

Trial on Merits
September 16, 2015

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REPORTER'S RECORD
VOLUME 5 OF 7 VOLUMES
TRIAL COURT CAUSE NO. 1424070
COURT OF APPEALS NO. 14-15-00820-CR

HERMAN RAY WHITFIELD)	IN THE DISTRICT COURT
Appellant)	
)	
Vs.)	HARRIS COUNTY, TEXAS
)	
THE STATE OF TEXAS)	
Appellee)	184TH JUDICIAL DISTRICT

TRIAL ON MERITS

On the 16th day of September, 2015, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable JAN KROCKER, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

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OFFICIAL COURT REPORTER
184TH DISTRICT COURT
HARRIS COUNTY, TEXAS

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TRIAL ON MERITS

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1 **(In Open Court, Defendant Present)**

2 **THE COURT:** Excuse me. Before we
3 start -- on the record -- I was a little concerned
4 about Mr. Whitfield's safety because there has been
5 some publicity, but he has informed me this morning
6 that he's in a cell by himself.

7 **MR. VINAS:** Yes, Your Honor.

8 **THE COURT:** Okay. I don't need to
9 e-mail anybody.

10 Okay. I think we're ready for the
11 jury. Is there a legal issue?

12 **MR. VINAS:** I mean, it's brief. As --
13 as we have discovered throughout the trial, there
14 have been some minor inconsistencies between Denise
15 Thompson's testimony and what was in Detective
16 McMurtry's initial report back in 2008 and, again, in
17 Jocelyn Batiz' testimony in the initial report in
18 2008.

19 I understand the state of the law that
20 if we -- if we impeach on those, that it probably
21 opens the door to the extraneouses coming in.

22 **THE COURT:** And all of the
23 extraneouses -- or some of them have a number of
24 similarities to this offense?

25 **MS. PRIMM:** Yes, ma'am. Many of them

1 have similarities.

2 **THE COURT:** Okay.

3 **MS. PRIMM:** There is one that happened
4 in almost the exact same location.

5 **THE COURT:** Oh, my.

6 **MR. VINAS:** So, obviously, we are on
7 very thin ice in that cross-examination. So, I
8 sought appellate opinion this morning on that.

9 **THE COURT:** Sorry? What?

10 **MR. VINAS:** I sought an appellate
11 opinion on that this morning.

12 **THE COURT:** Sure.

13 **MR. VINAS:** From one of the best
14 appellate Defense lawyers in town, and at her -- at
15 her recommendation, what I would like to do is when
16 the jury comes in, ask the State to go back through
17 their notes with Ms. Batiz -- obviously, they are not
18 going to give their notes from that conversation, and
19 I'm not asking them to do that -- just to go through
20 it and see if there was anything that showed
21 inconsistency in their meeting between --
22 inconsistencies between that statement to them and
23 the report made to Detective McMurtry, just to make
24 sure there is no *Brady* material that we were unaware
25 of. May have changed our defense. I'm not saying it

1 is or not because I don't know what's in there.

2 **THE COURT:** Might have changed what?

3 **MR. VINAS:** It could have changed our
4 strategy. I don't know that it would have,
5 obviously. But that should not take very long, just
6 a few minutes. And then Ms. Primm and Mr. Peneguy
7 can let you know whether there is any potential
8 impeachment material in there.

9 **THE COURT:** Okay. Well, you would
10 have to recall the witnesses anyway.

11 **MR. VINAS:** Right.

12 **THE COURT:** Right. So, make sure you
13 do that over the lunch hour so we can get started.

14 Are you aware of any *Brady* material
15 based on inconsistencies with the witnesses?

16 **MS. PRIMM:** I'm not. But I was going
17 to go over my notes really quick just to make sure
18 there wasn't anything different.

19 **THE COURT:** Okay. You think you can
20 do it in five minutes?

21 **MS. PRIMM:** Yes, ma'am.

22 **THE COURT:** Okay.

23 **MS. PRIMM:** Okay.

24 **MR. VINAS:** Thank you, Judge.

25 Thank you, Marie.

1 **THE COURT:** And I'm very aware that
2 you have to tread lightly or else all the
3 extraneous are likely to come in, at least some of
4 them. So, I understand you have to walk a thin line
5 here.

6 **MR. VINAS:** Thank you.

7 **(Brief pause)**

8 **THE COURT:** Can you let the jury know
9 a legal issue has come up so it's going to be just a
10 little bit? Okay.

11 **(Brief pause)**

12 **MS. PRIMM:** First time I ever heard
13 the "C" was in court.

14 **MR. VINAS:** Yes.

15 **MS. PRIMM:** She never said that. And
16 when we met her two previous times, she never said
17 that. She said it was a dark blue hat, which is
18 consistent with her report. That hasn't changed.

19 **MR. VINAS:** All right.

20 **MS. PRIMM:** I never questioned her
21 about serrated versus non-serrated.

22 **THE COURT:** Could you back up just a
23 moment? Did you ask her if it was anything on the
24 cap?

25 **MS. PRIMM:** No. I asked her to

1 describe the cap. She said dark blue baseball cap.

2 **THE COURT:** Okay.

3 **MS. PRIMM:** So, I didn't ask the
4 question. I just asked an open ended. As far as the
5 knife, I asked her to describe the knife. She said
6 it was a pocketknife that folded. I didn't ask her
7 serrated or non-serrated. Never asked that question.
8 So, she didn't have to answer that.

9 As far as calling Denise or not
10 calling Denise, I didn't ask her that question. She
11 said she went back to Denise's. And I think those
12 were the main -- I didn't see anything different in
13 my notes than what she testified to except for those
14 things, but some of them I didn't ask her.

15 **THE COURT:** Okay. Thank you.

16 **MR. VINAS:** Thank you. Thank you,
17 Judge.

18 **THE COURT:** Okay. Are we ready for
19 the jury then? Okay. Let's see.

20 **MR. VINAS:** Yes, Your Honor.

21 **THE COURT:** Does the witness -- is the
22 witness still around, or did he step out?

23 I guess he stepped out.

24 **MR. PENEGUY:** I will grab him.

25 **THE COURT:** As soon as he comes back

1 in, we will get the jury out.

2 **MR. PENEGUY:** Judge, do you want him
3 on the witness stand?

4 **THE COURT:** Sure. Come on up, sir.
5 Okay. I think we're ready for the
6 jury.

7 **(Jury enters the courtroom)**

8 **THE COURT:** Thank you. Please have a
9 seat.

10 Good morning, welcome back. Thank
11 you-all for being so timely.

12 Let's see. Where were we with the
13 witness? Were you still on direct?

14 **MR. PENEGUY:** We passed the witness,
15 Judge.

16 **THE COURT:** Passed? Thank you.
17 On cross.

18 **MR. VINAS:** Thank you, Your Honor.

19 **KEITH MCMURTRY,**
20 having been previously duly sworn, testified as follows:

21 **CROSS-EXAMINATION**

22 **Q.** **(BY MR. VINAS)** You ready?

23 **A.** Yes, sir.

24 **Q.** Okay. What was your rank when you retired?

25 **A.** Senior police officer.

1 Q. Okay. Did you have any other titles other
2 than Officer McMurtry?

3 A. Oh, investigator.

4 Q. Okay. I just want to make sure I get it
5 right.

6 A. Yes, sir.

7 Q. I don't want to call you something
8 disrespectful.

9 So, you said you had been with HPD for
10 25 years?

11 A. Yes, sir.

12 Q. Okay. You retired just last year, right?
13 About a year ago?

14 A. Yes, sir.

15 Q. All right. How long were you in the
16 homicide division?

17 A. Oh, about 18 years.

18 Q. Okay. And was all of that in the Sex
19 Crimes Unit?

20 A. Seventeen years was. The last 17 years was
21 in the Sex Crimes Unit.

22 Q. Okay. So, that first year you did homicide
23 other than sex crimes?

24 A. I assisted. I was not a primary
25 investigator. I was new to the division at that

1 time.

2 Q. Just to be clear, just because it's a
3 homicide division doesn't mean it's a murder case or
4 a manslaughter or something like that; is that
5 correct?

6 A. That's correct.

7 Q. They handle quite a few assaultive-type
8 cases. Is that fair to say?

9 A. Yes, sir. Homicide division with the
10 Houston Police Department handles everything from a
11 bar slap up to a killing.

12 Q. Okay. Yeah. And any question I ask you,
13 unless I state otherwise, we will be talking about
14 HPD. I'm not going to ask you to speculate as to
15 what any other law enforcement agency that you don't
16 have experience with would -- would do. Okay?

17 A. Okay.

18 Q. All right. And you said you -- you've
19 investigated very many sexual assault cases; is that
20 correct?

21 A. Yes, sir.

22 Q. Any estimate over the 17 years how many you
23 made?

24 A. We -- each investigator during my tenure
25 handled between 15 and 25 cases a month. So,

1 under -- to be honest, that would be approximately 20
2 cases a month --

3 Q. Okay.

4 A. -- for 17 years. I will let somebody else
5 do the math on that one.

6 Q. So, that's, what, 200-ish a year times 17
7 years. So, what's that, 3800?

8 A. Yes, sir.

9 Q. Okay. So, many, many, like you say?

10 A. Many.

11 Q. Okay. Did you ever -- of those few
12 thousand cases that you investigated, did you ever
13 get a -- assigned to a case and make a scene earlier
14 in the case than you did in this instance?

15 A. Probably.

16 Q. Okay. I mean, like you pull up on the
17 scene that day?

18 A. Once.

19 Q. Okay. Who normally handles the
20 investigation, if there is any investigation, in a
21 sex -- in a sexual assault case before it gets to
22 someone in your position, a sex crimes investigator?

23 A. The patrol officers.

24 Q. Okay. And is the investigation solely up
25 to them?

1 **A.** It can be. In most instances, yes, sir.

2 **Q.** When did HPD start the IFR unit?

3 **A.** Oh, I don't know.

4 **Q.** Okay. I'm sorry?

5 **A.** I don't know.

6 **Q.** The IFR unit is the immediate --
7 intermediate first response; is that correct?

8 **A.** Yes, sir.

9 **Q.** And those are guys that had been like
10 specialized divisions like yourself in homicide or
11 maybe robbery or something like that and HPD at one
12 point. I think they are still doing this. It took
13 them out of the specialized division and assigned
14 them to patrol so that you had someone with vast
15 investigative experience assisting patrol; is that
16 correct?

17 **A.** I'm not real comfortable in talking about
18 IFR because I don't know -- I never had exposure to
19 them.

20 **Q.** Okay.

21 **A.** I know of them, and that's it.

22 **Q.** So, you never had a case where it went from
23 patrol with the assistance of IFR; and then you
24 got -- you got on it?

25 **A.** I don't think so.

1 Q. Okay. All right. But you have -- you have
2 investigated scenes in probably every one of those
3 cases you investigated; is that correct?

4 A. To -- to some extent, yes, sir.

5 Q. Are there ever any cases where you don't go
6 out to the scene if it's possible for you to go out
7 to the scene?

8 A. Yes, sir. The vast majority of cases, I
9 did not -- we do not.

10 Q. Okay. All right. Just rely on --

11 A. Excuse me.

12 Q. Just rely on the patrol officer?

13 A. Very often, yes, sir.

14 Q. Okay. But in this instance, you chose to
15 go out to the scene yourself?

16 A. Yes, sir. This one an exception.

17 Q. And before you had gone to the scene --
18 let's say this happened -- this -- HPD got the call
19 June 11, 2008; is that correct?

20 A. Yes, sir.

21 Q. I think that was a Tuesday. I think that
22 is a Tuesday or Wednesday?

23 A. June 11, 2008.

24 Q. Right. You were assigned to the case
25 Thursday, June 12, 2008?

1 **A.** That's correct.

2 **Q.** And that was when your initial
3 investigation started. You read Officer Chillis'
4 report; is that correct?

5 **A.** The -- repeat the last portion, please.

6 **Q.** On this date, June 11, 2008, is when you
7 started your investigation. And I believe one of the
8 first things, if not the first thing, you did was to
9 read Officer Chillis' report; is that correct?

10 **A.** That's correct.

11 **Q.** And then you attempted to get in touch with
12 Jocelyn Batiz?

13 **A.** Yes, sir.

14 **Q.** Were you unsuccessful on that day, on
15 June 12th?

16 **A.** I believe I spoke with her late in the
17 afternoon on the 12th.

18 **Q.** And for your first attempt, I think you
19 might have left a message or something; and she
20 called you back at some point?

21 **A.** That's correct.

22 **Q.** Okay. And I believe you also spoke to
23 Denise Thompson on the 12th?

24 **A.** Yes, sir.

25 **Q.** And you spoke to her brother Matt; is that

1 correct?

2 **A.** Yes, sir.

3 **Q.** And it was the next day on the 13th that
4 you went to Jocelyn Batiz' house. And then you;
5 Jocelyn; Denise; and Matt, I believe, went to the
6 scene on Wilmington?

7 **A.** I believe that's correct, yes, sir.

8 **Q.** Now, you said in -- in the direct
9 examination that after y'all left the scene, that you
10 walked back, I believe -- or you walked to the scene,
11 you said -- I believe on direct examination you said
12 you walked to the scene -- you went to Jocelyn's
13 house and then you walked to the scene.

14 **A.** At one point we did walk --

15 **Q.** Okay.

16 **A.** -- from my car to the scene on Wilmington.

17 **Q.** Okay. Do you remember how Denise and Matt
18 met up with you then? Did you meet with them at
19 Jocelyn's house; or did you and Jocelyn go over to
20 the apartments, the Wilmington Apartments?

21 **A.** It was at the apartment complex.

22 **Q.** Okay.

23 **A.** Which is at the end of Wilmington -- excuse
24 me -- and across a pedestrian bridge.

25 **Q.** Okay.

1 **A.** And I -- that was a long time ago, and I
2 haven't been back there since. So, I'm not really
3 familiar with that specific location. But, yeah, I
4 do recall meeting them at an apartment or talking
5 there at the apartment complex, walking across the
6 pedestrian bridge and down Wilmington.

7 **Q.** Okay. While we're talking about -- about
8 the apartment complex, how many units would you say
9 the apartment complex had, just rough estimate?

10 **A.** I'm not comfortable in guessing that.

11 **Q.** Okay. You think a hundred or less?

12 **A.** I don't recall that.

13 **Q.** Okay. Now, at some point Ms. Batiz went --
14 on June 11, 2008, Ms. Batiz went back to the
15 Wilmington Apartments. Is that your understanding?

16 **A.** That's my understanding, yes, sir.

17 **Q.** And there is some testimony that she was --
18 she was banging on the door of -- Denise Thompson's
19 apartment door. Are you -- is that consistent with
20 the information that you received?

21 **A.** I believe that's correct.

22 **Q.** On -- on June 13th, when you went out to
23 the scene, did you knock on any neighbors' doors to
24 see if anybody had seen or heard anything?

25 **A.** I don't believe so.

1 Q. Okay. Is that something that you have done
2 in other investigations, is to go around the area and
3 see if you can find witnesses?

4 A. I have.

5 Q. And -- and that's a fairly common practice,
6 wouldn't you say?

7 A. It can be.

8 Q. And it's even got a name that we probably
9 all heard on police shows; is that correct?

10 A. I assume so.

11 Q. Canvassing the area. Is that a term you're
12 familiar with?

13 A. Yes, sir.

14 Q. Now, is that a term that we just know from
15 TV, or is that a term that y'all use sometimes?

16 A. Oh, I'd call it knocking on doors.
17 Canvassing would be fine.

18 Q. Okay. Okay. But you didn't do that in
19 this case?

20 A. No, sir.

21 Q. And to your knowledge, Officer Chillis
22 didn't do that?

23 A. To my knowledge, I can't say what Officer
24 Chillis did or not.

25 Q. Okay. And -- and knocking on doors, at

1 least in some cases, could lead to some helpful
2 evidence. Would you agree with that?

3 **A.** It can be.

4 **Q.** So, from the Wilmington Apartments you said
5 y'all went out the back gate across the foot bridge
6 and went down the road to where Ms. Batiz instructed
7 you this is where the whole sexual assault happened;
8 is that correct?

9 **A.** That's correct.

10 **Q.** When you got there, did you see the barbed
11 wire fence that was -- that separated the roadway
12 from the field?

13 **A.** Yes, sir. If I remember correctly, it was
14 not a full fence. It was a strand or two at most.

15 **Q.** Okay. Do you recall about how high off the
16 ground that lowest strand is?

17 **A.** I do not.

18 **Q.** Did Ms. Batiz tell you at that point how
19 she got under it?

20 **A.** I don't recall if she did or not.

21 **Q.** But she told you she went into that field?
22 From the road she went into that field?

23 **A.** Yes, sir.

24 **Q.** Did you look around that barbed wire at all
25 to see if there was any traces of blood or torn

1 clothing or anything like that?

2 A. Yes, sir, I'm sure I did.

3 Q. And you didn't find any?

4 A. No, sir.

5 Q. And you also said you looked around the
6 field for any other types of evidence that you might
7 be able to find?

8 A. Yes, sir.

9 Q. And I believe your testimony yesterday was
10 that you did not find anything of any forensic
11 evidentiary value; is that correct?

12 A. I did not. That's correct.

13 Q. All right. But you looked?

14 A. Yes, sir.

15 Q. How long would you say you looked?

16 A. Approximately 10 minutes. That's her
17 talking, my looking, us walking around the specific
18 site.

19 Q. Okay.

20 A. More or less.

21 Q. All right. So, you -- what specifically
22 were you looking for?

23 A. Anything that would appear to be related to
24 an assault such as this.

25 Q. At that point did you have information that

1 it was possible that the suspect wore a condom during
2 the assault?

3 **A.** Yes, sir.

4 **Q.** So, was that one of the items you were
5 looking for?

6 **A.** Yes, sir.

7 **Q.** And also a corresponding wrapper; is that
8 correct?

9 **A.** Yes, sir.

10 **Q.** And those would -- had you recovered them,
11 they could have had some pretty good evidentiary
12 value. Would you agree with that?

13 **A.** It could have been.

14 **Q.** Possible DNA?

15 **A.** Possible.

16 **Q.** Even -- even potential fingerprints on the
17 wrapper?

18 **A.** I suppose that could be a possibility.

19 **Q.** Okay. And obviously those would be helpful
20 if we had them to at least test to see if that
21 evidence was there; is that correct?

22 **A.** It could.

23 **Q.** And you were also aware at that time that
24 Officer Chillis had looked around the field; is that
25 correct?

1 **A.** I believe he did.

2 **Q.** She.

3 **A.** I'm sorry?

4 **Q.** She.

5 **A.** She?

6 **Q.** Yes.

7 **A.** Okay. I believe she did.

8 **Q.** I take it you never met Officer Chillis?

9 **A.** I have not.

10 **Q.** Okay. And so, you went around, I guess,
11 looking for evidence that she could have missed the
12 first time she looked?

13 **A.** Yes, sir.

14 **Q.** Okay. And, I mean, that's just -- that's
15 common practice, right?

16 **A.** It -- it -- well -- for me it was.

17 **Q.** Okay. And that's a careful thing to do,
18 kind of the two pairs of eyes are better than one?

19 **A.** Yes, sir.

20 **Q.** Now, I know you didn't -- got the case
21 assigned to you on June 12, 2008, and you talked to
22 some people. You went to the scene on the 13th. Is
23 that because they were not available on the 12th to
24 go out with you?

25 **A.** I don't remember.

1 **Q.** Okay. But as you stated earlier, you
2 never -- never met Officer Chillis, correct?

3 **A.** To my knowledge, I have not.

4 **Q.** Certainly don't remember meeting her?

5 **A.** Excuse me. No.

6 **Q.** And didn't meet her in connection with this
7 case?

8 **A.** I'm sorry?

9 **Q.** You didn't meet her in connection with this
10 case?

11 **A.** No.

12 **Q.** What hours did you work on June 11, 2008?
13 What shift were you?

14 **A.** Monday through Friday, 8:00 a.m. to
15 4:00 p.m.

16 **Q.** Okay. So, pretty standard day shift for a
17 sex crimes investigator?

18 **A.** Yes, sir.

19 **Q.** And there -- someone's on duty 24 hours; is
20 that correct?

21 **A.** At least by phone, yes.

22 **Q.** Either on call or actually down at the --
23 at 1200 Travis?

24 **A.** Yes, sir.

25 **Q.** I pause right there. You mentioned that

1 yesterday and you just mentioned 1200 Travis. What
2 is that building?

3 **A.** That is the headquarters building for the
4 Houston Police Department.

5 **Q.** Okay. So -- and that's where your office
6 is?

7 **A.** That's where it was.

8 **Q.** I'm sorry. At the time that's where it
9 was?

10 **A.** Yes, sir.

11 **Q.** And I guess your office is still there,
12 just don't belong to you anymore?

13 **A.** I -- I assume so.

14 **Q.** Okay.

15 **A.** I don't know.

16 **Q.** But that's where you read the report; is
17 that correct?

18 **A.** Yes, sir.

19 **Q.** What -- about what time of the day -- and,
20 I mean, I know you probably weren't looking at your
21 watch. It may be in your supplement.

22 What time of the day did you get
23 assigned this case? Do you remember?

24 **A.** That would have been the morning,
25 approximately 9:00 to 10:00 --

1 Q. Okay.

2 A. -- the following morning.

3 Q. So, before 2:00 or 3:00 in the afternoon?

4 A. Yes, sir.

5 Q. And you read Officer Chillis' report?

6 A. Yes, sir.

7 Q. You didn't call Officer Chillis to talk to
8 her?

9 A. I don't recall if I did or not.

10 Q. You didn't call dispatch to have her meet
11 you out there on that day so you could get a leg up
12 and see the scene before the witnesses became
13 available, did you?

14 A. I did not.

15 Q. Would you agree that the earlier on in the
16 investigation is probably better to find any sort of
17 evidence, if there is any?

18 A. It can be.

19 Q. And -- and you didn't go out there on your
20 own. It wasn't until Friday the 13th that you went
21 out with Ms. Batiz and Denise and Matthew Thompson;
22 is that correct?

23 A. I believe that's correct.

24 Q. When you were on the scene, did you notice
25 any nearby bus stops?

1 **A.** Nearby what?

2 **Q.** Bus stops.

3 **A.** No, I did not.

4 **Q.** Are you aware -- just because you said you
5 went back to the scene later, are you aware that
6 there are bus stops a couple of blocks down on
7 Wilmington and Cullen and then a couple of blocks the
8 other direction on Wilmington and Reed?

9 **A.** Cullen is somewhat a major street in that
10 area. Wilmington is not. So, I wouldn't be
11 surprised if there is not some bus stops on Cullen.

12 **Q.** Okay. And likewise on Reed Road because
13 that's also a pretty big road in the area?

14 **A.** Reed is a major thoroughfare in Sunnyside.

15 **Q.** All right. So, you didn't go over to the
16 bus stops to see if there was anybody that
17 potentially was riding the bus on Wednesday and back
18 again on Friday?

19 **A.** I don't -- I don't recall if I did.

20 **Q.** But if there was somebody at the bus stop
21 who had seen something, that potentially could have
22 been useful?

23 **A.** It could have been.

24 **MR. VINAS:** May I have just a moment,
25 Judge?

1 **THE COURT:** You may.

2 **(Brief pause)**

3 **Q.** **(BY MR. VINAS)** Yesterday you testified that
4 on that day after you left the scene, you requested
5 that the -- the DNA rape kit be tested; is that
6 correct?

7 **A.** Yes, sir.

8 **Q.** Okay. Do you know when it actually was
9 tested?

10 **A.** Oh, I do not.

11 **Q.** Now, you testified yesterday that you did
12 go around to the local businesses to see if they had
13 any video surveillance?

14 **A.** I went to several, yes, sir.

15 **Q.** Fruitless?

16 **A.** It was.

17 **Q.** Okay. I mean, you had to try.

18 **A.** I did.

19 **Q.** So, did you check with Metro to see if any
20 of their buses in that area had video to see if
21 somebody got on or off around the time of the sexual
22 assault?

23 **A.** Oh, at that time Metro buses -- to the best
24 of my recollection, at that time Metro buses didn't
25 have equipment like that.

1 Q. Okay.

2 A. They had cameras for the safety of their
3 drivers --

4 Q. Okay.

5 A. -- only.

6 Q. Right.

7 A. So, no, I would not have.

8 Q. But the camera -- the video, when you look
9 at that from the camera, shows the driver and the
10 area right around the driver?

11 A. Yes, sir.

12 Q. So, you can see if somebody's near the
13 driver's vicinity; is that correct?

14 A. I could only speak from experience. I have
15 had a couple of cases involving Metro bus drivers
16 from years ago.

17 Q. Sure.

18 A. And the footage that I have ever seen just
19 shows the driver herself or himself right there.

20 Q. Okay.

21 A. And never really anything fruitful of the
22 surrounding area.

23 Q. And I don't mean -- I don't -- I don't mean
24 outside the bus or even deep back into the bus
25 itself, but just right there around the driver kind

1 of -- I mean, I'd say compartment; but they are not
2 really compartments -- just in the immediate
3 vicinity?

4 **A.** That, I don't -- I don't know.

5 **Q.** Okay. All right. Were you able to
6 interview Denise and Matthew Thompson's mother in
7 connection with this case?

8 **A.** I -- I believe I spoke with her by phone.
9 I think.

10 **Q.** And was she -- did she see -- was she
11 present when Ms. Batiz was at their home? Was
12 Ms. Thompson, Denise and Matt's mother, at the
13 apartment on June 11, 2008, at the same time Jocelyn
14 was?

15 **A.** I don't remember that.

