

883 F.3d 1022

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Arthur WATERS, Defendant–Appellant.

No. 17-1423

Submitted: November 16, 2017

Filed: February 28, 2018

Rehearing and Rehearing En
Banc Denied April 23, 2018

Synopsis

Background: Defendant was convicted, on conditional guilty plea entered in the United States District Court for the Western District of Missouri, of being felon in possession of firearm, and he appealed from denial of his motion to suppress evidence, [Greg Kays](#), Chief Judge, 2016 WL 750663, as well as from the above-Guidelines sentence imposed.

Holdings: The Court of Appeals held that:

[1] protective sweep of residence in which suspected narcotics offender was arrested was not invalid merely because alleged offender may have been removed from the immediate area during, or immediately preceding, the sweep;

[2] officers, in conducting protective sweep, could move a large couch whose lower edge was located slightly more than one inch off the floor, and underneath which or behind which an individual could reasonably be hiding; and

[3] district court did not abuse its discretion or impose a substantively unreasonable sentence when, in sentencing a defendant who pled guilty to being felon in possession of firearm, it varied upward from his recommended Guidelines range of 37 to 46 months and imposed 87-month sentence.

Affirmed.

West Headnotes (12)

[1] **Criminal Law**

🔑 [Review De Novo](#)

Criminal Law

🔑 [Evidence wrongfully obtained](#)

On appeal from district court's denial of motion to suppress evidence, the Court of Appeals reviews district court's factual findings for clear error and its legal conclusions de novo.

[Cases that cite this headnote](#)

[2] **Searches and Seizures**

🔑 [Persons, Places and Things Protected](#)

Searches and Seizures

🔑 [Protective sweep; security check](#)

Search of residence is generally unreasonable, and violative of Fourth Amendment, without a warrant issued on probable cause; however, an exception to the general warrant requirement exists for protective sweeps. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[3] **Arrest**

🔑 [Scope of Search](#)

“Protective sweep,” of kind excepted from the general warrant requirement of the Fourth Amendment, is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others; it is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[4] **Arrest**

🔑 [Scope of Search](#)

App A

Protective sweep must be supported by a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. *U.S. Const. Amend. 4*.

[Cases that cite this headnote](#)

[5] **Arrest**

🔑 [Particular places or objects](#)

Protective sweep of residence in which suspected narcotics offender was arrested was not invalid merely because suspected offender may have been removed from the immediate area during, or immediately preceding, the sweep, where officers, prior to forcing their way through back door of residence, had announced their presence and thus provided occupants with opportunity to hide, and where officers, prior to entry, had observed both the upstairs and downstairs blinds move in quick succession, suggesting that residence might have more than one occupant. *U.S. Const. Amend. 4*.

[Cases that cite this headnote](#)

[6] **Arrest**

🔑 [Particular places or objects](#)

Officers, in conducting protective sweep of residence in which suspected narcotics offender was arrested, could move a large couch whose lower edge was located slightly more than one inch off the floor, and underneath which or behind which an individual could reasonably be hiding, given that officers, by announcing their presence prior to their forced entry, had provided occupants with opportunity to hide. *U.S. Const. Amend. 4*.

[Cases that cite this headnote](#)

[7] **Criminal Law**

🔑 [Sentencing](#)

On challenge to reasonable of sentence, the Court of Appeals reviews, first, for significant procedural error, and absent any

significant procedural error, for substantive reasonableness.

[Cases that cite this headnote](#)

[8] **Criminal Law**

🔑 [Sentencing](#)

Substantive reasonableness of sentence is reviewed under a deferential abuse-of-discretion standard.

[Cases that cite this headnote](#)

[9] **Sentencing and Punishment**

🔑 [Manner and effect of weighing or considering factors](#)

District courts enjoy wide latitude when applying the statutory sentencing factors and are free to assign some factors greater weight than others. *18 U.S.C.A. § 3553(a)*.

[Cases that cite this headnote](#)

[10] **Criminal Law**

🔑 [Sentencing](#)

Criminal Law

🔑 [Application of guidelines](#)

It will be an unusual case in which the Court of Appeals will find a sentence substantively unreasonable, regardless of whether it is within, above or below the Guidelines range. *U.S.S.G. § 1B1.1 et seq.*

[Cases that cite this headnote](#)

[11] **Criminal Law**

🔑 [Application of guidelines](#)

On appeal from district court's decision, when imposing sentence, to vary upward from the Guidelines range, the Court of Appeals will consider the extent of the variance, but give due deference to district court's decision that the statutory sentencing factors, on a whole, justify the extent of the variance. *18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq.*

[Cases that cite this headnote](#)

[12] **Sentencing and Punishment**

🔑 Nature, degree, or seriousness of other misconduct

Weapons

🔑 Possession after conviction of crime

District court did not abuse its discretion or impose a substantively unreasonable sentence when, in sentencing a defendant who pled guilty to being felon in possession of firearm, it varied upward from his recommended Guidelines range of 37 to 46 months and imposed 87-month sentence, based largely on defendant's lengthy history of serious and violent criminal behavior, including multiple convictions for robberies and assaults. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

***1024** Appeal from United States District Court for the Western District of Missouri—Kansas City

Attorneys and Law Firms

Bruce E. Clark, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Kansas City, MO, for Plaintiff–Appellee.

Laine Cardarella, Federal Public Defender, Rebecca L. Kurz, FEDERAL PUBLIC DEFENDER'S OFFICE, Kansas City, MO, for Defendant–Appellant.

Arthur Waters, Pro Se.

Before COLLTON and GRUENDER, Circuit Judges, and READE,¹ District Judge.

Opinion

PER CURIAM.

Arthur Waters entered a conditional plea of guilty to one count of unlawful possession of a firearm as a previously convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court² sentenced Waters to 87 months' imprisonment, followed by three years of supervised release. On appeal, Waters challenges the district court's order denying his motion to suppress

evidence seized during a search of his residence while executing an arrest warrant. Waters also challenges his subsequent sentence as substantively unreasonable. We affirm.

I.

On September 3, 2015, officers from the Kansas City, Missouri Police Department obtained information that Waters was residing with his fiancée, Dannaica James, and two children at 2202 Monroe, Kansas City, Missouri. Waters had outstanding warrants for his arrest. Officers surveilled the residence. That same day, officers stopped the vehicle of an individual known to associate with Waters. The individual identified a photo of Waters and stated that Waters was his source for illegal drugs. The individual made a controlled call to Waters, during which Waters stated ***1025** that he was at the residence, he would be there for awhile and had what the individual was requesting.

Several hours after the controlled call, officers observed James leaving the residence. James left the residence, walked a short distance, stopped and went back to the residence. James knocked on the door and someone inside opened the door. James then entered the residence and left again approximately thirty seconds later. After James entered her vehicle, which was located twenty to thirty yards from the residence, officers detained her at that location. She informed officers that Waters was inside the residence and that no one else was present.

Officers subsequently surrounded the residence, prepared to forcibly enter if necessary. James called Waters to inform him that officers were outside waiting for him and asked him to come to the door. Waters told James to “hold on.” As officers approached, they observed window blinds move on the second floor of the south side of the residence. Approximately thirty seconds later, officers observed window blinds move on the first floor near the west side of the residence. Specifically, it appeared that someone had pulled down a blind to look outside.

Detective Michael Miller knocked, announced the officers' presence and instructed Waters to come outside. Officers announced their presence several times. They did not receive a response. Ultimately, a sergeant authorized entry into the residence. Officers forcibly breached the

back door, which opened into a utility room. Officers moved through the utility room into the kitchen and heard Waters state that he was “coming down,” presumably from the second floor. The stairway was not visible from the kitchen. Officers encountered Waters in the living room, which was adjacent to the kitchen, and directed him into the kitchen. Officers took Waters into custody. He was handcuffed, searched for weapons and eventually removed from the residence.

Officers conducted a protective sweep of the first floor to check for individuals who might pose a threat to their safety. Officers observed marijuana and related paraphernalia in plain view in the living room. Officers observed a large couch situated against a wall in the living room. The couch was flanked by two end tables approximately a foot away. The bottom of the couch was about half the width of a dollar bill off the floor.

In the living room, Deputy United States Marshal Jason Roberts bumped the couch with his hip to determine the weight of the couch. The force slid the couch on the tile floor. Deputy Roberts then pushed one side of the couch away from the wall to see if anyone was hiding behind or inside it. He observed part of a firearm on the floor underneath the couch. The firearm was lying just over one tile square away from the wall.

