

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

vs.

No. CR 20124578-001

BRYAN PETER FOSHAY,

Defendant.

Tucson, Arizona

1/13/2014

BEFORE: The Honorable Jane L. Eikleberry, Judge

Appearances:

Lindsay P. St. John, Esq.
Appearing for the State

Walter Palser, Esq. and Elena Kay, Esq.
Appearing for the Defendant.

Defendant's Motion to Preclude
and
Motion to Continue Trial

GAIL D. VINSON, CR, RPR
Arizona # 50610
Official Court Reporter
Pima County Superior Court
Tucson, Arizona 85701

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

page

WITNESS: ROCKY EDWARDS

Direct Examination by Ms. St. John 6

Cross-Examination by Mr. Palser 30

Redirect Examination by Mr. Palser 49

REPORTER'S CERTIFICATE 68

1 THE COURT: This is CR20124578, State of
2 Arizona versus Brian Peter Foshay. Would you state
3 your appearances, please.

4 MS. ST. JOHN: Lindsay St. John on
5 behalf of the State, your Honor. For the record, the
6 victim representatives are here in the courtroom. Al
7 Blackwell and his daughter-in-law Toby.

8 THE COURT: Thank you.

9 MR. PALSER: Good morning, Judge -- Or
10 good afternoon. Sorry. Walt Palser and Elena Kay on
11 behalf of Mr. Foshay, who is present, out of custody.
12 And we invoke the rules for the motions.

13 THE COURT: You invoke the rules, so you
14 don't want any witnesses present.

15 MR. PALSER: Yes, your Honor.

16 THE COURT: Anyone who is going to be a
17 witness other than victim representatives, if they are
18 going to testify --

19 MS. ST. JOHN: They are not, your Honor.

20 THE COURT: -- please leave the
21 courtroom until you are called.

22 Where do you want to start? Do you want to
23 start with this motion to preclude the firearms
24 evidence?

25 MS. ST. JOHN: Yes, your Honor.

1 THE COURT: All right. Go ahead.

2 MR. PALSER: Judge, I believe the State
3 has witnesses on that issue, and the Court has read the
4 motions. I don't want to -- Given our limited time, I
5 don't want to repeat everything I said in my written
6 motion. At this point I think it might be best to just
7 hear the witness and then argue.

8 THE COURT: Call your first witness.

9 MS. ST. JOHN: Your Honor, I would
10 pronounce that on this point, the defense is the one
11 filing the motion. They bear the burden of proof that
12 the State does, in fact, have witnesses, and we have
13 flown in Mr. Edwards from California prepared to
14 testify.

15 But I do think that the Court does have the
16 ability upon reading the pleadings and finding that the
17 defense has brought no evidence under which to bear
18 their burden. And given that the Court has heard
19 innumerable testimony in other cases about ballistics
20 and firearm examinations, the Court could determine
21 that no Daubert hearing is necessary and that these
22 issues are merely sufficient for cross-examination but
23 don't rise to the threshold level excluding under
24 Daubert.

25 THE COURT: Mr. Palser?

1 MR. PALSER: Judge, the hallmark of the
2 Daubert case is reliability. We are not under the Frye
3 standard anymore. This is, in essence, an issue of
4 first impression with this Court. We searched for and
5 we failed to find a precedent to back up the State's
6 position that any Arizona court has decided this issue
7 under the Daubert standard.

8 Rule 702, which is the new basically
9 codification of that Daubert standard requires this
10 Court to act as a gatekeeper of any type of expert
11 evidence. And because we are no longer under the aegis
12 of the Frye case, certainly our position is that the
13 Court has, I guess, a right and a duty and a discretion
14 to do that in this case, to make that decision as to
15 what so-called expert testimony comes in.

16 THE COURT: All right. Ms. St. John, do
17 you have Mr. Edwards present?

18 MS. ST. JOHN: Yes.

19 THE COURT: I would like him to testify
20 briefly about his qualifications and about his opinions
21 about the reliability of the testing that he did.

22 MS. ST. JOHN: Thank you, your Honor. I
23 am happy to do that. I want to make sure the record is
24 clear I also have Frank Powell, a criminalist with the
25 Tucson Police Department laboratory, who is able to

1 talk about the history of firearms analysis. And I
2 would propose that we call him second, because
3 Mr. Edwards is from out of town, and I am concerned
4 about getting his testimony done.

5 THE COURT: Okay.

6 MS. ST. JOHN: Thank you.

7 ROCKY EDWARDS

8 was called as a witness and, having been first duly
9 sworn, was examined and testified as follows:

10 MS. ST. JOHN: Your Honor, before he
11 takes the stand can I ask him to get the keyboard? He
12 has a wireless keyboard.

13 THE WITNESS: I don't have the
14 attachment to it.

15 MS. ST. JOHN: We will deal with it on
16 the computer then.

17 DIRECT EXAMINATION

18 BY MS. ST. JOHN:

19 Q Mr. Edwards, would you please introduce yourself
20 to the judge?

21 A Yes, ma'am. My name is Rocky Edwards.

22 Q And where are you currently employed?

23 A I am employed by the Santa Ana police department
24 and am also a contract employee with the Stockton
25 Police Department in California.

1 Q Can you tell us about when you first became
2 involved in firearms and ballistics analysis?

3 A Yes, when I was in the Army in about early -- the
4 late 1980s. I was accepted to the United States Army
5 criminal investigation division where I was trained as
6 a forensic firearm and toolmark examiner.

7 Q Could you tell the judge a little bit about the
8 school that you underwent at that training?

9 A Yes. I was special agent prior to going to the
10 U.S. Army crime lab. And then, when I went to training
11 there, I was sent to most manufacturers of firearms in
12 the United States, trained in firearm toolmark
13 identification and also for -- It was a two-year
14 course, so for two years I trained in firearms and
15 toolmark examination.

16 I was sent to the Southwestern Institute of
17 Forensic Scientists in Dallas, Texas, where I trained
18 in the advanced techniques and was then sent to
19 Letterman Army Medical Center at the Presidio of San
20 Francisco.

21 THE COURT: Let me interrupt. I have
22 Mr. Edwards' CV. It's part of the file. I don't think
23 we need to go through all of this training and
24 experience. But if there's anything you have to add to
25 the CV?

1 MS. ST. JOHN: No, your Honor. I think
2 his CV is fairly detailed. But I want to make sure the
3 court understands that he has been doing this type of
4 analysis since the 1980s, and that after serving in the
5 military he then went on to work in private for law
6 enforcement departments doing the same type of work.

7 THE COURT: That's fine. Let's talk
8 about the new tests that he used in this case. That's
9 my primary concern.

10 MS. ST. JOHN: Thank you.

11 Q Now, Mr. Edwards, I want to take you a step back
12 before the judge's question, which is, are you as part
13 of your training taught how to go about the examination
14 or the comparison of a bullet to a test-fire for a
15 bullet to a gun or a bullet to a barrel cast?

16 A Yes, ma'am.

17 Q And is that the same sort of methodology that you
18 used using this newer technology?

19 A Yes.

20 Q Okay. Now I want to talk to you about the
21 technology. How long has confocal microscope been
22 around?

23 A It was created in 1955 by Marvin Minski --
24 M-I-N-S-K-I, I believe, is how you spell it. And it's
25 at Harvard University; that's where they developed it

1 at. And then this has been around in different
2 sciences and different areas and for the past -- for 50
3 years almost.

4 Q And, now, also as part of your system is there
5 sort of computer imaging that's being used?

6 A Well, the confocal microscope reads into the
7 computer as far as what images it's recording.

8 Q And how long has computer imaging been used in
9 ballistics analysis?

10 A I first saw it in 2001, but it's been around since
11 the 1990s.

12 Q Now, this use of confocal combined with 3-D
13 imaging, how long has that been around?

14 A Since the 1990s.

15 Q Okay. And in this case, specifically this image,
16 you have been able to produce not only a
17 computer-generated image but actually a 3-D image that
18 you can rotate and turn so that you can see it in
19 different angles; is that correct?

20 A Yes, very similar to the comparison microscope.

21 Q And how long has that 3-D imagery been in use?

22 A Since 2007.

23 Q Now, does this system change the essential
24 analysis that you are doing that you did under a
25 traditional comparison microscope?