16 **Q.** Okay. And do you remember whether or not
17 as Jocelyn was leaving Ms. Thompson passed her on the
18 road?

19 **A.** Passed her?

20 **Q.** Passed Jocelyn. As Jocelyn was leaving,
21 she drove to the grocery store. Did you ever get
22 that information?

23 **A.** I don't remember that.

24 **Q.** Okay. All right. Fair enough.

25 **MR. VINAS:** I'll pass the witness,

1 Your Honor.

2 **THE COURT:** Thank you.

3 **MR. PENEGUY:** State has no further
4 questions from this witness.

5 **THE COURT:** Thank you.

6 May this witness be excused, or do you
7 need him on call?

8 **MR. PENEGUY:** Excused.

9 **MR. VINAS:** He may go enjoy his
10 retirement, Judge.

11 **THE COURT:** Thank you. You're
12 released from your subpoena.

13 **THE WITNESS:** Thank you.

14 **THE COURT:** Thank you, sir.

15 **(Witness released)**

16 **THE COURT:** Does the State have an
17 additional witness?

18 **MS. PRIMM:** The State calls Officer
19 Holley Whillock.

20 **MR. GRAHAM:** Judge, may we approach?

21 **THE COURT:** Sure.

22 **(At the Bench)**

23 **MR. GRAHAM:** It might be best to just
24 take a very brief break to ask the jury to step out.
25 I just -- I want to address an issue that we did in

1 our Motion in Limine with the Court and just make
2 sure that we're clear with this witness.

3 **THE COURT:** What issue is that?

4 **MR. GRAHAM:** Just making sure that
5 there is no mention of the database or CODIS or
6 anything like that.

7 **MS. PRIMM:** I just went out in the
8 hallway and spoke to her.

9 **MR. GRAHAM:** Okay.

10 **MS. PRIMM:** And I was going to ask
11 that we be able to kind of lead her.

12 **THE COURT:** Ask what?

13 **MS. PRIMM:** Just want to address that
14 issue with the witness, that we addressed it with the
15 witness in the hallway. And I was going to ask the
16 Defense to let us lead her through that so we don't
17 have any mistakes.

18 **MR. GRAHAM:** And that was our
19 agreement. We're certainly on board with that.

20 **MR. PENEGUY:** For purposes of the
21 record, just the question that I'm going to ask is:
22 In 2013, did you develop an additional lead in
23 regards to Jocelyn Batiz' case?

24 **MR. GRAHAM:** That I think is the
25 proper way to do it.

1 **MR. PENEGUY:** Yes.

2 **MR. VINAS:** All right. Thank you,
3 Judge.

4 *(End of Bench Discussion)*

5 **MR. PENEGUY:** This witness has not
6 been sworn.

7 **THE WITNESS:** Yes.

8 **THE COURT:** Thank you.

9 Will you face the jury. You can sit
10 on the stand, whichever you prefer. And raise your
11 right hand.

12 *(Witness Duly Sworn)*

13 **THE COURT:** Thank you.

14 **MR. PENEGUY:** May I proceed?

15 **THE COURT:** Yes, sir.

16 **HOLLEY WHILLOCK,**
17 having been first duly sworn, testified as follows:

18 **DIRECT EXAMINATION**

19 **Q.** **(BY MR. PENEGUY)** Please introduce yourself
20 to the jury.

21 **A.** Yes. My name is Holley Whillock. I'm an
22 officer with the Houston Police Department.

23 **Q.** How long have you worked for the Houston
24 Police Department?

25 **A.** I'm going on a little over 16 years.

1 **Q.** And can you tell us where you're currently
2 assigned?

3 **A.** I'm currently assigned to the child sexual
4 abuse unit of our special victims division.

5 **Q.** And how long have you been assigned to that
6 unit?

7 **A.** Be 11 years next month.

8 **Q.** Can you kind of tell us in regards to that
9 what are your day-in-and-day-out responsibilities?

10 **A.** I have held a couple of different, I guess,
11 jobs during my course of tenure in this position. I
12 have investigated current cases regarding child
13 sexual abuse. I have investigated cold cases. I
14 have done various projects related to the -- these
15 types of investigations as well as training and
16 teaching at the academy and outside locations.

17 **Q.** And just for purposes of the record, are
18 you a certified peace officer in the state of Texas?

19 **A.** Yes, I am.

20 **Q.** When did you become licensed?

21 **A.** March of 2000.

22 **Q.** Okay. And in regards to what you do with
23 training, can you tell the jury a little bit about
24 what you train new coming officers about?

25 **A.** I have done training at the academy -- at

1 the police academy with cadets that are just entering
2 the police force as far as patrol, response to how to
3 take sexual assault reports, as far as specifically
4 to the unit.

5 When we have new investigators
6 assigned to our unit, I handle a lot of training as
7 far as the basics. Every case is unique, but there
8 are certain things that you hand -- deal with a lot
9 as far as the district attorney's office, various
10 things in the investigations.

11 **Q.** Based upon your experience in child sexual
12 assault cases and special victim type cases, have you
13 participated in investigations on few or many
14 occasions?

15 **A.** Own many occasions.

16 **Q.** And have you participated in investigations
17 of individuals who commit sexual assault?

18 **A.** Yes.

19 **Q.** On few or on many occasions?

20 **A.** Many occasions.

21 **Q.** I want to talk to you a little bit about
22 some of the projects that you had worked on for the
23 Houston Police Department back in the years 2010 and
24 2011. And, specifically, you had told the jury that
25 you had been working with -- on some cold cases.

1 What is a cold case?

2 **A.** A cold case is one that's easier to define.
3 A current case is a case that we receive a report
4 like in 2015. It's happened within a recent time
5 period; and so, we're notified of it. A cold case
6 would be one that was maybe reported to us a couple
7 of years ago, even up to 20 years ago, that we have
8 reopened due to maybe a victim recontacting us, maybe
9 new evidence coming forward; and then we proceed from
10 there.

11 **Q.** Back in 2010, 2011, was there issues going
12 on with rape kits in the Houston Police Department?

13 **A.** Yes, there were.

14 **Q.** Okay. Kind of just give us a quick -- was
15 there a backlog of rape kits?

16 **A.** Yes. One was identified during that --
17 around that time period.

18 **Q.** Was there -- was that backlog -- did that
19 mean that some of the older rape kits that had
20 existed had not been properly tested?

21 **A.** Yes.

22 **Q.** Not -- not that it hasn't been properly
23 tested, just hadn't been tested at all. Is that
24 fair?

25 **A.** Different variation of that, yes.

1 **Q.** Okay. In regards to -- to that time
2 period, did there become a push to get some of these
3 old kits tested?

4 **A.** Yes, there was.

5 **Q.** And when did that kind of begin?

6 **A.** I'm not sure of all the definite, you know,
7 behind the scenes in other divisions and stuff like
8 that in the department. But around 2010, 2011, a
9 count was done in our property room and our crime
10 lab; and then there were things that were, I guess,
11 put in motion that these old kits started to be
12 retested.

13 **Q.** And did you participate in some of that
14 process for the Houston Police Department?

15 **A.** Yes, I did.

16 **Q.** When did the -- you now, we talked about
17 when there was starting to become a push to get
18 organized. When did some of those old kits actually
19 start getting tested?

20 **A.** I believe as early as 2009. But 2010, I
21 think, is when it really through the crime lab
22 started to develop.

23 **Q.** Okay. Were you -- did you participate in
24 the process with the city to get more money in
25 funding for this testing?

1 **A.** I was part of the project that during the
2 course of that, money was, I guess, granted to the
3 project, yes.

4 **Q.** Did that testing continue through 2013 and
5 2014?

6 **A.** Yes, even through this -- into this year.

7 **Q.** In 2013, did you become involved in a case
8 involving an individual, a complainant, named Jocelyn
9 Batiz?

10 **A.** Yes, I did.

11 **Q.** And do you -- did you have an opportunity
12 to review the original offense report in that case?

13 **A.** Yes.

14 **Q.** And can you tell us when that case
15 originated?

16 **A.** I believe it was 2008.

17 **Q.** When you became involved in that
18 investigation, were you involved in it in 2008, 2009?

19 **A.** No, I was not.

20 **Q.** In your review of that case, did you learn
21 that there had been a rape kit?

22 **A.** Yes.

23 **Q.** And based upon your training and
24 experience, is it possible that rape kits sometimes
25 contain DNA evidence?

1 **A.** Yes.

2 **Q.** Did you request the evidence in Jocelyn's
3 case get processed?

4 **A.** I think it was processed. I don't remember
5 the exact person that made the official request
6 through our crime lab, but I know it was requested.

7 **Q.** And were you -- did you become involved in
8 the investigation at that point?

9 **A.** Yes.

10 **Q.** In 2013, did you and officers in your
11 division develop additional leads in regards to the
12 case involving Jocelyn Batiz?

13 **A.** Yes.

14 **Q.** And based upon that, did you participate in
15 some of the process to continue to pick up that
16 investigation?

17 **A.** Yes, I did.

18 **Q.** At some point in time in your
19 investigation, did you feel that you had sufficient
20 evidence to obtain a search warrant?

21 **A.** Yes, I did.

22 **Q.** And based upon your knowledge, what type of
23 information did you contain in that search warrant?

24 **A.** The -- there was evidence developed as far
25 as --

1 **Q.** Did you draft and obtain a probable cause
2 warrant?

3 **A.** Yes, I did.

4 **MR. PENEГУY:** Judge, may I approach
5 the witness?

6 **THE COURT:** You may.

7 **Q.** **(BY MR. PENEГУY)** For purposes of the
8 record, I'm handing you what's been marked as State's
9 Exhibit No. 42. And I'm going to ask that you review
10 that document.

11 **A.** (Witness complies.) Okay.

12 **Q.** Are you familiar with what's contained in
13 State's Exhibit 42?

14 **A.** Yes.

15 **Q.** And is that a document that you
16 participated in and assisted in drafting?

17 **A.** Yes.

18 **Q.** In that document, did you list a probable
19 cause affidavit for a search warrant?

20 **A.** Yes, I did.

21 **Q.** And what did you do once you had that draft
22 or document drafted?

23 **A.** Once it was drafted, it was brought to the
24 courts to be signed by the Judge and to be executed.

25 **Q.** Okay. And in what county did you bring

1 that document to be executed?

2 **A.** In Harris County.

3 **Q.** And to what judge did you bring it?

4 **A.** Judge Krockner.

5 **Q.** Did she have a -- did Judge Krockner have an
6 opportunity to review the warrant?

7 **A.** Yes, she did.

8 **Q.** Was it signed?

9 **A.** Yes, it was.

10 **Q.** Can you tell us the date it was signed?

11 **A.** It was March 11th, this year.

12 **Q.** Okay. State's 42, is that that document?

13 **A.** Yes.

14 **MR. PENEGUY:** Judge, at this
15 particular time, we offer State's Exhibit No. 42, the
16 search warrant, the top two pages marked State's
17 Exhibit No. 42.

18 **MR. VINAS:** May we approach, Judge?

19 **THE COURT:** You may.

20 **(At the Bench)**

21 **MR. VINAS:** Thank you. Your Honor, we
22 object that the warrant is hearsay. It also has --
23 as Officer Whillock testified, you signed that
24 warrant on March 11, 2015, which essentially makes
25 you a witness to this case. So, since it's an

1 out-of-court statement made by you, it's not only
2 hearsay, but really is putting evidence that you are
3 giving to the jury. So, it makes you a witness.

4 And, also, it's essentially you
5 commenting on the weight of the evidence that there
6 was at least probable cause in this case. So, those
7 are our objections to the warrant coming into
8 evidence.

9 **THE COURT:** I've never seen anyone try
10 and actually offer the warrant. What would be the
11 reason for doing that since the jury knows she had a
12 warrant?

13 **MR. PENEGUY:** Judge, we have offered
14 the search warrant on previous cases. We're not
15 offering the affidavit, but just the warrant to say
16 that we had probable cause when we executed the
17 buccal swabs through this officer of the defendant.

18 **THE COURT:** I'm not worried about my
19 being a witness. I mean, that's what Judges are here
20 for, to review warrants. But I think it would be a
21 safer course of action -- she has already testified
22 she had a valid warrant. I don't know that there is
23 any reason to put it in evidence. What would be the
24 probative value?

25 **MR. PENEGUY:** Judge, I think, just

1 basically, the probative value for us would
2 essentially have been that we had legal cause. The
3 Judge can review we had legal cause, but --

4 **MR. VINAS:** Judge, it's --

5 **MR. PENEGUY:** I have always --
6 sorry -- always offered the warrant, not the
7 affidavit in search warrants from a drug case through
8 to a capital murder whenever I obtained DNA evidence
9 from a case whenever we have searched a home.

10 **THE COURT:** Let me see what all is in
11 there.

12 **MR. PENEGUY:** Do you want me to get a
13 case on point?

14 **THE COURT:** Sorry?

15 **MR. PENEGUY:** This has a couple of
16 cases listed on point, predicated manual for search
17 warrants.

18 *(Brief pause)*

19 **THE COURT:** Well, if jurors are
20 instructed that they may not consider an indictment
21 as any evidence, how could they consider a warrant in
22 a probable cause finding by a Judge as any evidence?

23 **MR. PENEGUY:** They are not to consider
24 it as evidence at all, but rather that just that we
25 had leave -- we had the appropriate legal action in

1 order to be able to conduct a search.

2 **MR. VINAS:** Judge --

3 **THE COURT:** Thank you. The Defense
4 objection is sustained.

5 **(End of Bench Discussion)**

6 **THE COURT:** Thank you.

7 **MR. PENEGUY:** May we approach briefly?

8 **(At the Bench)**

9 **MR. PENEGUY:** Just for purposes of the
10 record, is the State going to be allowed to conduct
11 inquiry that she obtained the appropriate legal
12 documentation?

13 **THE COURT:** I'm sorry. Is the State
14 allowed what?

15 **MR. PENEGUY:** To inquire from the
16 witness prior to the buccal swab that we have the
17 appropriate legal documentation to conduct the
18 search?

19 **THE COURT:** Well, of course. You're
20 allowed to go into all that.

21 **MR. VINAS:** I think they have already
22 done that, actually.

23 **THE COURT:** Actually, I think you have
24 done it; but if you want to develop it a little more,
25 you certainly may.

1 **MR. PENEGUY:** Thank you, Judge.

2 **THE COURT:** You just don't want to get
3 into a position where I have to give an instruction
4 for them not to consider that. Okay.

5 **MR. VINAS:** Thank you, Judge.

6 **(End of Bench Discussion)**

7 **Q.** **(BY MR. PENEGUY)** State's 42 was a document.
8 Did you obtain the appropriate legal action to
9 conduct a search for DNA of an individual?

10 **A.** Yes, I did.

11 **Q.** Okay. And what is the name of that
12 individual?

13 **A.** Herman Whitfield.

14 **Q.** Okay. The document that you obtained, was
15 it signed by the Court?

16 **A.** Yes, it was.

17 **Q.** Was it filed in the district clerk's office
18 of Harris County?

19 **A.** Yes, it was.

20 **Q.** With that document, was it your
21 understanding that you had the legal authority to
22 obtain a sample of Hermann Whitfield's DNA?

23 **A.** Yes, I did.

24 **Q.** After obtaining the signature on the search
25 warrant, what did you do next?

1 **A.** We executed the search warrant.

2 **Q.** Could you tell the jury how you obtained a
3 sample of an individual's DNA?

4 **A.** How we do it is it -- we use what is called
5 buccal swabs, like an extra large Q-tip. We use it.
6 We insert it in a person's mouth. We swab it around
7 to get appropriately wet. And then once that's done,
8 we allow it to dry before tagged and putting it in an
9 envelope to separate it and keep it clean from any
10 contamination; and we take it to our property room.

11 **Q.** Is the swab that you used, are they
12 sterile?

13 **A.** Yes.

14 **Q.** Okay. And have you been trained on how to
15 conduct a buccal swab in order to obtain an
16 appropriate sample of DNA?

17 **A.** Yes.

18 **Q.** And is this something you have done on few
19 or many occasions?

20 **A.** On many occasions.

21 **MR. PENEGUY:** Judge, may I approach
22 the witness?

23 **THE COURT:** You may.

24 **Q.** **(BY MR. PENEGUY)** Now showing you what's
25 been marked as State's Exhibit No. 43.

1 **A.** Okay.

2 **Q.** It's an envelope. I'm asking that you
3 review the contents of that envelope?

4 **A.** Okay. Wait. Two envelopes.

5 **Q.** Okay. Are you familiar with the documents
6 and the envelopes that are State's Exhibit No. 43?

7 **A.** Yes.

8 **Q.** Okay. And it looks they have been handled
9 by the lab; but does it contain all of your pertinent
10 information, how you tag?

11 **A.** Yes. And my seal from when I tag it into
12 the property room is unbroken.

13 **MR. PENEGUY:** Your Honor, at this time
14 we offer State's Exhibit No. 43. Tender to opposing
15 counsel.

16 **MR. VINAS:** Judge, may I take the
17 witness on brief voir dire?

18 **THE COURT:** Granted.

19 **MR. VINAS:** Thank you, Judge.

20 May I approach the witness?

21 **THE COURT:** You may. Okay.

22 **VOIR DIRE EXAMINATION**

23 **Q.** **(BY MR. VINAS)** Officer, we have got State's
24 Exhibit 43, which is the envelope?

25 **A.** Uh-huh (affirmative.) Yes.

1 Q. With the evidence tape.

2 And then are these your initials
3 across the tape right there?

4 A. Yes. H.A.W., yes.

5 Q. Okay. And then we have these two just
6 plain white envelopes, look like mailing envelopes --

7 A. Yes.

8 Q. -- with HPD's logo and address on them?

9 A. Yes.

10 Q. That came out of State's Exhibit 43?

11 A. Correct.

12 Q. Is -- you testified that the initials
13 H.A.W. across the evidence tape of State's 43 are
14 your initials, correct?

15 A. Yes.

16 Q. Over here on the side of State's
17 Exhibit 43, we have the words RECD, abbreviation for
18 received, March 17, 2015?

19 A. Uh-huh (affirmative.)

20 Q. Then R.S?

21 A. Uh-huh (affirmative.)

22 Q. Is that you?

23 A. No.

24 Q. Do you know who this person is?

25 A. No.

1 **Q.** Okay. And then on the back of State's
2 Exhibit 43, we have initials B.C. and then March 26,
3 2015. And then those same initials across the
4 evidence tape on the two envelopes that came out of
5 State's Exhibit 43, B.C., March 26, 2015.

6 Is that person you?

7 **A.** No.

8 **Q.** Do you know who that person is?

9 **A.** No.

10 **Q.** Okay. Is it safe to say that somebody has
11 done something to State's Exhibit 43 between the time
12 that you last saw it back in March, March 11, 2015,
13 and here in court today?

14 **A.** Oh, yes.

15 **Q.** And other than taking Mr. Peneguy's word
16 that the swabs are still in the envelopes, you
17 haven't opened them --

18 **A.** No.

19 **Q.** -- to verify?

20 **A.** No.

21 **Q.** So, you don't know until we open what's in
22 the envelopes?

23 **A.** Correct.

24 **MR. VINAS:** Judge, we object to
25 State's 43. Well, actually, Matt, can we approach?

1 **THE COURT:** Well, do you still wish to
2 offer 43 at this time?

3 **THE WITNESS:** Yes, Judge.

4 **MR. VINAS:** But we have a further
5 discussion on State's 43.

6 **THE COURT:** Okay.

7 **(At the Bench)**

8 **MR. VINAS:** Our objection to
9 State's 43 is later that Officer Whillock did not
10 know what's in the envelopes because she hasn't taken
11 them out and looked at them. And so, she doesn't
12 know really what's in there. Two, it's not in the
13 same -- or she can't testify that is in the same or
14 substantially the same condition as it was the last
15 time she saw it. Somebody else has done something to
16 it. We have also got a chain of custody issue at
17 this point.

18 And then the last one that I think
19 Matt will agree with on this, previously on the boxed
20 evidence that the State offered, they have the tags
21 with all of the hearsay on it. We have the same
22 issue with the back of the envelope in State's
23 Exhibit 43. It's got many identifiers. It's all
24 hearsay. In fact, it's got a different complainant's
25 name on it and --

1 **MR. PENEGUY:** I have approached --

2 **MR. VINAS:** -- the charge of
3 aggravated sexual assault of a child. This is one of
4 the extraneous offenses that this officer is lead
5 investigator on, which was --

6 **MR. PENEGUY:** I told Joe -- I told Joe
7 I would be happy to redact that portion, what's on
8 the outside of the envelope; but it's necessary
9 for --

10 **THE COURT:** Supposing whoever needed
11 that for evidence down the road, it seems like
12 there -- are there swabs in there?

13 **MR. PENEGUY:** Yes, Judge.

14 **THE COURT:** Seems like it would be
15 better to remove them and put them in a plastic bag
16 or something rather than redacting it, but that's up
17 to you. But what is the harm of waiting to admit it
18 when the lab person testifies?

19 **MR. PENEGUY:** Judge --

20 **THE COURT:** She can testify how it's
21 received into the lab.

22 **MR. PENEGUY:** We can certainly do
23 that. With regards to that, it would go to the
24 weight, not the admissibility of it. I think that we
25 don't always call every single individual to prove

1 receipt in the property room for the chain of custody
2 of it. We have the analyst prepared to come in.

3 **THE COURT:** I'll go ahead and let it
4 in now, but -- circumstantially it's all been
5 identified, but will you be sure and link all that
6 together when you get the lab people here?

7 **MR. VINAS:** Just -- you said you were
8 going to admit the evidence at this point. Is that
9 unredacted, or does the State need to redact it and
10 take it out of the envelope?

11 **THE COURT:** Yes. If you would like, I
12 would just tell the jury that -- you sure you don't
13 need that for the lab?

14 **MR. PENEGUY:** Judge, what I will do on
15 the lunch break, with the Court's permission, is I
16 will create a xeroxed copy of the front of the
17 document that doesn't contain any hearsay evidence,
18 that just contained --

19 **MR. VINAS:** That's fine.

20 **MR. PENEGUY:** -- the evidence and
21 prepare a new evidence bag and clear it up on the
22 record how we are labeling so that we will still
23 retain the envelope in the manner it needs to be
24 preserved.

25 **THE COURT:** Okay. So, why don't I

1 tell the jury --

2 **MR. VINAS:** Actually, Judge, I'm not
3 sure we -- I think Matt is right. I don't think --

4 **THE COURT:** I can't hear you.

5 **MR. VINAS:** Sorry. I don't think we
6 need to tell them anything at this point. Just after
7 he does that, we will tell them State's 43 has been
8 substituted.

9 **THE COURT:** So, are you withdrawing it
10 at this time until that's done, or are you asking me
11 to go ahead and let it in?

12 **MR. PENEGUY:** I'd ask that you go
13 ahead and let it in. I won't publish it until we
14 have --

15 **THE COURT:** I usually just tell the
16 jury that a particular exhibit contains hearsay and
17 by agreement of the parties, that will be redacted
18 to --

19 **MR. PENEGUY:** Okay.

20 **THE COURT:** So they don't think it's
21 been tampered with.

22 **MR. VINAS:** Okay. Thank you, Judge.

23 **THE COURT:** Okay.

24 **(End of Bench Discussion)**

25 **THE COURT:** Members of the jury,

1 State's Exhibit 43 has been admitted into evidence.
2 However, it contains hearsay. It has writing on it.
3 So, by agreement of the parties, that information
4 will be redacted or crossed out. So, that doesn't
5 mean the evidence has been tampered with, that's
6 something that's done to follow the Rules of
7 Evidence. Thank you.

8 So, with that condition added, 43 is
9 admitted.

10 **MR. PENEGUY:** Judge, may I approach
11 the witness?

12 **THE COURT:** You may.

13 **DIRECT EXAMINATION (CONTINUED)**

14 **Q.** (**BY MR. PENEGUY**) Officer Whillock, for
15 purposes of clarification, you stated that State's 43
16 contains two white envelopes. Can you tell us what
17 the difference is between the two white envelopes?

18 **A.** At the time, one was marked from the right
19 side of the mouth, right side swabs; and one is
20 marked left side swabs.

21 **Q.** Okay. And just for purposes of the record
22 and for clarification, State's 43, are these the
23 buccal swabs that you took in this case?

24 **A.** It's -- yes.

25 **Q.** And are those buccal swabs that you took

1 pursuant to a search warrant?

2 **A.** Yes.

3 **Q.** And are these buccal swabs -- what
4 individual were they taken from?

5 **A.** Herman Whitfield.

6 **Q.** And do you recognize Herman Whitfield in
7 the courtroom today?

8 **A.** Yes.

9 **Q.** Would you please point to him and identify
10 him by an article of clothing?

11 **A.** The gentleman over there in the black suit
12 with the striped tie -- yellow striped tie
13 (indicating.)

14 **MR. PENEGUY:** Your Honor, may the
15 record reflect the officer has identified the
16 defendant, Herman Whitfield?

17 **THE COURT:** The record will show that,
18 please, Mrs. Lee.

19 **(Defendant Identified)**

20 **Q.** **(BY MR. PENEGUY)** And so, State's 43, are
21 those swabs that you took from the defendant in this
22 case?

23 **A.** Yes.

24 **Q.** After taking those swabs, what did you
25 do -- where did you take the swabs?

1 **A.** There was a brief meeting with ADA Primm
2 here in this building; and then after we were done
3 with that, I took them to our property room.

4 **Q.** Okay. And where is your property room
5 located?

6 **A.** At 1301 Washington.

7 **Q.** Okay. And is that the location where you
8 tag evidence?

