17 drug that might be not absorbed into the blood
18 stream yet. And blood circulates and we have a lot
19 of blood throughout our body. So the concentration
20 in the blood tend to be a lot lower than gastric,
21 and therefore these numbers are consistent.

22 Q Now, if someone were to take a regular
23 therapeutic dose of scopolamine, what would the
24 result be in terms of their blood contents?

25 A That depending on how individual might

1 take it. A transdermal, ingestion, the pills, or
2 even, I didn't mention earlier, but it can also get
3 injection directly through your muscle or vein. So
4 it's really depending on how you get them.

5 But if somebody were to wear a transdermal
6 patch, I find the concentration to be around 1 or 2
7 nanogram per milliliter, maybe 3. But definitely
8 not 16 nanogram per milliliter.

9 Q So based on your training and experience,
10 what does that say about Amy Allwine's contents of
11 scopolamine in her body?

12 A As far as blood, it is elevated. It's not
13 consistent with therapeutic use of scopolamine.

14 And as far as gastric, it indicate that
15 somebody ingest them instead of getting transdermal
16 or injection.

17 Q How would a therapeutic level of
18 scopolamine affect one's body?

19 A So even at the therapeutic concentration,
20 one might experience the central nervous system
21 depressant affect. Essentially mean that it affect
22 your brain. So your motion might be slower. You
23 might have impaired thought process. Your reaction
24 time may be slower. And also because it affects
25 eyes I talked about, it can dilate your eye, a

1 pupil. It can have blurred vision. You might have
2 dry mouth, dry eyes, flushing skin. So it has an
3 effect, not just the brain, but almost pretty much
4 throughout your body.

5 Q And now given the results of Amy Allwine's
6 blood and gastric contents, what are some effects or
7 symptoms that a person at that level could possibly
8 feel?

9 A She probably would have felt all that I
10 stated, because of the higher dosage. The
11 hallucinations or delusion, or things like that,
12 that could be also potential whether it really
13 happened or not, I can't state. But higher dosage,
14 hallucination has been reported.

15 Q Now, I think you already testified to
16 this, but I am going to ask to make sure for the
17 record, given the blood and gastric results on Amy
18 Allwine's samples, by what method can you say to a
19 reasonable degree of certainty -- by what method did
20 the scopolamine arrive into Amy Allwine's body?

21 A So having the scopolamine in the gastric
22 contents, I can say that scopolamine was introduced
23 via ingestion rather than injection or topical like
24 transdermal patch.

25 MS. KREUSER: Thank you, very much. I

1 have no further questions for this witness.

2 THE COURT: Cross examine.

3 MR. DEVORE: Thank you.

4 CROSS EXAMINATION

5 BY MR. DEVORE:

6 Q Help me with your last name.

7 A Chan-Hosokawa.

8 Q Chan-Hosokawa, good morning.

9 A Good morning.

10 Q I just have a few questions. I was just
11 wondering, I had never heard of scopolamine before.
12 I am wondering how many times have you heard of this
13 or worked with this drug before?

14 A Scopolamine is one of, I guess, the
15 leading drugs in this category of the drugs. So in
16 lectures it definitely covers what scopolamine is
17 and what type of effect it can cause an individual.

18 For case specific, it is not a common drug
19 to be tested for every forensic cases. So it's not
20 as common as other popular drugs of abuse. But it
21 certainly has medical application, and therefore we
22 test for it.

23 Q Sure. I am just wondering how many times
24 you have tested for it?

25 A Specifically, individual test, never.

1 Q So this is the first time?

2 A So the analysis was done by our
3 laboratory. I also report as final, or third
4 report. I did not physically test that sample.

5 Q Sure. All right. I'll rephrase it. Is
6 this the first time that you, personally, have dealt
7 with scopolamine as the drug that you have reported
8 on?

9 A You can say that, yes.

10 Q How long have you been working at NMS?

11 A Since June of 2008.

12 Q What is your position there? I know
13 you're a scientist; do you have a managerial role,
14 supervisor, lead?

15 A So as a forensic toxicologist we oversee
16 the laboratory staff. I don't have a specific
17 individual that I'm supervising, but it's a
18 different structure. Laboratory personnel do the
19 analysis and then toxicologists who review their
20 work.

21 Q So other people did the actual testing.
22 You took the results, did the analysis, wrote the
23 report; is that fair to say?

24 A That's correct.

25 Q Have you ever actually worked with or

1 treated a person while they are using scopolamine?

2 A No.

3 Q So you haven't actually personally,
4 yourself, witnessed somebody exhibiting the effects
5 of using scopolamine?

6 A I am actually going to correct myself.
7 Not as a professional, but as a just individual.
8 Friends of mine gets scopolamine patch, because she
9 gets motion sickness. So I've experienced that, but
10 not as a forensic scientist I have never experienced
11 patient.

12 Q Sure. And you said the patch, those are
13 more in the one to three nanograms per milliliter
14 range?

15 A Correct.

16 Q So the effects of it probably were just
17 negligible, I imagine, with your friend?

18 A No. You still get sedation and drowsiness
19 and those things. That's consistent with central
20 nervous system depressant. But not like
21 hallucinations or delusion.

22 Q So when you gave your statements about the
23 effects of higher level scopolamine, that had to do
24 with things that you have heard through lectures and
25 what not?

1 A Correct.

2 Q At 100 -- strike that.

3 MR. DEVORE: I have no further questions.

4 Thank you.

5 THE COURT: Any redirect?

6 MS. KREUSER: No, Your Honor.

7 THE COURT: You may step down.

8 MS. KREUSER: May we approach?

9 THE COURT: Approach.

10 (Whereupon, court and counsel had a
11 discussion off the record, at the bench.)