A grand jury charged Waters with one count of possession of a firearm as a previously convicted felon. Waters moved to suppress all evidence obtained as a result of the protective sweep of the residence. The district court ruled that the sweep was lawful pursuant to *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). Waters entered a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving the right to appeal the denial of his motion to suppress.

At sentencing, Waters's total adjusted offense level was 17 and he had a criminal history category of IV, resulting in a Guidelines range of 37 to 46 months' imprisonment. After considering the factors at 18 U.S.C. § 3553(a), the district court varied upward to a sentence of 87 months' imprisonment.

***1026** Waters raises two issues on appeal. First, he challenges the district court's denial of his motion to suppress evidence and argues that the scope of the protective sweep was unconstitutional. Second,

he contends that his sentence was substantively unreasonable.

II.

[1] When reviewing a district court's denial of a motion to suppress evidence, we review the district court's factual findings for clear error and its legal conclusions de novo. See *United States v. Wright*, 844 F.3d 759, 762 (8th Cir. 2016).

[2] [3] [4] Under the Fourth Amendment, the search of a residence is generally unreasonable “without a warrant issued on probable cause.” *Buie*, 494 U.S. at 331, 110 S.Ct. 1093. An exception to the general warrant requirement of the Fourth Amendment is the protective sweep. “A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” *Id.* at 327, 110 S.Ct. 1093. A protective sweep must be supported by “a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.* at 337, 110 S.Ct. 1093.

We have recognized the importance of officers' safety when conducting a home arrest. See *United States v. Alatorre*, 863 F.3d 810, 814 (8th Cir. 2017). “Protective sweeps in these circumstances are justified because officers are vulnerable during an arrest at a home, even when the arrestee and other occupants have been secured” *Id.*; see also *United States v. Davis*, 471 F.3d 938, 944 (8th Cir. 2006) (“A protective sweep is justified by the threat of accomplices launching a surprise attack during an arrest and is particularly important during an in-home arrest, due to the heightened potential for an ambush in unfamiliar surroundings.”).

[5] The district court properly found that the protective sweep was permissible under the Fourth Amendment. Waters contends that the protective sweep was unconstitutional because he was immediately arrested and removed from the premises before officers conducted the sweep. Although the exact timing is unclear, the record establishes that officers began the protective sweep either contemporaneously with, or immediately following,

Waters's arrest. The sweep is not invalid merely because Waters may have been removed from the immediate area during, or preceding, the sweep. Indeed, we have found protective sweeps to be permissible where the defendant was apprehended and removed from the immediate area of arrest before the sweep occurred. See *United States v. Boyd*, 180 F.3d 967, 975–76 (8th Cir. 1999); see also *Alatorre*, 863 F.3d at 814–15.

Waters also challenges the district court's conclusion that officers could have reasonably believed that the residence contained another person who posed a threat to their safety. The district court supported its finding with specific and articulable facts from which a reasonable officer could have concluded that another person was in the residence. In particular, officers observed window blinds move in both an upstairs and downstairs window within a short period. Because Waters was descending the stairs when officers entered the residence, it was reasonable for officers to conclude that Waters was not the person who moved the downstairs blind. Additionally, James called Waters as the officers approached the residence and informed him that officers were waiting outside for him. The officers also announced *1027 their presence multiple times before breaching the door. These circumstances provided anyone in the residence ample time to hide before officers entered the residence. Accordingly, it was reasonable for officers to believe that the residence could contain another person.

Further, we have recognized the association between drug offenses and violence in upholding protective sweeps of residences of known drug traffickers. See *United States v. Cash*, 378 F.3d 745, 748–49 (8th Cir. 2004). Here, officers were aware that Waters had distributed illegal drugs in the past and, based on the controlled call, could ostensibly supply the informant with drugs that day. The presence of drugs was also immediately ascertainable to officers upon entering the living room, where marijuana and drug paraphernalia were found in plain view. That officers did not have exact details on the extent of Waters's distribution of illegal drugs does not render the district court's finding erroneous. It was reasonable for officers to believe that any other person in the residence was dangerous.

[6] We further find no error in the district court's ruling that the couch could have harbored a dangerous individual. Waters contends that no officer could

have reasonably believed that the couch concealed an individual. However, Deputy Roberts testified that he had been involved in hundreds of arrests and received formal training on performing protective sweeps. He noted that he had learned to check any place that a person could hide, including closets, behind doors and inside and behind furniture. Similarly, Detective Miller testified that he had been involved in hundreds of arrests and was familiar with protective sweeps. He testified that police had found individuals in refrigerators, stairwells, under beds, between mattresses and, in one instance, inside a couch where a fold-up mattress should be. Deputy Roberts testified that, when he performed his “hip check” of the couch, it moved easily on the tile floor, suggesting that someone could have moved the couch to hide. The district court found that the couch was large enough that an individual could hide behind or inside it. Based on these facts, it was not clearly erroneous for the district court to conclude that the couch could conceal a person. Our sister circuits have similarly recognized the reasonableness of an officer's belief that a couch could conceal an individual. See, e.g., *United States v. Paopao*, 469 F.3d 760, 767 (9th Cir. 2006). We conclude that there was no error in the district court's determination that the protective sweep was constitutional under *Buie*.

Because we affirm on the above-articulated grounds, we do not address the government's alternative argument that a search behind the couch was justified as an area immediately adjoining the place of arrest and from which an attack could be immediately launched. See *Buie*, 494 U.S. at 334, 110 S.Ct. 1093 (“[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets or other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”). The district court properly denied the motion to suppress evidence.

III.

[7] We engage in a two-part review of a district court's sentence: first, we review for significant procedural error; and second, absent significant procedural error, we review for substantive reasonableness. See *United States v. Hairy Chin*, 850 F.3d 398, 402 (8th Cir. 2017). Waters does not contend that the district court committed procedural

error. His sole contention on *1028 appeal is that his sentence was substantively unreasonable.

[8] [9] [10] [11] We review the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard. See *United States v. Chavarria-Ortiz*, 828 F.3d 668, 672 (8th Cir. 2016). District courts enjoy wide latitude when applying the sentencing factors in 18 U.S.C. § 3553(a) and are free to “assign some factors greater weight than others.” *Id.* It will be an “unusual case” that we find a sentence substantively unreasonable, regardless of whether the sentence is within, above or below the Guidelines range. *United States v. Kelley*, 652 F.3d 915, 918 (8th Cir. 2011). If a district court varies beyond the Guidelines range, we consider the extent of the variance but “give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” *Ferguson v. United States*, 623 F.3d 627, 631 (8th Cir. 2010) (quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)).

[12] Waters contends that the district court gave undue weight to his criminal history. He further argues that the district court relied on considerations that are already accounted for in the Guidelines. Finally, he contends that his conviction for robbery in 1999, which received no criminal history points, was properly accounted for because his conviction for robbery in 2000 scored additional points since the 1999 robbery was unscored. He notes that, even if the 1999 robbery had received full criminal history points, the sentence imposed was still substantially higher than the resulting Guidelines range would have been.

None of these arguments alone or collectively persuade us that the district court abused its considerable discretion. The district court stated that it considered all of the factors at 18 U.S.C. § 3553(a) in reaching its decision to vary upward from the Guidelines. The district court discussed several of the factors in detail and concluded that a sentence within the Guidelines range would not result in adequate punishment, would not be an adequate deterrent and would not protect the public. The district court cited Waters’s lengthy history of serious and violent criminal behavior, including multiple convictions for robberies and assaults. That Waters’s criminal history is a factor already considered in the computation of the Guidelines range does not render the district court’s consideration of it under § 3553(a) erroneous. See *United States v. Bacon*, 848 F.3d 1150, 1152–53 (8th Cir. 2017) (per curiam); see also *United States v. Barrett*, 552 F.3d 724, 726 (8th Cir. 2009) (recognizing the district court’s authority to vary upward for underrepresented criminal history under § 3553(a)). The district court’s careful consideration of the § 3553(a) factors supported the sentence imposed and provided ample justification for the same. See *United States v. Feemster*, 572 F.3d 455, 462 (8th Cir. 2009) (en banc) (“We may not require ‘extraordinary’ circumstances to justify a sentence outside the Guidelines’” (quoting *Gall*, 552 U.S. at 47, 128 S.Ct. 586)). We conclude that there was no abuse of discretion.

IV.

The judgment of the district court is affirmed.