1 A No.

2 Q And can you explain to the judge the benefits or
3 the additional things you are able to see using
4 confocal microscopy and the digital imaging over what
5 you could see in a traditional conventional microscope?

6 A It allows you to look at -- Well, it gives you
7 more clarity, a clearer image. It's always in focus.
8 And the lighting, it's always where you can see what
9 you are looking at. So it's just an easier -- It's
10 just another way of looking at things.

11 The thing is, it's like having an additional
12 scope. So you have, where we have two additional
13 scopes, FSC which has LED lighting, and I like a DM
14 scope, which has incandescence. It has fluorescent, it
15 has LED, and different optics.

16 And then the 3D is another, basically,
17 comparison microscope for looking at different areas.

18 Q So for those two microscopes that you discussed in
19 your lab at California are those both comparison
20 microscopes with different types of lighting setups on
21 them?

22 A And objectives, yes.

23 Q Okay. Has this 3-D technology been tested?

24 A Yes.

25 Q Can you describe that for the judge? A scientific

1 study involving about 600 different unknown bullets
2 that were examined?

3 A Yes, it was a study just recently finished. 2010
4 it was finished. It's a takeoff from a 1998 validation
5 study by David Brundage where they did an examination
6 of ten consecutively manufactured firearms.

7 Q And what type of firearms were those?

8 A Ruger.

9 Q Is that the same type that we are dealing with in
10 this case?

11 A Same brand.

12 Q Please continue.

13 A So what they did is they took that study a step
14 further, and they sent it to 623 participants from 35
15 countries around the world, firearms examiners and
16 seven 3-D systems. This is not the only 3-D system
17 that exists. They sent those to the seven 3-D systems
18 which participated in this study.

19 And what they were doing is they had blind
20 tests in there, as well, and they were looking for the
21 error rates to see -- and they were all consecutive to
22 see if examiners can make proper identifications from
23 these test-firings.

24 And so as a result the study came out, there
25 was only two areas where two examiners could not make

1 identifications, and that was because they had about a
2 month's worth of training.

3 Q So those were two new examiners?

4 A Right. And they were not in the United States.

5 Q And were all of the other examiners able to make
6 determinations either identifying or excluding the
7 objects before them?

8 A Yes.

9 Q Now, I want to talk to you about this case
10 specifically. How did you first become involved in
11 this case?

12 A I was contacted by Detective Musik, and she asked
13 if I would be willing to take a look at the evidence in
14 this case. And --

15 Q And ultimately at did conclusion of looking over
16 everything, all of the microscopy, did you prepare a
17 presentation that ultimately you have given to me as
18 well as the defense?

19 A Yes.

20 MS. ST. JOHN: I am going to move to
21 admit State's Exhibit 1, which is that presentation at
22 this time.

23 MR. PALSER: No objection for purposes
24 of today's hearing.

25 THE COURT: State's Exhibit 1 is

1 admitted.

2 THE WITNESS: Click on the index.

3 MS. ST. JOHN: Sorry.

4 Q And, Mr. Edwards, is this the home screen of the
5 presentation that you prepared for myself as well as
6 for the Court?

7 A Yes.

8 Q Now, looking at this top left corner, is this the
9 gun magazine cartridge as well as the test-fire you
10 originally received?

11 A Those are the ammunition for the magazine and the
12 firearm and the holster and the magazine. So it's
13 pistol, magazine, the holster and the cartridges that
14 were recovered from the magazine.

15 Q And did you receive the test fires that were
16 performed by the Tucson Police Department laboratory?

17 A Yes, I did.

18 Q How many test fires were done by them?

19 A Six.

20 Q Did you go on to do any additional test fires?

21 A Twenty.

22 Q I'm sorry, I am having trouble hearing you.

23 A Twenty.

24 Q And why did you think it was important to do
25 additional test fires for a total of 20?

1 A To study how the microscopic variances between the
2 test fires were. They were all identifiable to each
3 other. And also studying what type of variations there
4 were.

5 Q And now over here barrel cast prep, can you
6 explain to the judge what we are looking at here?

7 A Yes, ma'am. This is how I prepared the barrel
8 cast. And it's a silicone type of substance that we
9 can put down the barrel. It hardens within five
10 minutes. And you can pull it out almost like a
11 champagne cork, pulling itself right out of barrel.

12 Q So does that allow you to create actually the
13 texture to duplicate the texture that's actually on the
14 inside of that barrel?

15 A It will show the characteristics that are inside
16 of that barrel.

17 Q And is that what we are looking at here, this gray
18 object next to the ruler?

19 A Yes.

20 Q Now, once you have a barrel cast, do you do
21 anything to it to prepare it for analysis and
22 comparison to the autopsy bullet?

23 A Yes. What I do is I take a paperclip and shove it
24 down the center to give it rigidity, and then put some
25 tape around it and cut it back about a edge from the

1 muzzle there. So that way I can write on that tape
2 that's on a 2-barrel cast. The silicon, you know it's
3 really hard to mark that.

4 Q And what's the purpose of being able to write on
5 the tape around the barrel cast?

6 A If I want to, I can put marks or something, a note
7 to me for areas that I need to come back to or
8 reference.

9 Q So when you are saying you are making notes, does
10 that include numbers, sort of where you start on the
11 barrel cast around the circumference?

12 A I do that on the autopsy bullet and on the
13 test-fire, but I didn't do so much on the barreling
14 cast.

15 Q And why do you do that on the autopsy bullet? Why
16 is that important?

17 A To get all the test fires orientated to each other
18 and go back. Once you start working with a bullet, you
19 can find areas that's in agreement present. As you go
20 back and fade back and go back to that area if for some
21 reason you are interrupted or you need to go back to
22 one of the different test fires. It saves you from
23 having to do it all over again.

24 Q So then down here we have the autopsy bullet. Is
25 that --

1 A Yes.

2 Q -- the bullet that you were given to compare to?

3 A Yes.

4 Q You were talking to the judge about how, even
5 though you are doing the same analysis that you would
6 on a comparison microscope, you've got some things that
7 are better on confocal. And we were talking about
8 lighting, so I am going to click on that. Can you
9 explain to us what we are looking at here?

10 A This is basically showing the lighting is similar
11 to the comparison microscope, the lighting up and down,
12 back and forth. So it has the same type of features,
13 very user friendly for the examiner.

14 Q For some reason I can't see the entire screen.

15 And movement. Can you explain what we are
16 looking at here?

17 A Yes, there again, very much like a comparison
18 microscope. You can take the bullet back and forth and
19 work with it at different angles.

20 Q So the image that we are seeing rotating on the
21 screen in front of us, is this an image that was
22 limited on the confocal microscope and pulled together
23 on the 3-D imagery?

24 A Yes, that's two scan autopsy bullets. And around
25 the base area.

1 Q And, then, the ability to zoom, why is that
2 significant and why is that a benefit of the confocal?

3 A Because it's always in focus, no matter how far
4 you zoom in. Your scope, you are always adjusting,
5 always making adjustments. This is much easier, you
6 come in and out. You zoom in as close as you want and
7 it's going to be in focus.

8 Q Now, I want to take you in to the bullet itself
9 and some of the comparisons that you made.

10 Mr. Edwards, on a standard comparison microscope, are
11 you able to line up, like, the unknown item and a
12 test-fire or a known item and rotate them individually
13 to make sure that they line up with what you are
14 looking for?

15 A Yes.

16 Q And is that something you are able to do with this
17 type of software, as well?

18 A Yes.

19 Q Is there one of these that we should start with?
20 Is there a particularly good area to start?

21 A Any of them. Start with one from the comparison
22 microscope and check one of the ones with diamond and
23 3-D.

24 Q That brings up another area that was questioned in
25 the defense motion. Did you, in fact, use a comparison

1 microscope to begin your analysis?

2 A Yes.

3 Q And were you able to come to a conclusion using a
4 comparison microscope?

5 A Yes.

6 Q And what was your conclusion?

7 A That the autopsy bullet was fired by that pistol,
8 by the P94.

9 Q The P94 or the gun that you were given for
10 testing; is that correct?

11 A In my opinion, yes.

12 Q Now, why was it then relevant for you to go on and
13 further examine these on the confocal microscope?

14 A Well, because the areas of agreement, the way the
15 autopsy bullet was, the reproducibility on that bullet
16 was faint. When the test-fire was fired in the water
17 tanking, this bullet passed I think through.

