

1 MS. BAILY: And, Judge, just briefly for
2 the record, the State would reoffer State's Exhibit 202
3 at this point and tender to defense counsel for any
4 objections.

5 (State's Exhibit No. 202 Offered)

6 MR. LOPER: Judge, we'd just renew our
7 previously stated objections.

8 THE COURT: That will be overruled. 202 is
9 admitted.

10 (State's Exhibit No. 202 Admitted)

11 MS. BAILY: Thank you.

12 MARK POWELL,

13 having been first duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MS. BAILY:

16 Q. Can you begin by stating your name for the
17 record, please?

18 A. Sure. It's Mark Powell.

19 Q. And, Mr. Powell, what is it that you do for a
20 living?

21 A. I'm a DNA -- forensic DNA analyst.

22 Q. And where is it that you work?

23 A. At the Harris County Institute of Forensic
24 Sciences.

25 Q. Can you give us, I guess a brief overview of

1 the educational background that you have that qualifies
2 you as a DNA analyst?

3 A. I have a bachelor's of science in microbiology
4 and immunology from McGill University in Canada and a
5 master's of science in forensic science from the
6 University of London in London, England.

7 Q. After schooling, was there additional training
8 that you received?

9 A. Yes. As part of working at any -- in the crime
10 lab, you get on-the-job training before you're
11 authorized to start working on real case work. So, at
12 every job I've held, I've had some sort of training.
13 And in addition, we have continuing education. As new
14 technologies come upon us, we get trained on that as
15 well.

16 Q. And do you hold any certifications?

17 A. Yes. I'm certified by the American Board of
18 Criminalistics.

19 Q. And how do you maintain that certification?

20 A. We have to either perform some research and get
21 it published or attend trainings, attend conferences.
22 And those all -- we have to do a certain amount per
23 year.

24 Q. And are you, I guess at this point today,
25 certified and in good standing?

1 A. Yes.

2 Q. And back in December of 2009 and the beginning
3 half of 2010, were you certified then as well?

4 A. Yes.

5 Q. Have you attended few or many courses involving
6 DNA analysis?

7 A. Courses -- I mean, just courses or courses and
8 conferences?

9 Q. I guess courses and conferences.

10 A. Many.

11 Q. And have you testified as an expert before in
12 the field of forensic DNA analysis?

13 A. Yes, I have.

14 Q. Have you done so on few or many occasions?

15 A. Many occasions.

16 Q. And, I guess, let's get down to the obvious.
17 What is DNA?

18 A. So, DNA is known as the blueprint of life.
19 It's -- you get half your DNA from your mother and half
20 your DNA from your father. And it's basically what
21 makes you, you. Like the DNA in a dog will make it a
22 dog. The DNA in a human will make it a human.

23 Q. And where is it that we find DNA in people?

24 A. DNA is found in almost every cell in your body.
25 The cells make up all the components of your body.

1 Q. Does DNA vary from person to person?

2 A. Yes, it does.

3 Q. Are there components of our DNA between us all
4 that are the same?

5 A. Yes. Most of the DNA from person to person
6 will be the same. There's a small portion that varies
7 greatly from person to person, and that's what we're
8 interested in in forensic DNA analysis.

9 Q. And what are those differences referred to as?

10 A. The differences we look at are known as short
11 tandem repeats, or STRs. And they're small repeating
12 units of DNA that occur throughout the DNA of a person.
13 And we look at a portion of those STRs.

14 Q. Is there a set number of how many of these STRs
15 that you look at?

16 A. There are 13 that are mandated by the FBI that
17 we're to look at. There are -- there are new
18 technologies where you can look at a couple more, but
19 there's a core 13 that we must look at.

20 Q. So, as I understand it, it's these 13 places
21 where I am different from you, from the Judge, from each
22 member of the jury?

23 A. Those are the areas that we look at so we can
24 try to individualize an evidence stain to a person.
25 There's the potential that if you looked at one area

1 that a person could be the same, but when you look at
2 all 13 areas, it's very -- extremely rare that somebody
3 would have the same DNA profile and the DNA profile is
4 just those 13 areas all together.

5 Q. And is it possible, Mr. Powell, to take a known
6 sample from a person and compare that to physical
7 evidence in a case such as this?