12 THE COURT: Call your next witness.

13 MS. KREUSER: State calls Autumn Hamilton.

14 THE COURT: Please come up to the witness
15 chair. Before you sit down, please raise your right
16 hand to be sworn.

17 AUTUMN HAMILTON,

18 having been first duly sworn, was examined

19 and testified on her oath as follows:

20 DEPUTY: Please be seated. State your
21 full name and spell your last name.

22 THE WITNESS: Autumn Hamilton,

23 H-A-M-I-L-T-O-N.

24 THE COURT: You may proceed.

25 MS. KREUSER: Thank you.

1 DIRECT EXAMINATION

2 BY MS. KREUSER:

3 Q Good morning.

4 A Hi.

5 Q Is it Dr. Hamilton?

6 A Yes.

7 Q Dr. Hamilton, it's true that you were
8 contacted by the Cottage Grove Police Department in
9 connection with this case; is that correct?

10 A That is correct.

11 Q It's true that they contacted you because
12 correspondence was uncovered between you and Stephen
13 Allwine?

14 A Yes.

15 Q How did you first have contact between the
16 two of you, through what forum?

17 A Through Ashley Madison.

18 Q Can you explain; do you have to become a
19 member? How does one go on Ashley Madison?

20 A I read an article, research article, of
21 men and women who cheat and then in that article it
22 mentioned the web site. I didn't think the web site
23 really existed because I thought that was kind of
24 odd. So I went to the website just to see if it was
25 real. And in order to see the website, you have to

1 create a profile. For women it's free. For men you
2 pay.

3 Q Okay. Got you. And then can you explain
4 how you began communication with Stephen Allwine?

5 A There is an email or message service on
6 the website and he contacted me through that.

7 Q Okay. He contacted you?

8 A As I recall. It's been a while, but
9 that's what I recall.

10 Q All right. Do you remember approximately
11 when this was?

12 A No.

13 Q Now, when you spoke with Cottage Grove
14 they did refer to message exchanges between you and
15 Stephen Allwine; is that correct?

16 A That is correct.

17 MS. KREUSER: May I approach, Your Honor?

18 THE COURT: You may.

19 BY MS. KREUSER:

20 Q Dr. Hamilton, I am showing you what's been
21 marked and entered into evidence as Exhibit 102. Do
22 those look familiar?

23 A Yes.

24 Q Okay. Now, did you have the occasion to
25 go on a date with Stephen Allwine?

1 A Yes.

2 Q Do you recall, approximately, when that
3 was?

4 A No.

5 Q Would it refresh your recollection to look
6 at the exhibit in order to gain some bearing as to
7 time frame?

8 A I did look at the dates. That's the first
9 thing I did, but yes, April of '15.

10 Q Can you explain what you did on the date,
11 where you went?

12 A We went to the Legends Golf Club.

13 Q And this individual that you went on the
14 date with, do you see him in the courtroom today?

15 A Yes.

16 Q Can you explain -- can you point out where
17 he is and explain where he is sitting and describe
18 an article of clothing that he is wearing?

19 A He is wearing a dark colored blazer. He
20 is sitting to my right across from me in the
21 courtroom.

22 Q Okay. And in relation to his attorney,
23 what side of his attorney is he sitting?

24 A He's on my right.

25 MS. KREUSER: Your Honor, may the record

1 reflect that Dr. Hamilton has identified the
2 defendant.

3 THE COURT: It may so reflect.

4 MS. KREUSER: Thank you.

5 BY MS. KREUSER:

6 Q Now, when you went on this date, do you
7 recall anything significant about how the date
8 ended?

9 A It was not a good match. I believe he
10 left, and I said I had to go to the restroom, so I
11 went the opposite way.

12 Q All right. And did you ever have the
13 occasion to see Stephen Allwine again?

14 A No.

15 Q Did you hear from him again or speak with
16 him again?

17 A I got an email from him the next day, or
18 within a short period of time and I replied back
19 that I was surprised to hear from him, because it
20 just didn't seem like a good match.

21 Q Did you ever subsequently speak with
22 Steven Allwine after that day?

23 A I only learned that it was him that I
24 talked to recently. I had -- I know several
25 Steve's, and I made a phone call on my phone, and I

1 hit Steve. And the person that answered wasn't the
2 person I needed, and I believe I immediately said, I
3 am sorry wrong number. And I honestly didn't until
4 I was talking to you even know that it was even him
5 that I called. But it was, him that I called.

6 Q Do you recall anything about that
7 conversation that he said. I think he said
8 something about, hey, we should get together again.
9 Again, I had no clue who I was talking to and I just
10 blew him off and said, oh yeah, we should do that.
11 Let me know. And hung up.

12 Q Thank you.

13 MS. KREUSER: I have no further questions.

14 THE COURT: Cross.

15 MR. DEVORE: Can I just have a second,
16 Your Honor?

17 THE COURT: You may.

18 MR. DEVORE: I don't have any questions.

19 THE COURT: You may step down.

20 MS. KREUSER: May we approach?

21 THE COURT: You may approach.

22 MS. KREUSER: Thank you.

23 (Whereupon, court and counsel had a
24 Discussion off the record, at the bench.)

25 THE COURT: Members of the jury: This

1 actually relates to why we were a few minutes late
2 starting. But a matter has come up that I do need
3 to deal with the attorneys on.

4 It is a matter that will require attention
5 for a considerable period of time. Therefore, I am
6 releasing you today. There will be no further
7 testimony for you today.

8 Now, I am going to do my, what I do is
9 repeating my instructions to you. Do not let
10 outsiders influence you. This includes family
11 members and friends, and anyone else who is not
12 actually involved in the trial. Do not discuss this
13 case with other jury members during the trial. You
14 will have plenty of time to do this at the end of
15 the trial once you have all of the evidence and I
16 have sent you to the jury room with my instructions
17 and the verdict forms.

18 Do not talk to anyone involved in this
19 case. The defendant, the lawyers, or the witnesses.
20 If anyone tries to discuss this case with you
21 outside the courtroom, report it to me.

22 When you go home during the trial, which
23 you are about to do, do not talk to your family,
24 friends or others about the case. You may tell them
25 that you are a juror on a criminal case, and that is

1 all you are allowed to tell them.

2 Do not have any electronic equipment with
3 you in the courtroom, even if it's shut off. I
4 repeat that, I know.

5 Do not report your experiences as a juror
6 while the trial and deliberations are going on. Do
7 not email, blog, tweet, text, do anything in terms
8 of electronic communication or any other kind of
9 communication about this trial, even if I have not
10 specifically mentioned the method of communication.