18 Q The brace and accent are a deadly combo.

19 You are saying a bullet fired in a water tank
20 is pristine; is that correct?

21 A Right. And the bullet that was recovered from, I
22 guess, the autopsy is there's going to be differences,
23 going to be changes. So this appeared to have a
24 lighter individual characteristics than the test fires
25 did.

1 Q And when you are talking about individual
2 characteristics, can you explain for the judge the
3 classes of characteristics that you are looking for
4 during the course of an examination?

5 A Yes, class characteristics are characteristics
6 that are determined by the manufacturer. In a firearm
7 we are looking at six lands graphs with right twist.
8 The manufacture determines that when he makes the
9 barrel, when he makes that firearm.

10 Then we go in from there to subclass
11 characteristics. Those characteristics are created by
12 like damaged tooling. When they are cutting the
13 rifling there might be a chip or burl on that tool that
14 may cover from that firearm to another or a series of
15 firearms. There may be more than one firearm that has
16 a subclass characteristic.

17 Q So agreement within the subclass narrows the type
18 of firearm, but doesn't give you a specific firearm
19 match or exclusion; is that fair?

20 A That's correct.

21 Q And then, beyond that, what are you looking at?

22 A From there we move to the individual
23 characteristics that are to that firearm. And they are
24 caused during the manufacturing process, from the time
25 they are manufactured, and then from -- it could be

1 from abuse of the firearm, you know, different ways,
2 it's not cleaned properly or that type of thing. Rust,
3 corrosion, those things can have an impact on that
4 firearm which will daily make the bullet even more
5 individual.

6 Q Now, when you are doing something like this and
7 you have got 20 test fires, do you expect each
8 test-fire to have the exact same individual
9 characteristics, have the exact same striations?

10 A No.

11 Q And why not?

12 A Because you have a bullet that's been fired in a
13 nanosecond. It's going through that barrel. And
14 there's different velocities between bullets. I mean,
15 you take a box of cartridges, fire them, and there will
16 be various velocities to each one of them. Plus you
17 have a mechanical device firing this cartridge. The
18 bullet is engaging, and it's just there's variances.
19 As that bullet engages that barrel and goes down the
20 barrel, it's just not going to reproduce exactly the
21 same every time.

22 Q Is that the advantage of having 20 test fires
23 versus only 6?

24 A Yes.

25 Q So when we are looking here at the autopsy bullet,

1 items that are denoted with a circle, are those going
2 to have images from the comparison microscope versus
3 those denoted with a triangle from the confocal
4 microscope?

5 A Yes.

6 Q So let's start with this blue comparison
7 microscope. We can see the little harder on the
8 screen. But we can see sort of a bright graphy color
9 on the left and a brighter color on the left with a
10 line of demarcation in the middle. Are those two
11 different items --

12 A Yes.

13 Q -- that we are looking at on the same screen?

14 A On the right side you would have the autopsy
15 bullet. On the left, this one -- Yes, right is the
16 autopsy bullet.

17 Q Do you need to see to the left?

18 A The left is the test-fire from Tucson PD.

19 Q The right is the autopsy bullet and the left is a
20 test-fire; is that what you are indicating?

21 A Right.

22 Q And can you explain to the judge what we are
23 looking for here?

24 A Looking for characteristics that are of common
25 contour and individual characteristics with land

1 impressions and groove impressions. Particularly
2 concentrate on the land impressions, because they are
3 less likely to have issues with -- Research has shown,
4 the research with subclass characteristics, subclass
5 characteristics are on the groove and impression areas,
6 which would be the area above where the blue lines are.

7 Q And do you know how I get out of this screen,
8 Mr. Edwards?

9 A No, I don't.

10 Q My computer is being strange.

11 THE COURT: Ms. St. John, in the
12 interests of time, I am not sure that all of the
13 particulars of the comparison that were done are
14 critical. I think the focusing ought to be whether the
15 testing done is the product of reliable principles and
16 methods and whether the testimony that this witness
17 could give at trial is based on sufficient facts or
18 data. And I don't think we need to go through all of
19 the things that he would testify to at trial to decide
20 these issues.

21 MS. ST. JOHN: I understand, your Honor.
22 And what I was hoping to do is, first we looked at a
23 comparison microscope, which is the traditional method.
24 I would now, like to take you to a confocal image so the
25 Court can see he is looking at substantially the same

1 thing. It's the same training he has always had to
2 look at the tool marks, the different striations. So
3 the Court can see that it not only follows the training
4 that he received but the transparency of the process
5 and how he carefully documents, which increases the
6 reliability, and allows the jurors themselves to look
7 at it.

8 So we are not going to go into each of these
9 points.

10 Q I am now going to take you into one of the
11 confocal areas. And can you tell the judge what we are
12 looking at?

13 We can, again, see a guideline on the left.
14 It appears to be test-fire 1 on the right, the autopsy
15 bullet; is that correct?

16 A Yes.

17 Q And you have marked something land impression one.
18 Do you see that on the right-hand side?

19 A Yes.

20 Q And then on the left-hand side we can see these
21 little tiny white lines. What are those markings?

22 A Those are notes to me to show me the areas we are
23 looking at and in case an examiner goes behind me to
24 recreate what I did.

25 Q So these little tiny striations in this area, is

1 that what the white lines are marking?

2 A Yes.

3 Q And we can see that the edges don't quite line up
4 in this image. Can you explain that to the judge?

5 A That's part of the variances in the test-fire and
6 the autopsy bullet.

7 If you go to land impression No. 2, there
8 would be a good example there. Or if you can click on,
9 I think, the red one at the bottom.

10 Q This bottom red one?

11 A No, the other one. The comparison microscope
12 circled in red. And scroll down. There's an area of
13 agreement with the autopsy bullet to a test-fire No. 20
14 showing the area of comparison on the base area of the
15 shoulder area of the land impression No. 1.

16 And then if you will click out of that.
17 Click on the green one or the red one. Click on the
18 red one.

19 Q So we are looking at that same land impression
20 No. 2 you were talking about?

21 A Yes, and which is the visual of what the 3-D was
22 showing on that shoulder area. I saw it on the
23 comparison microscope and I saw it there.

24 Q So you are saying you see more detail in the
25 confocal microscope and the computer imaging?

1 A Yes.

2 Q There's questions about the ability to change the
3 filter or lighting or the color to see it better. Are
4 you creating something that isn't already there as is
5 scanned in by the microscope?

6 A No, it's the same thing we do with the comparison
7 microscope. It's filters. Also, the visual technology
8 we have, as far as digital cameras and comparison
9 microscopes, lighting can be changed through that, as
10 well.

11 So it's -- The reason I use the brass look is
12 because it's similar to what I was looking at on the
13 comparison microscope, a different color.

14 Q So you are actually able to make the color this
15 appears for you when you are looking at it, but that
16 doesn't change the characteristics that you are seeing?

17 A No.

18 Q We won't go through it, because I understand the
19 Court is urging us to move past it. But did you go on
20 to mark these markings, these matching striations all
21 the way around the autopsy bullet?

22 A My impression of the autopsy bullet, I found areas
23 of agreement.

24 Q Did you find areas where there wasn't agreement?

25 A Yes, when I am doing an examination I am looking

1 at -- There's four possibilities in an examination:
2 One is a positive identification, one is an
3 inconclusive, one is an elimination, and one is it's
4 unsuitable for examination.

5 So when I am doing an examination, if during
6 an examination it becomes an identification, I am going
7 to photograph the areas of identification to show, to
8 justify that comparison.

9 If I am doing an inconclusive, if there's
10 variances to the photographs, I will expose those. And
11 if it's an elimination, I will expose those to show
12 what the basis for the elimination is.

13 Q Because you don't expect it to be exactly
14 identical? Some areas where you don't find an
15 agreement doesn't necessarily mean it's an elimination;
16 is that fair?