8 A. Yes, it is.

9 Q. And how is that done?

10 A. So, what we generally do is perform the DNA
11 analysis either on something from the crime scene or
12 something that was collected, submitted to us as an
13 unknown sample. They want to see who -- what the DNA
14 profile is, who it could possibly belong to. So, we
15 perform that analysis. And then we perform the same
16 analysis on a sample that's submitted to us from a
17 person. So, it would be a known or a reference sample.
18 We perform the same analysis. We generate a DNA profile
19 from the evidence, DNA profile from the reference
20 sample, and we compare it and see if they are the same
21 or if they're excluded.

22 Q. And, I guess, around here we call those
23 reference samples what?

24 A. So, a reference sample would be like a swab of
25 the inside of the mouth or a blood sample from a person.

1 So, these are collected from people.

2 Q. And those are typically collected from police
3 officers and submitted to your lab, right?

4 A. Yes.

5 Q. Okay. In this case -- I guess, can you tell us
6 how DNA analysis actually works?

7 A. So, the first part is we need to see if we --
8 we have anything that we can perform DNA analysis on.
9 So, that's what's known as screening the evidence.
10 We're looking for possible biological material, like
11 blood or semen. Sometimes we're just looking to see if
12 we can find somebody that has been touching an item or
13 been in contact with it. That's called like touch DNA.
14 So, that's the first step.

15 Those samples, if we find anything or if we
16 want to look for touch DNA, they're submitted for DNA
17 analysis. The first step is to -- we're just interested
18 in the DNA, so we do what's called extraction or
19 extracting the DNA, taking the DNA out of the blood
20 sample, out of those cells that may be on the item being
21 touched. We find out how much we have. And then from
22 there, we generate a DNA profile. And so, we're not
23 looking at all the DNA, just those areas that vary
24 greatly from person to person.

25 And how we do that is we make lots of

1 copies of just those particular areas. And when we have
2 the copies made, we run it on an instrument and we
3 generate the DNA profile.

4 Q. And then it's that DNA profile that you compare
5 to your known profile?

6 A. Correct.

7 Q. Okay. And was that done in this specific case?

8 A. Yes.

9 Q. Can you give us an overview of -- you don't
10 have to say everything, but the kinds of evidence that
11 were submitted to you in this case to do DNA analysis
12 on?

13 A. Sure. We had some reference samples. We also
14 had what looked to be swabs from a car, swabs from a
15 bottle, swabs from some weapons, swabs from some cell
16 phones, some items of clothing. And that's about it.

17 Q. Can you tell me -- these known swabs from
18 people, what people were you given known DNA samples
19 from?

20 A. We had a blood sample from the decedent, Juan
21 Rodriguez. And then we had some mouth swabs from
22 Crystal Scott, Willard Singleterry, Charles Mack, Larry
23 Wyatt, and Jesse Butler and Theadric Lee.

24 Q. And you actually received Theadric Lee's buccal
25 swab well after you received everybody else's; is that

1 true?

2 A. That's correct. His came in May of 2010 and
3 the rest of the evidence came in December of 2009.

4 Q. Okay. Now, once you develop your DNA profile
5 from evidence and you compare it to the -- these known
6 people, what are you actually looking to do?

7 A. So, when we generate a DNA profile from
8 evidence and we're making a comparison, our goal is
9 to -- the easiest -- the most definitive answer we can
10 give is, is the person excluded, meaning he couldn't
11 have contributed to that DNA. So, that's what we set
12 out to do. We look at the profile, we see can that
13 person be excluded. And if they can't be excluded, then
14 what we have to do is give an estimation of how common
15 or rare it is of that DNA evidence that we've found.

16 Q. So, in your terms, you're either excluded or
17 included?

18 A. Excluded or not excluded. Not excluded is the
19 same as included.

20 Q. Okay. So, when you're doing a DNA analysis in
21 a case like this, you're not actually looking for
22 matches, you're looking to exclude people?

23 A. Right. How we set about it is to see can that
24 person be excluded. And if they can't be excluded, then
25 we have to generate some statistics.

1 Q. I want to talk about briefly -- you mentioned
2 that you did some DNA analysis on some weapons. In this
3 case, you were given swabs from a Tec-9 pistol?

4 A. That's correct.

5 Q. Were you able to reach any conclusions or
6 results in terms of people that may have touched that
7 weapon?

8 A. So, there is a Tec-9 magazine swab and there
9 wasn't enough DNA on that item to perform any analysis.
10 So, we checked to see if there was DNA. There wasn't
11 enough, so we couldn't generate a profile.