11 Do not visit any chat rooms where the case
12 may be discussed. Do not read or listen to news
13 reports on newspaper, magazines, radio, television,
14 pod casts, or media about the case.

15 Do not do your own investigation. Do not
16 ask people about this case. Do not visit any of the
17 locations mentioned in the trial. Do not use
18 Internet map applications, or any other mapping
19 devices to view the locations. Do not research
20 anything about the case, including the issues,
21 evidence, parties, witnesses, location, or the law
22 through any form of written print, electronic, or
23 Internet media.

24 Do not create your own demonstration or
25 reenactment of the events which are the subject of

1 this case. And remember, you cannot consider
2 anything you hear or learn about this case outside
3 the courtroom.

4 I apologize for any inconvenience that
5 this may cause you in terms of having the trial go
6 longer than it may otherwise have gone. But we do
7 need to deal with the issues, and you need not
8 concern yourself as to what those issues are. And I
9 will require you to be here at 8:30 in the morning
10 so we can start tomorrow at 9:00.

11 Thank you very much. Go with the deputy.

12 (The jury exited the courtroom.)

13 (Whereupon, the following proceedings were
14 Had outside of the presence of the jury.)

15 THE COURT: Have a seat. An issue was
16 raised and told to me by you folks. We are going to
17 have a hearing at 2:00 this afternoon regarding that
18 issue. So I am going to let attorneys discuss and
19 talk about the things that they need to talk about
20 and review the things they need to review. And we
21 will convene here at 2:00.

22 Thank you.

23 MR. DEVORE: Thank you.

24 MS. KREUSER: Thank you, Your Honor.

25 MR. FINK: Thank you.

1 (Whereupon, the following proceedings were
2 had outside of the presence of the jury.)

3 THE COURT: All right. We have had a
4 discussion where certain items were presented and
5 made aware simply this morning, and evidently not
6 before that to either prosecution or defense.

7 In the conversation that we had off the
8 record, I had heard someone say, but I may have been
9 mistaken, that Ms. Frascone had already testified as
10 to items. And I believe it was Ms. Garfield that
11 testified to a variety of exhibits that had occurred
12 before. So if one of you said it, if I heard it
13 incorrectly, you have my apologies.

14 In any event, I have asked for both
15 Ms. Garfield and Ms. Frascone to be here this
16 afternoon to clear this up. So before we start with
17 that, has there been conversation that would be
18 helpful to me?

19 MR. DEVORE: No.

20 MR. FINK: No, Your Honor.

21 THE COURT: All right. Let's get
22 Ms. Garfield back up here.

23 MR. FINK: Excuse me, Your Honor, we have
24 a bunch of exhibits, and I am kind of at a loss on
25 how to label them at this point. If I should just

1 continue the sequence with the trial.

2 THE COURT: Certainly you can continue the
3 sequence of the trial.

4 Come forward, please. Since this is a
5 separate hearing, I am going to have you sworn in
6 separately.

7 THE WITNESS: Certainly.

8 THE COURT: Before you sit down, please
9 raise your right hand to be sworn.

10 LINDSEY GARFIELD,
11 having been first duly sworn, was examined
12 and testified on her oath as follows:

13 THE CLERK: Please be seated. State your
14 full name, and spell your last name.

15 THE WITNESS: Lindsey Garfield,
16 L-I-N-D-S-E-Y, and Garfield is G-A-R-F-I-E-L-D.

17 THE COURT: Before we start, I am going to
18 ask some questions. Ms. Garfield --

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: You have already testified in
21 this case. And you have testified as to a variety
22 of exhibits either prepared by or in conjunction
23 with BCA investigation, correct?

24 THE WITNESS: That's correct.

25 THE COURT: When you left here, I want you

1 to explain to me what your thought process was, how
2 you came to be involved, if you did so. How you
3 came to be involved in preparation of other
4 exhibits. Who you spoke with, and what happened.

5 THE WITNESS: Certainly. When I left here
6 I drove back to the BCA to approve time sheets for
7 my section, and I proceeded with other case work,
8 and work that I had on my desk.

9 Approximately, I would say 3:00 or so
10 yesterday afternoon, I got a phone call at my desk
11 from Michelle Frascone who was prepping for her
12 trial and said, I have a photo, and I'd like you to
13 look at it to see if you think we could do anything
14 with sizing something in the photograph. So I said,
15 okay. And I asked her which photograph it was. We
16 pulled it up onto the computer. And it was a
17 photograph, 90-degree photograph, of the hallway
18 outside the master bedroom door of the bamboo
19 flooring. And it was very similar to some of the
20 photographs that I showed in evidence that had the
21 black dashed marks that I had mentioned in my
22 testimony that I made on the floor.

23 THE COURT: I remember them.

24 THE WITNESS: There was a -- kind of an
25 overexposed, we call it a hotspot from a camera

1 flash on the floor. And she said do you have the
2 picture up? I said, yes, I do. And we looked at
3 it, and she said, look next to the hotspot on the
4 floor. And I said, oh my God. I said, there is a
5 footprint impression there. She said, that's what I
6 saw as well. So she said, is there any way to size
7 this? And I said, well, we have the measurements
8 from the width of the hallway, and we have photos
9 that show the number of floorboards in the hallway.
10 So I said, if we can convert the feet and inches to
11 inches, and divide that by the number of floorboards
12 in the hallway, we could get a rough estimate for
13 the size of the width of each floorboard. She goes,
14 okay.

15 So she got that information, and figured
16 out -- we had figured out together that those
17 floorboards, based on that rough estimated math, was
18 about four and a half inches per board. Then
19 looking at the photo with the footprint in it, it's
20 covering two boards, appears to be, and then
21 overlaps a little bit on each bordering board. So
22 we kind of estimated the size of that footprint from
23 what we could see based on those very rough
24 mathematical estimations.

25 THE COURT: Why in heaven's name did none

1 of this come up sooner?