All Citations

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Footnotes

- 1 The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa, sitting by designation.
- 2 The Honorable Greg Kays, Chief Judge, United States District Court for the Western District of Missouri, adopting the report and recommendation of the Honorable Robert E. Larsen, United States Magistrate Judge for the Western District of Missouri, with respect to the motion to suppress.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-1423

United States of America

Appellee

v.

Arthur Waters

Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cr-00324-DGK-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 23, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,) Case No. 15-00324-01-CR-W-DGK
)
 Plaintiff,) Kansas City, Missouri
) January 22, 2016
 v.)
)
 ARTHUR T. WATERS,)
)
 Defendant.)
)

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS
BEFORE THE HONORABLE ROBERT E. LARSEN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES :

For the Plaintiff:

Bruce E. Clark, Esq.
Assistant United States Attorney
400 E. Ninth St., Ste. 5510
Kansas City, MO 64106
(816) 426-3122

For the Defendant: Laine T. Cardarella, Esq.
Federal Public Defender
818 Grand Blvd., Ste. 300
Kansas City, MO 64106
(816) 471-8282

Court Audio Operator: Ms. Dorothy Myers

Transcribed by: Rapid Transcript
Lissa C. Whittaker
1001 West 65th Street
Kansas City, MO 64113
(816) 914-3613

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

1 (Court in Session at 1:37 p.m.)

2 THE COURT: Good afternoon.

3 MR. CLARK: Good afternoon, Judge.

4 MS. CARDARELLA: Hi, Judge.

5 THE COURT: I have a suppression hearing set in the case
6 of *United States of America vs. Arthur T. Waters*. The number of
7 the case is 15-324-01-CR-W-DGK. Let me get, Mr. Clark, your
8 appearance, please.

9 MR. CLARK: Yes, Your Honor. Bruce Clark for the United
10 States.

11 THE COURT: Thank you. Ms. Cardarella.

12 MS. CARDARELLA: Your Honor, Mr. Waters appears in
13 person and with Laine Cardarella. And Alan Bush is also at
14 counsel table.

15 THE COURT: Sure. And so we're going to go ahead and
16 proceed with the evidence here. It's my understanding that we
17 didn't have a warrant from my reading of the briefing here, so
18 I'll -- well, they did have a warrant.

19 MR. CLARK: They had an arrest warrant.

20 THE COURT: Or an arrest warrant. But I still think
21 it's kind of the Government's burden on that side of things. The
22 only thing I wanted to ask before we get started going down that
23 path, did we have any statement that was made either during this
24 proceeding or -- I think there were maybe during the proceeding,
25 but after the proceeding, that we need to be concerned about from

1 a Fourth Amendment issue?

2 MS. CARDARELLA: Yes, Your Honor. And I think the last
3 paragraph of my motion does address the suppression of any
4 statements as fruit of the poisonous tree, that there was an
5 inculpatory statement made during a post-arrest interview.

6 THE COURT: Okay. So, following the arrest --

7 MS. CARDARELLA: Following everything.

8 THE COURT: Everything. We do have that.

9 MR. CLARK: But I understand that the basis for wanting
10 to exclude the statement was the search, --

11 THE COURT: Exactly.

12 MR. CLARK: -- not something independent.

13 THE COURT: Exactly.

14 MS. CARDARELLA: Right.

15 THE COURT: That's what we're talking about here. Thank
16 you both for that clarification. So, if we have an issue
17 concerning eventually suppressing anything, it will include that
18 statement. It might be helpful if we had that in the record too.
19 If somebody would offer that statement, so that we have some
20 indication of it here.

21 MS. CARDARELLA: Sure.

22 THE COURT: You don't need to do it this minute, Bruce.
23 You can find --

24 MR. CLARK: Okay.

25 THE COURT: -- find it at some point.

1 MR. CLARK: I will do my best. Yeah. Are we ready to
2 proceed?

3 THE COURT: Okay. Yes, please.

4 MR. CLARK: The United States calls Detective John Keil.

5 THE COURT: Okay.

6 MR. CLARK: Your Honor should have a copy of the
7 exhibits in this case.

8 THE COURT: Great. Thank you.

9 MR. CLARK: And for your, and for defense counsel, with
10 this witness we're going to do the report, Exhibit #13, and the
11 search warrant, #11 and #12.

12 THE COURT: Okay. Thank you. Okay. If I can get you
13 to come up here and I'll place you under oath. Good afternoon.

14 MR. KEIL: Good afternoon, sir.

15 THE COURT: Raise your right hand, please.

16 JOHN A. KEIL, GOVERNMENT'S WITNESS, SWORN

17 THE COURT: If you'd take the stand over here on your
18 left, please. When you get up there it sometimes makes a noise,
19 but don't get concerned about it. It just adjusts for weight.

20 MR. CLARK: May it please the Court?

21 THE COURT: Yes, go ahead.

22 DIRECT EXAMINATION

23 BY MR. CLARK:

24 Q. Could you state your name and spell your last name for the
25 record, please?

1 A. John Andrew Keil, K-E-I-L.

2 Q. How are you employed?

3 A. With the Kansas City, Missouri Police Department.

4 Q. How long have you had that position?

5 A. Just over 21 years.

6 Q. All right. And what's your capacity there?

7 A. I'm a detective in the Career Criminal Unit.

8 Q. All right. In that capacity, did you become familiar with an
9 investigation involving an Arthur Waters?

10 A. Yes.

11 Q. And what was your involvement in that investigation?

12 A. We were contacted by another investigative element. They
13 wanted us to help them locate Mr. Waters and that's how we got
14 involved.

15 Q. All right. Did Mr. Waters have outstanding arrest warrants?

16 A. Yes.

17 Q. All right. So, on September 13th of last year, 2015, were
18 you involved in the arrest of Mr. Waters?

19 A. Yes.

20 Q. You mentioned that he had arrest warrants, is that correct?

21 A. Correct.

22 Q. Did you prepare a report concerning that arrest, how you went
23 about it, how you arrested Mr. Waters?

24 A. Yes, I did.

25 Q. All right.

1 MR. CLARK: Judge, may I approach?

2 THE COURT: Yes. You don't need to ask.

3 MR. CLARK: Thank you.

4 BY MR. CLARK:

5 Q. This is Government's #13. Does that look familiar?

6 A. Yes.

7 Q. Is that the report that you prepared in this case?

8 A. Yes, it is.

9 MR. CLARK: The United States would move admission of
10 Government's #13, Your Honor.

11 THE COURT: Any objection to #13?

12 MR. CLARK: Laine?

13 MS. CARDARELLA: Judge, I -- no. I was reading it
14 making sure. I think not just for purposes of this hearing,
15 Judge, --

16 THE COURT: Right.

17 MS. CARDARELLA: -- I don't have an objection.

18 THE COURT: Okay. For these purposes, that exhibit is
19 in.

20 MR. CLARK: Thank you.

21 BY MR. CLARK:

22 Q. So, could you explain to the Court how you went about
23 effecting the arrest of Mr. Waters? How it started, what
24 information led you to a particular residence?

25 A. We obtained some information about Mr. Waters' girlfriend.

1 We set surveillance up on her vehicle and as she came out of the
2 school she was in, we followed her to the residence on Monroe.

3 Q. Okay. So, she proceeded to a residence on Monroe. Was it
4 2202 Monroe, I think?

5 A. 2202 Monroe, yes.

6 Q. And at that point she -- did she go into the residence?

7 A. She did.

8 Q. Did she subsequently leave?

9 A. Yes.

10 Q. And did she turn around and go back in?

11 A. Yes.

12 Q. When she came out the second time, what happened?

13 A. That's when the surveillance crews moved in and detained her.

14 Q. All right.

15 A. We asked her if Mr. Waters was in the residence and she
16 confirmed that he was.

17 Q. All right. So, at that point how many -- how many officers
18 did you have there approximately?

19 A. Oh, there was probably eight to ten.

20 Q. Do you recall where they were set up?

21 A. I was actually on the perimeter towards the front of the
22 residence which is on the east side of the residence, so I don't
23 know exactly how many officers or detectives went into the
24 residence, but it -- normally probably five to seven.

25 Q. All right. So, there was a front door to the residence

1 obviously?