12 And from the Tec-9 pistol swab, there
13 was -- we didn't obtain any DNA profile from that item.

14 Q. So, Tec-9 and the magazine, no profiles?

15 A. Correct.

16 Q. Okay. What about the pump shotgun, the swabs
17 from the pump shotgun?

18 A. So, on that item there were -- we did obtain a
19 little bit of DNA. However, there wasn't enough to do
20 any comparisons to it. So that means that's an
21 inconclusive result.

22 Q. So, no real results from this pump shotgun?

23 A. Right, not enough results to make any
24 comparisons to the references.

25 Q. Okay. Now, let's talk about the Mossberg

1 shotgun swabs, 9-A. Were you able to reach any
2 conclusions regarding the Mossberg shotgun swabs?

3 A. Yes. We obtained a partial profile from that
4 item and it was consistent with a mixture of DNA from at
5 least two individuals.

6 Q. Okay. Were any of those individuals our known
7 reference samples?

8 A. Well, Larry Wyatt cannot be excluded as a
9 possible contributor to that mixture.

10 Q. Okay. And when you say "mixture," what does
11 that mean to us?

12 A. That means you have DNA from more than one
13 individual on that item or the swab that was taken, so
14 you're seeing DNA from at least two people.

15 Q. Now, I want to talk about -- I guess let's move
16 aside from the weapons. Let's move specifically to
17 Theadric Lee and the items in which he could not be
18 excluded. What are the items where Theadric Lee could
19 not be excluded?

20 A. So, from items, the Coke bottle swabs, black
21 do-rag, and one of the samplings of the black do-rag,
22 and a sampling of the black sweatshirt jacket, Theadric
23 Lee cannot be excluded as a possible source of the DNA
24 from those items.

25 Q. You say Coke bottle swabs, black do-rag, black

1 sweatshirt. Anything else?

2 A. On our Items 17 and 18, which were said to be a
3 rifle swab and a 223 magazine swab, those were some
4 partial DNA profiles and Theadric Lee could not be
5 excluded as a possible contributor on those as well.

6 Q. So, fair to say all the other physical evidence
7 that came to you in this case he was excluded?

8 A. Correct.

9 Q. Except for these, I guess, five or six items?

10 A. That's right.

11 MS. BAILY: Permission to approach, Your
12 Honor?

13 THE COURT: All right.

14 Q. (By Ms. Baily) Mr. Powell, I want to show you
15 what have been marked as State's Exhibits 205, -6 and
16 -7. Do you recognize these items (indicating)?

17 A. Yes. These were swabs that were collected.

18 Q. Okay. And how is it that you can tie these to
19 your case?

20 A. They have our case number as well as our item
21 numbers, date and initials.

22 Q. Okay. And these swabs, were they provided to
23 you by a police officer or were they actually done at
24 your lab?

25 A. These were collected at our lab from the item.

1 Q. Okay. And do they appear to have been altered
2 in any way?

3 A. No.

4 Q. I want to show you also State's Exhibit 208.
5 Do you recognize this chart (indicating)?

6 A. I do.

7 Q. Is this a chart that you helped me prepare for
8 your testimony today?

9 A. Yes.

10 Q. Okay. And is it a fair and accurate depiction
11 of the results from these five or six items?

12 A. It is.

13 Q. Okay. And would it be helpful in your
14 testimony to this jury if you were able to refer to it?

15 A. Yes.

16 MS. BAILY: Your Honor, at this time I'll
17 offer into evidence State's Exhibits 205, 206, -7 and
18 -8.

19 (State's Exhibit No. 205 through 208
20 Offered)

21 MR. GRABER: No objection, Judge.

22 THE COURT: State's 205, 206, 207, and 208
23 are admitted.

24 (State's Exhibit No. 205 through 208
25 Admitted)

1 Q. (By Ms. Baily) So, we have these items where
2 Mr. Lee could not have been excluded, right?

3 A. Correct.

4 Q. Okay. So, then what is the next -- I guess,
5 what's the next thing we need to know about the fact
6 that he can't be excluded?

7 A. So, we want to see how common or rare those
8 profiles from the evidence are in the general
9 population. So, it's one thing to say that he cannot be
10 excluded, but if it's -- if you were to test somebody at
11 random, you know, how common or rare is it to see if
12 they could be a possible contributor to that item as
13 well. So, you'd want to give some weight to the
14 evidence.