9 **A.** Yes.

10 **Q.** Are there procedures that you have to
11 follow in order to maintain the integrity of the
12 items that you're tagging?

13 **A.** Yes.

14 **Q.** Did you follow those procedures in this
15 case?

16 **A.** Yes, I did.

17 **Q.** In regards to the case, the investigation
18 into Jocelyn Batiz' case later in 2013, do you have
19 an opportunity to meet with Ms. Batiz?

20 **A.** I have never met with Ms. Batiz, no.

21 **Q.** Okay.

22 **MR. PENEGUY:** Judge, I pass the
23 witness.

24 **THE COURT:** Thank you.

25 **MR. VINAS:** May I have a brief moment,

1 Judge?

2 **THE COURT:** Yes, sir.

3 *(Brief pause)*

4 **MR. VINAS:** No questions for this
5 witness, Your Honor.

6 **THE COURT:** Thank you. Is she excused
7 for all purposes?

8 **MR. VINAS:** Yes, Your Honor.

9 **MS. PRIMM:** No, Your Honor. We're
10 going to have her remain on call.

11 **THE COURT:** Thank you. Then you're
12 free to go today subject to recall.

13 **THE WITNESS:** Okay. Do I need to
14 pack --

15 **MR. PENEGUY:** I will take care of it.

16 **THE COURT:** Okay. Thank you.

17 *(Witness released)*

18 **THE COURT:** Any other witnesses?

19 **MR. PENEGUY:** State calls Analyst
20 Lloyd Hansel.

21 **THE COURT:** Thank you.

22 **THE BAILIFF:** Your Honor, this witness
23 will need to be sworn in.

24 **THE COURT:** Thank you.

25 Good morning, sir.

1 **THE WITNESS:** Good morning.

2 **THE COURT:** Would you stop there and
3 face the jury and raise your right hand to take the
4 oath.

5 **(Witness Duly Sworn)**

6 **THE WITNESS:** Yes, ma'am.

7 **THE COURT:** Thank you.

8 **MR. PENEГУY:** May I proceed?

9 **THE COURT:** Yes, sir.

10 **LLOYD HALSELL,**
11 having been first duly sworn, testified as follows:

12 **DIRECT EXAMINATION**

13 **Q.** **(BY MR. PENEГУY)** Sir, would you introduce
14 yourself to the jury?

15 **A.** My name is Lloyd Halsell, and I'm a
16 forensic supervisor with the Houston Forensic Science
17 Center.

18 **Q.** And can you tell us where that lab is
19 located?

20 **A.** We're located at 1200 Travis here in
21 Houston, Texas.

22 **Q.** And you told us what your job title is.
23 Can you kind of tell us what being a supervisor at
24 that institute requires?

25 **A.** To be a supervisor, not only am I a DNA

1 analyst responsible for issuing DNA reports for cases
2 that we receive in, I'm also responsible for helping
3 to make sure the lab is functioning and that we have
4 everything proceeding as we need to.

5 **Q.** Can you talk to us about the training and
6 experience that you received in order to become a DNA
7 analyst?

8 **A.** Yes. I have -- my education is a
9 Bachelor's degree in microbiology from Texas State
10 University. I then obtained my Master's of Science
11 in forensic genetics from University of North Texas
12 Health Science Center. After that I started at a
13 laboratory in Nebraska and did six months of in-house
14 training before I was signed off as a DNA analyst.

15 Annually since then, I've obtained at
16 least a minimum of eight hours of continuing
17 education. As part of that training, when I moved
18 down here in 2012, I did approximately two months of
19 training to acclimate myself to the laboratory
20 procedures that were used here before I started
21 independent casework. And then I continue my
22 continuing education and training every year.

23 **Q.** Can you tell us about the lab where you
24 currently work? Is that an accredited laboratory?

25 **A.** Yes, sir.

1 **Q.** And what does it mean to be accredited?

2 **A.** So, our accreditation is currently issued
3 by FQS and the Texas Forensic Science Commission.
4 What it means to be accredited is that we have had
5 FQS, the outside agency, come and inspect our
6 laboratory, gets a set of international standards to
7 say how we are operating our laboratory. So, for
8 them to issue that accreditation means that they are
9 coming in, they are looking at our procedures, our
10 operations, our manuals, and saying that they are
11 meeting those international guidelines.

12 We also have requirements within those
13 guidelines that we do proficiency testing, meaning
14 that we have to take tests from an outside vendor
15 that -- which they know the results. We process them
16 and submit those results back to them to ensure that
17 all of our techniques and processes are correct and
18 accurate.

19 **Q.** And can you tell us -- when you're
20 getting -- or going through the process of
21 accreditation is just you pass one time, or is there
22 ongoing inspections?

23 **A.** No. They are ongoing inspections. Through
24 our current accreditation, there was an initial
25 on-site process. They had done numerous document

1 reviews before they came on site. They were on site
2 for about a week, and then every year we're required
3 to submit annual reports to them. And they may do a
4 desk audit, meaning that they look at our SOPs and
5 procedures and documents we send them; or if they
6 decide they need to, they may come back and do an
7 annual on-site visit.

8 And then after four years, they will
9 come back and do a --

10 **THE COURT:** Excuse me, sir. You're
11 just a little fast for us.

12 **THE WITNESS:** Okay.

13 **THE COURT:** And especially as you get
14 to using more scientific terms, we will need you to
15 go even a little slower than that. So, can you slow
16 down a little bit for us?

17 **THE WITNESS:** Yes, ma'am.

18 **THE COURT:** So, Mrs. Lee is just
19 working herself to death down there trying to write
20 down what you are saying.

21 **THE WITNESS:** Oh, yes, ma'am.

22 **THE COURT:** Thank you.

23 **A.** So, after four years they will come back
24 and do a full accreditation again.

25 **Q.** (**BY MR. PENEGUY**) And are there

1 continuing -- you talked a little bit about
2 proficiency testing. Is there continuing proficiency
3 testing that analysts have to pass in order to
4 maintain the lab's accreditation?

5 **A.** Yes. So, each analyst is required -- as a
6 DNA analyst, we're required to do two proficiency
7 tests every year.

8 **Q.** Are you current on all of your proficiency
9 testing?

10 **A.** Yes, sir.

11 **Q.** And is the laboratory current in its
12 accreditation proficiencies?

13 **A.** Yes, sir.

14 **Q.** Are there quality control standards to
15 maintain in the lab in order to keep your
16 accreditation?

17 **A.** Yes, sir.

18 **Q.** Does that involve equipment?

19 **A.** Yes, sir. It involves -- all of our
20 equipment has to be regularly maintained. We check
21 them, do a preventative maintenance every year. All
22 of our reagents and chemicals that come into the
23 laboratory, we quality check them before we use them
24 on casework. We also then, through our processing,
25 use controls that monitor for any potential

1 contamination of our reagents and processes.

2 **Q.** In regards to the maintaining of that
3 equipment, have you properly maintained it?

4 **A.** Yes, sir.

5 **Q.** Do the quality control measures also -- in
6 the accreditation also pass forward to the weight of
7 the laboratory the way the laboratory supports
8 evidence?

9 **A.** Could you repeat that?

10 **Q.** Accreditation, does it also require quality
11 controls for the way in which evidence is maintained
12 at the laboratory?

13 **A.** Yes, sir.

14 **Q.** Okay. And how is that?

15 **A.** We are responsible for maintaining our
16 evidence to ensure that any contamination, any
17 degradation change to that evidence does not -- we're
18 required to make sure it's secured at all times
19 within our laboratory and with individual's custody.

20 **Q.** As a DNA expert or analyst in Harris
21 County, do you perform DNA analysis and comparisons?

22 **A.** Yes, sir.

23 **Q.** During your career, have you performed many
24 analyses of items in DNA?

25 **A.** Yes, sir.

1 **Q.** In your career, have you performed DNA
2 comparisons?

3 **A.** Yes, sir.

4 **Q.** On few or on many occasions?

5 **A.** Numerous occasions.

6 **Q.** Have you testified in court before as an
7 expert in regards to DNA analysis?

8 **A.** Yes, sir.

9 **Q.** On few or on many occasions?

10 **A.** Many occasions.

11 **Q.** In regards to today, did you conduct DNA
12 analysis in regards to the Herman Whitfield case?

13 **A.** Yes, sir.

14 **Q.** And you have a stack of papers in front of
15 you. Is that part of your case file in regards to
16 the Herman Whitfield cases for the most part?

17 **A.** Yes, sir.

18 **Q.** Okay. I want to talk to you about evidence
19 in this case.

20 **MR. PENEGUY:** Judge, may I approach
21 the witness?

22 **THE COURT:** You may.

23 **Q.** **(BY MR. PENEGUY)** Showing you what's been
24 admitted into evidence as State's Exhibit No. 43.

25 **A.** Okay.

1 **Q.** In regards to our testing in this case, was
2 there a unique forensic case number that was assigned
3 to it?

4 **A.** Yes, sir.

5 **Q.** Okay. And the items that's contained in
6 State's Exhibit 43, are you familiar with those
7 items?

8 **A.** Yes, sir.

9 **Q.** Okay. There are markings on the outside of
10 those -- that envelope. Are those markings in that
11 evidence tape -- are those things that you're
12 familiar with?

13 **A.** Yes, sir.

14 **Q.** Okay. When an item comes into evidence in
15 your lab, is it -- is it checked out to your lab?

16 **A.** Yes, sir.

17 **Q.** And are there initialing and processes that
18 evidence has to go through in order to be checked out
19 as evidence to your lab?

20 **A.** Yes, sir.

21 **Q.** Okay. Was this followed in this case?

22 **A.** Yes, sir.

23 **Q.** Are there markings and initials on the
24 outside of that document that are consistent with
25 that process of checking the evidence out?

1 **A.** Yes, sir.

2 **Q.** In regards to your analysis, did you
3 perform analysis of these items in 2015?

4 **A.** Yes, sir.

5 **Q.** I want to talk to you specifically about
6 the type of testing that you did. When you receive
7 an item of evidence, what do you do with it as a DNA
8 analyst in order to be able to see if it contains
9 DNA?

10 **A.** So, our process in our lab is that whoever
11 is first assigned the case for evidentiary items is
12 to screen that evidence. What we mean by "screen" is
13 we want to potentially identify any biological
14 material that may be on a swab, an item of clothing,
15 piece of evidence that is submitted, to determine if
16 there is potential for DNA testing.

17 **Q.** Let's just talk briefly -- we have been
18 talking about DNA a lot, but we haven't really
19 touched upon what is DNA.

20 What is DNA?

21 **A.** So, DNA is the chemical or biological
22 chemical that is in all of us. It's in all of our
23 cells; and it's what makes us, what tells our bodies
24 how to function and what they should do. You get it,
25 of course, half from your mother, half from father.

1 And it creates who you are. You know, gives us eyes,
2 ears, arms, legs, and tells our bodies what to do.

3 There are variations within our DNA
4 that allow us to be individuals, to have different
5 eye color, hair color, height, things of that nature.
6 There are also variations within the DNA that have no
7 outward appearance, so variations within individuals
8 that you won't see on the surface level.

9 Q. Is DNA contained in a human being -- is DNA
10 contained within every cell in their body?

11 A. Not every cell but all tissues within the
12 body.

13 Q. Okay. With the exception of somebody who
14 is an identical twin, is a person's DNA unique to
15 them?

16 A. Yes, sir.

17 Q. And individual to them?

18 A. Yes, sir.

19 Q. Are there tests available that you have
20 knowledge about, that you can perform to detect an
21 individual's DNA?

22 A. Yes, sir.

23 Q. Let's talk about those tests. Are these
24 tests used throughout the entire scientific
25 community?

1 **A.** Yes, sir.

2 **Q.** Are these tests that are generally accepted
3 as valid within your scientific community?

4 **A.** Yes, sir.

5 **Q.** Are these tests that are used in your case
6 for criminal investigations, right?

7 **A.** Yes, sir.

8 **Q.** Are these the same types of tests that are
9 also used in commercial type formats and such?

10 **A.** In some settings, yes, sir.

11 **Q.** Like what?

12 **A.** In noncriminal paternity testing, some
13 private noncriminal investigations for
14 identification. Our particular area of DNA that we
15 use is good for identifying individuals. The
16 techniques and technology that we use can be applied
17 with different areas of DNA to do ancestry testing,
18 individual -- excuse me -- medical testing of that
19 type.

20 **Q.** And what type of DNA testing do you -- do
21 you use in your lab?

22 **A.** So, the area of DNA that I refer to is
23 we're doing what's called STR analysis.

24 **Q.** Okay. And what is STR analysis?

25 **A.** So, STR stands for a short tandem repeat.

1 And when I said that there were DNA areas that vary
2 that have no outward appearance, that is referring to
3 those small sections of DNA, meaning that they are
4 short areas that are repeating in tandem.

5 Q. Are there tests that you can perform in
6 order to be able to identify someone's STR DNA?

7 A. Yes, sir.

8 Q. And is it possible, also, to take an item
9 of biological material, right, like an item of
10 clothing --

11 A. Right.

12 Q. -- that has DNA on it and test for the STR
13 type from that item of clothing?

14 A. Yes, sir.

15 Q. Were the biological material on -- the
16 biological material on the item of clothing -- is
17 that more appropriate?

18 A. Yes, sir.

19 Q. When you conduct that type of testing, tell
20 the jury -- so, you receive a sample. What do you do
21 with it?

22 A. Me myself or the laboratory?

23 Q. Your laboratory.

24 A. Okay. So, the first step, as I said, we
25 will screen it, basically determine, you know, if we

1 feel that it's -- blood or semen are really the two
2 biological materials/fluids that we're looking for
3 that we can have tests to identify. So, we can use
4 chemicals to help identify potential stains on any
5 clothing or swabs; or we will determine if what the
6 area of interest is what we call contact, meaning
7 that they are skin cells.

8 And so, we don't -- we don't have a
9 test to tell us whether skin cells are there. So, we
10 just have to swab an item or take swabs that were
11 taken for contact and process them onto the next step
12 of beginning the DNA process.

13 Q. Okay. When you're talking about the DNA
14 process -- so, you take an item; and you attempt to
15 obtain DNA from it. How do you process that?

16 A. So, the next step is what we call DNA
17 extraction. And what our goal there is if we have
18 biological material, the DNA is found deep within the
19 cells, found under what we call the nucleus of the
20 cell. We need to remove that DNA from the nucleus.
21 So, we are going to use chemicals to break open the
22 cells; and then we're going to use some other various
23 chemicals to help clean up that DNA. So, we have a
24 purified DNA extract when we are done.

25 After that, we're going to move on to

1 determining how much DNA we obtained. And then after
2 that, we can use another set of chemicals and
3 processes to help us identify those STRs that we were
4 talking about. So that instead of having all the
5 DNA, we have, you know, 15 individual locations we're
6 looking at, plus a sex determining marker; and we can
7 then target those specific areas that were of
8 interest.

9 Q. So, within your scientific community, why
10 are you trying to target those specific locations?

11 A. Those locations that are generally accepted
12 and standardized in the field so that all
13 laboratories can potentially compare the result or
14 work on the same processes and obtain the same
15 results.

16 Q. And within your scientific community,
17 within the DNA community, are these locations -- are
18 they considered to be reliable for identifying
19 individuals?

20 A. Yes, sir.

21 Q. Are they useful?

22 A. Yes, sir.

23 Q. When you obtain results of those numbers,
24 are they unique to an individual?

25 A. Other than identical twins, yes, sir.

1 **Q.** So, when you're conducting your analysis
2 and you're identifying those 15 locations on DNA that
3 are unique to an individual, what kind of results are
4 generated?

5 **A.** So, once we generate a DNA profile, the
6 next thing -- and we have been able to interpret
7 it -- we're going to move on to interpretation and
8 ultimately a comparison. So, we're going to generate
9 DNA profiles from evidentiary items and then do the
10 same processes separately on known references so that
11 we can then compare the known references to the
12 evidentiary profiles.

13 **Q.** Okay. Now, in regards to the STR
14 locations, when you identified the item and you
15 identified what's at those 15 locations, what -- what
16 is generated for purposes of recordkeeping and
17 identification of that DNA strand?

18 **A.** So, we're going to -- once we have
19 completed what literally is a DNA profile that would
20 be printed on a piece of paper and we have done our
21 comparison, we will generate a DNA report that
22 contains all of our results and conclusions.

23 **Q.** And does it contain the STR identifiers at
24 each of the 15 locations?

25 **A.** Yes, sir.

1 Q. And also whether it's a male or female DNA?

2 A. Yes, sir.

3 Q. How does that look to a layman?

4 A. The DNA profile is essentially a table that
5 will have the items listed and will have total of 16
6 columns. Each column will have the unique name of
7 that STR marker, and we will then see a set of
8 numbers. We have in total 46 chromosomes, but if you
9 remember, we get half from mom and half from dad.
10 So, we have what we call 23 pairs, one of these being
11 our sex determine marker, that is the X and Y that we
12 always here about.

13 So, if we have just an X, we will see
14 female. We have X-Y, we have male. At the other
15 locations, we will see anywhere from 1 to 2 numbers.
16 If we see one number, what that means is the same
17 marker was obtained from mother and father. If we
18 see two numbers, we got one marker, one type of
19 marker from mom, one type from dad; but it's for that
20 same location.

21 Q. And so, when you are doing this and you get
22 kind of this numerical code with Xs and Ys at the
23 end, right?

24 A. Yes, sir.

25 Q. Is that numerical code unique to an

1 individual?

2 **A.** Yes.

3 **Q.** With the exception of identical twins, of
4 course?

5 **A.** Yes, sir.

6 **Q.** Did you perform a DNA analysis in regards
7 to the items contained in State's 43?

8 **A.** Yes, sir.

9 **Q.** And did -- were you able to go through your
10 DNA process in regards to that item?

11 **A.** Yes, sir.

12 **Q.** Were you able to obtain a DNA -- a complete
13 DNA profile from that item?

14 **A.** Yes, sir.

15 **Q.** Was it a male or female?

16 **A.** A male individual.

17 **Q.** Okay. And did you obtain what you're
18 talking about, that numerical code, that STR
19 numerical code for that evidence?

20 **A.** Yes, sir.

21 **Q.** Okay. And did you produce -- do your
22 records produce a table of that DNA profile?

23 **A.** Yes, sir.

24 **MR. PENEGUY:** Judge, may I approach
25 the witness?

1 **THE COURT:** You may.

2 **MR. GRAHAM:** Judge, may we approach
3 briefly?

4 **THE COURT:** Yes, sir.

5 **(At the Bench)**

6 **MR. VINAS:** I think at this time I
7 anticipate Mr. Peneguy is about to offer a report.
8 I'm not sure the extent of the report that he may be
9 wanting to offer, but we have received numerous DNA
10 reports on this specific case and we have not gotten
11 any kind of report with this individual witness.
12 This witness -- I think at this time we would need
13 to -- we would ask to take the witness on voir dire
14 outside the presence of the jury to find out.

15 **THE COURT:** I don't think voir dire is
16 appropriate at this time. There is nothing being
17 offered into evidence other than the results. What
18 is your issue exactly?

19 **MR. GRAHAM:** Well, my issue is I
20 don't -- I don't know what the State is about to try
21 to offer, if they are going to offer a full DNA
22 report.

23 **THE COURT:** Well, I will send the jury
24 out so you can show them and let them look at it.

25 **(End of Bench Discussion)**

1 **THE COURT:** Members of the jury, we're
2 going to need to take up a legal matter briefly. So,
3 I will ask that you step back to the jury room.

4 All rise, please, for the jury.

5 **(Jury released)**

6 **THE COURT:** Okay. Shall we move
7 along?

8 **MR. PENEGUY:** Judge, do you want to
9 clarify that issue about the offense report -- the
10 lab reports?

11 **MR. GRAHAM:** Yes.

12 **THE COURT:** We need to wait for Joe?

13 **MR. GRAHAM:** No, I don't need him. On
14 the record --

15 **THE COURT:** Is there something the
16 parties wish to put on the record before I bring the
17 jury back out?

18 **MR. GRAHAM:** Defense does. I want to
19 clarify my previous objection right before we took a
20 break. We have clarified -- I withdraw that
21 objection, and I do want to make clear for the record
22 there was some confusion on our part. The State has
23 been more than forthcoming giving us everything on
24 the case. Because of the volume of the cases and
25 everything that we have received, there is not a

1 specific supplement on the lab report relating to
2 this victim from this witness.

3 However, we clarified with the State
4 this witness did testing for this buccal swab. His
5 supplemental report is part of another victim's case
6 in an extraneous case, and his testing of this buccal
7 swab was used for comparison to multiple cases
8 including this case. So, obviously, we don't want to
9 go into any extraneous, the fact that there was
10 initially, he is doing testing related to another
11 victim's case.

12 So, I would ask the Court for a Motion
13 in Limine and instruction to the witness to make sure
14 that we don't mention -- the complaining witness in
15 that case is Inez. And we are only, in our
16 questioning, going to go into the buccal swabs
17 specifically with Herman Whitfield. And we just
18 ask -- and I think the State understands that we'll
19 do that.

20 **THE COURT:** That's okay with you?

21 **MR. PENEGUY:** Yes, Judge. And we're
22 trying to be as accurate as possible to talk about
23 how it's relevant without going into the back story
24 on some of that case.

25 And, Judge, just to bring to the

1 Court's attention, this will also be a relevant issue
2 in regards to the next witness who will testify,
3 which is another analyst named Amy Castillo, who also
4 conducted multiple analyses on other cases before the
5 analysis on Jocelyn Batiz' case. But we are going to
6 be very specific with her. We re-admonished her this
7 morning the fact that we're only talking about one
8 case. And you've given me a little bit of leeway to
9 lead him specifically, and we ask for a little
10 leniency with Ms. Castillo.

11 **MR. GRAHAM:** We agree.

12 **THE COURT:** Since you asked for an
13 instruction, I will give it.

14 If you were to somehow imply that
15 there was another victim and that you were working on
16 another case besides this one with Ms. Batiz, it
17 would be so prejudicial to the Defense I would have
18 to grant a mistrial and start all over; and you would
19 have to come back.

20 **THE WITNESS:** I will try to avoid
21 that.

22 *(Sidebar discussion outside hearing of*
23 *the Court Reporter)*

24 **THE COURT:** Okay. We're ready. May
25 we bring in the jury?

1 **MR. VINAS:** One more thing before they
2 come out, I don't know if he clarified on the record
3 this is for y'all.

4 **MS. PRIMM:** Spence did it.

5 **MR. VINAS:** Never mind. Spence did
6 it.

7 **MS. PRIMM:** Thank you.

8 **MR. VINAS:** Sure.

9 **THE COURT:** We're okay?

10 **MR. VINAS:** Yes, Judge.

11 **THE COURT:** Thank you.

12 *(Jury enters the courtroom)*

13 **THE COURT:** Thank you. Please be
14 seated. Mr. Peneguy, you may continue.

15 **MR. PENEGUY:** Thank you, Judge. May I
16 approach the witness?

17 **THE COURT:** Yes, sir.

18 **Q.** **(BY MR. PENEGUY)** I'm going to show you
19 what's been marked as State's Exhibit No. 85.

20 **A.** Yes.

21 **Q.** And I'm going to ask you if you recognize
22 this?

23 **A.** Yes, sir.

24 **Q.** Okay. And is this a fair and accurate
25 depiction of the allele chart that you created for

1 the STR DNA analysis in regards to what you obtained
2 from these swabs marked in State's Exhibit 43?

3 **A.** Yes, sir.

4 **MR. PENEGUY:** Your Honor, at this time
5 we would offer State's Exhibit 85 and tender to
6 opposing counsel.

7 **MR. VINAS:** And, Your Honor, during
8 our brief recess I was able to review State's
9 Exhibit 85; and I have no objection.

10 **THE COURT:** Admitted.

11 **MR. PENEGUY:** Judge, may I publish
12 State's Exhibit 85?

13 **THE COURT:** Yes, sir.

14 **MR. PENEGUY:** I think the writing on
15 this is still going to be too small for people to see
16 out in the distance. So, I just don't -- Judge, I'm
17 going to hold it up right in front of the jury.

18 **Q.** (BY MR. PENEGUY) And, sir, would you please
19 tell the jury what is State's Exhibit No. 85?

20 **A.** That is the table that is attached to a
21 report, indicating the STR profile that we obtained
22 for Herman Whitfield.

23 **Q.** Okay. And is this what we consider to be a
24 known DNA profile?

25 **A.** Yes, sir.

1 **Q.** And so, it's from a known individual; is
2 that correct?

3 **A.** Yes, sir.

4 **Q.** Are the -- the items that are contained --
5 let's talk about the columns. This first column,
6 what is contained in the first column?

7 **A.** That is just an item description or item
8 number and then the item description.

9 **Q.** Okay. And what's the item description in
10 regards to State's Exhibit No. 85?

11 **A.** In this instance it is a portion of a known
12 buccal swab from her spit.

13 **Q.** And why do we say portion of a known
14 buccal?

15 **A.** When we receive buccal swabs in, we
16 typically receive anywhere from two to four swabs.
17 We don't need all of that for testing. So, we will
18 take a portion, usually half a swab to one full swab,
19 to actually do the DNA testing.

20 **Q.** And the remaining evidence, what happens
21 with that?

22 **A.** It is properly sealed back up and stored in
23 our property room.

24 **Q.** So, in regards to this, did your lab take a
25 portion of a swab from Herman Whitfield?

1 **A.** Yes, sir.

2 **Q.** Okay. These remaining columns that contain
3 numerical values, can you tell us what these items
4 are?