17 A Say that again?

18 Q You were saying that sometimes you don't see one
19 of the class characteristics -- or the individual
20 characteristics carried over from one bullet to the
21 next, but that that doesn't cause you to automatically
22 exclude the weapon as the item that fired the autopsy
23 bullet?

24 A No.

25 Q And can you explain that?

1 A Sure. In the study of the different test fires,
2 not only this firearm but identifiers, you can see some
3 areas be more agreeable or disagreeable depending on
4 what the basis for the conclusion is. And maybe in
5 different land impressions where this agreement is
6 showing. So you have to study the way these variances
7 are between the test fires to be able to make that
8 determination.

9 Q In addition to preparing this presentation, did
10 you also prepare a lengthy written report which
11 documents your analysis in this case and includes
12 photographs both of comparison microscope and confocal
13 microscopy that you did in this case?

14 A Yes.

15 MS. ST. JOHN: The State moves for
16 admission of State's 22.

17 THE COURT: Any objection?

18 MR. PALSER: I don't see how it's
19 relevant to this hearing, Judge.

20 MS. ST. JOHN: Well, I think the Court
21 is being asked to consider the reliability of his
22 evidence. And I think it should matter to the Court
23 that his evidence has been carefully documented, that
24 it's highly transparent and that it's duplicable.

25 THE COURT: Exhibit 2 is admitted.

1 MS. ST. JOHN: Would you mind turning
2 back on the lights?

3 Thank you.

4 Q Now, in addition to preparing the report yourself,
5 do you have a second examiner look over your findings
6 and verify what you found?

7 A Yes. Troy Ward from the Long Beach Police
8 Department.

9 Q And is that a standard practice in your field?

10 A Yes.

11 Q Is that actually required by the testing authority
12 in your field however?

13 A Yes. Well, they have a certain procedure that
14 they like to see for a peer review. Every case that I
15 do for a trial is actually peer reviewed. So I do
16 100 percent with another examiner.

17 Q Okay. And so this case itself was peer reviewed?

18 A Yes.

19 Q In addition to having your findings peer reviewed
20 by another examiner at Long Beach, have you actually
21 presented on the 3-D analysis as well as your specific
22 findings in this case?

23 A Yes.

24 Q And where have you made those presentations?

25 A Mexico, Leon, France, and Interpol. And then the

1 country of Cypress and Montreal, and at AFTE for the
2 Chicago --

3 Q Would you spell that?

4 A A-F-T-E, Association of Firearms and Tool Mark
5 Examiners, which I am a distinguished member of.

6 Q Are those symposiums attended by colleagues in the
7 firearms examination field?

8 A Worldwide, yes.

9 Q And in those presentations and in presenting your
10 specific findings in this case have you ever had anyone
11 approach you either questioning your findings or
12 questioning your methodology?

13 A No.

14 Q I realize we skimmed over it. But as part of your
15 ongoing work, are you required to undergo proficiency
16 testing in this field?

17 A Yes.

18 Q Can you explain to the judge what's required for
19 proficiency testing?

20 A Proficiency testing is that they give us blind
21 evidence and we examine those and give those results
22 back to them. And they determine if we pass that test
23 or not, if it's accurate and our conclusions. And my
24 last proficiency test was in June.

25 Q Did you pass?

1 A Yes.

2 MS. ST. JOHN: Thank you. I have no
3 further questions at this time.

4 THE COURT: Cross?

5 MR. PALSER: Thank you, Judge.

6 CROSS-EXAMINATION

7 BY MR. PALSER:

8 Q The proficiency testing you just mentioned, was
9 that on the 3-D method?

10 A No.

11 Q It's not. It's on the -- Give me a phrase to use?
12 I want to use the old-fashioned way, the way that was
13 done before the 3-D way. What would be the proper term
14 for that?

15 A The same way I did in this case, with a comparison
16 microscope.

17 Q And you knew when you got this case from Detective
18 Musik that type of comparison had already been done
19 here by the Tucson Police Department?

20 A Yes.

21 Q And you knew that their conclusion using that
22 method was that it was inconclusive, they couldn't make
23 a call, correct?

24 A That's correct.

25 Q And you actually did that type of comparison

1 yourself, correct?

2 A Yes.

3 Q And you agree with the Tucson Police Department
4 that using that method to conclusion is inconclusive?

5 A Using those six test fires, yes.

6 Q Using what they did, using the methods that they
7 did, the old-fashioned methods I would call them, it
8 was inconclusive?

9 A There again, using the same methods as --

10 Q I didn't understand what you said?

11 A I'm sorry. Using the same methods that they used
12 in their test fires, yes.

13 Q So the type of methods that TPD used you would
14 reach the same conclusion of inconclusive?

15 A Yes.

16 Q We mentioned proficiency testing. There is no
17 proficiency testing on the 3-D method?

18 A No, not that I am aware of.

19 Q The 3-D method is fairly new, correct?

20 A No, it's been around for a while.

21 Q This is your fourth case using it?

22 A Yes. Using it like an additional scope, yes.

23 Q What was the last part?

24 A Using it as an additional scope, yes.

25 Q Okay. And I apologize sir, because the fan and

1 everything, it's hard for me to hear.

2 MS. ST. JOHN: If you are done with
3 that, I can turn it off, Walt.

4 MR. PALSER: If you would, I would
5 appreciate it.

6 Q In this case, the scanning is not even actually
7 available in the United States, right?

8 A They are in Boston and Atlanta.

9 Q And in this case you took the stuff to Canada to
10 have it scanned?

11 A Yes.

12 Q By the 3-D imaging company up there in Canada?

13 A By one of the Ph.D.s there, yes.

14 Q That was in what, Montreal?

15 A Yes.

16 Q As far as the program they use to do that type of
17 scanning, you do not even possess that program in the
18 U.S., correct?

19 A No, I do not.

20 Q That's a proprietary program that that company
21 possesses?

22 A Yes.

23 Q Do you know who wrote it?

24 A Dandro Berage {phonetic}.

25 Q And when did he write that?

1 A I don't know.

2 Q How is it coded?

3 A I have no idea.

4 Q How is the mapping done from the computer
5 logarithms to the world imaging in that computer
6 program?

7 A I have no idea.

8 Q What portion of the computer program is one-to-one
9 mapping and what portion of the computer program is
10 possibly interpretive, or do you know the answer?

11 A I don't know the answer to that.

12 Q Okay. I am not trying to overstate things, but
13 fair to say you don't know how the computer program
14 works?

15 A Only how to use it.

16 Q Okay. But what's behind the actual program that
17 does the mapping, you don't have any knowledge of it?

18 A No.

19 Q You mentioned a number of your qualifications,
20 which we have seen your CV, and I am not going to ask
21 you every one.

22 When you started in the Army, they didn't
23 have 3-D testing, did they?

24 A What?

25 Q 3-D imaging in the Army?

1 A Barrel casting but not 3-D imaging.

2 Q Not what we are talking about here today, yes?

3 This is fairly recent. You have used it on four cases,
4 what we are talking about here today?

5 A Yes.

6 Q So your training and experience did not apply to
7 the new method, because it didn't exist back then?

8 A We are talking about the same method.

9 Q But the tool being used did not exist for the vast
10 majority of your career?

11 A No.

12 Q You mentioned one study from 2013, correct?

13 A Yes.

14 Q Are you aware of any other studies on 3-D imaging
15 technique?

16 A I know that NHTSA did a study in 2007 or 28, which
17 is National Institute of Standards. And they did
18 testing with 3-D systems back in I believe it was 2007,
19 your Honor.

20 And they were evaluated on the graphical
21 engineering between poorly manufactured firearms and
22 better made manufactured firearms. And the study
23 showed it was beneficial on the more -- the better
24 quality firearms, but not so much on the poor ones.

25 Q Did that have to do with interrater reliability as

1 far as making a call as to which bullet came from which
2 bunch?

3 A No.

4 Q That came from testing itself or the testing types
5 itself?

6 A Yes.

7 Q That was not, in other words, a test of the
8 examiners?

9 A No.

10 Q Even in the 2013 study, what was the rate of
11 interrater reliability in that study --

12 A Near zero.

13 Q -- to rate.

14 A It was zero with the 3-D system all that barrel.

15 Q Now, you said there were some examiners that
16 couldn't make a call?

17 A There were two, with one month's training between
18 the two of them. And they are not from the United
19 States. I believe they were from Africa.