15 Q. So, it wouldn't make much of a difference, I
16 guess evidentiary speaking, if everybody in this room
17 couldn't be excluded, right?

18 A. That's correct. So, that's -- you want to --
19 you know, is everybody going to be consistent with that
20 DNA profile or is it a very rare thing to be consistent
21 with the DNA profile.

22 Q. Okay. And let's, just to be clear -- I don't
23 want to have any misgivings about this -- you can
24 never -- I guess can you tell me in any one of these
25 items that it is, in fact, Theadric Lee's DNA and no one

1 else's?

2 A. No, we can't. We can only give you an estimate
3 of how common or rare the DNA evidence profile is.

4 Q. But I want to know that it's him. Why can't
5 you just tell me that?

6 A. Well, the reason is we haven't tested every
7 single person in the world. So, all we can give is an
8 estimation of how common or rare the evidence profile
9 is. If we had a DNA profile from everybody in the
10 entire world, then we could exclude or include
11 definitively, but we don't, so we can give you an
12 estimation.

13 Q. And it's because you guys are scientists and
14 want to be exact, right?

15 A. Right, as accurate as possible.

16 Q. Okay. Let's look at this chart. And I'll try
17 to zoom in to different sections. What are we looking
18 at here in this row that we've color-coded blue
19 (indicating)?

20 A. So, that row is the results at the areas that
21 we test. So, on top of the column, that's just the name
22 of the area of the DNA that we're testing. Below it,
23 the 14, 17 on the first one, is just the results that we
24 obtained at those locations that we're testing. 14 and
25 17 stand for the number of repeats. So, there would be

1 14 short tandem repeats and 17 short tandem repeats at
2 that location. And there's two because you get one
3 piece of DNA from your mother and one from your father.
4 So, that's why there's a 14, 17. So, the 14 could have
5 come from the mother and the 17 from the father, or the
6 other way around.

7 Q. And so, this top row in blue, this is whose
8 profile (indicating)?

9 A. This is the DNA profile of Theadric Lee.

10 Q. Now, Mr. Powell, when we get over to, let's
11 say, this section that I'm pointing to, in the middle of
12 his profile there's one box, the D5S818, that only has a
13 number 10 in it, why is that (indicating)?

14 A. In that case the mother and the father
15 contributed the same form of DNA. So, he really has two
16 10's, one from the mom and one from the dad.

17 Q. Okay. And when it's two of the same number, it
18 only appears once?

19 A. That's how we represent it on our chart.

20 Q. Okay. So, the box next to it where the 12
21 is --

22 A. That's the same scenario.

23 Q. He received a 12 from his mother, 12 from his
24 father?

25 A. Right.

1 Q. Now, let's take a look at this -- this first
2 box here is Coke bottle swabs. What is significant
3 about what we see as we go through the chart here?

4 A. So, the DNA profile from the Coke bottle swab
5 is consistent with Theadric Lee's DNA profile. So, at
6 all the locations that we're looking at, it's
7 consistent. We can't exclude him.

8 Q. And that's because as we go along, the Coke
9 bottle swab numbers match everywhere with Theadric Lee?

10 A. Correct.

11 Q. What about the next section where it says "from
12 grips and trigger of rifle swab"?

13 A. So, that's, again, we had the results. Now,
14 this is a little different because it's a partial
15 profile, meaning we don't have results at all the areas
16 that we were testing. That can come about because
17 there's just not enough DNA there to get a full result.

18 Q. Okay. So, as we look across, the first two
19 boxes appear to match, right?

20 A. Correct, they're the same.

21 Q. What does it mean here in this third FGA box
22 where we have a 19 star (indicating)?

23 A. So, that 19 star means that there's a 19 that
24 we're detecting and the star indicates that there's also
25 something there but it's below the threshold that we --

1 our analysis threshold. So, it's below a cutoff point.
2 So, it's indicating that there's possible other results
3 there.

4 Q. So, something other than a 19 is there?

5 A. Correct.

6 Q. We just don't know what it is?

7 A. Right.

8 Q. What is -- the fact that this star that you
9 know something else is there but you don't have enough
10 to know what it is, what does that do to the results of
11 the DNA?