2 A. Yes.

3 Q. Then there was a number of officers at the rear door, is that
4 correct?

5 A. Yes.

6 Q. After you confirmed that Mr. Waters was present at the
7 residence, what did you do to effect the arrest?

8 A. Well, as we were setting up the perimeter of the residence,
9 there were other district officers that were with us to help. A
10 couple of those officers and one sergeant -- one officer, one
11 sergeant, I'm sorry, actually saw --

12 MS. CARDARELLA: Judge, I'm going to object to hearsay
13 if he's about to tell us what another said he saw.

14 THE COURT: Okay. Well, I'm going to overrule. It's
15 admissible for these proceedings.

16 BY MR. CLARK:

17 Q. Okay. Go ahead, please.

18 A. One officer observed a blind --

19 THE COURT: If you could though, I would appreciate
20 maybe knowing -- if you know the officer's name, --

21 THE WITNESS: Okay.

22 THE COURT: -- who said these things --

23 THE WITNESS: Yes, sir.

24 THE COURT: -- so that it's clear.

25 BY MR. CLARK:

1 Q. And you're referring to your report now, is that correct?

2 A. Yes. Okay. It was an Officer Phillips observed the blinds
3 move on the second floor of the residence. And then Sgt. Merrill
4 observed the blinds move on the first floor of the residence.

5 Q. Okay. And was this reported to you at the time? Did they
6 mention that at the time or --

7 A. Yes.

8 Q. Okay.

9 A. Yes.

10 Q. And this was -- was this following an announcement by the
11 police for Mr. Waters to come out?

12 A. That I'm not sure of.

13 Q. Take a look. Could you take a look at your report at the
14 bottom of your first page, please? Or second page, I guess, of
15 the report.

16 A. Okay.

17 Q. So, does that refresh your recollection?

18 A. Yes, it does. They knocked and announced, "Police, come to
19 the door." And after that is when they observed the blinds open.

20 Q. Okay. So, they saw blinds move upstairs and approximately 30
21 seconds later downstairs --

22 A. Yes.

23 Q. -- in what was later determined to be the kitchen, is that
24 right?

25 A. Correct.

1 Q. Following that --

2 THE COURT: That's right? Right.

3 THE WITNESS: Yeah. Yeah.

4 THE COURT: I didn't hear you --

5 MR. CLARK: Is that right?

6 THE WITNESS: I'm sorry, yes.

7 THE COURT: I'm --

8 MR. CLARK: Okay.

9 THE COURT: Yeah. Go ahead.

10 BY MR. CLARK:

11 Q. Following that did you -- or no. Did the officers make
12 entry?

13 A. Yes.

14 Q. And how was that effected?

15 A. After we confirmed that he was in there and the perimeter
16 officer saw the blinds move, after announcing "Police, come to
17 the door" several times Sgt. Greenwell authorized one of our
18 detectives to force the back door open.

19 Q. All right. What happened after they walked in -- after the
20 door was forced open?

21 A. They entered the kitchen.

22 Q. All right. You weren't part of that --

23 A. No.

24 Q. -- entry, is that right? When did you enter the residence?

25 A. I didn't go into the residence until after the protective

1 sweep was done.

2 Q. All right. So, when you entered the residence, what did you
3 see?

4 A. I went in the back door, walked through the kitchen. They
5 pointed out the clear bag of what was purported to be marijuana
6 laying on the living room floor, as well as a handgun that was
7 located behind a sofa in the living room.

8 Q. Okay. Was the substance tested for THC?

9 A. Yes.

10 Q. And what did that test result show?

11 A. It was positive.

12 Q. All right. So, you saw the marijuana. You also saw the
13 firearm, is that correct?

14 A. Yes.

15 Q. Following that, did you then seek a search warrant?

16 A. I did.

17 Q. Let me show you what's been marked as Government's #11 and
18 #12 and ask if you could identify that, please?

19 A. Yes. This is the application and the search warrant.

20 THE COURT: Which one? Which is it, #11 or #12?

21 THE WITNESS: Application is #11, the warrant is #12.

22 THE COURT: Thank you.

23 BY MR. CLARK:

24 Q. Okay. Government -- and that's the application and search
25 warrant you made for the residence of Arthur Waters, is that

1 right?

2 A. That's right.

3 MR. CLARK: The Government would move admission of
4 Government's #11 and #12, Your Honor.

5 THE COURT: Any problem with those?

6 MS. CARDARELLA: No, Judge. Thank you.

7 THE COURT: They're in for these proceedings.

8 BY MR. CLARK:

9 Q. All right. So, in reviewing the application for the search
10 warrant, it more or less corresponds with your report, is that
11 correct?

12 A. Yes.

13 Q. The information contained there is more or less the
14 information contained in the arrest report that you also wrote,
15 is that correct?

16 A. Yes.

17 Q. Was there additional information in the application involving
18 another contact with Mr. Waters on the same day with another
19 individual?

20 A. Yes.

21 Q. And what was that contact about?

22 A. Two of our detectives -- correction, one detective and one
23 FBI agent who is assigned to our squad, conducted a vehicle stop
24 on a gentleman that they knew was an associate of Mr. Waters.

25 Q. Okay. After they conducted the vehicle stop, did they talk

1 to that associate about where Mr. Waters was located?

2 A. Yes.

3 Q. And did they, in fact, place a phone call to Mr. Waters?

4 A. Yes.

5 Q. To confirm that he was at his residence?

6 A. They did.

7 Q. Was there -- during the -- what was the subject matter of
8 that phone call?

9 MS. CARDARELLA: Judge, I'm going to object again to
10 hearsay.

11 THE COURT: Okay. Overruled. I'm kind of confused
12 here. If you can, when was the phone call made? Was it before
13 they had gone into the residence?

14 THE WITNESS: Yes.

15 MR. CLARK: Yes.

16 BY MR. CLARK:

17 Q. This was before you had gone to the residence, is that
18 correct?

19 A. Correct.

20 Q. That was in an attempt to locate Mr. Waters, is that right?

21 A. Correct.

22 Q. What was the -- but does your search warrant affidavit also
23 explain what the content of that phone call about, the nature of
24 that phone call?

25 A. Yes.

1 Q. What was it about?

2 A. He was going to purchase narcotics.

3 Q. Okay. Thank you.

4 MS. CARDARELLA: I'm sorry, Detective. I didn't hear
5 the answer.

6 THE COURT: Approached from -- he was being approached
7 for narcotics.

8 MS. CARDARELLA: Okay. Thank you.

9 THE COURT: Okay. That was it, correct?

10 THE WITNESS: Yes, sir.

11 MR. CLARK: Thank you. That's all I have at this point.

12 THE COURT: Okay.

13 CROSS-EXAMINATION

14 BY MS. CARDARELLA:

15 Q. Detective Keil, you said you didn't go in until after the
16 protective sweep had been done. Who took the pictures after the
17 search warrant, do you know?

18 A. I believe Crime Scene, ma'am.

19 Q. I'm sorry. One more time.

20 A. Crime Scene.

21 Q. Okay. And have you seen those pictures in preparing for your
22 testimony today?

23 A. Yes.

24 Q. Were any photographs taken prior to the protective sweep?

25 A. Not that I'm aware of, no.

1 Q. Were any photographs taken after the protective sweep, but
2 before the search warrant was executed?

3 A. Not that I know of, ma'am.

4 Q. Okay. Okay. So, you're part of the Career Criminal Unit.
5 And that is sort of a multi-agency task force, is that right?

6 A. Yes.

7 Q. It's kind of an elite fugitive apprehension unit. Is that a
8 fair statement?

9 A. Yes.

10 Q. So, what you are mostly tasked with, primarily tasked with is
11 executing arrest warrants, finding fugitives and arresting them?

12 A. That's part of our job, yes.

13 Q. Okay. And that's what you were doing in this case?

14 A. Yes, ma'am.

15 Q. So, when you said that you were contacted by another agency,
16 it was for help locating and arresting Mr. Waters because he had
17 an outstanding warrant?

18 A. Not another agency, another element in our department.

19 Q. Okay. It was KCPD?

20 A. Yes, ma'am.

21 Q. Okay. Thank you. So, you got information about Dannaica
22 James. That's Mr. Waters' girlfriend or fiancée?

23 A. Yes.

24 Q. And you -- part of the information that you got about her was
25 what kind of car she drives, is that right?

1 A. Yes.

2 Q. So, you located that car at a school?

3 A. Correct.

4 Q. And you watched the car for about 30 minutes before she came
5 out and got in the car?

6 A. I didn't do it personally. There was other detectives out
7 there that did that, yes.

8 Q. Okay. And that's in your report?

9 A. Yes.

10 Q. Okay. And then from the school, she drove to their residence
11 at 2202 Monroe, is that right?

12 A. Yes.

13 Q. And it's a duplex, so 2202 and 2200 are the same building,
14 but two different sides of the duplex.

15 A. Correct.

16 Q. Okay. And then you said that she went in and then she left
17 again. But she went in and stayed in for a long time, is that
18 right?