20 Q Using the exact same methods and the exact ways to
21 compare, does it make a difference where they are from?

22 A No, it matters on the amount of training and
23 expertise they have.

24 Q If they had enough training and expertise to be in
25 the study shouldn't they be able to make a call like

1 everybody else?

2 A A lot of times these studies are very variable.

3 They don't differentiate on how they use those for the

4 studies. In other words, the training for these

5 participants were from 1 month to 32 years. So there's

6 no set standard on who gets them to take these tests.

7 Q And a lot of this testing is very subjective,

8 correct?

9 A Yes.

10 Q You are the one who has to make a call?

11 A Ultimately, yes.

12 Q It's not the computer that makes a call?

13 A No.

14 Q You don't enter a bullet, for example, an autopsy

15 bullet, a test-fire bullet, into the computer and have

16 them man it, and the computer says here is your answer?

17 A I wish it was that easy.

18 Q It's something that has to be interpreted by

19 somebody like yourself?

20 A It's a combination of objective and subjective

21 analysis.

22 Q But, ultimately, it's a subjective call?

23 A As in all sciences.

24 Q Okay, so that's a yes?

25 A Yes.

1 Q Thank you.

2 You mentioned in interview with us that every
3 time you work with one of these systems they get
4 progressively much more advanced?

5 A Based on the imagery.

6 Q So, once again, that's a yes, right?

7 A Well --

8 Q They get more advanced every time?

9 A The images get better and better as to the clarity
10 of those images.

11 Q If this is your fourth case, is this a more
12 advanced system than the previous three?

13 A It's got clearer images than the previous three,
14 yes. It's 3-D, HD3, and the other one was 3-D.

15 Q So you remember we had an interview with you on --
16 looks like 11/12/13?

17 A Yes, sir.

18 Q In my office?

19 A Yes.

20 Q I suppose Ms. St. John provided you a copy of your
21 interview?

22 A She did.

23 Q Have you had a chance to look at that?

24 A I did.

25 MR. PALSER: As soon as I get this

1 marked I would like to approach the witness, Judge.

2 Q All right, I will show you what has been marked
3 Defendant's Exhibit A. Is that a copy of the interview
4 you did with myself and Ms. St. John and Ms. Kay?

5 A Yes.

6 Q If you would glance at page 7, please, sir.

7 Right towards two middle of the page, Line
8 No. 20, I believe we were talking about the systems
9 that were used. And your answer there on line 20 was:
10 The system every year, every time I work with these
11 systems, this is my fourth case, they get progressively
12 much, much more advanced. The system that I am using
13 is much more advanced than what this is.

14 A That's imaging. You didn't ask me how it was
15 advanced based on the imagery.

16 Q Those were your words, "Every time the system gets
17 more advanced"?

18 A Right.

19 Q The software would have to be changed every time?

20 A I don't know how they do it, but it was better
21 than it was before.

22 Q You don't know the nuts and bolts, but you get a
23 better picture?

24 A I don't know how it works you, but --

25 Q Oh, so you don't know anything about the

1 reliability of the computer system itself?

2 A Well, they have been testing throughout the United
3 States and the world. They are being used worldwide as
4 far as whether checking for shootings amongst other
5 shootings, test fires, and then correlating those
6 results to pick a candidate list for comparative
7 analysis. So they are being used and correlations are
8 being done with those as well.

9 Q That's based on one study from 2013?

10 A No, that's since it's inception with the heritage
11 system. I guess they started back in 1993.

12 Q Now, you said on direct examination with Ms. Kay
13 that we have had this type of 3-D system since 2007?

14 A The one with the HD 3-D, HD 3-D has been since
15 2010. The 3-D system has been since 2007. And before
16 that there were two-dimensional systems from 1993
17 forward.

18 Q Okay, so the 3-D system was not tested worldwide
19 in the 1990s?

20 A No, two-dimension systems were.

21 Q I understand that. But the 3-D system didn't
22 exist in the 1990s to be tested?

23 A In 2007 the existence became available.

24 Q So it couldn't have been tested prior to 2007?

25 A No, you are right.

1 Q In the case that we are dealing with here today,
2 that was a total of 26 test fires, correct?

3 A Yes.

4 Q Six of those done by the Tucson Police Department,
5 20 of those done by you?

6 A Yes.

7 Q And you did not image all 26?

8 A No.

9 Q Let me back up a step. When we talk about doing
10 the imaging, you yourself don't actually do the
11 imaging?

12 A No.

13 Q You took the items to Montreal. You stood there
14 and watched a technician do something with a computer
15 to get the imaging?

16 A I watched the FHD that created the system enter it
17 in the system.

18 Q So they do some kind type of scan while you watch;
19 is that fair?

20 A Yes.

21 Q You, yourself, do not do the scanning?

22 A I did not do the scan, no.

23 Q You don't have any way to evaluate the scanning or
24 the person doing the scanning?

25 A I am sure he is very qualified in doing that.

1 Q Any studies to back that up?

2 A I mean, he create systems, a PhD, and --

3 Q So you can't evaluate his work --

4 A No.

5 Q -- fair?

6 Out of the 26 test fires, how many did you
7 image?

8 A Four.

9 Q And you specifically basically selected out the
10 four to use?

11 A Well, they were randomly selected.

12 Q Okay, so randomly selected. You took all 26. You
13 put them in a hopper or a hat. Let's use a hat. Put
14 all 26 in a hat and you have got an assistant and you
15 had them blindfolded and had them randomly pick out
16 four?

17 A No, I don't do it that way.

18 Q Okay. You actually looked at them all before
19 deciding which ones you were going to image?

20 A Well, I identified all 26. They are all
21 identifiable with each other.

22 Q You screened them all?

23 A Well, examined them, yes.

24 Q Well, the first thing you did was screen them on
25 the microscope, correct?

1 A I scanned them, yes.

2 Q Okay. And you wanted to make sure that you can
3 identify the test fires to each other?

4 A That's important in an examination, because if you
5 can't -- if you can't identify the test fires to each
6 other, than you are not going to be able to identify
7 them to the firearm that suspect, or eliminate or
8 agreement or anything. So the examination was done,
9 right.

10 Q So you took before that, we are in agreement with
11 each other?

12 A They were all in agreement with each other.

13 Q And you found two of them that you liked, and you
14 got two from your group, two from the other group?

15 A I chose two from Tucson PD and two from my test
16 fires that I did.

17 Q If I can refer you to page 43 of your interview
18 you did with me. And at the very bottom of page 43,
19 were your words there you found two of them that you
20 liked? It's line 41, sir.

21 A Right.

22 Q And then you continue over to the next page. And
23 you indicated that you would have to look at your
24 notes, but you got two of them from your group that you
25 decided to take, and you picked No. 20 because of the

1 it was of the 20, and you picked either No. 1 or 4, and
2 you go on to say, I picked one of those, not the first
3 one, and I took one or two of the ones from Tucson.
4 And later on in that page on line 14 the question was:
5 And you made sure you had four? What was your term on
6 that, the test fires are great --

7 A Right.

8 Q -- and your answer there on line 17, sir?

9 A That I could identify test-fire to test-fire.

10 Q Because if you take something that's not matching
11 up to itself, you are just wasting your time?

12 A Like I said, they were, all 26 were, identifiable.

13 Q And yet you used these four?

14 A As in the first time this question was asked, I
15 stated that it was random.

16 Q It's random after you have selected three?

17 A There's time constraints on that.

18 Q At some point you made a choice to take two test
19 fires from your group and two test fires from TPD's
20 group?

21 A Yes.

22 Q You did not put them all in a box and draw out two
23 or four or six or eight?

24 A No, I did not.

25 Q You chose which ones you were taking?

1 A Which is standard. I mean, it's not something
2 that's unusual.

3 Q Not saying it's unusual. I am just saying you
4 choose the once?

5 A Yes, I did choose them.

6 Q I want to sure I understood when you were talking
7 to Ms. St. John. All bullets will not reproduce the
8 same way every time fired from the same gun?