12 A. So, it's -- you know, we have to be a bit more
13 cautious in our interpretation for samples like this.
14 That particular location would not be included in our
15 statistical analysis. There's nothing exclusionary
16 there. It's just not something that we can rely on as
17 far as statistics go. So, a profile like this will
18 actually be more common because there's less places to
19 match in the general population. So, the less locations
20 that you have results for, the more common the DNA
21 profile is in the general population.

22 Q. So, essentially, you have to throw 19 star out
23 of the equation?

24 A. Yes.

25 Q. Okay. Do we have any mixtures in any of these

1 samples?

2 A. Nothing to indicate a mixture for those two
3 partial profiles. They were partial to the point where
4 we couldn't tell if they were from a single source or if
5 they were mixed. So, that's just to be cautious and
6 conservative. So, we say that they're partial. We
7 can't tell if it's a mixture or not. And so, that also
8 changes the way we do our statistical analysis.

9 Q. All right. A mixture is two or more people,
10 right?

11 A. Right.

12 Q. Okay. And then if you have a mixture,
13 ultimately the way the statistics work out, does that
14 mean that just more people can be included?

15 A. Correct. So, even if you just were to look at
16 one location here, maybe a 14, 15, when it's a single
17 source, that person, if you're going to be comparing,
18 they have to be a 14, 15, too. If they're not a 14, 15,
19 it's an exclusion. With a mixture, you could have a
20 mixture of two people who are 14, 15, you could have a
21 mixture of a person who's a 14, and a person who's a 15,
22 or a mixture of a person who's a 14 with a 14, 15. So,
23 it just makes more possibilities of how that DNA profile
24 came to be.

25 Q. And so, what is the "ND" on the 223 magazine

1 swab mean to us?

2 A. That means we have no results whatsoever at
3 that location.

4 Q. So, of the items tested, the Coke bottle, the
5 swabs from the grips and trigger, the swab from the
6 magazine, the do-rag swabs and the black sweatshirt
7 swabs, you said there was only two that were --

8 A. None that we can call a mixture. There was two
9 that were partial to the point where we couldn't
10 determine definitively whether it was a single source or
11 a mixed sample.

12 Q. Which two were the partial profiles?

13 A. They were 17 and 18.

14 Q. Okay. Once -- once we know this and we have it
15 charted out, then you do this statistical analysis,
16 right?

17 A. Correct.

18 Q. Okay. Can you walk us through your results in
19 terms of statistics for the coke bottle?

20 A. Sure.

21 Q. Let me phrase it, can you just walk us through
22 your results?

23 A. So, just tell you the statistics?

24 Q. Sure.

25 A. Okay. So, the combination of DNA alleles from

1 Item 8A is expected to occur approximately in 8A, the
2 Coke bottle swabs, 1 in 42 quintillion Caucasians; 1 in
3 640 quadrillion African-Americans; or 1 in 26
4 quintillion Hispanics.

5 Q. Okay. So, what items were those again?

6 A. That was the Coke bottle and also it's the same
7 statistics for one of the do-rag swabs.

8 Q. Okay. Now, if we know that Mr. Lee is an
9 African-American, can you tell us the statistics there?

10 A. So, for the African-Americans, it would be 1 in
11 640 quadrillion African-Americans.

12 Q. That's how rare it is?

13 A. That particular statistic means if you were to
14 just go about testing people to see if you could find
15 that evidence profile, how many would you expect to have
16 to test before you'd see that profile representing that.
17 And you would have to test about 640 quadrillion
18 African-Americans.

19 Q. Okay. How many people are on earth,
20 Mr. Powell?

21 A. About 7 billion.

22 Q. So, what does that mean to us?

23 A. That means you'd need -- you'd need at least a
24 million worlds before you'd expect to see this DNA
25 profile again.

1 Q. So, that's pretty rare?

2 A. That's very rare.

3 Q. Okay. So, 1 million worlds before you would
4 expect to see another profile like this, like Mr. Lee's?

5 A. Right. Just, you'd need to test about a
6 million worlds worth of people before you'd expect to
7 see this profile.

8 Q. Okay. And that is for which items?

9 A. That is for 8A and 29A.

10 Q. Okay. Are there other statistics for 29C and
11 30C-1?

12 A. Yes. Those are a little bit -- those are
13 lower.

14 Q. And are those -- can you tell us those
15 statistics for an African-American?

16 A. So, for 30C-1, it would be 1 in 18 quadrillion
17 African-Americans. And for 29C, it would be 122 -- 1 in
18 122 trillion African-Americans.