5 **A.** So, the next 116 columns, you will see for
6 the very top row it lists the marker name. That is
7 the individual location that we're looking at. What
8 you then see in the row below that is the actual DNA
9 profile of Herman Whitfield at that location.

10 **Q.** Okay. And does it create a series of
11 numbers that are unique to Herman Whitfield?

12 **A.** Yes, sir.

13 **Q.** Now, in some of the locations we see two
14 numbers separated by a comma. In other locations we
15 see a singular number. Can you tell the jury what
16 the difference is?

17 **A.** Yes, sir. As we stated earlier, since you
18 have two copies of every chromosome -- one from
19 mother, one from father -- you have the possibility
20 of obtaining a -- a different marker from each one of
21 them. So, the numbers -- the columns where there is
22 two numbers, one of those was obtained from the
23 father; one was obtained from the mother. And in the
24 instances where there is one number, that number was
25 both obtained from mother and father.

1 **Q.** Okay. We also see one column where we have
2 an X and a Y. Can you tell the jury what that's an
3 indicator of?

4 **A.** That indicates that this sample is from a
5 male individual.

6 **Q.** Okay. And if it was a female individual,
7 how would that appear?

8 **A.** Just an X.

9 **Q.** Okay. Because there would be no Y
10 chromosome present?

11 **A.** Correct.

12 **Q.** In regards to this, did you conduct DNA
13 analysis on a portion of a known sample from Herman
14 Whitfield to generate the evidence, this numerical
15 code, that's contained in State's Exhibit No. 85?

16 **A.** Yes, sir.

17 **MR. PENEGUY:** Pass the witness.

18 **THE COURT:** Thank you.

19 **MR. GRAHAM:** May I proceed, Your
20 Honor?

21 **THE COURT:** Yes, sir.

22 **CROSS-EXAMINATION**

23 **Q.** **(BY MR. GRAHAM)** Okay. Sir, I just want to
24 go over briefly what you were talking about to kind
25 of start off with DNA in general. So, we all have

1 unique --

2 (Court emergency alarm sounding)

3 THE COURT: Do we need to retire the
4 jury? I will ask you to retire briefly. It's just a
5 security issue in another court. There is nothing to
6 be concerned about for us.

7 (Jury released)

8 (Brief pause)

9 THE COURT: Okay. Ready for the jury.

10 (Jury enters the courtroom)

11 THE COURT: Thank you. Please have a
12 seat. And someone just hit the alarm by mistake.

13 MR. GRAHAM: May I proceed, Your
14 Honor?

15 THE COURT: You may.

16 MR. GRAHAM: Thank you.

17 Q. (BY MR. GRAHAM) Okay. I think all this
18 talk of science, I just want to make sure we're
19 all -- so, for those of us that are not as well
20 trained and educated in forensic testing and
21 biological testing, let's just talk a little bit
22 about DNA. So, it's unique to each individual; is
23 that correct?

24 A. Other than identical twins, yes.

25 Q. So, kind of like a fingerprint in the old

1 snowflake that each individual, with the exception of
2 identical twins, should have unique numbers on a
3 chart like we see in State's Exhibit 85?

4 **A.** Yes, sir.

5 **Q.** Okay. You and I would have different
6 numbers, if we did an allele chart of each of us,
7 than what we see for Mr. Whitfield?

8 **A.** Yes, sir.

9 **Q.** Okay. So, let's talk about the process of
10 how you get to this. I think you described that you
11 use a chemical to break down the cell and get to the
12 nucleus of the cell?

13 **A.** Yes, sir.

14 **Q.** Okay. And what kind of chemical do you use
15 in order to do that process?

16 **A.** There is actually numerous chemicals that
17 come in a DNA extraction kit that we use.

18 **Q.** Okay. Okay. So -- and you use the same
19 types of chemicals in every DNA extraction?

20 **A.** Not all the time, no, sir.

21 **Q.** Okay. Do you know what kind of chemical
22 you used in this particular extraction?

23 **A.** In this one we used -- it's from a vendor
24 called Qiagen, Q-I-A-G-E-N. And it's a DNA
25 investigator kit.

1 Q. Okay.

2 A. The buffer -- I don't know exactly what
3 they are because they are proprietary. But, in
4 general, the chemicals are used -- you need something
5 to break open the cellular membrane so something that
6 can -- easiest analogy to picture is kind of like an
7 oil slick; and if you use soap to break open that oil
8 slick, you will see the oil kind of disperse. And
9 that's what you need is something similar to that to
10 break open that cell membrane.

11 Q. Okay. Makes sense.

12 In this particular company, do you use
13 their DNA extraction kit on a regular basis at the
14 Houston Forensic Science Center?

15 A. Yes, sir.

16 Q. And just for clarification, too, when we
17 talk about you're currently working at the Houston
18 Forensic Science Center, that is the new name for
19 what we know as the HPD crime lab. Is that fair to
20 say?

21 A. Yes, sir.

22 Q. Okay. And I think y'all changed the name
23 in the last couple of years?

24 A. Yes, sir. April of 2014.

25 Q. Okay. And the type of kit that you're

1 using for this DNA extraction as well as the company,
2 is that an accepted company within the scientific
3 community to use for this purpose?

4 **A.** Yes, sir.

5 **Q.** And this particular kit, is that accepted
6 within the scientific community to use this
7 particular kit with those chemicals?

8 **A.** Yes, sir.

9 **Q.** And then after you extract the membrane,
10 what do you do from there to do your further DNA
11 testing? What is your process from there?

12 **A.** So, once we have completed DNA extraction
13 using that kit, the next step is what we call
14 quantification. The purpose of that is to determine
15 exactly how much DNA we have obtained during the DNA
16 extraction process.

17 **Q.** Okay. And is there a variance as far as
18 like how much DNA you get on any particular DNA
19 extraction?

20 **A.** Yes, sir.

21 **Q.** What is that variance?

22 **A.** Well, it will really depend on what
23 material you're starting with. You know, if we're
24 dealing with a blood swab that has lots of cells,
25 lots of DNA, we can get a -- quite a bit of DNA

1 recovered from that. Same with sexual assault
2 samples. Semen, skin cells from vaginas have lots of
3 DNA that can have lots of DNA.

4 Or, as I mentioned when we talk about
5 contact, looking for skin cells, sometimes with those
6 we don't obtain as much DNA because there is not as
7 many cells left on a surface.

8 Q. Got you. And in this particular case,
9 you're testing a buccal swab --

10 A. Yes, sir.

11 Q. -- is that correct?

12 Okay. Which is the saliva. So, it
13 would be skin cells from the inside of Herman
14 Whitfield's mouth?

15 A. Yes, sir.

16 Q. Okay. So, do you know -- were you able to
17 get a high level of DNA in your quantification
18 analysis?

19 A. I can refer to my records if you want the
20 exact number, but I know we were able to obtain a
21 sufficient amount to perform our DNA testing.

22 Q. Okay. And is there a threshold to get a
23 certain amount to be able to do further testing?

24 A. We don't have a -- an exact threshold for
25 stopping because we can move on. Even if a sample

1 tells us we have no DNA, we -- you know, means that
2 there is -- extremely, extremely small, small amounts
3 may be there. We will still move on to our -- our
4 next step, in some cases to determine is there
5 actually a way to get a profile.

6 Q. Okay. And in this particular case, after
7 you got your sufficient amount of DNA to test, what
8 do you do with that DNA that you have?

9 A. So, the next step is what we call
10 amplification. And this is using a kit from another
11 manufacturer that is accepted in our scientific
12 community and for use in this purpose that will
13 target all of the individual locations that are
14 listed in the table up here.

15 Q. Okay. And with this kit, is it also a kit
16 with various chemicals?

17 A. Yes, sir.

18 Q. Okay. And when you say "amplification," so
19 you're actually multiplying the DNA that you
20 subtracted from the buccal swab?

21 A. Yes, sir. The analogy I like to use to
22 kind of give people is if you imagine you have a
23 textbook and this textbook is all of your DNA, it's
24 100 percent your DNA that you have. What
25 amplification allows us to do is it's kind of like

1 putting it into a copier, but saying I only want
2 these 16 lines on these certain pages. And as it
3 makes the thousands and millions of copies, it's only
4 going to copy those specific lines on those certain
5 pages because it's designed to target just those
6 locations.

7 **Q.** Got you. And so, after you complete your
8 amplification process, fair to say you have got
9 millions of these samples from these different
10 locations of Herman Whitfield's DNA?

11 **A.** Yes, sir.

12 **Q.** Okay. And so, once you have completed this
13 amplification process, what is done with all the
14 millions of samples of his DNA?

15 **A.** So, the next step is we typically just call
16 analysis; and we are able to put a portion of the
17 product that's generated during our amplification
18 into an instrument. And then that instrument will
19 allow us to separate out and visualize the data and
20 generate a profile such as it is in the table.

21 **Q.** Okay. So, you put a sample into this
22 machine; and then what do you do with the rest of the
23 DNA that was produced in this amplification process?

24 **A.** In our laboratory the product from
25 amplification is stored for six months, and then we

1 will -- we will destroy that product, but we still --

2 Q. All right.

3 A. But we still have the remaining. We don't
4 use all of the DNA extract originally obtained.

5 Q. Okay. And then the portion that you
6 actually put into the machine to pull out and be able
7 to visualize the chart, as you have in State's
8 Exhibit 85, what -- is that all used up in the
9 machine, or what -- what happens to that?

10 A. Yes. It's considered consumed and
11 discarded when the process is over.

12 Q. Okay. And is there some sort of failsafe
13 process where you check the machine to make sure
14 there is no leftover DNA from Herman Whitfield in the
15 machine?

16 A. Yes, sir. The instrument is designed and
17 been validated to ensure that no cross contamination
18 will occur between samples, between runs. It has
19 protocols in it that will flush all necessary
20 pathways to remove any DNA. And then with every run,
21 we also have our known positive control to ensure
22 that it is operating correctly, but also still
23 negative controls to ensure that the instrument and
24 reagents we're using aren't contaminated.

25 Q. And do you do all these steps yourself, or

1 is there another individual that will come in and
2 complete this process of cleaning out and making sure
3 the machine is clear of any DNA?

4 **A.** A lot of that is automated by the
5 instrumentation itself; but it is performed by a
6 technician in our lab, not myself.

7 **Q.** Okay. And so, did you actually do the
8 quantification and amplification process as well; or
9 is that done by a technician?

10 **A.** That is all done by a technician.

11 **Q.** Okay. And then when the sample is
12 separated into the extracted amount to go into the
13 machine and then the other sample is stored, is that
14 done by you; or is that done by a technician?

15 **A.** A technician.

16 **Q.** And is it all the same technician, or are
17 there different technicians involved?

18 **A.** It -- there can be different technicians.
19 We have several in our laboratory, depending on
20 workflow and how it's designed. Any of the parts can
21 be done by anybody that is trained and signed off to
22 operate that.

23 **Q.** Okay. And so, in this particular case you
24 didn't actually -- the leftover sample that didn't
25 actually go into the machine that was stored, you

1 didn't handle that particular amplified portion of
2 Herman Whitfield's DNA, correct?

3 **A.** No, sir.

4 **Q.** Okay. Do you know from your personal
5 knowledge what happened to that amplified sample of
6 his DNA?

7 **A.** From the amplified product?

8 **Q.** In other words, you said your normal
9 process is it goes into storage for six months. Do
10 you know if that actually happened in this situation?

11 **A.** I would have expected that, and I would
12 expect -- I believe we are still within the six
13 months window of that testing that it should still be
14 in storage.

15 **Q.** Okay. And do y'all keep records like chain
16 of custody records to make sure that the sample is,
17 in fact, where it's supposed to be?

18 **A.** So, for the original DNA extract, yes. We
19 maintain a chain of custody tracking through our
20 laboratory information management system. Once we
21 have gone through the amplification step and
22 generate, as we have been referring to here, product,
23 it is generally accepted and listed in our standards
24 that the product does not have to -- we document what
25 we do with it and all the steps we do with it, but we

1 don't have to maintain as detailed a chain of custody
2 for that item.

3 Q. Okay. And would it be fair to say the
4 technicians that are doing the steps along the way to
5 assist you in your analysis, the quantification,
6 amplification, the putting of the DNA extracted
7 portion into the machine for your visualization, they
8 don't have the kind of training that you have as a
9 DNA analyst and supervisor at the Houston Forensic
10 Science Center.

11 Would that be fair to say?

12 A. Correct.

13 Q. Okay. And I think you said you do have a
14 process by which you can -- and I know you didn't do
15 that in this case, but you talked about during direct
16 examination -- certainly you would know this as a
17 supervisor -- process by which you can identify
18 whether or not a particular sample of DNA is from
19 blood or semen as opposed to maybe contact DNA?

20 A. Yes, sir.

21 Q. Okay. And I think you also said that if it
22 is contact DNA, that would be skin cells. You really
23 don't have a process to say for sure whether or not
24 it is skin cells?

25 A. Correct. During our screening method,

1 there is no known test that can really -- chemical
2 test type of quick test you can use to tell you
3 whether skin cells are present or not.

4 **Q.** Is it kind -- I mean, if I understand
5 correctly, kind of a process of elimination. If
6 there is a negative test for blood, negative for
7 semen but yet you have DNA, you can kind of just
8 assume that it is skin cells at that point?

9 **A.** Actually, given our processes, we typically
10 will not test for blood or semen if we suspect
11 contact because part of the process might remove that
12 contact. And so, if we fear that contact is --
13 "fear" is the wrong word. If we suspect that contact
14 is on the sample, we will then say that that analysis
15 was not done to preserve any potential contact and
16 send the full sample forth with it.

17 **Q.** Okay. And in this particular case, with
18 your work on this particular analysis, as we see in
19 State's Exhibit 85, would it be fair to say that with
20 it being a known sample of an individual Herman
21 Whitfield, you would expect to be able to get DNA and
22 get a DNA profile that you can now visualize?

23 **A.** Yes, sir.

24 **Q.** And in that -- that can then be used for
25 whatever further testing may need to be done?

1 **A.** Yes, sir.

2 **Q.** Okay. And you didn't do any further
3 testing on these buccal swabs?

4 **A.** No, sir.

5 **Q.** As related to this particular case?

6 **A.** Correct.

7 **Q.** Okay.

8 **MR. GRAHAM:** I pass the witness,
9 Judge.

10 **THE COURT:** Thank you.

11 **MR. PENEGUY:** No further questions
12 from this witness.

13 **THE COURT:** Is this witness excused,
14 or do you need him on call?

15 **MS. PRIMM:** On call, Judge.

16 **THE COURT:** All right. Thank you so
17 much. You're free to go today, subject to recall.

18 *(Witness released)*

19 **THE COURT:** Thank you. Any other
20 witnesses?

21 **MR. PENEGUY:** Yes, Judge. Ms. Amy
22 Castillo.

23 **THE COURT:** Thank you.
24 Hello, Ms. Castillo.

25 **THE BAILIFF:** Your Honor, this witness

1 will need to be sworn in.

2 **THE COURT:** Thank you. Come on up.
3 And if you don't mind, would you turn and face the
4 jury and raise your right hand?

5 *(Witness Duly Sworn)*

6 **THE COURT:** Thank you. Please have a
7 seat.

8 **MR. PENEГУY:** May I proceed?

9 **THE COURT:** Yes.

10 **AMY CASTILLO,**
11 having been first duly sworn, testified as follows:

12 **DIRECT EXAMINATION**

13 **Q.** *(BY MR. PENEГУY)* Would you please introduce
14 yourself to the jury?

15 **A.** Yes. My name is Amy Castillo.

16 **Q.** And where are you currently employed?

17 **A.** I'm currently employed by the Houston
18 Forensic Science Center.

19 **Q.** And is that the -- just for purposes of the
20 record, is that the institution formerly known as the
21 Houston Crime Lab?

22 **A.** Yes.

23 **Q.** And how long have you been employed there?

24 **A.** I started in March of 2010. So, a little
25 over five years.

1 **Q.** What is your current assignment at that
2 laboratory?

3 **A.** Currently I'm the director of Methods and
4 Validation.

5 **Q.** What does that mean?

6 **A.** I am starting a department where we work on
7 validating new methods for the laboratory as well as
8 lab rates with other labs to come up with new methods
9 for forensics.

10 **Q.** Do you also -- throughout the time that you
11 have worked at the lab, have you worked as a DNA
12 analyst?

13 **A.** Yes. Prior to this position, I was a
14 supervisor in the forensic biology section and a DNA
15 analyst at that time; and prior to that I was a DNA
16 analyst.

17 **Q.** And throughout the course of your time at
18 this laboratory, let's just briefly touch on some of
19 the experience that you had through your educational
20 experience to become a DNA analyst. Take us kind of
21 through your credentials.

22 **A.** Okay. So, first, I obtained my Bachelor's
23 degree in biochemistry from the University of
24 Houston. After that I went on to obtain my Ph.D. in
25 biochemistry also from the University of Houston.

1 After my doctorate, I worked for a research and
2 development company that worked on next generation
3 DNA sequencing. When that company moved to
4 California, I then came to the Houston Police
5 Department Crime Lab.

6 Q. Okay. Are you current in all of your
7 certifications with -- in regards to DNA analysis?

8 A. Right. I'm not certified. That's not
9 required to be certified right now. I am proficient
10 in DNA analysis at the time.

11 Q. Okay. And is the laboratory that you work
12 for -- is the institute -- it is an accredited
13 laboratory?

14 A. We are an accredited laboratory.

15 Q. And as part of that process, do you have to
16 maintain certain proficiencies in regards to DNA
17 analysis?

18 A. Yes. We have to maintain proficiency to do
19 any testing on casework.

20 Q. And just for a pause, in regards to DNA
21 analysis of an item, is it sometimes common at your
22 lab to employ technicians who will handle some of the
23 steps in the process of identifying DNA?

24 A. Yes. That is how we process casework in
25 our laboratory right now. We currently have -- the

1 first step would be when the evidence comes in, we
2 have screeners who screen the evidence for any
3 potential body fluid. They then will take portions
4 or take cuttings from those items and put them in
5 secure storage where a technician will then when the
6 case is batched, will go carry out the lab work and
7 then move that data along to a DNA analyst, who will
8 then write the report.

9 Q. Okay. In regards to your knowledge about
10 the lab, have you personally observed and gone
11 through the necessary processes in regards to how DNA
12 is -- where an item is processed through your
13 laboratory?

14 A. Yes, I have.

15 Q. Okay. And are you familiar with the
16 individuals that are the evidence technicians?

17 A. Yes, I am.

18 Q. Okay. Do they have proficiencies, in other
19 words, for the lab to be accredited?

20 A. Yes. They would have to be proficient on
21 any casework they handle and the method they were
22 using on the casework.

23 Q. Are they tested just the same way a DNA
24 analyst was tested?

25 A. Yes. We are all tested with -- when a

1 proficiency test comes in, basically, what happens is
2 we look at what you're currently doing on casework
3 and that would be included in that proficiency test.
4 So, for example, for me, I'm a DNA analyst. I write
5 DNA reports. My proficiency exam covers analyzing
6 DNA and writing the report.

7 If a technician -- whatever steps they
8 were processing in the lab, that is what their
9 proficiency would then include.

10 **Q.** Okay. In regards to once the evidence is
11 screened and then it goes to a technician who does
12 some laboratory on, we already talked a little bit
13 about that with a previous analyst named Lloyd
14 Halsell. Do -- do you know Lloyd Halsell?

15 **A.** Yes, I do.

16 **Q.** And is he a colleague of yours?

17 **THE REPORTER:** Excuse me. Give me one
18 second.

19 *(Brief pause)*

20 **THE COURT:** It would help if everybody
21 would talk a little slower.

22 **THE WITNESS:** Okay. I tend to talk a
23 little fast.

24 **THE COURT:** Thank you.

25 **A.** He is a colleague of mine.

1 **Q.** **(BY MR. PENEГУY)** And are you also familiar
2 with the individuals who do the amplification in
3 regards to the DNA analysis?

4 **A.** Yes.

5 **Q.** And do the laboratory processes in regards
6 to processing the DNA?

7 **A.** Yes, I am.

8 **Q.** Do they have proficiencies, as well?

9 **A.** Yes.

10 **Q.** What's their proficiencies?

11 **A.** It would depend on, again, the processes
12 that they carry out in the lab. A person who carries
13 out the amplification would need to be proficient on
14 the chemical entries and equipment that we use to
15 carry out that amplification.

16 The same goes if you have a different
17 person who quantifies the DNA, which is where we
18 count how much DNA we have, they would need to be
19 proficient in that chemistry and the equipment used
20 to do that test.

21 **Q.** The person who is the analyst, which was
22 the role that you had previously, does that person go
23 through the entire laboratory file before reaching
24 their analysis in regards to an item of evidence?

25 **A.** Yes. We, as the analyst, take ownership --

1 let me step back because the first step is the
2 screening, and the screener does issue a report for
3 their screening.

4 As a DNA analyst, I review that. I do
5 not take ownership of it. But as far as the DNA work
6 is concerned, when I issue the DNA report, I am
7 taking ownership of all of that work that was done to
8 generate those profiles for analysis.

9 Q. As a DNA analyst in Harris County, have you
10 testified -- or have you performed DNA analysis and
11 comparisons?

12 A. Yes.

13 Q. On few or many occasions?

14 A. Comparisons on many occasions.

15 Q. Have you testified in court before as an
16 expert in regards to DNA analysis?

17 A. Yes, I have.

18 Q. On few or many occasions?

19 A. Few occasions.

20 Q. Did you conduct analysis in regards to a
21 case with Laboratory No. L0812478?

22 A. Yes.

23 Q. And also conduct analysis in regards to
24 Forensic Case No. 085993808?

25 A. Correct. It's the incident number. And

1 yes.

2 Q. In regards to that case, is that a unique
3 case number that's assigned to a case, an
4 investigator, when it comes to your laboratory?

5 A. Correct. The incident number is assigned
6 prior to it coming to our laboratory. We used to do
7 this, and in cases when it was screened. There was a
8 point in time where the lab would also identify the
9 case with its unique number, which was the first
10 number that you read, L0812478, that would have been
11 designated by the laboratory.

12 Q. In regards to both of those numbers,
13 forensic case number and laboratory number, are those
14 in regards to the same case?

15 A. Yes, sir.

16 Q. For purposes of going forward, can you
17 refer to it by forensic case number?

18 A. The --

19 Q. Yeah, the incident 08?

20 A. Incident number, yes, laboratory number.

21 Q. Thank you.

22 A. Correct.

23 Q. Did you perform an analysis in that case?

24 A. I performed a DNA analysis in that case.

25 Q. Prior to testifying today, have you had an

1 opportunity to review your laboratory file in regards
2 to that analysis?

3 **A.** Yes.

4 **Q.** And are you familiar with those records?

5 **A.** Yes.

6 **Q.** Are those records kept in the ordinary
7 course of business for your laboratory?

8 **A.** Yes.

9 **Q.** Are they -- are they basically made by
10 people with knowledge of the events that are recorded
11 in the documents in the reports?

12 **A.** Yes.

13 **Q.** Personal knowledge, right?

14 **A.** Correct.

15 **Q.** Are these reports that you rely upon in
16 order for you to be able to do your analysis?

17 **A.** Yes.

18 **Q.** And is that how your lab operates with
19 maintaining of those records in order to perform
20 analysis?

21 **A.** Yes.

22 **Q.** I want to talk to you about the testing
23 that was done in regards to this case. Are you
24 familiar with the items of evidence that were
25 screened in regards to this case?

1 **A.** Yes. I have the report here with that
2 information.

3 **Q.** Okay. And in regards to that, can we talk
4 about some of the items? Basically, was there a rape
5 kit that was screened in regards to this case?

6 **A.** Yes, there was.

7 **Q.** Okay. And was there a box of evidence that
8 contained other items also screened in this case?

9 **A.** Yes.

10 **MR. PENEGUY:** Judge, may I approach
11 the witness?

12 **THE COURT:** Yes, sir.

13 **Q.** **(BY MR. PENEGUY)** Ms. Castillo, are you
14 familiar with cases in regards to cases in which your
15 lab conducts analysis on rape kits?

16 **A.** Yes. We can generally look at it, and
17 there is identifying information that other analysts
18 put on there.

19 **Q.** Okay. I'm going to show you what's been
20 admitted into evidence already as State's Exhibit
21 No. 41. Here. I'm --

22 **A.** Okay.

23 **Q.** Can you see what you need to see?

24 **A.** Yes. I see here the initials of Christine
25 Konecny, who was the screener. And before you turned

1 it, we also -- generally I will date the box. Sorry.
2 And what the item number is, she has documented that
3 on here with her initials.

4 Q. Okay. This is going to be a little more
5 helpful probably.

6 A. Thank you.

7 Q. In regards to the evidence that was
8 screened from State's Exhibit No. 41, were they
9 screened by a technician who is employed with your
10 laboratory?

11 A. Yes. They were screened --

12 MR. VINAS: I object to her knowledge.
13 That would be based on hearsay.

14 THE COURT: Thank you.

15 And your response to his objection?

16 MR. PENEGUY: She is qualified as an
17 expert referring to notes that are contained with
18 hearsay, she is allowed to testify.

19 MR. VINAS: I believe she is allowed
20 to, under 703, base parts of her ultimate opinion
21 upon hearsay. However, the hearsay itself is
22 inadmissible.

23 THE COURT: Overruled. You may
24 answer.

25 A. Can you repeat the question?

1 **Q.** **(BY MR. PENEGUY)** Sure.

2 Can you tell us who performed or
3 screened the analysis in regards to State's Exhibit
4 No. 41?

5 **A.** Christine Konecny.