9 A I believe that replica, no, it won't be

10 Q And so there will be variations between test
11 fires?

12 A There will be microscopic variations, yes.

13 Q Even using the same gun?

14 A Yes.

15 Q And you agree with me when you are doing your
16 examination that you are more in tune with agreement
17 than disagreement?

18 A No.

19 Q I am trying to read my own notes here.

20 Sir, you have still got that transcript up
21 there in front of you?

22 A I do.

23 Q Page 26, please.

24 A Okay.

25 Q Line 4. The question I asked there was: "Do you

1 look for disagreement?"

2 And what was your answer there or line 6?

3 A I said, "I am more in tune with agreement than
4 disagreement."

5 Q So, like I said, you are more in tune for
6 agreement than you are for disagreement.

7 A In a lot of comparisons, once the agreement starts
8 to come into alignment I am going to start identifying
9 those areas of agreement. If it's elimination, the
10 same way with elimination. It's not that I am more in
11 tune. It's whatever that comparison is showing me and
12 whatever that evidence is saying to me when we examine
13 it.

14 Q In this examination, this was not a blind
15 examination?

16 A No.

17 Q You knew what case it was?

18 A Yes.

19 Q You knew what, obviously, Detective Musik wanted
20 tested?

21 A Say that again?

22 Q You knew what items Detective Musik wanted
23 testing?

24 A Yes, he sent them to me, yes.

25 Q You were provided one gun?

1 A Yes.

2 Q You weren't provided any other guns?

3 A No.

4 Q There was no control guns used?

5 A No.

6 Q You did not do comparisons to any other .40
7 caliber guns and make any test fires from those?

8 A No.

9 MR. PALSER: May I have just a moment,
10 Judge?

11 That's all we have for now, Judge. Thank
12 you.

13 THE COURT: Ms. St. John, anything
14 further?

15 MS. ST. JOHN: Your Honor, may I have
16 just a moment?

17 Did you need a break?

18 THE WITNESS: Yes, if I could go to the
19 restroom?

20 MS. ST. JOHN: May we take just a
21 five-minute break, your Honor? Mr. Edwards had asked
22 me in advance if we could break at the halfway point.

23 THE COURT: This better be way past
24 halfway. It's five after 4:00. Go ahead and take your
25 break.

1 But can the lawyers stay so we can use this
2 time?

3 MS. ST. JOHN: Of course, your Honor.
4 He just needed a few minutes.

5 THE COURT: That's fine. Go ahead.

6 Did you say you had another witness you
7 wanted to testify on this issue?

8 MS. ST. JOHN: Well, I have another
9 witness available. And the question is whether the
10 Court needs to hear -- The question is whether the
11 Court needs to hear from Mr. Powell. We have disclosed
12 Mr. Powell. He is with the Tucson Police Department
13 laboratory. He has been there for a long time. And
14 because part of the issue raised in the defense motion
15 is the underlying science of toolmark analysis, I have
16 Mr. Powell prepared to testify about that, as well.

17 If the Court's primary concern is about
18 the -- not only the method used in this case but also
19 the 3-D imagery in this case, then I don't know that we
20 need call Mr. Powell. But I did want to make sure that
21 he was available for the Court, to answer any questions
22 that the Court had about that.

23 THE COURT: I assume there's no serious
24 argument about the methods that have been used in the
25 past?

1 MR. PALSER: Judge, we are focusing more
2 on the --

3 THE COURT: So we don't need to call
4 Mr. Powell?

5 MR. PALSER: I agree. We would object
6 to calling Mr. Powell now. He was disclosed. We asked
7 for an interview with him tomorrow morning. That's the
8 first time he could get that scheduled on everybody's
9 schedule. I would object to that.

10 MS. ST. JOHN: That was the first time
11 we could get him set up given the times we were given
12 by counsel, given he was disclosed right before the
13 Christmas holiday.

14 THE COURT: And you also have another
15 witness here about this issue?

16 MS. ST. JOHN: I only have the two. I
17 believe they may have subpoenaed somebody else.

18 THE COURT: Do you folks have testimony
19 you want to present on any of this?

20 MR. PALSER: No. I would ask you to
21 take note of the testimony and the results of
22 Ms. Bishop who did the original TPD analysis.

23 THE COURT: All right, that's fine.

24 MS. ST. JOHN: May I advise Ms. Bishop,
25 who is here as well as Mr. Powell, that they can be

1 excused then, your Honor?

2 THE COURT: Actually, is it okay if my
3 bailiff does this to save your time?

4 MS. ST. JOHN: Yes, thank you.

5 THE COURT: Come on back up, sir.

6 MS. ST. JOHN: Thank you for allowing us
7 a brief recess.

8 REDIRECT EXAMINATION

9 BY MS. ST. JOHN:

10 Q Now, Mr. Edwards, I wanted to go back over with
11 you some of the areas that were covered just now with
12 you with Mr. Palser.

13 Okay, the first is this idea of being in tune
14 with identification versus exclusion. During the
15 course of your career, have you ever made exclusions
16 when comparing two items?

17 A All the time.

18 Q And you were asked whether there was a control gun
19 or another .40 caliber weapon those test fires were
20 using. Is that something that you would normally do
21 based on your training and experience?

22 A No, not in casework, no.

23 Q Is that something that's required in proficiency
24 testing for you to then create your own additional test
25 fires from another weapon to compare?

1 A No.

2 Q And you were talked to about the Ph.D. who created
3 a software that was used in this case. Is he, in fact,
4 the same Ph.D. that worked on that 600 bullet study
5 that you were discussing from 2013?

6 A Yes.

7 Q You talked to Mr. Palser about how this isn't
8 something where the computer takes the images and
9 processes it and then just pops out a result, it's a
10 match or it's a exclusion, but this is something where
11 you have to actually look at the imagery and determine
12 whether or not it's a match; isn't that correct?

13 A That's correct.

14 Q And is it true that, in fact, your verifier also
15 has to look with his own eyes and make his own
16 analysis?

17 A Yes.

18 Q And in this case you talked about -- you clarified
19 with Mr. Palser that it's not, in fact, a new method
20 that you are using, it's just different technology to
21 enhance the old method; is that correct?

22 A Well, I think it's different technology. You
23 have, like, a different way of looking at it. So it's
24 like having, in my case I have three different
25 microscopes to work with, and it's just like I have an

1 additional microscope. So it's just something to help
2 look at those areas with a bit more clarity that would
3 be much more difficult with a comparison microscope.

4 Q And when you are looking at these images on the
5 bullet track system, are they just more detail of what
6 you have already seen on the comparison microscope or
7 are you seeing something entirely new?

8 A It's not seeing something entirely new. It's just
9 more clarity, a different type of image. But when I am
10 doing this analysis, it's not so much -- 3-D is not the
11 most important part of the comparison. It's the actual
12 comparison microscope.

13 Q So your initial comparison using the comparison
14 microscope, once you had the additional test fires as
15 well as the barrel cast that you developed in this
16 case, for you all of that information was conclusive
17 before you even went on to the confocal microscope?

18 A No.

19 Q Can you explain?

20 A Yes. In examining with a comparison microscope
21 looking over 3-D, if there's agreement there and I am
22 seeing agreement with the comparison microscope, that
23 would be expected. If I am looking at the comparison
24 microscope and the 3-D, and I don't see any agreement
25 in those areas, that would be a red flag to me.

1 But for me to make an identification it has
2 to be done with a comparison microscope. That's the
3 only standard that's accepted in the United States, and
4 that's the standard that I used in this case and in
5 every case that I have ever done in 3-D. So it's only
6 used as a supplement, not used as the main scope.

7 MS. ST. JOHN: Thank you. I have no
8 further questions.

9 THE COURT: May this witness be excused?

10 MS. ST. JOHN: Unless the Court has
11 anything further for him, certainly he may be.

12 THE COURT: Thank you. You may be
13 excused.

14 THE WITNESS: Thank you, ma'am.

15 THE COURT: Mr. Palser, argument?

16 MR. PALSER: I am trying not to repeat
17 everything we put in our motion, Judge.

18 But certainly the Court has heard the
19 testimony today. And the question here is more the
20 question of what is science. And, you know, contrary
21 to what Mr. Edwards said, science is not subjective.
22 There's not some, Gee, I think it looks like something
23 so it must be. Every call in science is made
24 ultimately subjectively, I don't think most scientists
25 are going to agree with that. Science is all about

1 what are the underpinnings.