19 A. Yes. She went in -- she went initially and stayed in for
20 quite a while. And then after a couple of hours, she came back
21 out and started to walk down the stairs, turned around, went back
22 in and then, you know, a matter of 20 to 30 seconds later she
23 came back out of the residence and started to walk to her car.

24 Q. Okay. So, that time period that she was in, if you can look
25 at page 2 of your report, if you need to, to refresh your

1 recollection, you began your surveillance of her vehicle at the
2 school at about nine o'clock in the morning on September 3rd, is
3 that right? It would be the first line of your narrative if
4 you're looking for it.

5 A. Yeah.

6 Q. Okay.

7 A. Yes. At nine -- yes. At nine o'clock in the morning is when
8 we located the vehicle at the school.

9 Q. Okay. And you did your surveillance -- this said for about
10 30 minutes before she came out and left the school?

11 A. That's correct.

12 Q. And the school is in the 2500 block of Agnes in Kansas City,
13 Missouri?

14 A. Yes.

15 Q. And she drove directly from there to the duplex at 2202
16 Monroe?

17 A. Yes.

18 Q. And that's a matter of minutes. That's not a long drive at
19 all, is it?

20 A. No.

21 Q. Okay. And then you said that she went into the duplex and so
22 then surveillance started at the duplex at about 9:45?

23 A. Correct.

24 Q. And then she didn't come out until 1450?

25 A. Yes.

1 Q. That's 2:50 in the afternoon?

2 A. Correct.

3 Q. So, about five hours?

4 A. Yes.

5 Q. Okay. You didn't see anybody else go in or come out in that
6 five-hour period, is that right?

7 A. No.

8 Q. I'm sorry. That was a terrible question. Did you see
9 anybody else go in or come out in that five-hour period?

10 A. No.

11 Q. Okay. And you were doing surveillance on the house during
12 that time?

13 A. Yes.

14 Q. Okay. And then you said she came out and kind of quickly
15 turned around, went back in and came out. Did you get the
16 feeling that she had seen you, or did you get the feeling maybe
17 she forgot something? Did you get a feeling at all?

18 A. Well, I -- again, I wasn't the one that actually was doing
19 the surveillance on the residence, other detectives were. I
20 don't think that they -- I don't think that they thought that she
21 saw them. It looked to us like she might have forgotten
22 something.

23 Q. Okay. And we say that she goes in and out, that's through
24 that back door by the back of the house into the kitchen area?

25 A. Yeah.

1 Q. A storage area and then the kitchen, is that right?

2 A. Yes.

3 Q. Okay. And there's kind of a -- I guess there's alley access
4 and a pretty deep yard and that's where she had parked her car.
5 It was in the back of the house.

6 A. Yes.

7 Q. Okay. And that's where she was stopped was right there in
8 the back of the house.

9 A. Correct.

10 Q. Okay. And so once you -- well, I know you were in the front
11 of the house for all that, but once the -- your -- the other
12 officers, your colleagues stopped her, they asked her is Arthur
13 Waters inside?

14 A. Yes.

15 Q. And she said, yes, he is.

16 A. Yes.

17 Q. And she said nobody else was inside.

18 A. Correct.

19 Q. And then they had her call him to see if he would just come
20 surrender himself, is that right?

21 A. I don't recall that.

22 Q. Okay. So, and you weren't back there?

23 A. No, I was not.

24 Q. Okay. So, you're not aware that she made a phone call and
25 confirmed that he was in the house and would come down for them?

1 A. I can't confirm it, no.

2 Q. You don't know about that. Okay. Do you know that she told
3 the officers don't kick in the door, he's coming? Did you hear
4 that?

5 A. No.

6 Q. Okay. So, I know you weren't in there for the protective
7 sweep, but you had said that Deputy Roberts found the firearm
8 behind the couch.

9 A. Yes.

10 Q. It was on the floor?

11 A. Correct.

12 Q. And it was under the couch on the floor towards the back?

13 A. Correct.

14 Q. Okay. And I think the Government printed -- yeah, we have a
15 picture. It's mine. Yep. So, I'm going to show you Defendant's
16 Exhibit #12 and ask you if you recognize what's pictured there?

17 A. Yes.

18 Q. And that is a picture of a gun on the floor underneath a
19 couch, right? Is that the gun?

20 A. Pretty close.

21 Q. Yeah. Is that the gun that we're talking about, do you
22 think?

23 A. It appears to be the gun, yes.

24 Q. Okay. So, now this is not exactly how it was found. This
25 gun has been rendered safe and unloaded and everything, correct?

1 A. Yes.

2 Q. Is this picture, does it represent where the gun was found
3 initially and then it was placed back for the photograph?

4 A. That I'm not sure about, ma'am.

5 Q. Okay. Because you didn't find the gun.

6 A. I didn't find it, no.

7 Q. Okay. When you went into the house, when you did go into the
8 house, did you notice that the windows were open?

9 A. I don't recall them being open. I recall some of the blinds
10 that were there and some curtains.

11 Q. Okay. This house, do you recall, it did not have central
12 air?

13 A. I don't recall.

14 Q. Okay. Okay. So, I want to talk to you about this other
15 contact of the information you included in the search warrant.
16 Who was that person?

17 A. I didn't get his information. The other detective and the
18 FBI Special Agent are the ones that contacted him.

19 Q. And I'm trying to remember if your search warrant says -- so
20 that was Detective Joe Daneff and Special Agent Williams?

21 A. Yes.

22 Q. Okay. So, you don't know who that was?

23 A. No.

24 Q. And you didn't know when you prepared your search warrant?

25 A. I did not have his information at the time, no.

1 Q. Okay. Is he someone who is an established informant for the
2 police department?

3 A. Not that I'm aware of.

4 Q. Okay. And what was the nature of that car stop? Was it just
5 coincidence that they stopped somebody who knew Mr. Waters or was
6 that the purpose of the stop?

7 A. Detective Williams -- or Detective Daneff and Special Agent
8 Williams were the ones that developed that information. I wasn't
9 out there on them -- or with them on that car stop, so I'm not
10 positive how they came about the information to contact this guy
11 in the vehicle.

12 Q. Okay. And today you said that, I think -- I even made you
13 repeat it. I think you said that the purpose of the phone call
14 was to try to acquire narcotics. In your search warrant you said
15 that -- in your search warrant application you said that Waters
16 told this unknown person that he could get what he was looking
17 for, referring to narcotics. Do you know exactly what words were
18 used?

19 A. No, ma'am, I don't.

20 Q. Do you know exactly what narcotic this unknown person claimed
21 that he was able to get from Mr. Waters?

22 A. No, ma'am.

23 Q. During the protective sweep were any large quantities of,
24 like distribution amounts of drugs found?

25 A. No.

1 Q. There was some evidence of marijuana use. There was a plate
2 with the little baggie of marijuana on it.

3 A. Yes.

4 Q. And I think there was a pipe, is that right?

5 A. I don't recall if there was or not, but --

6 Q. Okay. But you didn't find like large-scale marijuana or any
7 narcotic?

8 A. No.

9 Q. And you didn't find any scales?

10 A. Not that I recall. Like again, we could look at the report
11 and figure out --

12 Q. And the return and everything?

13 A. Yes.

14 Q. And I think Detective Miller wrote the return.

15 A. Yes.

16 Q. So, he's going to testify. And then as far as you know, they
17 didn't find any large quantities of cash?

18 A. Correct.

19 Q. Okay. The contact with the acquaintance of Mr. Waters that
20 you referred to -- this is going to be the dumbest question
21 you've ever heard -- you refer to it in your application for the
22 search warrant, so that was part of the basis for your
23 application for the search warrant, is that right, that
24 information?

25 A. After we confirmed that Mr. Waters was in the residence, yes.

1 Q. So, but the information in your application is basically your
2 report about the surveillance at the school and then following
3 Ms. James back to the house and doing surveillance on the house,
4 right?