2 THE WITNESS: I never saw it until she
3 pointed it out. It was not -- that footprint was
4 not visible to me at the scene, and I never saw it
5 in the photographs.

6 THE COURT: Did you receive any
7 communication from either prosecuting attorney
8 regarding this yesterday?

9 THE WITNESS: No, I did not.

10 THE COURT: Did you communicate with --
11 did you call either prosecuting attorney yesterday?

12 THE WITNESS: No, I did not. Michelle did
13 that after she and I had spoken.

14 THE COURT: Okay. And I ask you that not
15 to cast doubt on what I have been told.

16 THE WITNESS: Certainly.

17 THE COURT: But I am trying to verify
18 everything in detail. I am going to ask that you
19 step down. I want you to stay close. You will be
20 recalled. I want Ms. Frascone to come in at this
21 point.

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: Please come forward to the
24 witness chair. Before you sit down, raise your
25 right hand to be sworn.

1 MICHELLE FRASCONE,
2 having been first duly sworn, was examined
3 and testified on her oath as follows:

4 THE CLERK: Please be seated. State your
5 full name, and spell your last name.

6 THE WITNESS: Full name. My first name is
7 Michelle, last name is Frascone, F-R-A, S as in Sam,
8 C-O-N-E.

9 THE COURT: Now, if and when you testify
10 at trial, that will be a separate matter and you
11 will be sworn in separately. But for me, tell me
12 where you work, what you do. Give me that general
13 background information.

14 THE WITNESS: I am a special agent. I am
15 assigned to Metro Homicide out of the Minnesota
16 Bureau of Criminal Apprehension. I am a licensed
17 police officer.

18 THE COURT: Okay. How long have you
19 worked for the BCA?

20 THE WITNESS: I have worked for them for
21 two years. And prior to that, I worked for the
22 Woodbury Police Department for ten.

23 THE COURT: Okay. We have an issue that
24 has been raised regarding proposed exhibits that
25 were evidently received just this morning. Please

1 explain how those exhibits came to be, and let's
2 start with that. Go ahead.

3 THE WITNESS: Yesterday afternoon I was
4 prepping for court. And I was clicking through the
5 series of photographs that were taken by the crime
6 scene team in preparing for testimony today. While
7 clicking through those photographs, I have a larger
8 monitor. I noticed what I thought was a footprint
9 within one of the photographs in that series. And
10 so I continued to click through to finish up looking
11 at them. I went back to the photograph, and still
12 believed I was looking at a footprint. So as a
13 result, I went to Mike Kaneko who does some of our
14 software, you know, produces court exhibits, and I
15 asked him for some overlay pictures.

16 And those overlay pictures, they will take
17 one picture, and another picture, and put them
18 together, and take out the background -- the bad
19 coloring. So that's what I had asked for.

20 So fast forward to the point that once I
21 got those, I called Lindsey Garfield down in her
22 office and I asked her to come up and look at the
23 photograph. At that point, she came up, and I said
24 look next to kind of this light area. Do you
25 believe this is a footprint, and she said an

1 expletive, and I must have missed that.

2 THE COURT: Why did this not get dealt
3 with, discovered, found, discussed -- any verb you
4 want to put with it -- earlier?

5 THE WITNESS: I wish I could tell you that
6 answer. I mean I just court prepped yesterday. I
7 have a heavy caseload, and that's not a good answer
8 for it, but it was yesterday afternoon at about 3:00
9 when I got to the photo section of it. And at that
10 point, I recognized it as an issue, and then
11 confirmed what I was seeing, and then reported it to
12 court staff.

13 THE COURT: When did you get notice that
14 you were going to be a witness in this case?

15 THE WITNESS: I am not sure of the exact
16 timing.

17 THE COURT: About when.

18 THE WITNESS: It was a while ago.

19 THE COURT: Months?

20 THE WITNESS: Yes.

21 THE COURT: When you got that notice, did
22 you do anything to prep for the case?

23 THE WITNESS: At that time, I made sure I
24 had the information that I would likely be asked
25 about, which would be my interview, likely, with the

1 defendant, and things like that. But it wasn't
2 until yesterday that I started to prepare for it.

3 And I should be more specific, I prepared
4 for the interview portion. I had not viewed the
5 photographs.

6 THE COURT: When you viewed the
7 photographs, what was your purpose in viewing the
8 photographs?

9 THE WITNESS: To better orientate myself
10 to remind myself of the crime scene. We do quite a
11 few crime scenes a year through my position. I just
12 wanted to confirm the information again.

13 THE COURT: All right. I am going to
14 change what I said a moment ago. Instead of
15 numbering in sequence, we will go A, B, C, D, E for
16 these particular exhibits.

17 Now, Mr. Fink, you may ask any questions
18 of this witness you wish to ask.

19 EXAMINATION

20 BY MR. FINK:

21 Q Could you describe what the blending
22 process is, again, please?

23 A Yep. So it's ultimately the same
24 photographs that are in the entirety of the crime
25 scene photos, and they are overlaid on each other.

1 So it would be the same photos, or the same angle of
2 the photos. It just cleans up the background so
3 it's easier for viewing.

4 Q Okay. So assume for purposes of this next
5 question that we have in the record pictures of, for
6 instance, the doorway to the master bedroom in
7 regular light, as well as pictures of the doorway in
8 front of the master bedroom that's already been
9 luminaled, okay.

10 So are you saying that you take picture
11 one and overlay over picture two?

12 A That's correct.

13 MR. FINK: Approach, Your Honor?

14 THE COURT: You may.

15 BY MR. FINK:

16 Q I would like to show you Exhibit C; do you
17 know what that is?

18 A I do.

19 Q What is it?

20 A It's a photo in the series of photographs
21 that were taken at the crime scene, specifically
22 9536.

23 Q And you were present when all of those
24 pictures were taken, were you not?

25 A I was.

1 Q And pictures were taken in regular light,
2 or perhaps enhanced by a flash?

3 A That's correct.

4 Q And also after luminal was spread, and you
5 saw -- you were present and saw all of that; is that
6 correct?

7 A That's correct.

8 MR. FINK: Approach?

9 THE COURT: You may.

10 BY MR. FINK:

11 Q I would like to show you Exhibits D
12 through K inclusive. What are those?

13 MR. DEVORE: Your Honor, may I approach
14 just to write down the exhibit numbers on mine, so I
15 can keep track of the pictures.