2 You heard nothing about, because it's not in
3 the evidence, what is the basis for the computer
4 program, how exactly the items are then scanned into
5 the 3-D computer, the 3-D imaging system. There's
6 nothing to back any of that up to determine that it's
7 reliable or unreliable. This Court has a paucity of
8 evidence on that issue for sure.

9 And then, if you look at, Judge, and I think
10 our line of questioning was pretty clear so I am trying
11 to keep this as brief as I can. But when you look at
12 the methods that were actually applied here, this is
13 not a blind test.

14 This is not the type of test, Judge, where if
15 you look at DNA -- I mean that's the gold standard.
16 DNA testing is done -- And this is argument I know this
17 is not in testimony. But DNA testing, the analyst is
18 sent a blind sample and told: Give us a result.
19 That's how they test their proficiency every year. I
20 have done a huge number of those cases and they are not
21 told, here is what we are looking for. They are not
22 told, here is the profile we would like you to find.
23 Test this sample and see if you find it. That's not a
24 blind test.

25 A blind test was not done in this case. This

1 reminds me of the old real estate appraisals that
2 under-plied the real estate bubble. They used to call
3 them MIA appraisals, which they joked about, there's
4 some fancy joke for that, but it's short for made as
5 instructed. But that's what happens when you don't
6 have a blind test. That is not in any way, shape or
7 form science.

8 Then you look at the selection of the test
9 fires versus random selection. And, once, again, I
10 certainly take exception, or I argue, however you want
11 to put it, with what Mr. Edwards defines as random.
12 Random is not -- if we look up Webster's I am pretty
13 sure I will be right. Random is not screen out the
14 ones I like, and I am going to take those four and test
15 those and ignore the other 22. Random would truly be
16 my example of putting all 26 into a hat and drawing out
17 two or four or however many you intend to test. So
18 there's certainly no randomized testing in this case at
19 all.

20 There's no studies backing up the 3-D
21 imaging. Mr. Edwards kept talking, and that's why I
22 tried to redirect him on that well. In the 1990s there
23 are these studies. None of that stuff applies to
24 something that wasn't in existence until 2007.

25 And even the stuff that was in existence in

1 2007, in Mr. Edwards' own words, every time he does
2 this, it's a different program. It has to be if you
3 are going to get different fancier results or however
4 you want to determine that it's going to be a different
5 program.

6 And the question is was this test here in
7 this case the product of reliable methods. And you
8 heard nothing at all about whether or not the system he
9 was using, in his fourth case using this, he had to go
10 to Montreal, Canada, to use, heard nothing about that
11 system being reliable in any way, shape or form.

12 In addition, Judge, I think the most
13 important thing is looking at the scientific principles
14 behind this, the lack of blind examination, the lack of
15 sample validity, the lack of any type of studies shows
16 interrater reliability using this particular 3-D
17 method. None of that is good science.

18 And, as such, Judge, it's not wide enough to
19 go in front of a jury.

20 THE COURT: Ms. St. John.

21 MS. ST. JOHN: Mr. Palser is correct,
22 what he is saying is arguments. He has not provided
23 the testimony of a single scientist who can come in
24 here and tell you that the methodology used in this
25 case is improper. As the Court knows, the defense has

1 no obligation to disclose anything unless they intend
2 to use it at trial. But certainly they did have the
3 opportunity and exercised it to check out the gun, the
4 barrel cast, as well as all of the test fires and the
5 autopsy bullet in this case for independent testing.

6 And, while they have no obligation to put on
7 evidence, if they had someone who could come in here
8 and say that the methodology used was improper, you can
9 bet that they would be here, and you would be hearing
10 from them.

11 So Mr. Palser telling you that this should
12 have been a blind test, when, in fact, we heard
13 directly from Mr. Edwards that that is not the industry
14 standard, it's sort of irrelevant. Much like a DNA
15 sample, or a DNA test, sure, the verification can be a
16 blind test. And we heard that Mr. Edwards has
17 undergone that sort blind testing to receive his yearly
18 accreditation.

19 However, at his proficiency testing.

20 However, much like with the DNA tests where
21 you send in a known sample and you send in an unknown,
22 and you ask whether they match, that's what was done in
23 this case. And Mr. Edwards testified that he has made
24 plenty of exclusions over the course of his career.

25 Furthermore, the idea that the bullet needed

1 to be randomly selected is not supported by any
2 industry standard by any scientific testimony that you
3 have heard before you.

4 Finally, the issue of whether there were
5 studies with interrater reliability, you, in fact,
6 heard from Mr. Edwards that the study done in 2010 with
7 the 3-D analysis involved interrater reliability. And
8 while I am not super experienced in understanding that
9 certainly Mr. Powell and Mr. Edwards discussed that it
10 was near zero, and the fact is that there wasn't bias
11 between when somebody was re-examining.

12 In this case, we have Mr. Edward using
13 techniques that he has been trained in for over two
14 decades. He has honed those techniques over that time
15 and used the same method with some additional
16 instrumentality which allowed him to see in better
17 detail something he was already seeing on the
18 comparison microscope. So how the scans are generated
19 from the confocal and input into the 3-D imaging
20 software is irrelevant when he can say those are the
21 same lands, grooves and striations that he was seeing
22 on the comparison microscope. It's the same bullets
23 the same test fires, and it's the same analysis with
24 better detail.

25 For all of those reasons, what he has

1 testified about today has indicated the hallmarks of
2 reliability of this method. The fact that this has
3 been presented specifically, his findings in this case
4 have been presented without challenge at peer attended
5 conferences, indicate the reliability.

6 And, although we didn't go in depth, the fact
7 that the really high transparency of the analysis that
8 he has engaged in, the fact that he takes so many
9 photographs, the imagery that he developed for the
10 presentation that is given both to me and to the
11 defense, so that they can duplicate, look with their
12 own eyes, the jury can look with their own eyes, and
13 the examination he engaged in adds to the reliability.

14 For all of those reasons we believe we have
15 met the Daubert standard. The Daubert case asks this
16 Court to act as a threshold, but not as a gatekeeper.
17 And we certainly have crossed over that threshold, I
18 would argue well above it, and it's something that
19 needs to be presented to the jury.

20 THE COURT: Mr. Palser?

21 MR. PALSER: Judge, I mean, and I am
22 going to mispronounce the case, but Kungnom here
23 clearly says the Court is the gatekeeper for this type
24 of evidence. That's the Daubert standard. Obviously
25 one of the things the State does not address, spent a

1 lot of time about how we got to look at the evidence,
2 because that's irrelevant, because that's our right,
3 and what I think of how it looks is really not part of
4 today's case.

5 But whether we check it out and look at it or
6 not, that has nothing to do with your decision. What
7 does have a lot to do with the court's decision today
8 is Mr. Edwards' own testimony where he admitted
9 multiple times that ultimately this is a subjective
10 call. This is a subjective call on his part.

11 If you look at the standards under the United
12 States versus Rich, quoting Daubert, applying the
13 Daubert standard, the State hasn't met any of these
14 standards. And the chief thing I would say in
15 rebuttal, this is all subjective, because Mr. Edwards
16 told you ultimately this is a subjective call.

17 THE COURT: The Court finds that
18 Mr. Edwards does qualify as an expert in the area of
19 firearms identification. He has extensive training and
20 experience doing this, and he can testify as to the
21 work he did and as to the opinions that he has arrived
22 at.

23 Although counsel argues that there's some
24 subjectivity in arriving at those opinions, I don't
25 think that means that the evidence is not scientific.

1 Scientific evidence often can involve judgment calls
2 and opinion testimony by experts. And the fact that
3 some of the opinions may be subjective rather than
4 entirely objective does not mean that the evidence is
5 not scientific or technical and is barred.

6 The Court finds that the testimony is the
7 product of reliable principles and methods. The
8 principles and methods used in firearm identification
9 have been around for a very long time. Mr. Edwards has
10 extensive experience with them. And using this 3-D
11 confocal microscopy is just a new tool to utilize the
12 same principles and those that have been used forever,
13 and that this new technology is helpful to an expert
14 such as Mr. Edwards involved in this.