6 **Q.** Is she an individual that you know?

7 **A.** Yes.

8 **Q.** Is she currently employed at your
9 institute?

10 **A.** Yes, she is.

11 **Q.** What is her current assignment?

12 **A.** Her current assignment is DNA analyst.

13 **Q.** Okay. Back when they screened this
14 evidence, was she an evidence screener?

15 **A.** Yes, she was.

16 **Q.** Okay. And when did she screen the items
17 from State's Exhibit 41?

18 **A.** Her report was issued on July 22nd of
19 2010.

20 **Q.** Okay.

21 **A.** The testing was started on July 1st of
22 2010 and also was carried out July 7th through the
23 8th of 2010.

24 **Q.** And in regards to the items that were
25 contained in State's Exhibit 41, can you tell us what

1 the items were that were tested from State's
2 Exhibit 41 --

3 **A.** And --

4 **Q.** -- or screened?

5 **A.** Is 41 the sexual assault kit?

6 **Q.** Yes.

7 **A.** Okay.

8 **MR. VINAS:** Judge, I again renew my
9 objection. Anything that she testifies to what other
10 people tested, evidence contained in State's Exhibit
11 No. 41, is hearsay. And there is also a Sixth
12 Amendment *Bullcoming*, *Melendez-Diaz*, and *Crawford*
13 issue.

14 **THE COURT:** Thank you. Overruled.

15 **Q.** (**BY MR. PENEGUY**) Can you tell us which
16 items were tested?

17 **A.** Yes. So, what she tested were -- let me go
18 to the testing page because it normally includes more
19 than what was tested.

20 She tested the vaginal swabs that were
21 contained within the kit, anal swabs, fingernail
22 scrapings from right and left hands, no testing was
23 done on that, and also labia minora swabs and a pair
24 of panties.

25 **Q.** Were those items screened for semen?

1 **A.** Yes.

2 **Q.** And was there any semen detected?

3 **A.** No. It was negative for semen.

4 **Q.** Was there a box of evidence that contained
5 items for testing?

6 **A.** Yes.

7 **MR. PENEGUY:** Judge, may I approach
8 the witness?

9 **THE COURT:** Yes, sir.

10 **Q.** **(BY MR. PENEGUY)** I'm going to show you
11 what's been admitted as State's Exhibit No. 39. What
12 is State's 39?

13 **A.** Okay. I think I said -- I think it's been
14 re-boxed. I don't see her initials on that.

15 **Q.** In regards to?

16 **A.** But I do -- I do see her initials on the
17 bags.

18 **Q.** Okay.

19 **A.** And her item numbers.

20 **Q.** Do you recognize her markings on State's
21 Exhibit No. 40?

22 **A.** Yes.

23 **Q.** Okay. State's Exhibit 38?

24 **A.** Yes.

25 **Q.** And State's Exhibit 37?

1 **A.** Yes, I do.

2 **Q.** And were those items screened for semen?

3 **A.** Yes, they were.

4 **Q.** Okay. What was the results?

5 **A.** They were negative for semen.

6 **Q.** In regards to the evidence, was the
7 evidence screened for blood?

8 **MR. VINAS:** Judge, may we approach?

9 **THE COURT:** All right.

10 **(At the Bench)**

11 **MR. VINAS:** Judge, at this point, if
12 they are going to go into results obtained from
13 another analyst, I believe that based on her
14 testimony that she has given on direct earlier, that
15 goes outside of what she should be permissibly
16 allowed to testify to. That is outside of what her
17 testimony should be allowed, and I'd like to conduct
18 a hearing based on that outside the jury's presence.
19 Shouldn't take maybe 5, 10 minutes.

20 **THE COURT:** What is the purpose of the
21 hearing?

22 **MR. VINAS:** State is trying to offer
23 results from another analyst in this case, testing
24 that she did not perform, testing that's done by
25 somebody with another subspecialty within the

1 laboratory. And she stated earlier that she doesn't
2 take ownership of those people's reports. She reads
3 them. But it's one thing for her to base an ultimate
4 opinion on what -- whose DNA is there based on
5 cuttings and scrapings and swabs and that sort of
6 thing, but it's another for her to be able to testify
7 to an analysis done by a completely different person
8 with a different subspecialty and tell the jury what
9 that person did. That violates the Sixth Amendment.

10 **THE COURT:** Excuse me just a moment.
11 Do you plan to call that person?

12 **MR. PENEGUY:** Judge, in the interest
13 of time, we weren't going to call that person. Only
14 thing that I need to realistically happen is -- the
15 screener detected blood and takes a cutting, this
16 analyst performs DNA analysis on the cuttings.

17 **THE COURT:** So, the person who
18 actually did the DNA?

19 **MR. PENEGUY:** That DNA analyst from
20 the cut.

21 **MR. VINAS:** Right.

22 **MR. PENEGUY:** And the known -- and the
23 known buccal swab of Jocelyn Batiz. She is the DNA
24 analyst on those two items. I'm just laying the
25 predicate how they obtained items.

1 **THE COURT:** So, your issue goes to the
2 blood sample?

3 **MR. VINAS:** Right.

4 **THE COURT:** So, who determined the DNA
5 profile on the blood sample? This witness?

6 **MR. PENEGUY:** Yes.

7 **MR. VINAS:** But she determined DNA.
8 She did not determine whether or not it was blood.
9 She determined only that there is DNA and later
10 developed a profile as to whose DNA it was.

11 **THE COURT:** Thank you.

12 **MR. VINAS:** She developed a profile
13 and compared it to -- what's his name? Your last
14 witness?

15 **MR. PENEGUY:** She compared it to --

16 **MR. VINAS:** Lloyd.

17 **MR. PENEGUY:** -- what Lloyd had done.

18 **THE COURT:** Compared it to what?

19 **MR. PENEGUY:** Known sample from Lloyd
20 and the known sample from Jocelyn Batiz.

21 **THE COURT:** Your objection is
22 overruled.

23 **MR. VINAS:** All right.

24 **(End of Bench Discussion)**

25 **Q. (BY MR. PENEGUY)** Was the -- were the items

1 State's Exhibits 37, 40, and 38, screened for the
2 presence of blood?

3 A. Yes. Can I verify the item number on
4 those?

5 Q. Sure.

6 A. As you're saying that, it's hard for me to
7 go back from the evidence number to item number.

8 Q. Absolutely. Can you verify what the item
9 for State's 37 is?

10 A. Yes. It's -- the bar code, it's long. So,
11 I'm going to say .3 is how we described it, which was
12 a shirt. And there was no testing done for blood on
13 that item, but there was also no red-brown stains
14 obtained. That's our general first indication that
15 we would screen for blood.

16 Q. State's Exhibit 40, what is that?

17 A. So, that's .1, which was a bra. And there
18 was no red-brown staining on this item. So, it was
19 not screened for blood.

20 Q. And State's Exhibit 38?

21 A. State's Exhibit 38 is .2, which was a pair
22 of shorts, and on those there was red-brown staining
23 which was screened and confirmed to be blood.

24 Q. Okay. I'd like to refer you to State's
25 Exhibit No. 37, which is the item that you identified

1 as item .3; is that correct?

2 A. .3, which is a shirt.

3 Q. Yes, ma'am.

4 A. Yes.

5 Q. .3 is the item that you have labeled for
6 the white shirt?

7 A. Correct.

8 Q. Okay. And was this item screened?

9 A. Yes, it was.

10 Q. Okay. And the markings that are on top of
11 it, this tag --

12 A. Uh-huh (affirmative.)

13 Q. -- is that a tag that is assigned to it
14 from your laboratory?

15 A. Can I see it a little closer, please?

16 Q. Sure.

17 A. Yes. That is the tag that Christine would
18 have put on there as she was screening it so that we
19 can later identify that that is the shirt we tested.

20 Q. These markings that are contained on the
21 shirt, these blue markings, are these markings that
22 are made by your laboratory?

23 A. Yes, they make those markings. The first
24 test that we normally do is a visual inspection, but
25 also something ALS -- which is alternative life

1 source, which can indicate possible stains for
2 further testing. And when they are doing the ALS
3 testing on it, they will circle stains that were
4 positive to then take out into the laboratory to do
5 further screening on.

6 Q. I'd like to direct your attention to
7 State's Exhibit No. 40, which you have labeled as .1;
8 is that correct?

9 A. Yes.

10 Q. Can you tell the jury what you have labeled
11 as .1?

12 A. A bra.

13 Q. And are these items, these blue markings,
14 are they markings made by your laboratory?

15 A. Yes.

16 Q. And this tag that's attached to this item,
17 is that from your laboratory?

18 A. Yes, sir.

19 Q. I'd like to direct your attention to
20 State's No. 38. And is that the item that you have
21 labeled as item .2?

22 A. Yes.

23 Q. And what is item .2?

24 A. Shorts.

25 Q. What color are the shorts?

1 **A.** Red.

2 **Q.** And is there a tag that is found on this
3 item from your laboratory?

4 **A.** Yes.

5 **Q.** And is there markings in blue pen from your
6 laboratory?

7 **A.** Yes, sir.

8 **Q.** And is there samples taken from your
9 laboratory in regards to these shorts?

10 **A.** Yes, and which corresponds with the
11 documentation that she made.

12 **Q.** Okay. Describe to the jury what type of
13 documentation she made for the rear of the item that
14 you list as .2, which is State's No. 38.

15 **A.** She circled a stain that is --

16 **MR. VINAS:** Judge, I object to the
17 hearsay statements made for the truth of the matter
18 asserted by someone who is not present in court.

19 **THE COURT:** Yeah. You need to
20 rephrase your question.

21 **Q.** **(BY MR. PENEГУY)** Was there a sample
22 removed?

23 **A.** Yes.

24 **Q.** That's visual?

25 **A.** Yes.

1 **Q.** Okay. And do you have lab documentation
2 that records that?

3 **A.** Yes.

4 **Q.** Just for purposes of the record, so it's
5 part of the record, can you kind of describe where in
6 regards to on the front or back of the shorts?

7 **A.** The sample is got from the back of the
8 shorts.

9 **Q.** Is it the right or left side of the back of
10 the shorts?

11 **A.** The right side.

12 **Q.** Okay. And in reference to -- is it a back
13 right pocket?

14 **A.** Yes.

15 **Q.** And in reference to this pocket, where is
16 the cutting taken?

17 **A.** Kind of diagonal to the bottom of the
18 pocket.

19 **MR. PENEGUY:** Judge, may I approach
20 the witness?

21 **THE COURT:** You may.

22 **Q.** **(BY MR. PENEGUY)** For purposes of the
23 record, I'm going to hand you State's Exhibit No. 45
24 and 46 and ask you if you recognize the markings on
25 those items?

1 **A.** Yes, I do.

2 **Q.** Okay. And do those contain markings and
3 initials from your laboratory?

4 **A.** Yes, they do.

5 **Q.** Okay. And are they consistent with
6 portions taken in regards to this investigation?

7 **A.** Yes. One envelope is for portion taken
8 from the shorts.

9 **Q.** That's what I -- that's State's Exhibit?

10 **A.** 45.

11 **Q.** Okay.

12 **A.** Which in our number becomes .2.1.

13 **Q.** .2 to designate the shorts?

14 **A.** Correct.

15 **Q.** And .1 to designate the portion of the
16 shorts?

17 **A.** Correct.

18 **Q.** Okay. What about State's Exhibit 46?

19 **A.** That is labeled as item .7, which is the
20 known saliva swabs which indicates that she retained.

21 **Q.** Okay.

22 **A.** And those are not a portion. They would
23 have been both swabs.

24 **MR. PENEGUY:** Judge, at this time we
25 offer State's Exhibit 45 and 46. Tender to opposing

1 counsel.

2 **MR. VINAS:** Judge, may I take the
3 witness on very brief voir dire?

4 **THE COURT:** You may.

5 **MR. VINAS:** Thank you, Judge.

6 **VOIR DIRE EXAMINATION**

7 **Q.** (**BY MR. VINAS**) Ms. Castillo, I'm showing
8 you State's Exhibit 45 -- apparently the only one not
9 wearing gloves here -- and State's Exhibit 46.

10 Just for the record and my health,
11 these are still sealed, though; is that correct?

12 **A.** Yes, they are.

13 **Q.** Okay. Good. State's Exhibit 45 and 46
14 both have quite a bit of handwriting on them. Would
15 you agree with that?

16 **A.** Yes.

17 **Q.** Some initials to designate who has done
18 certain tests on those items; is that correct?

19 **A.** Correct.

20 **Q.** We see the initials C.K. --

21 **A.** Uh-huh (affirmative.)

22 **Q.** -- on State's 45 and 46; is that correct?

23 **A.** Correct.

24 **Q.** And that is Ms. Konecny?

25 **A.** Yes, sir.

1 Q. Okay. What is her first name?

2 A. Christine.

3 Q. Christine. Okay. Thank you.

4 So, her initials appear both on here?

5 A. Uh-huh (affirmative.)

6 Q. And I'm sorry. Just for the record, can
7 you say "yes" or "no"?

8 A. Yes. I'm sorry.

9 Q. And, in fact, her initials appear on the
10 back of both exhibits; is that correct?

11 A. Correct.

12 Q. And there's somebody else here from a
13 couple of years ago whose initials E.R. appear on
14 State's Exhibit 46 and on 45.

15 A. Yes, sir.

16 Q. Do you know who that person is?

17 A. Elizabeth Richey.

18 Q. Okay. Your initials do not appear on these
19 envelopes?

20 A. No, they do not.

21 Q. Do you yourself do any testing on the items
22 that are contained -- or purported to be contained
23 within State's Exhibit 45 and 46?

24 A. I did no physical testing on them.

25 Q. Have you ever seen what's inside of 45

1 and/or 46?

2 **A.** No.

3 **Q.** All right. Do you even -- without --
4 without looking inside or without -- well, without
5 looking inside, can you tell what's in there?

6 **A.** No. I would only be going off the
7 description until they are opened.

8 **THE COURT:** Sorry. What was your
9 answer?

10 **THE WITNESS:** I would only be going
11 off the description until I physically opened them.
12 We do have, say when Elizabeth Richey opened them,
13 she generally will document what she observed when
14 she opened the envelopes.

15 **THE COURT:** Thank you.

16 **MR. VINAS:** And, Judge, my objection
17 to 45 and 46 -- I believe is also being offered at
18 this time -- is that the witness lacks the requisite
19 personal knowledge to tell the jury other than they
20 are envelopes. What is inside of them?

21 **THE COURT:** Thank you. You want to be
22 heard for the record?

23 **MR. PENEGUY:** Judge, the State
24 believes we have laid a proper predicate for those
25 items. We believe that the analyst can testify in

1 regards to what her lab has done in regards to the
2 DNA analysis in these items.

3 **THE COURT:** The Defense objection is
4 overruled.

5 **DIRECT EXAMINATION (CONTINUED)**

6 **Q.** (**BY MR. PENEГУY**) So, State's Exhibit 45,
7 can you tell the jury what that is?

8 **A.** It's item .2.1, which was the reddish brown
9 stain from the shorts.

10 **Q.** So, that came from item .2, which is
11 State's 38, the red shorts?

12 **A.** Correct. From the description, yes.

13 **Q.** Item 46, what is this?

14 **A.** Known saliva swabs from the complainant,
15 Jocelyn Batiz.

16 **Q.** Okay. And are saliva stains or buccal
17 swabs of the complainant, are those items obtained
18 during the process of a rape kit?

19 **A.** Normally, yes.

20 **Q.** And in this case, that came from State's
21 Exhibit 41, Jocelyn Batiz?

22 **A.** Sexual assault kit? Yes, sir -- yes,
23 ma'am. I apologize. Yes.

24 **Q.** The other portions of it would be contained
25 within State's 41, correct?

1 **A.** Yeah. There were items, and the kit would
2 be contained back within the kit.

3 **Q.** Okay. Things like panties, things like
4 other swabs, vaginal swabs, stuff like that?

5 **A.** Yes. Our screeners put everything back in
6 other than what we are retaining for DNA analysis.

7 **Q.** Thank you.

8 Did you perform a DNA analysis on
9 State's Exhibit 45 and State's Exhibit 46?

10 **A.** Can you say that item number?

11 **Q.** Sure.

12 **A.** I apologize.

13 **Q.** Absolutely.

14 **A.** Without the --

15 **Q.** Did you perform -- let's do it one at a
16 time.

17 **A.** Okay.

18 **Q.** Did you perform a DNA analysis on State's
19 Exhibit 45, which is .2.1, reddish brown stain from
20 shorts?

21 **A.** Yes. And we actually did a DNA analysis on
22 a portion of that stain.

23 **Q.** Okay. To still maintain the stain for
24 further testing?

25 **A.** Exactly. Yes. Our policy is that we

1 only -- it's up to half of the evidence that is
2 retained to make sure that we are leaving enough for
3 retesting should it be necessary.

4 **Q.** Okay. Have you performed a DNA analysis on
5 State's Exhibit 46, .7, known saliva swab from
6 complainant, Jocelyn Batiz?

7 **A.** Yes. And, again, that was on a portion of
8 that.

9 **Q.** The types of DNA analysis that you perform,
10 is that also assisted by technicians just like Lloyd
11 Halsell was?

12 **A.** Yes, it is.

13 **Q.** Okay. And is that the way that your
14 laboratory processes DNA evidence?

15 **A.** Yes, it is.

16 **Q.** There was a mention of E.R. Do you know
17 who E.R. is?

18 **A.** Elizabeth Richey.

19 **Q.** Okay. Who is she?

20 **A.** She's currently a DNA analyst in our lab.
21 At one point she was also a technician.

22 **Q.** Okay. So, she's another person that used
23 to be in evidence -- she participated in the process;
24 and now she does what you used to do, which is DNA
25 analysis?

1 **A.** Correct.

2 **Q.** Obviously, she is still at the lab?

3 **A.** Yes.

4 **Q.** Can you tell us on what date -- well, let's
5 just talk. We heard previously a lot about a lot of
6 discovering of -- obtaining of DNA sequencing.
7 State's Exhibit 85 is a chart, a board that is next
8 to you.

9 Are you familiar with that type of
10 chart?

11 **A.** Yes. We call it an allele chart.

12 **Q.** Okay. And what is an allele chart?

13 **A.** Basically, we -- I will kind of start from
14 the beginning to say what an allele is.

15 **THE COURT:** Excuse me just a moment.
16 Perhaps this would be a good place to break for lunch
17 since lunch has arrived for the jurors. And it's
18 about 12:00. So, if you want to walk around the
19 courthouse, please come back around 1:00; and we will
20 try and get started shortly after that.

21 All rise, please, for the jury.

22 **(Jury released)**

23 **(Lunch recess taken)**

24 **(AFTERNOON SESSION)**

25 **THE COURT:** Okay. I think we're ready

1 for the jury.

2 **MR. GRAHAM:** He is handling -- there
3 he is.

4 **THE COURT:** Okay.

5 **MR. VINAS:** I'm back. Thank you for
6 waiting.

7 **THE COURT:** Let me think. Where were
8 we? On direct still?

9 **MR. VINAS:** Yes.

10 **MS. PRIMM:** Direct, yes, ma'am.

11 *(Brief pause)*

12 **THE BAILIFF:** All rise, please.

13 *(Jury enters the courtroom)*

14 **THE COURT:** Thank you. Please have a
15 seat.

16 Mr. Peneguy, you may continue with the
17 witness.

18 **MR. PENEGUY:** Thank you, Judge.

19 **Q.** *(BY MR. PENEGUY)* Ms. Castillo, prior to the
20 lunch break, we were talking about DNA analysis that
21 you performed on two items; is that correct?

22 **A.** Correct.

23 **Q.** And that an item in evidence -- that's
24 State's Exhibit 45, which is .2.2, a cutting from an
25 item of shorts --

1 **A.** Correct.

2 **Q.** -- and from item -- State's Exhibit No. 46,
3 item .7, known saliva swabs from Jocelyn Batiz.

4 **A.** Yes.

5 **Q.** Were you able to perform a DNA analysis on
6 those items?

7 **A.** Yes, we were.

8 **Q.** And were you able to analyze that data?

9 **A.** Yes, we were.

10 **Q.** Okay. Juries learned previously -- and you
11 talked about the allele chart. Can you tell the jury
12 what you mean by an allele chart?

13 **A.** So, an allele chart is how we document
14 alleles that we find and the sequence that we
15 develop. And what the alleles are are the
16 variability that we see. It's different locations on
17 the chromosome. So, what you -- basically, you get
18 one from your mom and one from your dad. So, you can
19 have two different numbers there.

20 Or if you got the same from the mom
21 and dad, you can have one number. And what those
22 numbers are designating is what we found at that
23 location. So, that would be, for example, like your
24 profile, if we were to run a sample.

25 **Q.** Okay. And someone's DNA profile that we

1 see there, is that unique to a person, with the
2 exclusion of identical twins?

3 **A.** Yes, it is.

4 **Q.** Is this the type of analysis that your lab
5 conducts when screening an item for a known DNA?

6 **A.** When we test for -- to compare DNA or DNA,
7 that is the type of test we run.

8 **Q.** Is that the type of test run at all labs?

9 **A.** Labs that do DNA comparisons, yes.

10 **Q.** Did you run the two items, State's 45 and
11 State's 46, to obtain numerical values for DNA
12 profiles from those two items?

13 **A.** Yes, we did.

14 **Q.** Okay. And did you prepare a chart that's
15 similar to the chart that's shown in State's Exhibit
16 No. 85?

17 **A.** Yes, we did.

18 **MR. PENEGUY:** Judge, may I approach
19 the witness?

20 **THE COURT:** You may.

21 **Q.** *(BY MR. PENEGUY)* I'm showing you what's
22 been marked as State's Exhibit No. 86. Prior to
23 testifying today, have you had an opportunity to
24 review this item?

25 **A.** Yes.

1 Q. Okay. And does it contain the allele chart
2 for your analysis in this case?

3 A. Yes. And the top portion -- the top two
4 items are a copy of the allele chart that is in our
5 report.

6 Q. Okay. What's the bottom column?

7 A. The bottom column is a reference that was
8 processed in a different time that we then compared
9 to the profiles that we had obtained and my initial
10 report.

11 Q. Okay. And was that compared by Lloyd
12 Halsell?

13 A. Yes.

14 Q. Okay. And did you use that in your
15 comparison?

16 A. Yes, I did.

17 Q. And the numbers and their values reflected
18 here in your portion of the report, are they
19 consistent with your report from your lab?

20 A. Yes. From reviewing it previously, yes,
21 they are.

22 Q. Okay.

23 **MR. PENEGUY:** At this time we offer
24 State's 86 and tender to opposing counsel.

25 **MR. VINAS:** May we approach briefly,

1 Judge?

2 **THE COURT:** Yes, sir.

3 **(At the Bench)**

4 **MR. VINAS:** For the purposes of the
5 record, with this witness and with the previous
6 witness, we made multiple objections about them
7 relying on evidence that they themselves did not
8 process. So, I don't want to waive any of those
9 objections to any of the evidence that's been coming
10 in. So, I want to make this clear that our objection
11 to State's 86 is that the results are based upon
12 evidence that was admitted over our objection that we
13 believe is inadmissible. So, that would be our
14 objection to State's 86.

15 **THE COURT:** Thank you. Overruled.

16 **MR. VINAS:** Thank you, Judge.

17 **(End of Bench Discussion)**

18 **THE COURT:** The exhibit is admitted.

19 **MR. PENEGUY:** May I publish State's
20 86?

21 **THE COURT:** Sure.

22 **MR. PENEGUY:** Judge, Mr. Vinas
23 unfortunately might need to move around because I
24 don't believe you can see this.

25 **MR. VINAS:** Oh, yes.

1 **Q.** **(BY MR. PENEГУY)** Ms. Castillo, do you have
2 a copy of the chart portion of it that you analyzed
3 in this case?

4 **A.** Yes, I do.

5 **Q.** Okay. So, you know what's on State 86 and
6 what's on State's 85; is that correct?

7 **A.** Yes.

8 **Q.** In regards to State's 8 -- 86, did you
9 contain -- did you obtain a known sample from Jocelyn
10 Batiz?

11 **A.** Yes, we did.

12 **Q.** Okay. And was that from the buccal swab of
13 Jocelyn Batiz?

14 **A.** Yes, it was.

15 **Q.** And were you able to generate a full single
16 source female profile from that swab?

17 **A.** Yes, we were.

18 **Q.** Okay. And is that shown in the numbers
19 that are for item 18.7.1?

20 **A.** Correct.

21 **Q.** Okay. That's the -- majorly, the second
22 column of your allele chart? I mean --

23 **A.** Second row.

24 **Q.** -- the second row?

25 **A.** Second row, yes.

1 **Q.** Is it listed on the left side of the second
2 row what that is a chart for?

3 **A.** Yes. Portion of known saliva swab, Jocelyn
4 Batiz.

5 **Q.** Okay. Did you also test the portion of the
6 reddish-brown stain from the shorts that were in
7 evidence in this case?

8 **A.** Yes, we did.

9 **Q.** And did you obtain a DNA profile from that
10 sample?

11 **A.** Yes, we did.

12 **Q.** Okay. And are those numbers at the STR
13 location points, are they reflected in the first row
14 of this table?

15 **A.** Yes, they are.

16 **Q.** Okay. And can you tell -- what can you
17 tell the jury about the DNA profile that you were
18 able to develop from the reddish-brown stain?

19 **A.** So, when this report was issued, we had a
20 single source male DNA profile of unknown origin.

21 **Q.** Okay.

22 **A.** And we say unknown origin when we have a
23 profile that we are -- the reference that we tested
24 is not consistent with, and we don't have another
25 reference to test it against.