16 THE COURT: Yes. You may approach. And I
17 want to coordinate this. I know this hearing is
18 unusual enough, so that I want to make sure that
19 everybody has the correct information.

20 MR. DEVORE: Thank you.

21 THE COURT: Mr. Fink, you may continue.

22 BY MR. FINK:

23 Q Did I ask the question, and not have an
24 answer?

25 THE COURT: I think perhaps in terms of

1 identifying those particular exhibits. Do you know
2 what they are?

3 THE WITNESS: Yes, I do.

4 BY MR. FINK:

5 Q What are they?

6 A They are photographs that I provided to
7 your office that include overlay photos of crime
8 scene photos.

9 Q As you have described.

10 A As I have described.

11 MR. FINK: Point of procedure, Your Honor.
12 May I use exhibits that have been entered as well?

13 THE COURT: Yes.

14 MR. FINK: Okay. Thank you. May I
15 approach?

16 THE COURT: You may.

17 BY MR. FINK:

18 Q Showing you Exhibit 67 and 68; do you know
19 what those are?

20 A I do.

21 Q What are they?

22 A Crime scene photos that include the
23 luminescence or the luminal.

24 Q And Exhibit 69; what is that?

25 A That is a photograph also of the crime

1 scene that does not include the luminescence.

2 Q And regular light?

3 A And regular light.

4 Q Exhibit 70.

5 A Includes the crime scene with the
6 luminescence.

7 Q 71.

8 A Includes the crime scene without the value
9 of the luminescence.

10 Q And Exhibit 72.

11 A Is the crime scene with the value of the
12 luminescence in it.

13 Q 73.

14 A Is the crime scene bathroom photo without
15 luminescence.

16 Q And 74.

17 A Is the crime scene photo with
18 luminescence.

19 Q 75.

20 A 75 is the child's bedroom from the crime
21 scene without the luminescence.

22 Q And 76.

23 A Is the crime scene photo with
24 luminescence.

25 Q 77.

1 A Is the crime scene photo without
2 luminescence.

3 Q And 78.

4 A Is the same crime scene photo, but
5 illuminated. I apologize, these are now out of
6 order for you.

7 Q I showed you Exhibit C before.

8 A That's correct.

9 Q I would like to show you what's been
10 marked as Exhibit 47; is that the same picture?

11 A It is the same picture. However, it
12 appears 47 has been cropped.

13 Q Okay. Now, when you looked at Exhibit C,
14 what did you observe in your preparation?

15 A I observed what I believed to be a
16 footprint.

17 Q And I think you described to the court
18 what you did upon that realization?

19 A Yes.

20 Q Could you go through how you figured out
21 the measurements again?

22 A Yes. So part of looking at this photo, I
23 asked if we had measurements for the hallway. If we
24 had measurements for the hallway, I believed that I
25 would be able to do a rough math on possibly how

1 large the foot size was, if this is in fact a
2 footprint.

3 Q Okay. Now, can I stop you right there? I
4 would like to show you Exhibit 138. What is this?

5 A That would be a lab exhibit for the crime
6 scene.

7 Q Based upon your having spent a good deal
8 of time there, is that an accurate representation?

9 A Yes, it is.

10 Q Does it have measurements on it?

11 A Yes, it does.

12 Q This is what you relied on?

13 A That is what I relied on.

14 Q Go ahead.

15 A And so I was able to see that there was
16 three and a half feet measured in that hallway by
17 the crime scene team. Based on that information of
18 the three and a half feet, and the measurement of
19 the boards, I outlined what I believed to be a
20 footprint. Counted the boards. Based on those
21 measurements, changed it into inches, and measured
22 the foot.

23 Q What did it measure?

24 A Approximately 11 and a half to 12 inches.

25 Q And that was a footprint you said.

1 A It's a footprint.

2 Q Does that translate into what shoe size?

3 A Yes. After looking up the 11 and a half
4 to 12 inches, I looked at possible shoe sizes. It
5 looks -- based on the information I was able to look
6 at, it looks like it's between 11 and a half and 12
7 foot shoe size. I should specifically say U.S.
8 men's shoe size.

9 THE COURT: And you may approach.

10 BY MR. FINK:

11 Q Do you have your sketch, if you will, with
12 you?

13 A I do.

14 Q May I have it, please?

15 A Yes.

16 Q And this replicates, with additions,
17 Exhibit C; is that correct?

18 A That's correct. That's with my
19 mathematical equation.

20 MR. FINK: If I may approach?

21 THE COURT: You may.

22 BY MR. FINK:

23 Q Showing you what's marked as Exhibit L.
24 Please tell us what that is.

25 A This is a printout that I took of the

1 scene photograph, and a rough estimate drawing that
2 I did around the footprint. Included in there is
3 the sizing of the board in inches, as well as the
4 sizing of the potential footprint.

5 Q As you indicated, this is replicated by
6 Exhibit C, except for the extra markings on it?

7 A That's correct.

8 Q That was picture number 9536; is that
9 correct?

10 A That's correct.

11 Q That was included on a disc provided our
12 office by the BCA?

13 A Yes, it was.

14 MR. FINK: And as an officer of the court,
15 I can inform the court that that was disclosed.

16 THE COURT: All right.

17 MR. FINK: Is there anything else the
18 court would request me to inquire about?

19 THE COURT: No. But I am going to allow
20 Mr. DeVore, of course, to inquire.

21 MR. FINK: Sure.

22 THE COURT: Go ahead.

23 EXAMINATION

24 BY MR. DEVORE:

25 Q That Exhibit L, when did you prepare that?

1 A I prepared this late yesterday afternoon.

2 Q Okay. So that was not disclosed --

3 MR. DEVORE: Just for, as an officer of
4 the court, that was not disclosed to me before
5 minutes ago. I think what Mr. Fink was referring to
6 was the Exhibit 47, I believe, that's already been
7 entered as an exhibit in this case.