5 A. Yes.

6 Q. And the contact that the other agent and officer or detective
7 had with the unknown person, right?

8 A. Yes.

9 Q. And then what you found during the protective sweep including
10 the firearm, is that right?

11 A. Yes.

12 Q. Okay. And that unknown person that they talked to, he
13 confirmed, I guess, that Mr. Waters lives at 2202 Monroe?

14 A. Yes.

15 Q. With a female and two children?

16 A. Yes.

17 Q. And he didn't say anything about any other adults or anything
18 else?

19 A. Not that I'm aware of, no.

20 Q. Okay. Okay. I don't think I have anything else. Thank you.

21 A. Uh-huh.

22 THE COURT: Did you -- what was the exhibit that you
23 referred to? Is it #12?

24 MS. CARDARELLA: Judge, I referred to #12. I didn't
25 offer it yet.

1 THE COURT: For defense though?

2 MS. CARDARELLA: Yeah.

3 THE COURT: Right. Right.

4 MS. CARDARELLA: It's Defense #12.

5 THE COURT: Okay. I just wanted to make sure I got it
6 right. Go ahead. Anything else?

7 MR. CLARK: Oh, just a couple of questions.

8 REDIRECT EXAMINATION

9 BY MR. CLARK:

10 Q. I just want to clear up a couple of things. The drugs that
11 were found at Mr. Waters' residence, those were in plain view, is
12 that correct?

13 A. Correct.

14 Q. They were out in the open?

15 A. Yes.

16 Q. Nobody had to move anything for those?

17 A. No.

18 Q. Also, did you talk to Ms. James when she came out?

19 A. No.

20 Q. In your report you indicated that she said that Mr. Waters
21 was inside, is that correct?

22 A. That's what she told the officers that detained her when she
23 came out of the residence.

24 Q. Okay. Do you know whether she said that nobody else was
25 inside?

1 A. I do not know.

2 Q. Okay.

3 A. I don't know if she said it or not.

4 Q. Okay. Thank you.

5 THE COURT: Ms. Cardarella?

6 MS. CARDARELLA: I don't have anything else, Judge.

7 Thank you.

8 THE COURT: Okay. You may step down. Thank you.

9 MR. CLARK: The United States would call Officer Michael
10 Miller.

11 THE COURT: Just come up here and I'll place you under
12 oath. Raise your right hand, please.

13 MICHAEL MILLER, GOVERNMENT'S WITNESS, SWORN

14 THE COURT: Take the stand over here on your left,
15 please.

16 DIRECT EXAMINATION

17 BY MR. CLARK:

18 Q. Good afternoon.

19 A. Good afternoon.

20 Q. Could you state your name and spell your last name for the
21 record, please?

22 A. Michael Miller, M-I-L-L-E-R.

23 Q. How are you employed?

24 A. I'm a detective with the Kansas City, Missouri Police
25 Department.

1 Q. How long have you had that position?

2 A. I've been a detective for approximately nine years now.

3 Q. All right. What positions have you held in the Kansas City,
4 Missouri Police Department?

5 A. I've been a patrol officer, a tactical officer for eight
6 years. I worked as a detective within the Gang Squad for six
7 years and now with the Career Criminal Unit for three years.

8 Q. All right. During your time with the Kansas City, Missouri
9 Police Department, have you been involved with the arrest of
10 suspects?

11 A. Yes, I have.

12 Q. How many? Just an estimate.

13 A. Hundreds, if not thousands.

14 Q. Are a number of those in-home arrests?

15 A. Yes, they have been.

16 Q. So, you are familiar with the procedures of a protective
17 sweep?

18 A. Yes.

19 Q. What is a protective sweep?

20 A. It is just basically when we go into a residence clearing
21 anywhere within that residence that could potentially be a threat
22 where a person could hide that could be a threat to us.

23 Q. And in your experience with the police department, where have
24 you found people hiding?

25 A. I've found people in refrigerators, in stairwells, under

1 beds, in between mattresses of beds, in closets, inside couches,
2 quite a few different places -- in laundry machines.

3 Q. What do you mean inside couches?

4 A. One specific one there was a fold-out couch where somebody
5 was folded up inside where the mattress should be.

6 Q. Were you involved in the arrest of Arthur Waters?

7 A. Yes, I was.

8 Q. And what was your job during that arrest?

9 A. I was primarily just assisting with the surveillance and then
10 the clearing of the residence when we actually apprehended him.

11 Q. All right. Let me show you what's been marked as
12 Government's #1 through #10, and ask you if you can identify
13 these. You've previously seen these, is that correct?

14 A. Uh-huh. Yes, I have.

15 Q. Ask if you can identify those as photographs of Mr. Waters'
16 residence?

17 A. Yes, they are photographs of the exterior, as well as the
18 interior of the residence.

19 Q. Okay. And is that a fair and accurate representation of the
20 residence after the -- at the search?

21 A. Yes, it is.

22 Q. Thank you.

23 MR. CLARK: Government would move Government's #1
24 through #10, Your Honor.

25 MS. CARDARELLA: Judge, I don't have any objection.

1 THE COURT: Okay. Let me just ask a clarifying
2 question. Is the question whether or not they're fair and
3 accurate representations of the scene afterwards or at the time
4 of the search?

5 MR. CLARK: These are after the search.

6 THE COURT: I know they're taken after the search, but
7 they are -- do they fairly reflect what was there at the time of
8 the search?

9 BY MR. CLARK:

10 Q. Do they --

11 A. Yes.

12 Q. -- reflect what's there after the search?

13 A. Yes, they do.

14 THE COURT: Okay. They're in.

15 BY MR. CLARK:

16 Q. All right. Directing your attention -- well, you're going to
17 need these, aren't you? (Inaudible). Okay. Referring to
18 Government's Exhibit #1, is that -- what is that a picture of?

19 A. That would be a picture of the front door of the residence
20 which would be east facing.

21 Q. All right. And Mr. Waters' residence is on the left-hand
22 side, is that correct?

23 A. That is correct.

24 Q. 2202. All right. Government's Exhibit #2, which is in my
25 version not particularly helpful, but that's a picture of the

1 kitchen, is that correct?

2 A. Yes, it is.

3 Q. And then roughly in the center of the picture there is a
4 white column, is that correct?

5 A. Yes.

6 Q. And to the right of that white column is that the back door?

7 A. Yes, it is.

8 Q. All right. Is that where you made entrance into the
9 residence?

10 A. Yes, it is.

11 Q. So, on Exhibit #3 you're still in the -- this is still a
12 picture from the kitchen taken of the -- there's a utility room,
13 is that correct, on the other side of that --

14 A. Yes.

15 Q. -- hallway where you make entrance in the back door?

16 A. Yeah. Through that doorway is a utility room. And once you
17 enter that door from the kitchen to the left is the rear door of
18 the residence.

19 Q. Okay. So, when you come into the rear -- from the rear door
20 of the residence you've got the kitchen on the right and the
21 utility room on the left, is that right?

22 A. Yes.

23 Q. And then the stairs are essentially right above that
24 location?

25 A. Yeah. The wall immediately in front of you, once you enter

1 that back door at the back of the utility closet would be where
2 the stairwell to the upstairs would be.

3 Q. Okay. So, Exhibit #4 then is you're still in the kitchen and
4 this is a picture looking into the living room?

5 A. Yes, that's correct.

6 Q. Is that right? Exhibit #5 is a picture sort of the opposite,
7 from the living room into the kitchen?

8 A. Yes, that's correct.

9 Q. Is that correct? Now, when you walk into the living room
10 from the kitchen then, the -- as you walk in, there is a couch
11 over on your right, is that correct?

12 A. Yes, it is.

13 Q. And sort of diagonal from you is the front door of the
14 residence, is that right?

15 A. Yes, that is correct.

16 Q. Okay. The stairs lead from the -- essentially the stairs
17 come down and they stop roughly at the front door, is that right?

18 A. Yes.

19 Q. The stairs from upstairs. If you take a look at Exhibit #6,
20 that again is a picture of -- that's the couch, is that correct?

21 A. Yes, that is a picture of the couch.

22 Q. And then over to the left there's a loveseat there.

23 A. That is correct.

24 Q. Is that right? Now, if you take a look at Exhibit #7 --

25 THE COURT: I'm kind of -- on #6, can you show me where

1 the loveseat is? I'm missing that. I can't see it.