1 **Q.** Okay. So, at that time is it -- is it
2 correct to say that you were able to eliminate
3 Jocelyn Batiz as being the source of the
4 reddish-brown stain contained on the shorts?

5 **A.** That's correct.

6 **Q.** And the source that you had, the
7 reddish-brown stain on the shorts, was that a male
8 DNA profile?

9 **A.** Yes, it was.

10 **Q.** Okay. And was it a full single source male
11 DNA profile?

12 **A.** Yes, it was.

13 **Q.** Were you later able to compare that from a
14 known buccal from Herman Whitfield?

15 **A.** Yes, we were.

16 **Q.** Okay. And is that indicated -- the results
17 of that comparison, is that indicated in column No. 1
18 and column No. 3?

19 **A.** Yes. I don't have that exact copy in front
20 of me.

21 **Q.** Sure.

22 **A.** But, yes, we compared what is in column 3,
23 item 2.1 portion of known buccal swabs from Herman
24 Whitfield, to item 2.1.1, the portion with the
25 reddish-brown stains, the shorts.

1 **Q.** You told us that you were able to eliminate
2 Jocelyn Batiz as the source of the DNA for what's
3 contained in the portion of the reddish-brown stain
4 from shorts. Were you able to eliminate Herman
5 Whitfield as the source of that DNA?

6 **A.** No. The conclusion that we drew on that
7 comparison is that Herman Whitfield cannot be
8 excluded as a possible contributor to the profile
9 from that item. We then do statistics to show the
10 odds that another random individual could be included
11 as a contributor to that profile, and what was
12 calculated was 1 in 310 quintillion for Caucasian, 1
13 in 1.5 sextillion for African Americans, and 1 in 130
14 sextillion for southwest Hispanics.

15 **Q.** Okay. And is that the manner in which DNA
16 statistics are calculated within the scientific
17 community?

18 **A.** Yes. For single source profiles, what --
19 what -- the way it's calculated and what we're saying
20 is how like -- how random individuals you have to
21 test that are unrelated that would also be included
22 in the profile that we obtained from the evidence and
23 that is how the community does the single source
24 statistics.

25 **Q.** Okay. In your laboratory, it's not

1 protocol for you guys to say something is a match, is
2 it?

3 **A.** No, we don't say that.

4 **Q.** Okay. And that's the -- that's because of
5 the way that statistics are used to make reflections
6 of DNA comparisons within the scientific community?

7 **MR. VINAS:** Judge, I object to
8 leading.

9 **MR. PENEGUY:** Sorry.

10 **THE COURT:** Overruled.

11 **A.** The reason that we don't use that
12 terminology is we use a database for our statistics.
13 And that database is based on hundreds of individuals
14 that were tested. They determined that was enough to
15 do the statistics, but not every person in the world
16 is tested for their profiles.

17 So, what we do not have a database of
18 every person on the planet. And until we do have
19 that information, we don't say match because we can't
20 say that we have compared it to every person in the
21 world that we know nobody else has that profile. So,
22 that's why we do not say "match." We say "included"
23 or "excluded," and then we calculate the statistics
24 to estimate how many people we would have to test
25 based on the science we have to find that profile

1 again.

2 Q. (BY MR. PENEGUY) Okay. And in regards to
3 what we talked about earlier for STR allele charts,
4 to say it is -- is it generally accepted within your
5 scientific community that everyone has an individual
6 STR allele chart with the exception of identical
7 twins?

8 A. The profile, yes. Then you -- that would
9 be the whole entire profile of the 15 locations.
10 Everybody has their own individual profile except for
11 identical twins.

12 Q. Okay. I want to talk to you about the
13 statistics. You gave us some big numbers. Is that
14 fair to say?

15 A. Yes, sir.

16 Q. Okay. And I know that you're able to read
17 them off. Can you just tell us -- in regards to the
18 results that you obtained, you gave us a breakdown
19 based upon race?

20 A. Correct.

21 Q. Why is that?

22 A. We do that for the groups. That is the way
23 the database is set. Generally they don't vary a
24 whole lot. But there is a variance wherein it is
25 more common in one race than another.

1 **Q.** And that would change the statistics,
2 correct?

3 **A.** Correct.

4 **Q.** In regards to the statistics, for one in
5 however many, what is the -- what is the profile from
6 this DNA item, the unknown for the reddish-brown
7 stain, in regards to African American individuals?

8 **A.** The -- sorry. Flipped away from the
9 report. 1.5 sextillion. So, we would have to test
10 1.5 sextillion random individuals to find somebody
11 else to include as a contributor to that profile.

12 **Q.** Can you give us some prospective what -- do
13 you guys rely upon statistics for what the earth's
14 population is?

15 **A.** Well, I know the earth population is a
16 little over 7.7 billion.

17 **Q.** Okay. And what is a sextillion versus a
18 billion?

19 **A.** I can tell you how many zeros are in the
20 sextillion, if that would help. I'm going to refer
21 to my notes. That's 21 zeros in sextillion versus
22 nine zeros in a billion.

23 **Q.** Okay. So, we're talking about multiples of
24 the earth's population?

25 **A.** Correct.

1 **Q.** After you conducted your analysis in
2 regards to this case, is there evidence that's
3 retained by the lab in case anyone wants to do any
4 independent testing of it?

5 **A.** There is a couple of things. First, we
6 have -- like we had mentioned previously, we only use
7 half of the evidence that was retained. So, for this
8 DNA, we only used half the stain. Half of that stain
9 remained for retesting. Most of the times it does go
10 back to the property room, HPD property room.
11 Sometimes it could be retained in the lab
12 temporarily, and that can be retested.

13 Oftentimes, as well, when we create,
14 when we -- assuming we are talking about extractions,
15 when we extract the DNA and have the extraction, we
16 generally don't use that whole volume for our
17 testing. So, some of that remains; and we retain it
18 in the lab. Generally if retesting is done, they do
19 go back to the evidence.

20 **Q.** And in this case you retained at least half
21 of the sample; is that correct?

22 **A.** Correct. We only took half of the stain to
23 extract.

24 **Q.** In regards to this case, the evidence that
25 you analyzed, were these full single source profiles?

1 Were there any mixtures involved?

2 **A.** We did not have my mixtures in this case.

3 **Q.** Okay. And when you're talking about blood
4 DNA, is blood a -- how would you classify blood? Is
5 it a good source, bad source, medium source?

6 **A.** It's a good source of DNA just like saliva
7 and semen would be. The body fluid indicates a
8 concentrated amount of cells. Therefore, a lot of
9 cells are left behind. So, we generally -- from any
10 body fluid like that, if we have a stain large enough
11 to see, we can get a pretty good profile.

12 **Q.** Okay. In regards to the first column, the
13 profile obtained from the reddish-brain --
14 reddish-brown stain from shorts and the known profile
15 obtained from Herman Whitfield, did those two
16 profiles -- are the alleles the same?

17 **A.** Yes.

18 **MR. PENEGUY:** Pass the witness.

19 **THE COURT:** Thank you.

20 Mr. Vinas.

21 **MR. VINAS:** Thank you, Your Honor.

22 **CROSS-EXAMINATION**

23 **Q.** (**BY MR. VINAS**) Mr. Peneguy -- well, when
24 you first introduced yourself to the jury, you said
25 that you worked for the Houston Forensic Science

1 Center, correct?

2 A. Correct.

3 Q. And Mr. Peneguy cleared that up. That's
4 what's formerly known as HPD Crime Lab; is that also
5 correct?

6 A. That's correct.

7 Q. I'm going to have to warn you, like I did
8 our Nurse Spjut yesterday, you and I both talk very
9 fast.

10 A. Okay.

11 Q. And Mrs. Lee has already gotten on me a
12 couple of times. So, we have to make sure we slow it
13 down a bit. I mean, if you and I talk fast over each
14 other, this is going to be a mess.

15 Where is the Houston Forensic Science
16 Center located?

17 A. Right now we have two locations. The
18 laboratory is located t 1200 Travis. And we also
19 have a location at 1301 Fannin. However, right now
20 that's where CSU is housed, the Crime Scene Unit, in
21 some administrative capacity.

22 Q. Still on the 26th floor over at 1201
23 Travis?

24 A. The 24th and 26th floor.

25 Q. Okay.

1 **A.** And 25th.

2 **Q.** So, three floors?

3 **A.** Yes.

4 **Q.** And that's the same as it was when it was
5 known as HPD Crime Lab; is that correct?

6 **A.** Correct. We have not moved.

7 **Q.** And most of the employees -- I mean, there
8 has been some turnover, but a lot of the people
9 working at the Houston Forensic Science Center are
10 the same folks who were working at the HPD Crime Lab?

11 **A.** There is a lot of folks that are the same.
12 We have also had a lot of people come on board --

13 **Q.** Sure.

14 **A.** -- since.

15 **Q.** Now, you talked about when -- when you were
16 going through your resume with Mr. Peneguy, you
17 stated that your proficient in DNA analyst; but you
18 made the distinction that you're between proficiency
19 and certification; is that correct?

20 **A.** Correct.

21 **Q.** And you said you're not certified?

22 **A.** I am not certified.

23 **Q.** What certification exists for a DNA
24 analyst?

25 **A.** There is a board called the American Board

1 of Criminalistic who offers an exam that you can
2 take. It's voluntary at this time. And if you pass
3 this exam and then you meet qualifications for how
4 long you have been in the field, then you become
5 certified.

6 Q. Have you taken this exam yet?

7 A. I have not taken that exam.

8 Q. You also stated that the lab is accredited.
9 Who is the accrediting agency?

10 A. We were accredited by the Forensic Quality
11 Services, which has since been taken over by ANAB,
12 which has also taken over two other accrediting
13 bodies. The American national standards -- can I
14 look at my notes?

15 Q. Please do.

16 A. This is all very new. It took over --
17 September 11th is when they started. So, ANAB took
18 over FQS --

19 Q. Slow down. Slow down. Who is ANAB? What
20 is the acronym?

21 A. ANAB has more acronyms in the name.
22 ANSI-ASQ National Accreditation Board.

23 Q. That's a terrible name. Who is the other
24 board you said?

25 A. Well, the two that are in there is ANSI,

1 which is the American National Standards Institute.

2 Q. Okay.

3 A. And ASQ is the American Society for
4 Quality.

5 Q. So, they merged; and now that's two that
6 has your certifications?

7 A. Yes. FQS used to do known -- basically, I
8 think they worked together, and then they went by
9 ANAB as opposed --

10 Q. When did y'all obtain that certification?

11 A. September 11, 2014. We have been
12 accredited since 2006. However, we obtained
13 international accreditation; and that's when we
14 switched from what we used to, ASCLD/LAB, the
15 American Society for Crime Laboratory Directors
16 Laboratory Accreditation Board. We were accredited
17 under them and we went to international and we're now
18 accredited under ANAB.

19 Q. And that was going to be my question. Have
20 you had the accreditation consistently since 2006?

21 A. Yes.

22 Q. Okay. You talked about different
23 technicians, screeners, and analysts, is there a
24 hierarchy between those different occupations or
25 titles?

1 **A.** No, there is not.

2 **Q.** Okay. I mean, you have got HPD; but are we
3 talking about post docs working as screeners?

4 **A.** It really depends on when you come in, what
5 your experience level is. For example, I came in as
6 a screener because prior to working with Houston
7 Police Department Crime Lab, I was more -- in
8 research. So, I started screening so I could learn
9 the whole process. It's -- we all have to have
10 specific qualifications to work in any aspect of the
11 biology section. So, it really depends more on your
12 experience and the processes that you have been
13 through.

14 **Q.** Okay.

15 **A.** What parts of the process you work on.

16 **Q.** So, are -- so the screeners, I guess, are
17 the least experienced of the group. Is that fair to
18 say?

19 **A.** No, I don't think that's fair to say. We
20 have some screeners that have been doing it for more
21 than 10 years, and they love doing it. So, they are
22 still screening. We have people that come in that
23 are more interested in DNA analysis. So, they move
24 that direction. It really isn't a qualification to
25 be able to do one or the other.

1 **Q.** Okay. And then there is the technicians,
2 and they are the ones who I think you said they batch
3 the cuttings and scrapings or whatever the screener
4 gets?

5 **A.** Right. They receive the batches. So, we
6 have a case manager who batches cases. That's why we
7 do the assembly line process. It's more efficient to
8 be able to say we are going to work these 10 cases in
9 this batch. So, then that batch is given to a
10 technician; and then they start their process.

11 **Q.** Okay. So, you will test -- when you talk
12 about batch testing, you're talking about multiple
13 pieces of evidence from a single case you're testing
14 at the same time or evidence from various sources?

15 **A.** It depends. It can be from various
16 sources. I believe, like in this specific case, the
17 extraction of the evidence, that was the only item
18 extracted.

19 **Q.** Okay.

20 **A.** However, there are -- because we use a lot
21 of robotics, we can also process different cases at
22 the same time.

23 **Q.** And you're an analyst?

24 **A.** Correct.

25 **Q.** You said you started as a screener?

1 **A.** Correct.

2 **Q.** Did you go through the technician phase?

3 **A.** I -- I did the technician work as part of
4 my training to be the analyst. I was proficient in
5 it, but I moved pretty quickly to just being an
6 analyst.

7 **Q.** Now, earlier in your direct examination,
8 you said that you take ownership of all the DNA
9 analysis that you do on your case, right?

10 **A.** Correct.

11 **Q.** You said that you look at the reports that
12 the screeners or the technicians write, but you don't
13 take ownership of that?

14 **A.** The screeners. The technicians do not
15 write a report. So, that is the data I take
16 ownership of. The screener's report has already been
17 issued at that point.

18 **Q.** Okay.

19 **A.** So, that's correct.

20 **Q.** And who did you say the screener was for
21 the red shorts in this case?

22 **A.** Christine Konecny.

23 **Q.** Okay. But you said now she's a DNA
24 analyst?

25 **A.** Correct.

1 **Q.** And for the record, Christine common
2 spelling? Konecny is K-O-N-E-C-N-Y; is that correct?

3 **A.** Correct. I'm going to double check in the
4 report. K-O-N-E-C-N-Y.

5 **Q.** All right. I'm going to make her mad
6 later. So, just trying to earn brownie points with
7 Mrs. Lee.

8 And you said she's still at the lab?

9 **A.** She is.

10 **Q.** Now, she did some of the screening on the
11 red shorts, but there was testing done by another
12 person; is that correct?

13 **A.** She did all of the screening --

14 **Q.** Okay.

15 **A.** -- on the red shorts.

16 **Q.** But then after and before the cutting was
17 made, did anybody else do any analysis on the shorts?

18 **A.** There would have been a second reader for
19 her tests on the shorts; but once she took that
20 cutting, nobody else would have tested it until it
21 was time for extraction to start.

22 **Q.** The blood test you referred to earlier,
23 would that have been by Christine Konecny or someone
24 else?

25 **A.** By Christine Konecny. The blood

1 confirmatory result would have been confirmed by
2 another screener, but she would have done the
3 testing.

4 Q. And I think I asked you this probably
5 twice. Christine Konecny is still at the lab?

6 A. Yes, she is.

7 Q. And the second reader on the stain, appears
8 the initials are -- is that J.W.R.?

9 A. J.M.R.

10 Q. J.M.R. That was going to be my guess.
11 And --

12 A. Juli Refuss.

13 Q. Correct.

14 A. J-U-L-I, R-E-F-U-S-S. Yes. S-S. I
15 believe there's two Ss.

16 Q. And she does serology; is that right?

17 A. Yes. She is actually one of the most
18 experienced serologist.

19 Q. So, she was the second reader?

20 A. Correct.

21 Q. And the side of the stain on those red
22 shorts that you ultimately did some biological tests
23 from things taken from that stain besides the stain
24 was roughly a quarter inch by quarter inch?

25 A. That's what's documented here.

1 **Q.** All right. You said earlier that Elizabeth
2 Richey did something on this case?

3 **A.** She is actually the one who extracted the
4 bloodstain in this case.

5 **Q.** And Elizabeth is common spelling. Last
6 name is R-I-C-H-E-Y?

7 **A.** Correct.

8 **Q.** And she still works at the lab?

9 **A.** Correct. And she extracted both samples,
10 the evidence sample and the reference sample, from
11 Jocelyn Batiz.

12 **Q.** Okay. And that lab is, what, 15 blocks
13 from here, maybe 20?

14 **A.** Approximately. Five-minute drive.

15 **Q.** Did you -- and I don't know why I can't
16 remember his name. Lloyd. What's his last name?

17 **A.** Lloyd Halsell.

18 **Q.** Halsell. Did y'all come in this morning
19 together?

20 **A.** Yes, we did.

21 **Q.** And I'm sure he left you here?

22 **A.** Yes.

23 **Q.** Okay. The testing for blood that -- and
24 I'm just going to -- for ease, I'm going to use the
25 first names if it's okay with you and the Judge --

1 that Christine and the Juli tested, when was that
2 conducted?

3 **A.** They -- let me refer to the case.

4 **Q.** July of 2010?

5 **A.** Right. July 8, 2010.

6 **Q.** Some three years before you did your
7 testing; is that correct?

8 **A.** Correct.

9 **Q.** Do we know the reason for the delay?

10 **A.** Just in the past we have had a large DNA
11 queue. We have -- when I joined the lab, we had
12 quite a few screeners. I can't remember an exact
13 number. And I think at the time we had three DNA
14 analysts. So, a lot of screening of cases gets done.
15 We retain the evidence. We make the assignment for
16 DNA. We just had a large queue. And so, it could
17 take time between.

18 And priority wise, sometimes if you
19 don't have a reference, then stuff will get put to
20 the back of the queue for other priority cases that
21 come in. We're in a better situation now. We still
22 have a two-day turnaround time, but there was just
23 definitely a large queue.

24 **Q.** Okay. So, it was sitting somewhere --
25 well, let me ask you this: Between July 8, 2010,

1 when Christine and Juli tested or Christine tested
2 and Juli --

3 **A.** Second reader.

4 **Q.** -- read the results -- because there was
5 only one test, right?

6 **A.** Correct.

7 **Q.** And then Juli just looked at her report?

8 **A.** She looks at -- when we confirm for blood,
9 we use a cassette that almost looks like a pregnancy
10 test. And whenever we report those results, two
11 people have to verify it because we don't keep that
12 cassette. So, it's our policy that two people have
13 to verify what that result was.

14 **Q.** Okay. So, Christine does the testing and
15 then says, Hey, Juli come check this out?

16 **A.** Right. Yeah.

17 **Q.** Between -- so, that -- the actual result of
18 that test would have been discarded, what, that day?

19 **A.** Yes.

20 **Q.** And then the other half of the sample --
21 well, do you do your DNA testing on the same portion
22 of the cutting that they tested?

23 **A.** No. Normally what they do is they take a
24 very small cutting for that testing.

25 **Q.** Okay.

1 **A.** And that is consumed in that testing.

2 **Q.** Okay.

3 **A.** But it's only very small because you don't
4 need very much for the confirmatory test. And then
5 once we confirm it's positive, then they would take
6 the cutting in these -- at this time take the cutting
7 of the whole stain for retaining it. In the current
8 process you would actually just take the portion for
9 DNA, and the rest of the stain would have stayed in
10 the shorts.

11 **Q.** Okay. So, back in 2010, cut the whole
12 thing out, I guess, and divide it in half?

13 **A.** Right. Well, they actually would have just
14 cut the whole thing out, put it in a secure envelope,
15 and nothing else would have been done. And then the
16 person who -- the technician, Elizabeth, who came in
17 to extract it, would actually then cut half of the
18 stain.

19 **Q.** Okay.

20 **A.** At that time.

21 **Q.** And then put the other untested half back
22 in the envelope?

23 **A.** Correct.

24 **Q.** And then -- so, you never physically
25 touched the evidence; is that right?

1 **A.** I did not. Correct.

2 **Q.** What you do, if the -- to put your
3 testimony together with Lloyd's and I'm sorry, I
4 don't mean any disrespect, you're the only person
5 whose last name I can readily pronounce. So, to put
6 y'all's -- y'all's testing together, your testimony
7 together, you don't in your analysis ever take the
8 actual biological material from the fabric of the
9 shorts in this case and then develop a DNA analysis.
10 It goes through Elizabeth Richey who takes that and
11 extracts it through whatever machine y'all have to do
12 the extractions; is that correct?

13 **A.** Correct.

14 **Q.** And then would she -- then at that point
15 you do the quantification?

16 **A.** Right. In this case Jisel Bailon, which is
17 B-A-I-L-O-N, she did the quantification amplification
18 and the separation. She is also -- she's now a DNA
19 analyst, and at the time she was a technician.

20 **Q.** But still working at the lab?

21 **A.** Correct.

22 **Q.** And when I say "the lab," you know what I
23 mean, Houston Forensic Science Center?

24 **A.** Correct.

25 **Q.** Okay. So, it went from Christine Konecny

1 to Elizabeth Richey who was the last person to really
2 touch the -- or not -- I guess she took it from the
3 shorts, and then Jisel Bailon is the one who
4 amplified -- quantified and amplified the DNA?

5 **A.** So, Christine Konecny screened it, cut the
6 stain out, put that in secure storage. And then
7 Elizabeth would have gotten it from security storage,
8 extracted it, and at that point passed the extracts
9 on to Jisel Bailon, who would have done the
10 qualification, amplification, and separation.

11 **Q.** And then you take that fluid that comes out
12 of that, and you do the DNA analysis on that?

13 **A.** I did data.

14 **Q.** Okay.

15 **A.** So, the data and the process that Jisel ran
16 the end product of that is a data file. I then get
17 the data files and all of the paperwork involved in
18 the work that they did.

19 **Q.** Time out. Are you saying data vial, like
20 V-I-A-L, or file?

21 **A.** File, F-I-L-E.

22 **Q.** Okay.

23 **A.** Yes.

24 **Q.** So, you never in this case touched any
25 actual fluid or biological material or anything?

1 **A.** No, I do not.

2 **Q.** You look at the computer inside the
3 machine, it gives a printout, and analyze the numbers
4 that ultimately come out of the big DNA machine?

5 **A.** Right, along with all the paperwork that --
6 because every step has a worksheet that we make where
7 they document controls. They document all the
8 parameters. And that's what I'm taking ownership of,
9 that -- I been trained in that and as a DNA analyst
10 that I agree that they did the correct thing.

11 **Q.** Okay. Now, when you -- when you're doing
12 that, you're not allowed or any of the other
13 supervisors -- you're not actually supervising them
14 while they are doing this. You're just -- you're
15 looking at the reports that they give you, kind of
16 almost like a checklist, at each stage there and
17 saying yeah, Okay. It's documented correctly. It's
18 documented correctly, that sort of thing, right?

19 **A.** Correct. We are not watching them as they
20 do it.

21 **Q.** Right. Okay. And before today in court,
22 had you ever seen State's 37, 38, 41, 43, 45, or 46
23 before?

24 **A.** No, not the physical items.

25 **Q.** All right. Just trust that's the same

1 stuff based on paper trail that you ultimately
2 analyzed the data on?

3 **A.** Not only the paper trail but also what I
4 know we document on the items when we test them.
5 That's one thing we're taught as screeners so that we
6 can -- even if -- even if I had seen them before, so
7 I -- that I can identify it by the tags and in those
8 pictures that it is the same item.

9 **Q.** And almost -- yeah, I guess that was a bad
10 way for me to phrase it, paper trail. Just the
11 documentary evidence?

12 **A.** Uh-huh (affirmative.)

13 **Q.** Whether it's on the evidence itself or
14 there is a report written. Okay.

15 I might have left out in my butchering
16 of one of those names, but Juli still works over
17 there at the lab, right?

18 **A.** Yes, she does.

19 **Q.** All right. And she is still doing
20 serology?

21 **A.** Yes.

22 **Q.** And did -- once you did a DNA profile,
23 did -- did Christine or Juli or anybody else go back
24 and retest any portion, any of that stain for blood
25 again?

1 **A.** No. As far as I have documented, there has
2 been no more testing done on that.

3 **Q.** Just that one little minute part -- I think
4 is the word you used -- that was consumed?

5 **A.** For the screening, yes.

6 **Q.** Okay.

7 **MR. VINAS:** I pass the witness, Your
8 Honor.

9 **THE COURT:** Thank you.

10 Redirect?

11 **MR. PENEGUY:** Yes, Judge. May I
12 approach the witness?

13 **THE COURT:** You may.

14 **REDIRECT EXAMINATION**

15 **Q.** **(BY MR. PENEGUY)** Showing you what's been
16 marked for identification purposes as State's Exhibit
17 No. 44. Are you familiar with the items that are --
18 three pages of State's Exhibit 44?

19 **A.** I'm familiar with the three pages from the
20 case file, yes.

21 **Q.** And when you guys are doing your reports,
22 it's true you don't handle the physical item; but you
23 guys do take a photographic image of them. Is that
24 fair to say?

25 **MR. VINAS:** Object to leading.

1 **A.** Sorry.

2 **THE COURT:** Sustained.

3 **Q.** **(BY MR. PENEGUY)** Okay.

4 **MR. PENEGUY:** Judge, I offer State's
5 44. Tender to opposing counsel.

6 **MR. VINAS:** May we approach?

7 **THE COURT:** Okay.

8 **(At the Bench)**

9 **MR. VINAS:** For the record, State's
10 Exhibit 44 is three pages from the HPD lab report.
11 There are some photographs of the evidence that is
12 already in evidence. And I will get the numbers
13 wrong; but it's the red shorts, the whitish-yellowish
14 shirt, and purple underwear. Those are already in
15 evidence. So, to admit photographs of them at this
16 point would be cumulative.