8 THE COURT: I understand that. And what
9 was referred to as number 9536, which was a
10 particular item, may or may not be 47, I haven't
11 doublechecked that, or crosschecked that, but that's
12 what I understood that to be.

13 My understanding is that Mr. Fink and
14 Ms. Kreuzer were notified of all of this not much
15 before you were.

16 MR. DEVORE: Sure. I just want to make it
17 clear that that document has never been in my hand.

18 THE COURT: You bet.

19 BY MR. DEVORE:

20 Q Ms. Frascione, when you were out at the
21 Allwine property to do your investigation?

22 A I believe the date of the case is November
23 13.

24 Q What year was that?

25 A 2016.

1 Q What's the date today?

2 A January 25, 2018.

3 Q Would you agree that that's roughly 14
4 months ago that you were out there to take these
5 pictures?

6 A I do agree.

7 Q And you were actively involved in this
8 investigation; is that correct?

9 A Through the majority of it, yes.

10 Q Not just taking pictures, but also doing
11 interviews and things like that; is that correct?

12 A That's correct.

13 Q And you have known about this trial coming
14 up since it was set back in like July or June; isn't
15 that correct?

16 A That's correct.

17 Q And you've had conversations with
18 Mr. Fink and Ms. Kreuser; is that correct?

19 A That's correct.

20 Q Okay. And you did some trial preparation
21 work in this case at some point; is that correct?

22 A That's correct.

23 Q With the county attorney's office?

24 A That's correct.

25 Q And I would assume in your trial

1 preparation, you talked about your testimony; is
2 that correct?

3 A That's correct.

4 Q And I assume that you look through your
5 evidence and things like that, as you normally
6 would; is that correct?

7 A That's correct.

8 Q But yesterday -- was it yesterday
9 afternoon, then, you did this overlay process, and
10 you came up with this stuff?

11 A Yesterday afternoon is when I recognized
12 what I believed to be a footprint in this.

13 Q Okay.

14 THE COURT: When you say "in this", you
15 were holding a document. What is it?

16 THE WITNESS: Oh, I apologize, Exhibit C.

17 THE COURT: Thank you. Go ahead.

18 BY MR. DEVORE:

19 Q And you had Exhibit C in your possession,
20 really, for 14 months; is that correct?

21 A That's correct.

22 Q All right. And tell me about this overlay
23 process. What does that involve?

24 A It's a software program where two pictures
25 are put on top of each other. It just makes it

1 easier for viewing. So it was for my purposes in
2 preparing for court so I could view the photographs.

3 Q Sure. So you take two regular
4 photographs, and then you kind of combine them. The
5 computer does something with them so they can
6 enhance things; is that right?

7 A That's correct.

8 Q So you essentially alter the state of both
9 photographs to get to one photograph?

10 A The optics change, correct.

11 Q When did you do that?

12 A That was done yesterday. My request form
13 was yesterday afternoon. I picked them up about
14 9:00 p.m. last night.

15 Q Right. Okay. And how long have you known
16 about this overlay process that you do?

17 A For approximately two years.

18 Q So you have known about doing this type of
19 procedure for at least a couple of years?

20 A Yes.

21 Q You got some training in it, or something
22 like that?

23 A Yes.

24 Q Is there anything about that that
25 prevented you from having access to these

1 photographs, at any time, over the last 14 months?

2 A No.

3 MR. DEVORE: Your Honor, I have no further
4 questions.

5 THE COURT: Ms. Frascone, this is an odd
6 question to be asked in a courtroom, but I am going
7 to phrase it this way: Tell me why I should rely on
8 this, and why it's important?

9 THE WITNESS: Well, as an agent, obviously
10 it's a little surprising to view photographs, and I
11 was surprised to see what I believed to be a
12 footprint. I feel it was my duty to at least let
13 somebody know what my thoughts were, and what was
14 going on in my mind.

15 Would it have been beneficial to do court
16 prep months and months ago, absolutely it would have
17 been. However, with schedule and children, and
18 things like that, my time to do it in extensive
19 detail was yesterday. So when I did find what I
20 believed to at least be something of note, and
21 again, it's my interpretation of a footprint within
22 the photograph. I felt it was important to at least
23 let the court know.

24 THE COURT: But having said that, why
25 should I believe the overlay process is worth

1 anything, and that it helps us learn anything?

2 THE WITNESS: It simply, I believe, helps
3 for viewing. I don't think it changes the
4 photographs at all. I don't think it changes any of
5 the measurements. It doesn't change optically. It
6 just makes it easier to view.

7 THE COURT: You've known about that
8 technique for about two years. Is it generally
9 known?

10 THE WITNESS: I believe it's generally
11 known within crime scene.

12 THE COURT: Anyone outside of BCA employ?

13 THE WITNESS: I don't know that answer.

14 THE COURT: Mr. Fink, do you have any
15 other questions?

16 MR. FINK: I do.

17 CONTINUED EXAMINATION

18 BY MR. FINK:

19 Q The numbered exhibits that I gave you.

20 A Yes.

21 Q Are alternatively a particular view with
22 normal light, and then the same view with luminal;
23 is that correct?

24 A That's correct.

25 MR. FINK: For the purposes of this

1 motion, I would like to move the lettered exhibits
2 into evidence.

3 THE COURT: For the purposes of this
4 motion here -- for the purpose of the motion so we
5 can argue whether we get to trial. I am going to
6 receive them. Mr. DeVore.

7 MR. DEVORE: I have no objection to this,
8 Your Honor.

9 THE COURT: All right.

10 MR. FINK: And I think, Your Honor, it's
11 important for Your Honor to view them to put the
12 testimony into perspective.

13 THE COURT: So do I. Any other questions?

14 MR. DEVORE: No, Your Honor.

15 THE COURT: All right. We are going to
16 take a break. I am going to take a look. It may be
17 that I come back and ask for arguments on both sides
18 at that point. And it may be that I might not rule
19 immediately, because I might want to take a another
20 look, depending on what you argue and what you tell
21 me. But right now, I do want to take a look at the
22 exhibits.