15 The Court finds that the 2013 study gives
16 further support for the use of this technology.

17 Accordingly, the Court hereby denies the
18 Daubert motion to preclude the firearms identification
19 and finds that it's entirely appropriate for
20 Mr. Edwards to testify to the testing that he did and
21 the opinions that he reached as a result of that
22 testing.

23 Now, we have got a motions to continue the
24 trial. I didn't see -- I don't think I saw an
25 opposition. Is there an opposition to that position?

1 MS. ST. JOHN: Your Honor, I am torn.
2 The victim representatives are obviously really eager
3 to go forward. And at the time of the last defense
4 continuance, we adamantly objected. And this is not
5 information that was sought prior to the last defense
6 continuance. Furthermore, I don't ultimately suspect,
7 though I have no inside information, that this is
8 information that ATF is going to give up, nor do I have
9 any reason to believe that it will lead to a third
10 party that they can pursue as a defense.

11 But I do acknowledge that they have the right
12 to investigate third party defenses.

13 THE COURT: Counsel. Sorry.

14 MS. ST. JOHN: And with that I guess we
15 defer to the Court.

16 THE COURT: Thank you.

17 Counsel?

18 MR. PALSER: Judge, we certainly --
19 We -- Let's go back. I do know that the State objected
20 last time. At that point in time, if my recollection
21 is accurate, I had been assigned to the case maybe four
22 or five days. And as I informed the Court that the
23 first chair of this case had not prepared really
24 anything on the case.

25 We did start our investigation. We certainly

1 do have a right under Arizona -- or Machado versus
2 Arizona, or Arizona versus Machado, I can't remember
3 which way the caption is flipped on that, but it's the
4 Machado case. I am highly familiar with it. We do
5 have a right to investigate these third party defenses
6 and certainly bring those out in front of jury.

7 The issue in this case, Judge, I think if we
8 look at the time line, we certainly requested that
9 interview with Agent Brant. We were informed by the
10 State -- and I understand, Judge, we are not having --
11 We are not having a yelling back and forth contest
12 between myself and Ms. St. John. But at that point in
13 time the State said, oh, sure we will make him
14 available. They even went as far as to set up an
15 interview with Agent Brant.

16 I don't recall if we showed up to that
17 interview or if it was one on the same day with the
18 same case, but on that day we were told Agent Brant
19 will not comply with an interview. We filed
20 appropriate motions with this Court to try to get that
21 done. I am going to paraphrase. The Court basically
22 told us to go ahead and file a Touhy letter. And we
23 provided that to Court and counsel.

24 We have not received a response back. It's
25 just a couple weeks after the new year's. But

1 certainly, Judge, given the severity of the case and
2 certainty of the punishment that is available on this
3 type of charge, that we should be allowed to explore
4 every single avenue. I have discussed the matter with
5 Mr. Foshay. He is willing to waive time obviously to
6 do this.

7 I think it's important -- He is in a position
8 now, Judge, where they can either say yes or they can
9 say no. If they say yes, I don't see how we can get
10 this done by the trial date next week. If they say no,
11 I would like an opportunity to explore my obvious
12 options as to what we can take as the next step.
13 Unfortunately, we are out of time. I will submit that
14 to the Court, that that's not all on our side of the
15 equation. But given the severity of the case, I would
16 ask the Court to continue it.

17 I am looking at dates. I have dates I could
18 make available in April.

19 THE COURT: Let me ask, you have also
20 mentioned that the State disclosed a portion of a free
21 talk between the Attorney General's office and an
22 individual indicating that someone else indicated an
23 interest in killing Mr. Blackwell. Are you doing
24 anything to follow up on that?

25 MR. PALSER: We are, Judge. That was --

1 I am trying to think of the right way to phrase this,
2 not trying to dodge your question. We were disclosed a
3 partial portions of that -- I guess that says it
4 twice -- about a ten minute section of that. I have no
5 idea how long the whole thing is. We did request the
6 whole thing from the State.

7 Ms. St. John has informed us that's under the
8 Attorney General's office, that she does not have that.
9 We are going to contact the assigned attorney general
10 on that case and request that.

11 THE COURT: If I understand, that
12 information was new to you?

13 MR. PALSER: Yes.

14 THE COURT: All right. Given the fact
15 that that information has recently been provided and
16 that counsel obviously wants to follow up on that to
17 see if it might serve as a basis for a third party
18 culpability defense as well as defense counsel is
19 hoping to interview Agent Brant, whether that happens
20 or not, I don't know, but you think you would be
21 prepared for trial in April?

22 MS. ST. JOHN: Your Honor, I am afraid I
23 am not available in April. I'm sorry. I didn't bring
24 my calendar because I was so focused on Daubert. So I
25 am actually contacting my staff, and she is

1 double-checking as we speak. But I believe May 27 I am
2 available. If I can have just a minute to verify?

3 THE COURT: I am not.

4 MS. ST. JOHN: Okay, let me double check
5 that I don't have something in April.

6 I apologize, your Honor.

7 THE COURT: That's all right. While we
8 are waiting for that --

9 MR. PALSER: The Court is not available
10 the 27th?

11 THE COURT: Correct.

12 MR. PALSER: Because we could look at, I
13 guess, the next week --

14 MS. ST. JOHN: Hold on.

15 MR. PALSER: -- the 3rd.

16 MS. ST. JOHN: Your Honor, what's the
17 last week of April? What's that date?

18 THE COURT: The 29th, April 29.

19 MS. ST. JOHN: I think that works. If I
20 may have just a minute?

21 THE COURT: My calendar also reflects we
22 have some motion to compel or disclose, and I can't
23 find one.

24 MR. PALSER: Judge, quite frankly, I am
25 baffled. I think that is part of the Touhy issue that

1 just got reincorporated on the calendar.

2 THE COURT: You don't have that. That's
3 good.

4 MR. PALSER: Yeah.

5 MS. ST. JOHN: May I place a phone call,
6 your Honor? Thank you.

7 THE COURT: Mr. Palser, are you saying
8 you folks are available on April 29?

9 MR. PALSER: Yes, Judge.

10 THE COURT: Do you still expect this to
11 be a seven-day trial?

12 MR. PALSER: I think we should, yes.

13 THE COURT: And the next week, too.
14 Ms. St. John the next week.

15 MS. ST. JOHN: Your Honor, for April 29
16 and 2 weeks, I do have a trial the second week, but
17 this would take priority.

18 THE COURT: All right, fine.

19 And the victim representatives are available?

20 MS. ST. JOHN: They are available that
21 week, your Honor.

22 THE COURT: All right. Good cause
23 having been shown, the trial date of May 22 is hereby
24 continued to April 29. Rule 8 having been waived, time
25 is excluded until the 29th of April.

1 So we will start April 29, 1:15 p.m. 12
2 jurors, seven days.

3 MS. ST. JOHN: And, I don't know,
4 obviously we will need to notify folks of the change in
5 date. But if we could ask that all subpoenas remain in
6 full force and effect?

7 THE COURT: All subpoenas will remain in
8 full force and effect.

9 MS. ST. JOHN: Thank you.

10 THE COURT: Anything further?

11 MR. PALSER: Judge, I believe the trial
12 for January 22 should be vacated.

13 THE COURT: Did I say something
14 different?

15 THE CLERK: May.

16 THE COURT: Well, if there was a trial
17 date in May, we will vacate that, too, because we are
18 going to do it in April.

19 MR. PALSER: I'm sorry?

20 THE COURT: We are vacating the trial
21 date of January 22 and resetting it for April 29.
22 Thank you.

23 MS. ST. JOHN: Thank you.

24 (Court adjourned at 4:40 p.m.)

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

C E R T I F I C A T E

I, Gail D. Vinson, do hereby certify that as a Certified Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability, and that the same was transcribed by me via computer-aided transcription, and that the foregoing pages of typewritten matter are a true, correct and complete transcript of all the proceedings had, as set forth in the title page hereto.

GAIL D. VINSON, RPR, CR
Arizona License No. 50610
Pima County Superior Court
Tucson, Arizona