2 MR. CLARK: Yeah. These pictures did not come out very
3 well.

4 THE COURT: Can we have him kind of point --

5 MS. CARDARELLA: My picture is good, Bruce, if you want
6 to see it, the one you gave me.

7 THE COURT: Let me see what you're referring to here.

8 MR. CLARK: Wow.

9 MS. CARDARELLA: I got the good ones, Judge.

10 MR. CLARK: She got the good ones.

11 MS. CARDARELLA: Here, let's trade because I've seen all
12 these.

13 MR. CLARK: Okay.

14 THE COURT: Okay.

15 MS. CARDARELLA: Maybe I got the good packet and the
16 Judge got a copy packet.

17 MR. CLARK: Yeah. I remember those pictures being a lot
18 clearer when I was looking at them.

19 MS. CARDARELLA: Yeah. They're good on the computer.
20 Once you start printing them, then --

21 THE COURT: Yeah. Thank you.

22 MS. CARDARELLA: Can I have these?

23 THE COURT: Yeah, sure. You can have them. There we
24 go. I just want to make sure I don't give you more than what I'm
25 supposed to. Thank you.

1 MS. CARDARELLA: Sure.

2 THE COURT: Thank you very much.

3 MS. CARDARELLA: Uh-huh.

4 THE COURT: And that was -- what one were we talking
5 about?

6 MR. CLARK: We're looking at, oh, #6, I think.

7 THE COURT: #6. Okay. Thank you.

8 MR. CLARK: Do you see the loveseat now?

9 THE COURT: Oh, yeah, I do now. Okay. Yeah. They are
10 a lot better, aren't they?

11 MS. CARDARELLA: Aren't they? Yeah.

12 THE COURT: Yeah.

13 MS. CARDARELLA: I didn't know what you were talking
14 about.

15 MR. CLARK: They're much better. I need to talk to
16 somebody about this, because they're nothing but blobs here.

17 MS. CARDARELLA: Yeah. They're very dark.

18 THE COURT: Yeah. Why don't we have these be the
19 originals here that we're talking about.

20 MR. CLARK: Okay.

21 THE COURT: The one we just switched out. Go ahead.

22 MR. CLARK: Thank you.

23 By MR. CLARK:

24 Q. So, referring then to Exhibit #7. This is where the loveseat
25 and the couch sort of meet, is that correct, in the corner of the

1 room?

2 A. Yes, it is.

3 Q. And in the center of that picture, could you describe what
4 that is?

5 A. On the floor in the center there is the area where we located
6 some marijuana and some other items, a pipe and some residue as
7 well as a grinder.

8 Q. Okay. And when you entered the residence these were in --
9 were these in plain view?

10 A. Yes, they were.

11 Q. So, #8, picture 8, Government's #8 is roughly a close-up of
12 the same thing that's shown on #7, is that correct?

13 A. Yes. Once we entered the living room, that's what we
14 observed on the floor in between the couch and the loveseat.

15 Q. Government's #9 is a picture of the firearm that was found
16 behind the couch?

17 A. Yes, that is correct.

18 Q. And it wasn't found in this state. This was after it was
19 secured and made safe?

20 A. Yeah. It was -- the magazine and the live rounds were
21 actually located inside the handgun and it was made -- unloaded
22 and made safe.

23 Q. Okay. And Government's #10 is a picture of the stairs coming
24 down into the first floor, is that correct?

25 A. Yes, that's correct.

1 Q. Okay. So, at the time of this arrest or when the arrest was
2 happening, where were you located?

3 A. I was just inside the kitchen from the utility room.

4 Q. Let's go back before that, before you made entry.

5 A. Okay.

6 Q. All right. Where were you located at that point?

7 A. Well, I was in my vehicle at -- I don't remember the exact
8 spot, but at a stationary surveillance location. And then once
9 we moved into the area and we were going to make contact with the
10 residents of the house, we -- I was in the back alleyway where I
11 assisted in contacting the female resident that exited and
12 started to drive away.

13 Q. Okay. And what did she tell you?

14 A. She identified herself as a responsible party for the
15 residence and we told her what we were doing, why we were there
16 and she confirmed that Mr. Waters was inside the house.

17 Q. Okay. After you got that information, what did you do then?

18 A. I then proceeded to the rear door along with several of the
19 U.S. Marshals and some of the other surveillance team members.
20 And at that time we knocked on the door and attempted to make
21 contact with Mr. Waters.

22 Q. You knocked yourself, is that correct?

23 A. Yes.

24 Q. Did you receive a response?

25 A. We did. As we were approaching the back and as we were

1 announcing ourselves we observed the blinds just to the right of
2 the back door is the kitchen, which ended up being a kitchen
3 window. Somebody had looked out those blinds and then we had
4 information that was passed onto us from the front of the house
5 that there was movement seen in an upstairs window as well.

6 Q. So, there was movement at an upstairs window and then there
7 was movement in the kitchen area, is that correct?

8 A. Yes, that's correct.

9 Q. All right. After you -- and this was after you had
10 announced, is that correct?

11 A. I can't remember if it was as we were approaching prior to a
12 -- I think the actual looking out the kitchen window is as we
13 were approaching maybe right before we announced --

14 Q. All right.

15 A. -- who we were. It's right --

16 Q. After you announced, what happened?

17 A. We did not receive any answer to the door.

18 Q. So, after you announced, how long did it take before you made
19 entry?

20 A. We waited a couple minutes, and then I forced the back door
21 open.

22 Q. All right. You forced in the back door, is that correct?

23 A. Yes, I did.

24 Q. All right. Who went in then? Do you recall?

25 A. I know it was the Marshal, Deputy Redetzke as well as Deputy

1 Roberts and myself, and I don't recall everybody else that
2 actually made entry into the room.

3 Q. All right. So, you -- when you make entry to the apartment,
4 to the duplex, the kitchen is on your right, and the utility room
5 is on your left?

6 A. Yeah, once you open that door, you're actually in the utility
7 room, and then the kitchen is off to the right.

8 Q. All right. Did you proceed into the kitchen?

9 A. Yes, we did.

10 Q. What happened there?

11 A. Then, I believe it was Deputy Redetzke was -- made verbal
12 contact with Mr. Waters. He had made a comment about he was
13 coming down. And shortly after that, we had visual sight of Mr.
14 Waters and directed him into the kitchen area.

15 Q. All right. So, he came down from upstairs?

16 A. I would assume that. We did not have a visual of the stairs.
17 All we -- the first time we actually saw him was when he was in
18 the living room area.

19 Q. So, he was in the living room, is that correct?

20 A. Yes.

21 Q. You had him come to you or did you go to him?

22 A. We had him come to us into the kitchen.

23 Q. So, he walked into the kitchen and was taken into custody at
24 that location, is that right?

25 A. Yes, he was.

1 Q. All right. Did you participate in a protective sweep?

2 A. Yes, I did.

3 Q. And what did you do?

4 A. I basically just filled in with the rest of the team and we
5 cleared the living room and the second floor bedrooms and
6 bathroom for any potential other individuals.

7 Q. Okay. Did you -- were you present when the gun was found?

8 A. After. I was present when it was found. I did not see it
9 when it was found. My attention was directed somewhere else. I
10 did hear somebody mention that there was a gun, but I was not
11 actually witness to how it was located.

12 Q. Okay. Following the arrest of Mr. Waters, did you do --
13 conduct an interview with him?

14 A. Yes, I did.

15 Q. Let me show you what for identification purposes would be
16 Government's #14 and ask if you recognize that?

17 A. Yes, I do. This is my interview report that I made following
18 the interview.

19 Q. Okay. And this report was prepared after interviewing Mr.
20 Waters, is that correct?

21 A. Yes, that's correct.

22 Q. All right.

23 MR. CLARK: The Government would move for admission of
24 Government's #14, Your Honor.

25 MS. CARDARELLA: Judge, did I give you my #14 when I

1 gave you all those pictures?

2 THE COURT: You may have. Hold on. I didn't see it,
3 Laine.

4 MR. CLARK: It's in -- do you want my copy?

5 MS. CARDARELLA: Yeah, thank you. I mean, Judge, I
6 don't really know why this is relevant for today's hearing, but
7 just for today's hearing, I don't have an --

8 THE COURT: Well, they're doing it mainly to satisfy me.
9 I want to have kind of a listing of everything that was taken and
10 if there were any statements, I want to have that as well.