23 MR. FINK: May I retrieve them for Your
24 Honor?

25 THE COURT: Absolutely. It may be that

1 Ms. Garfield is not needed again this afternoon.

2 Having said that, I don't want her going yet. Okay.

3 We will take a break.

4 (A recess was taken.)

5 DEPUTY: Remain seated and come to order.

6 THE COURT: I have a general idea what I
7 am going to hear from both sides.

8 Mr. Fink, you go first. Tell me why I
9 should consider having not gotten into the
10 testimony, the foundation, and the other kinds of
11 questions you would ask before an exhibit is offered
12 at trial. Other than that, why should I be looking
13 at these?

14 MR. FINK: Why should they be admitted?

15 THE COURT: Why should they be admitted?
16 Why should the jury have a chance to see these?

17 MR. FINK: Well, first of all, Your Honor,
18 in the overlay photos, which Your Honor has, there
19 is nothing new in them. It is merely a
20 clarification, if you will, of exhibits that have
21 already been entered into evidence in this trial.
22 It provides, perhaps, a different perspective, but
23 it still amounts to those two photos that have been
24 admitted. So it's nothing new. As I said, it's
25 merely a clarification. A visual clarification of

1 at least one of the prepared exhibits that have been
2 admitted into trial.

3 It does not affect the defense at all,
4 because the defense is, I was out of the house when
5 Amy Allwine was shot and killed.

6 The evidence was there all along as
7 Special Agent Frascone explained. It was only when
8 she was reorienting herself to the crime scene by
9 going through the pictures that she even noticed it.

10 So in short, the blended pictures, the
11 lettered exhibits, save C, are merely a combination
12 of evidence that's already been introduced, offered,
13 and received at trial.

14 As far as the shoe measurements, if you
15 will --

16 THE COURT: On L, I believe.

17 MR. FINK: Thank you. Those were done, as
18 I indicated, as Ms. Frascone was going through the
19 pictorial evidence to orient herself, reorient
20 herself, based on the number of crime scenes that
21 she goes to in a given year. And based upon that,
22 based upon that observation, I think as a law
23 enforcement officer she had to proceed as she did,
24 and then alert us as quickly as she could, which she
25 did.

1 THE COURT: When did you find out about
2 it?

3 MR. FINK: We had a short conversation
4 after court yesterday, it was probably 4:30, quarter
5 to 5:00. We didn't get any of the exhibits before
6 Your Honor until this morning, which we promptly
7 replicated and gave to counsel.

8 I guess, in short, it's really nothing
9 new. It's been there all along. It's been
10 available -- it was made available earlier. Not the
11 blended photos, but C was part of the package that
12 counsel received in discovery.

13 THE COURT: Mr. DeVore.

14 MR. DEVORE: Well, Your Honor, there are
15 some undeniable facts that are important. Number
16 one, Ms. Frascone, whether she did her job or not.
17 Nobody is faulting her for doing her job. What we
18 are talking about is whether or not the evidence
19 that is trying to be admitted in is allowed in
20 court. That's under the rules that we have.
21 There's a vast microscope that we are looking at
22 this for.

23 Now, there are some undeniable facts.
24 There are eight photos that are at issue in this
25 case. She has had this evidence, as has all of the

1 state, for 14 months. For 14 months we haven't
2 heard one thing. Haven't seen these extra eight
3 photos. They weren't even created until the night
4 before her expected testimony. They were never
5 disclosed. That is an absolute undeniable fact.

6 Now, are they important? Well, she used
7 an expletive to describe the response that
8 Ms. Garfield had when she looked at the photos. So
9 now the court might say, well, okay, let's just say
10 we can keep out the overlay photos. But at this
11 point, Your Honor, her observations, her
12 measurements were utilized by using the overlays.
13 She did a computer program where she does the
14 overlays. And yes, she can send them out for print,
15 and she gets them back at 9:00. But she does the
16 computer overlay, and sees what the results are.
17 From there, she does these measurements.

18 Yesterday, Ms. Garfield when asked on the
19 stand whether you could calculate measurements from
20 any of the photographs that they had, she said no.
21 Right? So she was basing it on the natural
22 photographs that we had. It wasn't until
23 Ms. Frascone then changed the photograph, did the
24 overlay, and altered two sets of photographs to
25 create an ability to be able to do the measurements

1 that she needed. Sure then she took the
2 measurements and wrote them down on a regular
3 photograph. But she didn't see those measurements.
4 She couldn't have made those measurements, when she
5 didn't see the footprint of the distinction that she
6 did until she did the overlay.

7 So Your Honor, I am asking for two things.
8 I am asking the court not to allow these eight
9 photographs because they are obviously very late in
10 disclosure, and they are very important, and they
11 are highly prejudicial. Because a witness could get
12 on the stand now and talk about not only what they
13 believe the size of the footprint to be, but they
14 might even be able to testify as to when the
15 footprint was left. Because now we have a different
16 perspective of the footprint, and how it overlays
17 onto the wood, and then the other things that are on
18 the photograph, that wouldn't be seen with the
19 regular photograph.

20 I am asking for two things. One:
21 Complete -- I am asking the court not to allow the
22 photographs. But I am also asking the court to
23 instruct any witness that testifies about these
24 photographs not to opine on the measurements, and
25 not to opine on the information that they would have

1 received by looking at the overlay photographs.
2 Because it doesn't do me any good, or the defense
3 any good, if they come in and testify to knowledge
4 that they received as a result of the overlay
5 photographs, even if you don't let them in.

6 Now, a violation or a question when it
7 comes to disclosure of information by the State
8 under the Rule 9.03 says the court really has a lot
9 of flexibility to do what it wants to do.