17 Additionally, there is quite a bit of
18 hearsay all over these photos. And I will tender
19 them to the Court in a moment; but it's hearsay
20 written by mostly Christine Konecny, a few by Juli
21 Refuss, documenting what they did out of court. So,
22 those would be out-of-court statements offered for
23 the truth of the matter asserted.

24 **THE COURT:** Are you offering this as a
25 business record?

1 **MR. PENEGUY:** Judge, we're offering
2 this as part of a business record and part -- and
3 also to correct a false light that we believe was
4 created during the cross-examination that she has
5 never -- that she can't verify that these are the
6 items that were reviewed because she didn't
7 physically handle the items. These are photographs
8 that are part of her case file.

9 **THE COURT:** I don't recall you laying
10 the business record predicate.

11 **MR. PENEGUY:** I laid the business
12 record predicate for her file in the direct
13 examination, and that would be my objection and
14 response to the hearsay argument.

15 **MR. VINAS:** Well, Judge, 803.6 would
16 be the business --

17 **THE COURT:** Sorry.

18 **MR. VINAS:** 803.6 would be the rule --
19 hearsay rule for business records exception. It
20 clearly states in the rule, reports by law
21 enforcement offered by the State are not admissible
22 in a criminal case. So, even if it does lay the
23 business records predicate, it's still inadmissible
24 even as a business record because they are clearly
25 law enforcement at the time that this report was

1 generated, both times in 2010.

2 **THE COURT:** I thought one reason the
3 new lab was created was to make them not so much a
4 part of the ownership, but much more independent.

5 **MR. VINAS:** That would be the
6 presumption. However, Judge, they're at the same
7 location. They are still housed at HPD headquarters,
8 on the top three floors of HPD headquarters. But
9 even more importantly, at the time that these reports
10 were written in 2010 and in 2013, they were still the
11 HPD Crime Lab. That's already -- that's in evidence.
12 I believe it was Lloyd Halsell who testified that it
13 was last year in 2014 that they became the Houston
14 Forensic Science Center.

15 **THE COURT:** Let me look at that just a
16 minute.

17 **MR. VINAS:** Yes, Judge.

18 **THE COURT:** None of this contains any
19 hearsay about conviction or other cases or anything
20 like that.

21 **MR. VINAS:** That's correct.

22 **THE COURT:** Right. So, I have no
23 problem with it coming in if you don't mind just
24 going over the business records predicate again to
25 make sure we got it.

1 **MR. PENEGUY:** Okay.

2 **MR. VINAS:** Please note our objection.

3 **THE COURT:** Objection is noted, but he
4 still needs to do the predicate.

5 **MR. PENEGUY:** Yes, Judge.

6 **MR. VINAS:** Okay.

7 **(End of Bench Discussion)**

8 **Q.** **(BY MR. PENEGUY)** I'm handing you three
9 pieces of paper again that are marked as State's
10 Exhibit No. 44. I'm going to ask you do you
11 recognize these items?

12 **A.** They appear --

13 **Q.** Do you recognize these three pages?

14 **A.** Yes.

15 **Q.** Okay. Are these papers -- these pages --
16 pages, are those records that are made in the
17 ordinary course of business for your laboratory?

18 **A.** Yes, they are.

19 **Q.** And are those made by someone at or near
20 the time of the events recorded therein?

21 **A.** Yes.

22 **Q.** Okay. Are they made by someone with
23 knowledge -- with personal knowledge of what they are
24 writing down?

25 **A.** Yes.

1 **Q.** Okay. And are these types of documents,
2 are they documents that are kept in the ordinary
3 course of business for the laboratory?

4 **A.** Yes, they are.

5 **Q.** Do they appear to be duplicates -- just
6 duplicates from the file?

7 **A.** Yes, copies from the file.

8 **Q.** Do they appear to have been altered in any
9 way?

10 **A.** No.

11 **MR. PENEGUY:** Judge, at this time I
12 offer State's 44.

13 **MR. VINAS:** Judge, we renew our
14 objections under Rule 403, under 802, and 803 under
15 hearsay, and also to the Sixth Amendment issues
16 presented by testimony given in those exhibits by
17 people who are not present in court, yet are
18 available. So, we are running afoul of *Crawford*,
19 *Bullcoming*, *Melendez-Diaz*, and many other non-Supreme
20 Court cases, but all the way down the lab.

21 **THE COURT:** Thank you. Can you
22 establish if she is the custodian of the records?

23 **MR. PENEGUY:** Sure.

24 **Q.** **(BY MS. PRIMM)** Do you work for the lab?

25 **A.** Yes, I do.

1 **Q.** And you a custodian of this laboratory?

2 **A.** Yes.

3 **THE COURT:** Okay.

4 **MR. PENEGUY:** And, Judge, for purposes
5 of the record and clarification, may we approach,
6 Mr. Vinas?

7 **THE COURT:** I'm ready to rule on it.

8 **MR. PENEGUY:** Certainly, Judge.

9 **THE COURT:** The Defense objection is
10 overruled. And what was the exhibit number again?

11 **MR. PENEGUY:** It was 44.

12 **THE COURT:** That's admitted. Staple
13 them together.

14 **MR. PENEGUY:** Yes, ma'am.

15 May I approach the witness?

16 **THE COURT:** Yes. Thank you.

17 **Q.** **(BY MR. PENEGUY)** Okay. State's 44, do they
18 contain photographic images? Let's start with item
19 .2, the front of the shorts.

20 **A.** What was the question?

21 **Q.** Do they contain photographs -- a
22 photographic imagine of the front of the red shorts?

23 **A.** Yes, they do.

24 **Q.** And do they contain a photographic image of
25 the back part of the red shorts?

1 **A.** Yes, it does.

2 **Q.** Okay. The second page, does it contain a
3 photographic image of the front side of the
4 white-yellowish shirt?

5 **A.** For item .3, yes, it does.

6 **Q.** Okay. And does it also contain a
7 photographic image of the back?

8 **A.** Yes, it does.

9 **Q.** Does it also contain a photographic image
10 of a pair of female underwear?

11 **A.** Yes. I have another page that shows that
12 picture.

13 **Q.** Okay.

14 **A.** Pair of purple.

15 **Q.** And front and backside, right?

16 **A.** Correct.

17 **Q.** Does it also have documentation that's
18 consistent with some of the markings that we actually
19 saw on the physical items?

20 **A.** Yes, they do document on the picture where
21 they wrote on the items.

22 **Q.** Okay. And so, while you didn't physically
23 inspect these items, you respected -- did you review
24 these images during the course of your analysis?

25 **A.** We do review the images.

1 **MR. PENEGUY:** Pass the witness.

2 **THE COURT:** Thank you.

3 **REXCROSS-EXAMINATION**

4 **Q.** **(BY MR. VINAS)** And I believe you told me
5 that on cross-examination. We clarified that, but
6 does that change the fact that you still never
7 reviewed any of the physical items that you went
8 through earlier on cross?

9 **A.** No, it doesn't.

10 **Q.** I want to talk to you about the shorts.
11 You went through the testimony on them, especially
12 just now with State's Exhibit 44. The shorts are
13 laid out flat; is that correct?

14 **A.** In the picture, yes.

15 **Q.** Yes. And so, that stain appears -- I
16 believe you said, and correct me if it wasn't you --
17 I think it was you who said it earlier that the stain
18 that we're talking about, the reddish-brown stain,
19 was on the back below and diagonally to the right of
20 the back pocket; is that correct?

21 **A.** Yeah, approximately.

22 **Q.** And that's because the shorts are laid out
23 not flat, correct?

24 **A.** Yes.

25 **Q.** Okay. Now, when someone puts them on,

1 you're going to fill those shorts out; is that right?

2 A. Yes.

3 Q. And so, if something is laid out flat -- a
4 piece of clothing is laid out flat, although
5 something may appear to be on the front or on the
6 back, if it were filled out with a person, at least
7 part of that is on the side. Would you agree with
8 that?

9 A. It -- it could be.

10 Q. All right.

11 A. And that's why we somewhat define -- we try
12 to define it in our pictures as received this.

13 Q. Sure.

14 A. This is how the picture -- because we
15 aren't able to predict necessarily how it would be on
16 somebody.

17 Q. You didn't go put it on a manikin?

18 A. No.

19 Q. So, from a flat perspective, it's in back;
20 but if it were filled out, at least the edges of the
21 back and the front would be somewhere on the side of
22 that article of clothing?

23 A. I think it could be.

24 Q. Okay. Well, I mean, unless someone was
25 two-dimensional, at least part of it is going to be

1 on side; is that correct?

2 **A.** It's a possibility. If I didn't see it on
3 a person, I have a hard time saying for sure where it
4 would be.

5 **Q.** Well, I'm not asking you specifically this
6 item.

7 **A.** Uh-huh (affirmative.)

8 **Q.** But, you know, the dress you're wearing, if
9 you laid it on your bed tonight, it would be flat?

10 **A.** Correct.

11 **Q.** But you're wearing it, parts of that are
12 like on side of your ribs?

13 **A.** That's true. Yes.

14 **MR. VINAS:** I pass the witness, Your
15 Honor.

16 **THE COURT:** Thank you.

17 **MR. PENEGUY:** No further questions.

18 **THE COURT:** Is this witness excused or
19 on call?

20 **MR. PENEGUY:** On call, Judge.

21 **THE COURT:** Okay. Thank you.

22 You're free to leave today. Thanks.

23 **(Witness released)**

24 **MR. VINAS:** I -- you said -- I'm fine
25 with her being for not back, Judge. Sorry. I was

1 reading something else.

2 **THE COURT:** Okay. Any other
3 witnesses?

4 **MS. PRIMM:** The State of Texas would
5 rest.

6 **THE COURT:** Thank you.
7 Will the Defense be offering any
8 evidence?

9 **MR. GRAHAM:** Can we approach?

10 **THE COURT:** You may.

11 **(At the Bench)**

12 **MR. GRAHAM:** I don't know if you want
13 to give the jurors a short break.

14 **THE COURT:** Is that because you have a
15 motion?

16 **MR. VINAS:** Yes, Judge.

17 **THE COURT:** I usually just do it at
18 the bench.

19 **MR. VINAS:** Okay. We also would like
20 a few minutes to -- and I would like for the jury not
21 to see this -- for us to confer with Mr. Whitfield
22 just to make sure he is electing at this point not to
23 testify. I don't want them to see us talking to him
24 and then --

25 **THE COURT:** That's okay. I can give

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1 you a break for that.

2 **MR. VINAS:** Thank you, Judge.

3 **MR. GRAHAM:** We --

4 **THE COURT:** The motion, can we go
5 ahead and finish it; or is it lengthy?

6 **MR. VINAS:** No. It's -- at this
7 point, the State having rested, we have a Motion for
8 a Directed Verdict. And the law says that if we
9 specify too much, then we would waive objection to
10 other areas. So, just a general Motion for Directed
11 Verdict that they have not met their burden as to
12 each element of the offense.

13 **THE COURT:** Thank you. That motion is
14 denied.

15 **(End of Bench Discussion)**

16 **THE COURT:** Thank you. Members of the
17 jury, we're going to take a brief recess. So, I will
18 ask that you step back to the jury room, please.

19 All rise, please, for the jury.

20 **(Jury released)**

21 **(OBJECTIONS TO THE COURT'S CHARGE)**

22 **THE COURT:** With regard to the charge,
23 with the understanding if the Defense decides to
24 present evidence, of course, we will relook at
25 everything. And does the State have any objections

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1 or corrections?

2 **MS. PRIMM:** The only -- I don't have
3 any objections. The only -- I wanted three pages
4 removed from the charge because they didn't come into
5 play. There is an extraneous charge for the
6 defendant that I don't believe any other evidence of
7 any other crimes or bad acts were introduced.

8 There is another page --

9 **THE COURT:** So, I agree that one needs
10 to come out.

11 Are you in agreement, Mr. Graham?

12 **MR. GRAHAM:** Yes, ma'am.

13 **THE COURT:** Okay. Next one.

14 **MS. PRIMM:** There is an additional
15 page -- basically it's a different extraneous
16 evidence charge on the defendant. And I believe that
17 needs to come out, as well; and then there is a third
18 page about a witness being convicted of a crime,
19 which there is no evidence of that in this case, as
20 well.

21 **THE COURT:** Okay.

22 **MR. GRAHAM:** And we're in full
23 agreement on those pages being removed.

24 **THE COURT:** Okay. Anything else?

25 **MR. GRAHAM:** Yes, Your Honor. And I

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1 don't -- honestly for the life of me, can't
2 understand why the charge bank keeps including that
3 language. It's very clear throughout the charge and
4 every charge we get that it's the State's burden to
5 prove the case beyond a reasonable doubt; and unless
6 and until they do so, you are to find the defendant
7 not guilty.

8 And you talk about how the defendant
9 doesn't have to prove their innocence. And in the
10 last paragraph; is your sole duty at this time to
11 determine the guilt or innocence of the defendant.
12 That's not their doubt to determine guilt or
13 innocence. And I think that's confusing.

14 I think it should say, it is your sole
15 duty at this time to determine whether or not the
16 State has met their burden to prove this case beyond
17 a reasonable doubt and proving the defendant's guilt
18 or whether or not he is not guilty. And I just think
19 that it's prejudicial.

20 You know, for the life of me, I don't
21 understand why it's been included all these years by
22 the charge bank. And, you know, I think that the
23 State Bar is made very clear in their patent jury
24 instructions that this is not the language that
25 should be included.

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1 **THE COURT:** It would probably be a
2 better practice to change it: It's your sole duty at
3 this time is to determine whether the State has
4 proven the defendant's guilt beyond a reasonable
5 doubt -- or the defendant's guilt under the
6 indictment in this case beyond a reasonable doubt. I
7 don't know which place you want the beyond a
8 reasonable doubt. Seems to me it's not worth arguing
9 about on appeal.

10 **MR. GRAHAM:** Right.

11 **THE COURT:** Is that okay with you?

12 **MS. PRIMM:** It's fine, Judge.

13 **THE COURT:** Okay. So, tell me how you
14 want it worded exactly.

15 **MR. GRAHAM:** How about I just write it
16 down? That might make it a little simpler for me.

17 **THE COURT:** Okay.

18 *(Brief pause)*

19 **THE COURT:** On the record. Let me see
20 what it says.

21 **MR. GRAHAM:** Yes, ma'am.

22 **THE COURT:** Each and every element of
23 the indictment, not the case.

24 **MR. GRAHAM:** Sorry.

25 **THE COURT:** Each and every element of

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1 the indictment.

2 **MR. VINAS:** That's fine.

3 **MR. GRAHAM:** Oh, sorry. Judge.

4 That's much better.

5 **THE COURT:** Beyond a reasonable doubt.

6 *(Brief pause)*

7 **THE COURT:** Okay.

8 **MR. GRAHAM:** Judge, if I may. We have
9 consulted with Mr. Whitfield not only about the
10 current charge that he is on trial for, but the
11 extraneous cases that I know the Court's well aware
12 of. Mr. Whitfield is well aware of the other
13 extraneous case also that the State could potentially
14 get into, including the case that he is currently in
15 TDC for, as well as any other priors that he has.

16 And based on that, we having consulted
17 with him, he has decided that he is not going to
18 testify. And I just want to make sure it's clear on
19 the record that we have fully consulted with
20 Mr. Whitfield and that that is his decision at this
21 time.

22 **THE COURT:** Is that correct,
23 Mr. Whitfield?

24 **THE DEFENDANT:** Yes, Your Honor.

25 **THE COURT:** You choose not to testify;

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1 is that correct?

2 **THE DEFENDANT:** Yes, Your Honor, I
3 choose not to.

4 **THE COURT:** All right. Thank you,
5 sir.

6 **MR. GRAHAM:** Thank you, Judge.

7 **THE COURT:** Okay.

8 **(Recess taken)**

9 **THE COURT:** We have the final draft of
10 the charge. Does the State have any objections?

11 **MS. PRIMM:** State has no objections,
12 Your Honor.

13 **THE COURT:** The Defense?

14 **MR. VINAS:** No, Your Honor.

15 **MR. GRAHAM:** No objection.

16 **THE COURT:** Okay. Then we're ready
17 for the jury.

18 Of course, we need Mr. Whitfield
19 first.

20 **(Brief pause)**

21 **THE COURT:** Everybody ready?

22 **MS. PRIMM:** Ready.

23 **THE COURT:** Let me just look. And we
24 have no family members here?

25 **MS. PRIMM:** No, ma'am.

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1 **THE COURT:** Let me just mention one
2 thing. I'm sure you-all would never do this. But
3 just for the State, I have had a few prosecutors who
4 like to shake their finger really close to the
5 defendant to try and get him riled up; and I don't
6 allow that. So, I say the same thing in every case.
7 Anything from the end of their counsel table back
8 that way is the defense field. State's not allowed
9 to go over there.

10 **MS. PRIMM:** Okay.

11 **THE COURT:** So -- and, also, I don't
12 allow the lawyers to sit in the witness stand and
13 pretend they're the witness because they are the
14 lawyer in the case.

15 Okay. All right. I think we're
16 ready.

17 *(Jury enters the courtroom)*

18 **THE COURT:** Thank you. Please be
19 seated.

20 Does the Defense wish to offer any
21 evidence?

22 **MR. VINAS:** No, Your Honor. The
23 Defense rests at this time.

24 **THE COURT:** Thank you.

25 State rest and closes, also?

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1 **MS. PRIMM:** Yes, ma'am.

2 **THE COURT:** Thank you.

3 Members of the jury, it now becomes my
4 responsibility to read the Court's instructions to
5 you. Then we will have final arguments. The lawyers
6 will be given up to 25 minutes per side to argue
7 their respective cases.

8 **MR. VINAS:** Judge, before you begin
9 the charge, may we approach briefly?

10 **THE COURT:** Okay.

11 **MR. VINAS:** Just take a second.

12 **(At the Bench)**

13 **MR. VINAS:** Now that both sides have
14 rested and closed, we are reurging our Motion for
15 Directed Verdict at this time. And we're also
16 renewing any objections we had to any evidence that
17 came through the guilt/innocence portion of the
18 trial.

19 **THE COURT:** I'm sorry. I didn't catch
20 the last part.

21 **MR. VINAS:** We are reurging our
22 objections --

23 **THE COURT:** Oh.

24 **MR. VINAS:** -- to any of the evidence
25 that came into trial.

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1 **THE COURT:** Thank you. The rulings
2 remain the same. Motion for Instructed Verdict is
3 denied.

4 **MR. VINAS:** Thank you, Judge.

5 **THE COURT:** Thank you.

6 **MR. VINAS:** All right.

7 **(End of Bench Discussion)**

8 **(Court's Charge Read)**

9 **THE COURT:** The State of Texas Vs.
10 Herman Whitfield.

11 Members of the Jury: The defendant,
12 Herman Whitfield, stands charged by indictment with
13 the offense of aggravated sexual assault, alleged to
14 have been committed on or about the 11th day of June,
15 2008, in Harris County, Texas. The defendant has
16 pleaded not guilty..

17 A person commits the offense of
18 aggravated sexual assault if the person intentionally
19 or knowingly causes the sexual organ of another
20 person, without that person's consent, to contact the
21 sexual organ of another person, including the
22 defendant; and if the person uses or exhibits a
23 deadly weapon in the course of the same criminal
24 episode.

25 An aggravated sexual assault is

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1 without the consent of the other person if the
2 defendant compels the other person to submit or
3 participate by the use of physical force or violence.

4 .

5 Deadly weapon means anything
6 manifestly designed, made, or adapted for the purpose
7 of inflicting death or serious bodily injury; or
8 anything that in the manner of its use or intended
9 use is capable of causing death or serious bodily
10 injury.

11 Bodily injury means physical pain,
12 illness, or any impairment of physical condition..

13 Serious bodily injury means a bodily
14 injury that creates a substantial risk of death or
15 that causes death, serious permanent disfigurement,
16 or protracted loss or impairment of the function of
17 any bodily member or organ..

18 A person acts intentionally, or with
19 intent, with respect to a result of his conduct when
20 it is his conscious objective or desire to cause the
21 result.

22 A person acts knowingly, or with
23 knowledge, with respect to a result of his conduct
24 when he is aware that his conduct is reasonably
25 certain to cause the result.

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1 Now, if you find from the evidence
2 beyond a reasonable doubt that on or about the 11th
3 day of June, 2008, in Harris County, Texas, the
4 defendant, Herman Whitfield, did then and there
5 unlawfully, intentionally or knowingly cause the
6 sexual organ of Jocelyn Batiz to contact the sexual
7 organ of the defendant, Herman Whitfield, without the
8 consent of Jocelyn Batiz, namely the defendant
9 compelled Jocelyn Batiz to submit or participate by
10 the use of physical force or violence, and in the
11 course of the same criminal episode, the defendant
12 used or exhibited a deadly weapon, namely a knife,
13 then you will find the defendant guilty of aggravated
14 sexual assault, as charged in the indictment.

15 Unless you so find from the evidence
16 beyond a reasonable doubt, or if you have a
17 reasonable doubt thereof, you will acquit the
18 defendant and say by your verdict "Not Guilty."

19 A defendant in a criminal case is not
20 bound by law to testify in his own behalf therein and
21 the failure of any defendant to so testify shall not
22 be taken as a circumstance against him nor shall the
23 same be alluded to nor commented upon by the jury,
24 and you must not refer to, mention, comment upon or
25 discuss the failure of the defendant to testify in

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1 this case. If any juror starts to mention the
2 defendant's failure to testify in this case then it
3 is the duty of the other jurors to stop him or her
4 at.

5 A Grand Jury indictment is the means
6 whereby a defendant is brought to trial in a felony
7 prosecution. It is not evidence of guilt nor can it
8 be considered by you in passing upon the question of
9 guilt of the defendant. The burden of proof in all
10 criminal cases rests upon the State throughout the
11 trial and never shifts to the defendant.

12 All persons are presumed to be
13 innocent and no person may be convicted of an offense
14 unless each element of the offense is proved beyond a
15 reasonable doubt. The fact that he has been
16 arrested, confined, or indicted for, or otherwise
17 charged with the offense gives rise to no inference
18 of guilt at his trial. The law does not require a
19 defendant to prove his innocence or produce any
20 evidence at all. The presumption of innocence alone
21 is sufficient to acquit the defendant, unless the
22 jurors are satisfied beyond a reasonable doubt of the
23 defendant's guilt after careful and impartial
24 consideration of all the evidence in the case.

25 The prosecution has the burden of

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1 proving the defendant guilty and it must do so by
2 proving each and every element of the offense charged
3 beyond a reasonable doubt and if it fails to do so,
4 you must acquit the defendant.

5 It is not required that the
6 prosecution prove guilt beyond all possible doubt; it
7 is required that the prosecution's proof excludes all
8 reasonable doubt concerning the defendant's guilt.

9 In the event you have a reasonable
10 doubt as to the defendant's guilt after considering
11 all the evidence before you, and these instructions,
12 you will acquit him and say by your verdict Not
13 Guilty.

14 You are the exclusive judges of the
15 facts proved, of the credibility of the witnesses and
16 the weight to be given their testimony, but the law
17 you shall receive in these written instructions, and
18 you must be governed thereby.

19 After you retire to the jury room, you
20 should select one of your members as your Foreperson.
21 It is his or her duty to preside at your
22 deliberations, vote with you, and when you have
23 unanimously agreed upon a verdict, to certify to your
24 verdict by using the appropriate form attached hereto
25 and signing the same as Foreperson.

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1 During your deliberations in this
2 case, you must not consider, discuss, nor relate any
3 matters not in evidence before you. You should not
4 consider nor mention any personal knowledge or
5 information you may have about any fact or person
6 connected with this case which is not shown by the
7 evidence.

8 No one has any authority to
9 communicate with you except the officer who has you
10 in charge. After you have retired, you may
11 communicate with this Court in writing through this
12 officer. Any communication relative to the cause
13 must be written, prepared and signed by the
14 Foreperson and shall be submitted to the court
15 through this officer. Do not attempt to talk to the
16 officer who has you in charge, or the attorneys, or
17 the Court, or anyone else concerning any questions
18 you may have.

19 Your sole duty at this time is to
20 determine whether the prosecution has proven each and
21 every element of the indictment in this cause beyond
22 a reasonable doubt and restrict your deliberations
23 solely to this issue.

24 Following the arguments of counsel,
25 you will retire to consider your verdict. And I am

1 now signing as the Judge of the court.

2 The following are the verdict pages.

3 Please choose one.

4 We, the Jury, find the defendant,
5 Herman Whitfield, not guilty.

6 We, the Jury, find the defendant,
7 Herman Whitfield, guilty of aggravated sexual
8 assault, as charged in the indictment.

9 Will the State be giving an opening
10 argument?

11 **MS. PRIMM:** The State would -- State
12 would waive the right to open and reserve the right
13 to close.

14 **THE COURT:** Thank you.

15 For the Defense?

16 **CLOSING STATEMENT**

17 **MR. GRAHAM:** Thank you, Your Honor.
18 May it please the Court --

19 **THE COURT:** Yes, sir.

20 **MR. GRAHAM:** -- Ms. Primm,
21 Mr. Peneguy, ladies and gentlemen of the jury.

22 In law school -- and we all went to
23 the same law school, all different times. I think we
24 told you that we all work together. We're friends
25 with the prosecutors. And I think it was a very

1 friendly trial, but we have different -- very
2 different positions in this case.

3 And in law school, you know, they
4 taught us, you know, to be very stoic and serious and
5 refer to the complaining witness and the defendant
6 and the Government or the State and the dirty Defense
7 attorneys. But we're going to show a lot more
8 respect to this process than little law school
9 tricks.