19 Q. Okay. So, 18 quadrillion?

20 A. Yes.

21 Q. How many -- that would be multiple earths as
22 well?

23 A. Right. Greater than a million.

24 Q. Okay. And what about the 122 trillion?

25 A. Greater than 100,000 worlds.

1 Q. So, in all fairness, in the Coke bottle swabs,
2 the do-rag swabs, and the black sweatshirt, you wouldn't
3 expect any other person on this earth to have that?

4 A. Well, I mean, it's -- it's very, very rare.
5 This is just an estimate, though. I mean, rare things
6 do happen. The statistics are indicating that it would
7 be unlikely, but it doesn't make it impossible.

8 Q. Then the results, I believe, you said are
9 different for 17 and 18 because of the mixture. What
10 are those results?

11 A. So --

12 Q. The partial profile.

13 A. For 17-1, it would be 1 in 425 million
14 African-Americans. And for 18-1, it would be 1 in
15 18 million African-Americans.

16 Q. Okay. So, off of the grip swabs, you said 1 in
17 425 million?

18 A. Right.

19 Q. Okay. Explain that to us. Can you quantify
20 that?

21 A. So, that would be -- you'd have to test -- the
22 U.S. has about 300 million. So, maybe one U.S. and a
23 little less than a half of a U.S. before you'd expect to
24 find someone.

25 Q. All right. And then in 18?

1 A. So, maybe one in about half of Texas.

2 Q. So, it's still fairly rare in terms of you're
3 just concerning Houston, right?

4 A. Right.

5 MS. BAILY: I'll pass the witness, Your
6 Honor.

7 THE COURT: Mr. Graber.

8 MR. GRABER: Thank you, Judge.

9 **CROSS-EXAMINATION**

10 **BY MR. LOPER:**

11 Q. Mr. Powell, would you agree with me that 17 and
12 18, meaning the rifle swabs -- excuse me -- the DNA from
13 the rifle swabs, that those are just partial matches?

14 A. Yes. They're partial profiles and Theadric Lee
15 cannot be excluded.

16 Q. And the reason for that is because there's --
17 at some of the locations, at some of the markers, the
18 alleles do not match the defendant's; is that correct?

19 A. No, not to my knowledge.

20 Q. On -- let me rephrase that for you.

21 If you look at -- if you look at the
22 defendant's profile and you look at 17 and 18 -- let me
23 rephrase that.

24 The reason that those are just partial
25 profiles, is that because there are numerous locations

1 where there's no DNA?

2 A. Right. So, the reason they're partial is we
3 don't have information in all the areas we test.

4 Q. And is it also because at some of those
5 locations either there's no DNA to compare or that the
6 DNA that is there at those -- at those locations is that
7 the allele is below threshold so you can't use that in
8 your statistical analysis?

9 A. That's correct. So, either nothing is
10 represented or there are some indications that we're not
11 getting all the information that may be there.

12 Q. For instance, like on 17 at the location TPOX,
13 for instance, that there's an 8, but it has a star by
14 it, meaning that's below threshold so you can't put that
15 in your statistical analysis; would you agree with that?

16 A. That means that there's a possible allele there
17 below our detection threshold. And it also can indicate
18 that it's partial, too.

19 Q. And so, as a scientist, as you've indicated,
20 you want to be conservative and not use that in your
21 statistical analysis; is that correct?

22 A. Correct.

23 Q. Your reports also indicate that there was some
24 testing that was attempted to be done on three different
25 cell phones; is that correct? Items, at least, in your

1 report, the laboratory items would be 24, 25, and 26; is
2 that correct?

3 A. That's correct.

4 Q. Okay. And would you agree with me that on 24
5 and 26, on those two separate cell phones, that the
6 swabbing, the analysis of the swabbing from those phones
7 indicates that there's insufficient DNA to do an
8 analysis and a comparison?

9 A. Correct.

10 Q. Regarding cell phone Item No. 25, which is a
11 Motorola I776 cell phone swab, would you agree with me
12 that there was sufficient DNA on that swab to do a
13 comparison?

14 A. That's correct.

15 Q. 25; is that correct?

16 A. Right.

17 Q. And would you agree with me that the
18 defendant's DNA profile, when compared to the DNA
19 profile of that one cell phone, No. 25, that the
20 defendant was excluded, meaning that DNA biological
21 material on that cell phone was not the defendant's?