10 THE COURT: Understood.

11 MR. DEVORE: One of the options is to stop
12 the trial, right, and give the defense a
13 continuance. That would allow me to maybe go and
14 get an expert, or somebody, to look at the
15 photographs. I don't know who that kind of an
16 expert would be, because I wasn't prepared to do
17 that. But I don't even know -- I would have to get
18 somebody to take a look at them. Can I do it in the
19 next couple of days? I doubt it. Can I get a
20 person qualified to do that, to be able to look at
21 the documents, secure their -- retain their
22 services, and then get them to be able to testify in
23 this trial in the relatively near future? I have no
24 idea.

25 So, you know, one of the options would be

1 to give me a continuance, and then we would shut
2 down the trial, and we would have to restart it.
3 That's not a good option for anybody. But that is
4 one of the options for the court.

5 Another easier option that I believe that
6 this court has been confronted with probably in
7 these situations, I certainly have, is that the late
8 disclosure means it doesn't come in. We have
9 already picked the jury. We have already had, what,
10 16 witnesses or more testify in this case. We have
11 already had a witness, Ms. Garfield, testify about
12 the photographs, about the footprints. She was
13 there for 16 hours, or 19 hours, on the scene. And
14 we have already now asked and answered questions
15 based on the information that we have had.

16 Even if you put Ms. Garfield back up there
17 in front of the jury, and then we get to ask her
18 these new set of questions regarding new information
19 that was just received, it is still tainted because
20 I have already asked her questions based on the
21 information that we had at the time. So it still
22 prejudices the defendant even if the court allows
23 Ms. Garfield to come back on the witness stand and
24 try to rectify the situation.

25 Your Honor, I am asking the court to not

1 allow the photos. I am asking the court to instruct
2 any witness that would testify about these, not to
3 testify about the measurements or about the overlay
4 observations that they would have learned through
5 the overlay.

6 THE COURT: Mr. Fink, any other comments?
7 And it strikes me that what I have just heard from
8 Mr. DeVore includes some very specific comments
9 about how the measurements came to be, which is very
10 different from what was originally put into evidence
11 in this trial. So anything on that subject, or any
12 other response?

13 MR. FINK: Well, first of all, I think
14 Mr. DeVore inadvertently misrepresented Special
15 Agent Frascione's testimony. Because her discovery,
16 if you will, of what she felt to be a footprint, was
17 when she reviewed the Exhibit C before Your Honor,
18 which is not one of the ones that is --

19 THE COURT: No. That's correct.

20 MR. FINK: Okay. I just wanted to clear
21 that up.

22 So it's really two questions. One is
23 whether the discovery by Special Agent Frascione as
24 to the footprint comes in on the one hand, and
25 whether the -- I can't remember the terminology that

1 was used -- but the overlay process on the other
2 photos comes in. Those are really two questions.

3 Again, there is nothing new here. There
4 is absolutely nothing new.

5 THE COURT: All right. I am going to take
6 another look at a couple of things, including the
7 exhibits and including the rules, and I will be back
8 in a few minutes, and I will give you my answer.

9 (A recess was taken.)

10 THE COURT: I don't like last minute
11 evidence. I know Mr. DeVore doesn't, and I assume
12 Mr. Fink and Ms. Kreuser don't either, actually.
13 The difficulty I find myself in is hearing things
14 from both sides to which I agree.

15 Here's what I am doing. Assuming proper
16 foundation is laid, and proper questions are asked,
17 I am going to admit these photos as demonstrative
18 evidence. I am going to read to the jury before
19 they come in something akin to, the state is about
20 to introduce a set of computer generated photos.
21 These do not serve of proof of any facts of
22 themselves. They are presented only to aid your
23 understanding of a witness's testimony, or other
24 evidence here in court. If the computer generated
25 photos are not consistent with your evaluation of

1 the testimony, or other evidence, you should
2 disregard them and determine the facts from the
3 underlying testimony or other evidence. That would
4 also mean I would give the standard demonstrative
5 exhibit JIG, or jury instruction, at the end of the
6 trial.

7 Now, having said what I have said, and
8 ruled what I have ruled, Mr. DeVore, do you want the
9 opportunity to seek out someone to rebut this
10 information, or these photos?

11 MR. DEVORE: How much time are you willing
12 to give me?

13 THE COURT: If you do it, I would give you
14 up to a week. And I would say that Ms. Frascone
15 doesn't testify before you receive your information.

16 MR. DEVORE: What do you mean by
17 demonstrative evidence? What does the jury get to
18 do with them?

19 THE COURT: They don't get them in the
20 jury room.

21 MR. DEVORE: Okay.

22 THE COURT: They get to see them as an
23 explanation of Ms. Frascone's testimony. They do
24 not get to take them into the deliberation room.

25 MR. DEVORE: Are there any limits to the

1 questions the state is allowed to ask Ms. Frascone,
2 based on the statements that I made in my argument?

3 THE COURT: I am not going to stop the
4 state from asking questions about the measurements,
5 because it is the measurements that are the basis of
6 the, if you will, demonstration. But I am
7 instructing the jury, and will instruct them, if
8 necessary, more than once that these are not
9 evidence in themselves. This is simply something a
10 witness has done to aid understanding of the
11 testimony, and other evidence.

12 MR. DEVORE: Well, practically speaking,
13 Your Honor, I don't know how long it will take. But
14 I would guess that, you know, I could start trying
15 to figure it out. I don't know what kind of person
16 takes a look at this stuff. I have somebody in
17 mind. But then I can let the court know tomorrow,
18 if I can get ahold of him, and see where we are at.

19 THE COURT: Let's go that way. Let's
20 assume for now that Ms. Frascone is not the next
21 person up, and we will move ahead tomorrow. Yes.
22 You may tell me tomorrow anything further.

23 Thank you.

24 MS. KREUSER: Thank you, Your Honor.

25 (Proceedings concluded.)

1 STATE OF MINNESOTA)
) ss:
2 COUNTY OF WASHINGTON)

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REPORTER'S CERTIFICATE

I, DEBORAH L. FOSTER, do hereby certify that the above and foregoing transcript, consisting of the preceding pages, is a correct transcript of my stenographic notes and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated: March 12, 2018

DEBORAH L. FOSTER
Official Reporter
Washington County District Court
(651) 430-6354

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