10 And I want to talk first about -- to
11 that point, Ms. Batiz. I think our hearts go out to
12 Ms. Batiz. I don't -- I don't think that there is
13 any dispute that she went through a lot on June 11,
14 2008. And she poured her heart out in this
15 courtroom, and nobody from our side is challenging
16 that she went through a lot on June 11, 2008.

17 But what Mr. Peneguy told you in
18 opening is exactly what panned out, in that
19 Jocelyn -- and certainly no blame goes to her for
20 this -- has questions and unanswered evidence that
21 only science, as he said, could provide. So, all of
22 her hopes and dreams in this case about getting
23 closure about the person that did this to her is on
24 the science in this case.

25 So, as passionately as these two

1 prosecutors have represented the State in this
2 case -- and as I'm sure you're going to hear a very
3 passionate argument, highlighting all the things that
4 Jocelyn Batiz went through on June 11, 2008, here in
5 this courtroom, and since 2008. It really boils down
6 to this, to the science.

7 And as emotional the type of charge as
8 this is and the subject matter it is, and it's not
9 taking away anything from that, the questions in this
10 case come down to the science. And the problem is
11 that there is just a lot of questions. And the
12 bottom line is that all of her hopes and dreams, all
13 of their hopes about the results in this case, are
14 relying on the HPD Crime Lab, an organization that
15 has had a history of problems, as we talked about
16 from jury selection on.

17 They now renamed themselves the
18 Houston Forensic Science Center, probably in hopes
19 that they can get past their history as the Houston
20 Crime Lab because of all the problems they have had
21 dated back to 2001, to these recent issue --

22 **MS. PRIMM:** I object. This is outside
23 the record, Your Honor.

24 **THE COURT:** Sustained.

25 **MR. GRAHAM:** All the problems that you

1 heard about during this trial that even the State's
2 own witnesses talked about, issues with their crime
3 lab. What you have to rely on in this case to do
4 what the State is asking you to do and find Herman
5 Whitfield guilty of aggravated sexual assault is that
6 all those people in the Houston Crime Lab did their
7 job.

8 And what you have is a situation where
9 you heard from some witnesses, but you didn't hear
10 from all the witnesses that did work on this case.
11 And you heard us object to some things, and what's
12 important about that -- for instance, you heard about
13 there was some blood testing that was done by
14 Christine Konecny and Juli Refuss.

15 Now, those people are 15 blocks away.
16 They are a five-minute car ride from here. Why
17 aren't they here to testify? Why aren't they here to
18 talk about the techniques they used to determine
19 whether or not there was, in fact, blood on those
20 shorts?

21 This man's on trial for his life.
22 This is an extremely serious charge against him. And
23 if they want to prove this case beyond a reasonable
24 doubt, they need to use every effort. Every single
25 ounce of information that they have needs to be

1 brought into this courtroom. And they didn't do
2 that.

3 They have a person that works with
4 these people that says, Yeah, they are proficient;
5 and it looks like they did a good job. Well, that is
6 not good enough to show someone is guilty beyond a
7 reasonable doubt of aggravated sexual assault.

8 Now, one thing that's important in
9 this charge that I want to highlight to you, it talks
10 about presumption of innocence. All persons are
11 presumed to be innocent, and no person may be
12 convicted of an offense unless each and -- each
13 element of the offense is proved beyond a reasonable
14 doubt. Remember that bubble that Judge Krockner put
15 over Herman Whitfield, that the Constitution provides
16 him the presumption of innocence?

17 They have to burst that bubble, and I
18 would submit to you they didn't burst that bubble.
19 You can pull it up. We talked about the steps that
20 they have got to reach to get to beyond a reasonable
21 doubt. Beyond a reasonable doubt, right here at the
22 top. It's not scintilla of evidence, reasonable
23 suspicion, probable cause, preponderance of the
24 evidence like in civil court, or in clear and
25 convincing evidence to take children away from

1 parents. It's beyond a reasonable doubt, the highest
2 burden that the law allows.

3 I think he did it; he probably did it;
4 I reasonably suspect he did it; it's more likely than
5 not he did it. It's clear he did it. It is
6 convincing he did it. What do all of those things
7 have in common? They are not beyond a reasonable
8 doubt.

9 And I would submit to you that the
10 questions that we have in this case, the fact that
11 the only evidence linking Herman Whitfield to this
12 crime is a small spot on shorts that they say comes
13 back to his DNA is not beyond a reasonable doubt.

14 Now, you heard from several different
15 officers starting with Officer Chillis, who is a nice
16 lady. She has been on patrol for 27 years, didn't
17 ever move up from being a regular patrol officer.
18 And she says -- and she seems like a nice lady --
19 that she just likes to help people. The problem is,
20 she is not really a trained investigator, and she is
21 not certainly qualified the way Officer McMurtry is
22 to really forensically examine the kind of scene that
23 she was at.

24 There was no evidence that she checked
25 the barbed wire to see if there is any kind of torn

1 clothing or blood on that barbed wire. We don't know
2 exactly where she went once she went past the barbed
3 wire. There is no photographs. She said she had a
4 camera and she took pictures, but she didn't take
5 pictures of this area, she said, where there was
6 depressed grass.

7 She didn't take pictures of the
8 surrounding area to see if there might have been some
9 kind of indication or evidence out there, and she
10 didn't find any evidence. But she also didn't call
11 for help. She is trying to deal with the complaining
12 witness. She was about to get off shift change --
13 get off because of shift change. She said she was
14 only there for an hour at most. She had neighborhood
15 watch come out, that they could have helped.

16 **MS. PRIMM:** I object as to
17 mischaracterization of the evidence.

18 **THE COURT:** Sustained.

19 **MR. GRAHAM:** She testified that
20 neighborhood watch came out and assisted her, but she
21 didn't call for any help. She didn't call for any
22 additional patrol unit or detectives to come help her
23 review this scene. And it was referred over to
24 Officer McMurtry, but by the time he gets it -- I
25 mean, this is an area that's very accessible. It

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1 could have very easily been tampered with if there
2 was any evidence left behind. Don't you know that
3 somebody had plenty of time from June 11th until
4 June 14th, when Officer McMurtry gets out there to
5 get rid of evidence? So, we didn't have that
6 evidence.

7 Officer McMurtry was a little unclear
8 as to whether or not he even talked to Denise's mom.
9 And we heard from Jocelyn that Denise's mom was
10 coming back from that area with groceries, that she
11 had just been to the store. So, why wasn't that
12 witness talked to? Why wasn't she talked to in more
13 detail? That's somebody that could have possibly
14 seen something.

15 Why weren't neighbors talked to in the
16 apartment complex? We talked about how canvassing an
17 apartment complex, where Jocelyn was clearly very
18 upset coming up, banging on the door, that talking to
19 neighbors that might have seen something could be a
20 very important part of an investigation. Officer
21 McMurtry told you that.

22 Why wasn't somebody going to the
23 business that was nearby to talk to somebody in the
24 business to see could they have seen something?
25 Going to the bus stop, getting video off the bus

1 stop, or get -- off the bus potentially.

2 There are things that you do when you
3 want to prove someone's guilt beyond a reasonable
4 doubt. The most serious charge that you can file
5 against someone, bring someone to court for,
6 aggravated sexual assault. Is there anything more
7 serious that somebody can be charged with? And you
8 want to convict someone of aggravated sexual assault,
9 and you don't do everything that you possibly can to
10 show that person's guilt beyond a reasonable doubt.
11 You don't bring every witness that you can. You
12 don't do everything you can in the investigation.
13 Shouldn't we at least expect that?

14 If we're going to take one of our
15 citizens out of our community, brand them as a sex
16 offender, we're going to convict them of aggravated
17 sexual assault, shouldn't we at least expect that the
18 prosecutors, that the police officers, are going to
19 do every single thing that they possibly can, kick
20 every single tire, bring the whole body of work to us
21 for us to examine? But we don't have that here. And
22 it is your solemn duty to hold them to their job,
23 which is to prove, if they can, this case beyond a
24 reasonable doubt.

25 And each one of you sits there in your

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1 own individual chair with your own individual mind
2 and your own definition of beyond a reasonable doubt,
3 and each one of you has to have them pop that bubble
4 of presumption of innocence and prove this case to
5 you beyond a reasonable doubt. Each one of you is an
6 individual that has a duty to carefully examine all
7 this evidence, and you can take all this evidence.
8 The Judge can send back all of this evidence to you,
9 and you can carefully take a look at anything that
10 you want.

11 If you have any disputes with
12 testimony, Mrs. Lee -- she can't do the whole
13 transcript or the whole trial for you, but she can
14 give you any kind of disputes -- if there is a
15 dispute, you think a witness said one thing and
16 another person thinks they said something different,
17 it's your duty to carefully look at that and
18 carefully examine did they really do it.

19 They may have gotten close, but did
20 they really get there? Did they push this all the
21 way up the mountain to show beyond a reasonable
22 doubt? And I would submit to you no, that they
23 didn't show that this man committed this crime beyond
24 a reasonable doubt. And, therefore, it is your duty
25 as Americans, as Texans, as jurors, in this case to

1 find this man not guilty.

2 **THE COURT:** Thank you very much.

3 Ms. Primm.

4 **MS. PRIMM:** May I have just a moment,
5 Judge?

6 **THE COURT:** Yes, ma'am.

7 **(Brief pause)**

8 **CLOSING STATEMENT**

9 **MS. PRIMM:** Nightmares don't happen in
10 the middle of the city of Houston at 1:30 in the
11 afternoon on a bright, sunny day. They don't happen.
12 At least that's what Jocelyn Batiz thought on June
13 11, 2008. A young lady that had grown up in
14 Sunnyside; that to get from place A to place B, she
15 had to walk and take the bus. For her to be able to
16 go out and live her life every single day, she had to
17 believe that. She had to believe that nightmares
18 don't happen.

19 So, Jocelyn Batiz did what Jocelyn
20 Batiz has to do every day. She went to see her
21 friend over here in the Wilmington Place Apartments
22 on a bright, sunny day. She takes the bus, and she
23 walks. And when she gets the phone call to go see
24 her mother, she does that. She does what she is
25 supposed to do. She leaves her friend and says, I

1 will call you when I see my mom. And she takes off.

2 And she takes off down a pathway, a
3 pathway that's used often by just about everybody in
4 that area. In fact, it's used often. It was used by
5 Denise's mom on that same day. Because nightmares
6 don't happen in the middle of the day. They just
7 don't.

8 So, Jocelyn takes off down that path.
9 She is looking at her phone. She is not thinking
10 anything is going to happen to her that day. She
11 passes a man. He has on sunglasses and a hat. He
12 appears to be looking for something. But what
13 Jocelyn doesn't know is he is looking for a victim.
14 He is looking for somebody weaker than he is. He is
15 looking for someone smaller than he is. And you saw
16 Jocelyn. She is not a very big woman. She is small.
17 You saw her shorts and her shirt. She is tiny. She
18 was smaller in 2008 than what she was when she took
19 that stand.

20 He was out there searching and he was
21 looking and he found Jocelyn Batiz. She walked right
22 past him. What did he do? Got her by the neck and
23 he put a knife up to her. What a perfect way to
24 attack a victim. Why? Because you're not going to
25 let them see your face. Because you're a coward.

1 You're a monster that wants to be hidden in plain
2 sight. And that's what he is, a monster who wants to
3 stay hidden.

4 **MR. GRAHAM:** Objection to counsel
5 pointing at the defendant --

6 **THE COURT:** Overruled.

7 **MR. GRAHAM:** -- in argument.

8 **MS. PRIMM:** And think about it.
9 Sunglasses, a hat, he takes her from behind. And
10 every time Jocelyn tries to look at him, what does he
11 do? What does he do to her? Pow. Don't look at me.
12 He doesn't want her to see who he really is. And he
13 takes her into that field.

14 Is Jocelyn telling you the truth? We
15 talked about corroboration on voir dire. Was she
16 telling you the truth about going into that field and
17 going under that barbed wire fence? Was she telling
18 you the truth? Well, what do we have? We have her
19 shirt, this shirt that says "baby girl" that Jocelyn
20 was wearing that day. A very tiny shirt. And what
21 do we see on the back of that shirt? It is ripped.
22 Is that consistent with her being pushed under a
23 barbed wire fence into a field? To be taken out of
24 view of anybody who might happen down that path?
25 It's absolutely consistent.

1 And where did he take her? He took
2 her into a field, overgrown field, where nobody could
3 see her and nobody could hear her. But what he
4 didn't know is not only did he get the victim that he
5 thought was great, he got a little bit better.
6 Because Jocelyn can't scream. He didn't know that
7 now -- then, but you-all know that. She couldn't
8 scream.

9 So, I don't care if there was anybody
10 in that business. How would they have ever heard
11 Jocelyn? You could barely hear her with a
12 microphone. No one could hear her because she can't
13 scream.

14 And then what did he do? What did
15 Jocelyn hear? She heard the sounds of a wrapper, a
16 condom wrapper. She told you she knows what that
17 sounds like, and she was paying attention. Is that
18 consistent with the rest of his MO? Wearing
19 sunglasses, wearing a hat, taking his victim from
20 behind, and smack her every time she tried to look at
21 him?

22 What is he trying to do? He is trying
23 to hide in plain sight. He is trying to keep his
24 identity hidden from you-all. But what he doesn't
25 know is that knife that's a way to get the victim to

1 cooperate, to go with him, also became his worse item
2 that he took with him. Why? Because as he was
3 pulling down Jocelyn's shorts -- he took these shorts
4 off of her, and he pulled them down, he cut his
5 finger. He cut himself. He didn't know it. He cut
6 himself with a pocket knife and trying to get her
7 shorts down.

8 And what do we know? This blood drop
9 was left on Jocelyn's shorts. So, science was able
10 to take off his hat, science was able to take off his
11 sunglasses, and science wasn't worried about whether
12 he was going to punch her yet one more time. Science
13 could reveal his face. And there it is, ladies and
14 gentlemen, as he sits across the courtroom from you,
15 Jocelyn's worse nightmare come true.

16 But now, he doesn't have all the
17 things that hid his identity. We know his identity
18 from the blood he left at the scene. Jocelyn told
19 you she has no idea who he is. She'd never seen him
20 before, and she doesn't know him. Why else is his
21 blood on her shorts? There is only one explanation.
22 You-all know the explanation. Because he was -- as
23 he was using that knife, he cut himself; and he left
24 his calling card on the shorts.

25 Now, the Defense wants to say that we

1 didn't do our job as prosecutors, that we didn't call
2 every single witness. No, we didn't. We called the
3 analyst who looks at the entire body of work to
4 determine whether it's done correctly, proficiently,
5 and right.

6 Let me say something else. Defense
7 attorneys have access to all of the reports, for all
8 of the evidence. And they, too, have the right and
9 ability to subpoena witnesses and call them down.

10 **MR. GRAHAM:** Judge, I would object
11 this is burden shifting.

12 **THE COURT:** Overruled.

13 **MS. PRIMM:** And if the Defense
14 attorneys felt these people did something wrong or
15 bad, they have the ability to call them here and let
16 you-all see it and hear it; and they didn't. And so,
17 we have the science here. What do you see on the
18 science?

19 You have identifiers. A DNA profile
20 is different for every single person, except for
21 identical twins. And what do we find out? Well, we
22 know who Jocelyn is at each and every marker. And we
23 know the blood stain on her shorts at each and every
24 marker. It's not her blood. You know that for sure.

25 The first marker she is a 15. On the

1 shorts the blood is a 12 and 13. Oh, but
2 Mr. Whitfield is 12 and 13 at the first marker. And
3 you can go down each and every one of the 15 markers
4 and you can look and you can say, whose DNA profile
5 is that on the shorts? Is it Jocelyn, or is it
6 Herman Whitfield? It's Herman Whitfield. There is
7 no doubt about that.

8 And as the Defense said, there is no
9 doubt what happened to Jocelyn in that field.
10 You-all saw her. You saw how she reacted. You saw
11 how difficult it is for her to go up on that stand
12 and to have to confront her nightmare over and over
13 again with every single question. And did you see
14 her? When somebody asked her a question and she had
15 to think about it, what did Jocelyn do? Jocelyn
16 closed her eyes, and she thought. Why do you think
17 she closed her eyes?

18 When she closes her eyes, one thing
19 comes back to mind, that 30 to 40-ish black male with
20 sunglasses and a hat grabbed her by the neck and took
21 her in the field. Each and every time she closes her
22 eyes, that's what she sees; and that's what she has
23 to think about.

24 When the Defense counsel said she has
25 hopes and dreams about this case, no, there is no

1 such thing for Jocelyn Batiz. She only has
2 nightmares when we talk about this case, and it's
3 just a nightmare.

4 **MR. GRAHAM:** Judge, I object. This is
5 outside the record.

6 **THE COURT:** Sustained.

7 **MS. PRIMM:** There are --

8 **MR. GRAHAM:** Ask that the jury be
9 given instructions to disregard.

10 **THE COURT:** That's denied.

11 **MR. GRAHAM:** Motion for -- for
12 mistrial.

13 **THE COURT:** I'm sorry?

14 **MR. PENEGUY:** Sorry. Withdraw.

15 **THE COURT:** Okay.

16 **MS. PRIMM:** She has no hopes and
17 dreams, as Defense counsel said in his argument.
18 There are none. There is just the horrific truth of
19 what happened to her.

20 And just as Mr. Peneguy said in his
21 opening statement, Jocelyn did everything that she
22 could do to survive that, because she just -- as she
23 told the defendant, Sir, you can do whatever you want
24 to do to me. Just let me go home to my family. And
25 she did everything right. She ran, and she told.

1 Immediately she ran, and she told.

2 She left her shoes at the scene for
3 Officer Chillis to find. She ran and told
4 immediately. She told law enforcement immediately.
5 She cooperated with them. She went to the hospital
6 and endured an over two-hour exam for somebody to
7 poke and prod every orifice of her body after what
8 had just happened to her. But she endured that
9 because she wanted to know and she wanted to stop
10 that man. So, she did it.

11 And it took a long time. It took too
12 long for science to solve and unmask that man.
13 Should we be mad at law enforcement or the lab that
14 it took this long to solve the case? Yes. Without a
15 doubt we should be mad at them. But being mad at the
16 lab for not doing it sooner or being mad at the
17 police for not doing it sooner, don't find him not
18 guilty because of that. Don't punish Jocelyn for the
19 fact that they didn't do it sooner.

20 Jocelyn did everything right. And the
21 evidence is there. Science solved it. Science
22 unmasked him, took his glasses off, took his hat off.
23 Now, there is something else that Jocelyn can't do.
24 Jocelyn can't make him responsible. Jocelyn can't
25 hold him accountable for that. You can. You are it.

1 I want you to go back there, look at all the
2 evidence, and find him guilty because he is guilty.

3 **THE COURT:** Thank you.

4 The jury, please, will retire to the
5 jury room to begin your deliberations. If you're
6 still in deliberations at 5:00, my plan would be to
7 send you home at that time.

8 All rise, please, for the jury.

9 We will send the evidence and the
10 charge in to you.

11 **(Jury retired for deliberations)**

12 **THE COURT:** Before the lawyers get
13 away, we will make sure we're in agreement as to what
14 is in evidence. Make sure we're not missing
15 anything. Thank you.

16 Did you take the other one off, or
17 where is the original?

18 **MR. VINAS:** The original -- what we're
19 talking about, Judge, for the record, is State's
20 Exhibit 43, which was the envelope that had all the
21 hearsay regarding another case on the back of it.
22 So, because the State doesn't want to destroy the
23 record should State's Exhibit 43 be needed for
24 another case, what we have agreed to do is
25 Mr. Peneguy has gone down to another court, used a

1 copier, made a copy of the front of the envelope for
2 State's Exhibit 43. So, it's got the identifying
3 information. And then the two envelopes that were
4 contained inside State's Exhibit 43, we're going to
5 attach with a paperclip or staple, something, so that
6 now --

7 **THE COURT:** Okay. Here -- you want a
8 stapler?

9 **MR. PENEGUY:** Judge, for purposes of
10 the record, the two envelopes containing the buccal
11 swabs are still preserved and sealed.

12 **THE COURT:** Thank you.

13 **MR. VINAS:** And these are the buccal
14 swabs of Mr. Whitfield, I believe.

15 **THE COURT:** And is there an exhibit
16 number on it?

17 **MR. VINAS:** 43, Judge.

18 **THE COURT:** Thank you.

19 **MR. VINAS:** And the sticker has been
20 photocopied onto the front.

21 **THE COURT:** Okay. All right. Thank
22 you.

23 **(Recess taken)**

24 **THE COURT:** Okay. Are we ready?

25 **MR. VINAS:** Yes, Your Honor.

1 **THE BAILIFF:** All rise, please.

2 **(Jury enters the courtroom)**

3 **THE COURT:** Thank you. Please be
4 seated. Would the Foreperson give the verdict page
5 to the bailiff, please? Thank you, sir.

6 Mr. Whitfield, if you would stand,
7 please.

8 The jury has reached the following
9 verdict: We, the jury, find the defendant, Herman
10 Whitfield, guilty of aggravated sexual assault as
11 charged in the indictment.

12 Thank you. You may have a seat.

13 Does the State wish to have the jury
14 polled?

15 **MS. PRIMM:** No, ma'am.

16 **THE COURT:** Does the Defense?

17 **MR. VINAS:** Yes, Your Honor.

18 **THE COURT:** Thank you.

19 If you will think back to the number
20 you had when you were sitting in the jury panel, the
21 clerk will call each of your 12 numbers. When your
22 number is called, if this is your verdict, please
23 answer "yes." If this is not your verdict, please
24 answer "no."

25 **THE CLERK:** Juror No. 18?

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1 **JUROR NO. 18:** Yes.

2 **THE CLERK:** Juror No. 36?

3 **THE COURT:** He was excused.

4 **THE CLERK:** Juror No. 37?

5 **JUROR NO. 37:** Yes.

6 **THE CLERK:** Juror No. 40?

7 **JUROR NO. 40:** Yes.

8 **THE CLERK:** Juror No. 43?

9 **JUROR NO. 43:** Yes.

10 **THE CLERK:** Juror No. 61?

11 **JUROR NO. 61:** Yes.

12 **THE CLERK:** Juror No. 64?

13 **JUROR NO. 64:** Yes.

14 **THE CLERK:** Juror No. 69?

15 **JUROR NO. 69:** Yes.

16 **THE CLERK:** Juror No. 76?

17 **JUROR NO. 76:** Yes.

18 **THE CLERK:** Juror No. 81?

19 **JUROR NO. 81:** Yes.

20 **THE CLERK:** Juror No. 83?

21 **JUROR NO. 83:** Yes.

22 **THE CLERK:** Juror No. 91?

23 **JUROR NO. 91:** Yes.

24 **THE CLERK:** And Juror No. 118?

25 **JUROR NO. 118:** Yes.

1 **THE COURT:** Thank you.

2 Was everyone's number called? Anyone
3 whose number was not called?

4 Thank you. May I see the lawyers on
5 the schedule?

6 **(At the Bench)**

7 **MS. PRIMM:** I don't have witnesses
8 here, Judge.

9 **THE COURT:** Oh, no. I think it's too
10 late to start today.

11 **MS. PRIMM:** Okay. Good.

12 **MR. VINAS:** Before we talk --

13 **THE COURT:** I'm on call to sign a
14 search warrant. So, I have to stay until 5:00.

15 **MS. PRIMM:** I'm sorry.

16 **MR. VINAS:** Before we confer on
17 scheduling, do you want to let them go so they can
18 get a head start and get on out of here?

19 **THE COURT:** Huh?

20 **MR. VINAS:** Before we all -- the five
21 of us discuss scheduling, do you want to go ahead and
22 let them --

23 **THE COURT:** I'm wondering -- can we
24 start at 9:15 again?

25 **MS. PRIMM:** Yes, ma'am. I have

1 witnesses coming in before then. So, I will be ready
2 at 9:15.

3 **MR. VINAS:** Yes, ma'am.

4 **THE COURT:** Okay. Thank you.

5 **MR. VINAS:** Thank you.

6 **(End of Bench Discussion)**

7 **THE COURT:** Members of the jury, we
8 will begin the punishment hearing tomorrow. If you
9 will come at 9:15 again, then we will get started
10 bright and early. Thank you.

11 And please remember all of the
12 instructions I have given you before. Don't discuss
13 the case with anyone. Don't do any research on the
14 case. Of course, don't look at any media reports.
15 That includes both print media and also radio and
16 television. And, of course, it also includes any
17 kind of social media or any kind of news -- news
18 services you would read online. So, it's real
19 important you follow that rule.

20 See you in the morning at 9:15. Have
21 a good evening.

22 All rise, please for the jury.

23 **(Jury released)**

24 **(END OF TODAY'S PROCEEDINGS)**

25

1 STATE OF TEXAS
2 COUNTY OF HARRIS
3

4 I, CYNTHIA J. LEE, Official Court Reporter in
5 and for the 184TH District Court of Harris, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested
9 in writing by counsel for the parties to be included
10 in this volume of the Reporter's Record in the
11 above-styled and numbered cause, all of which
12 occurred in open court or in chambers and were
13 reported by me.

14 I further certify that this Reporter's Record of
15 the proceedings truly and correctly reflects the
16 exhibits, if any, offered by the respective parties.
17
18

19 /s/Cynthia Lee

20 CYNTHIA J. LEE, CSR 3732
21 Official Court Reporter
22 184TH District Court
23 1201 Franklin, 17th Floor
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25 Telephone: (713) 755-6358
Expiration: 12/31/2015

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