22 A. That's correct, he was excluded.

23 Q. As a scientist in performing this analysis, if
24 there is a determination that there is -- a certain
25 person cannot be excluded as being the source of that

1 biological material, that DNA, would you agree with me
2 that you as a scientist -- we're not there, I don't know
3 if we'll ever get there, you can answer this -- but you
4 can't time-stamp when that biological material that you
5 got the DNA from was placed upon that item?

6 A. That's correct.

7 Q. You hope to get there one day?

8 A. It would be good.

9 Q. Would you, as a scientist, someone -- an expert
10 in DNA, the analysis and all of that, you would expect
11 to see somebody's biological material where you can
12 determine their DNA from that biological material,
13 sweat, epithelial cells, whatever, from an item that --
14 for instance, a gun that was purchased by a person the
15 day before it was recovered by the police?

16 A. It depends who was handling it, how they were
17 handling it, what happened from the point that it was
18 discarded to when the sample was collected. So, there
19 is a lot of factors that go into it, especially with
20 touch DNA.

21 Q. And when you speak about touch DNA, you're
22 speaking about biological material that comes from our
23 fingers on things that we touch, correct?

24 A. Correct.

25 Q. Sweat, epithelial cells, et cetera, correct?

1 A. Right.

2 Q. And would you expect those items to remain on a
3 surface for more than a couple of hours?

4 A. Again, you know, if I -- so, say I touched
5 something and then I dropped it outside and it started
6 to rain, then, you know, it's potential that it could be
7 washed away. Or there's also the potential that I touch
8 something and I just happen to not leave anything that
9 time when I touched it. Maybe I just washed my hands or
10 I'm wearing gloves or -- so, there's a lot of factors
11 that go into it. So, we just kind of -- there's a lot
12 of different ways to explain how touch DNA can get
13 somewhere.

14 Q. But it doesn't just evaporate?

15 A. No, but you could touch something and then the
16 next person touches something and when they're touching,
17 they remove the cells that I had previously left behind.
18 So, if you were to just touch something and leave it and
19 it was undisturbed, then assuming you had touched it and
20 deposited enough material in the first place, then you
21 should be able to detect it.

22 Q. Assuming that something -- that touch DNA was
23 not altered, tampered -- tampered is not a word I like,
24 but wiped away by something, caused to be removed by
25 something, you would expect that touch DNA to be on that

1 item for more than just a couple hours until it was
2 recovered by the police, correct?

3 A. Right. And with the assumption that you've
4 touched it initially to leave something that could be
5 detected.

6 Q. Yeah. You may not leave anything anyway?

7 A. Correct.

8 MR. GRABER: That's all I have, Judge.

9 THE COURT: Ms. Baily.

10 MS. BAILY: Thank you, Your Honor.

11 **REDIRECT EXAMINATION**

12 **BY MS. BAILY:**

13 Q. Just quickly, Mr. Powell. Is it possible for
14 somebody to touch and use a cell phone and not leave
15 DNA?

16 A. Yes.

17 Q. And is there anything specific to firearms that
18 may affect the ability to detect DNA off of a firearm?

19 A. To my knowledge, no. I mean, I guess you could
20 have different grip textures that may inhibit the way
21 you can collect it from the grip, but if there is enough
22 there and you can collect it, you should be able to get
23 some results.

24 MS. BAILY: No further questions, Your
25 Honor.

1 MR. GRABER: Same here, Judge.

2 THE COURT: You may step down, sir. You're
3 free to go.

4 Call your next witness.

5 MS. DEVINE: State calls Dr. Roger Milton.

6 THE BAILIFF: Your Honor, this witness has
7 not been sworn.

8 (Witness sworn)

9 MR. GRABER: Judge, may we approach the
10 bench?

11 THE COURT: Okay.

12 (At the Bench, on the record)

13 MR. GRABER: Judge, the defense is going to
14 object to this medical -- assistant medical examiner
15 testifying. He was not the medical examiner who
16 performed the autopsy upon the complainant and we would
17 object under the United States and Texas Constitution
18 confrontation clause.

19 THE COURT: That will be overruled.

20 MR. GRABER: Thank you, Judge.

21 Can we have a running objection to all of
22 his testimony regarding that objection?

23 THE COURT: Yes.

24 MR. GRABER: Thank you, Judge.

25 (Open court, defendant and jury present)