11 MS. CARDARELLA: This is the statement.

12 THE COURT: And that's the only reason we're putting it
13 in, just so that we --

14 MS. CARDARELLA: Judge, there's also a video of this
15 statement, which I think that Detective Miller would say is the
16 more thorough representation of the statement. If you want that,
17 I wouldn't have any objection to that being offered into the --

18 THE COURT: As long as we have something in the record
19 that indicates that that's also part of it.

20 MS. CARDARELLA: Okay.

21 (Off Record Discussion)

22 THE COURT: Yeah, you guys can submit that afterwards.
23 I'm not --

24 MS. CARDARELLA: I have it. I have it marked. I have
25 it --

1 MR. CLARK: Okay. You're going to --

2 MS. CARDARELLA: I'll introduce it.

3 MR. CLARK: All right. That's fine then. In that case,
4 I don't have any other questions at this time, Judge.

5 THE COURT: Okay. Cross.

6 MS. CARDARELLA: Thanks, Judge.

7 THE COURT: Do you want to use your exhibits that you've
8 given to me on the photos?

9 MS. CARDARELLA: Me?

10 THE COURT: Yeah.

11 MS. CARDARELLA: That's okay. I can use these dark one,
12 Judge. I know what they look like. Thank you.

13 THE COURT: All right.

14 CROSS-EXAMINATION

15 BY MS. CARDARELLA:

16 Q. Detective Miller, do you have -- no, you don't because that's
17 mine. You don't have it. So, never mind. So, you were a part
18 of this investigation, for lack of another word, from during the
19 surveillance of the house through the execution of the search
20 warrant?

21 A. Yes, that's correct.

22 Q. So, you all entered the house sometime around 3:00 in the
23 afternoon. Detective Kyle said in his report that Ms. James left
24 at about 1450. So, judging from what you said happened after she
25 left the house and was detained, it's probably going to be around

1 1500, is that fair?

2 A. That's pretty accurate.

3 Q. Okay. And that's 3:00 in the afternoon. The search warrant
4 was not obtained until 2350. Is that 11:50 at night?

5 A. Yes, that's correct.

6 Q. Okay. And then was executed actually the next morning at
7 1:00 in the morning, right?

8 A. That's correct.

9 Q. Do you know what took so long from going in until obtaining
10 the search warrant? Was there something unusual?

11 A. I believe the majority of the time the delay was in between
12 e-mailing the electronic search warrant process between Detective
13 Keil and the prosecutor's office and the judge, --

14 Q. Okay.

15 A. -- in getting that returned.

16 Q. Okay. Everything's done electronically now?

17 A. Yes.

18 Q. Yeah. Okay. Judge Larsen asked if you if those photographs
19 that you have, which I think are the Government's #1 through #10,
20 if they fairly and accurately represent the house at the time of
21 the search. And I think they definitely have everything that was
22 in the house at the time of the search, but it didn't look quite
23 like this before you executed the search warrant, is that right?

24 A. No, that's correct.

25 Q. So, all of the couch cushions that are overturned and

1 everything, that's because of the execution of the search
2 warrant?

3 A. Correct.

4 Q. Okay. And I want to direct your attention to Government's
5 Exhibit #9. And that's the picture that you identified as the
6 gun. And then I'm going to show you Defendant's Exhibit #12.
7 And it was also taken by your Crime Scene people. But if you
8 look at #9 and #12, that's the same gun in the same position on
9 the same floor?

10 A. Yes, that is correct.

11 Q. Okay. And does Defendant's Exhibit #12 fairly and accurately
12 represent where the gun was placed to represent where it was
13 located initially?

14 A. Yes.

15 Q. Okay.

16 MS. CARDARELLA: Judge, I move for the admission of
17 Defendant's Exhibit #12.

18 THE COURT: Any problem?

19 MR. CLARK: No objection, Judge.

20 THE COURT: #12 is --

21 MS. CARDARELLA: I'm such a bad person. I didn't bring
22 you copies.

23 THE COURT: It's all right.

24 MS. CARDARELLA: So, I'll give it to you when I'm done
25 using it, if that's okay?

1 THE COURT: #12 is in. Let me just make sure I
2 understand what you're saying. #12 shows where the gun was
3 before it was secured?

4 THE WITNESS: It was, once it was secured, it was placed
5 back in the area where it was located and then photographed.

6 THE COURT: Okay. So, then -- oh, thank you.

7 MS. CARDARELLA: #12 is just a further away shot, Judge,
8 so you can you get a little perspective.

9 THE COURT: Okay.

10 MS. CARDARELLA: So, Government's #9 is more of a close-
11 up of the gun. #12 you can see it *vis-à-vis* the couch.

12 THE COURT: Okay. And so, that's the way it would have
13 appeared, except now it's been secured?

14 THE WITNESS: That is correct.

15 THE COURT: When you seized it, right?

16 THE WITNESS: Yes.

17 THE COURT: Okay. All right. Thank you. That's
18 helpful.

19 BY MS. CARDARELLA:

20 Q. Okay. I'm going to give this back to you, Detective Miller,
21 because I have a couple of questions about it. The couch, you
22 can see the -- I guess that's the arm of the couch in Defendant's
23 Exhibit #12, is that right?

24 A. That is correct.

25 Q. And that's the couch, not the loveseat. They look similar.

1 But that's the couch.

2 A. Yeah, it should be the couch, yes.

3 Q. Okay. And it's pulled away from the wall.

4 A. Yes.

5 Q. And it was not pulled away from the wall when you all first
6 entered the residence.

7 A. I don't believe so. As far as I can recall, it was up
8 against the wall. However, I did not directly manipulate the
9 couch. When I went through, I bypassed the couch and was more
10 concerned with the stairwell to that second floor.

11 Q. Okay. That couch is right in the doorway as you exit the
12 kitchen and enter the living room, the couch is just to your
13 right of that doorway, is that correct?

14 A. Yes, that's correct.

15 Q. Okay. I'm going to show you Defendant's Exhibit #12 -- or
16 #11. You have #12. This is Defendant's Exhibit #11 and ask if
17 you recognize what's pictured there?

18 A. That is a picture of the couch with the cushions removed as
19 well as the loveseat that looks like it's on end.

20 Q. Okay. And does this, again, fairly and accurately represent
21 the furniture that was in the room at the time of the search, if
22 not the condition of the furniture prior to the search?

23 A. It would be the condition following the search.

24 Q. Okay. But this is the furniture that was in the room prior
25 to the search?

1 A. Yes.

2 Q. Okay.

3 MS. CARDARELLA: Judge, I'm going to move for the
4 admission of Defendant's Exhibit #11.

5 BY MS. CARDARELLA:

6 Q. And, Detective Miller, can you --

7 THE COURT: Hold on. Let me just see if he's got any
8 objection before you --

9 MS. CARDARELLA: Oh.

10 MR. CLARK: No objection.

11 THE COURT: It's in.

12 MS. CARDARELLA: Okay. Thank you.

13 THE COURT: Go ahead.

14 BY MS. CARDARELLA:

15 Q. In this picture -- and we have to share -- there you can see
16 the couch, and there's an end table with a lamp on either side of
17 that couch, is that correct?

18 A. That is correct.

19 Q. And again, in this photograph, the couch is pulled away from
20 the wall.

21 A. That is correct.

22 Q. Okay. When you went into the residence -- well, I'm sorry.
23 Let's go back a little bit. So, you were part of the team that
24 detained Ms. James -- Dannaica James, the woman who left?

25 A. Yes.

1 Q. Okay. And she identified herself. She told you Arthur
2 Waters was in the house?

3 A. That's correct.

4 Q. And she told you nobody else was in the house. You asked her
5 who else was in there, she said nobody else.

6 A. Yeah, I believe she -- I believe that's what she said.

7 Q. Okay. And then she called Mr. Waters to see if he would come
8 down for you?

9 A. I don't recall that. It's possible, but I don't recall that.

10 Q. Okay. And do you remember as you all were getting ready to
11 breach the door, her saying, you know, don't kick in my door,
12 he's coming, he's coming? Do you remember that?

13 A. No, I do not.

14 Q. Okay. But we talked about -- you talked about so far two
15 windows with the blinds moving. First of all, do you recall that
16 the windows were open in the house? It was a warm day but not
17 hot.

18 A. I don't recall whether they were open or closed.

19 Q. Okay. So, you saw, you said the people saw movement at two
20 windows. Let's talk about the window at the back of the house,
21 which turns out to be a kitchen window, you said.

22 A. Yes.

23 Q. Did you see that movement or did somebody else see it?

24 A. I saw that movement.

25 Q. Okay. And did you say you saw someone look out?

1 A. It looked like a hand had pulled the blind down and looked
2 out.

3 Q. Okay. But you couldn't identify anybody?

4 A. No.

5 Q. Okay. And then you said the other window was at the front of
6 the house?

7 A. It would have been on the south side of the house.

8 Q. Side of the house that is?

9 A. Yes.

10 Q. Okay. When you all went into the house, you had one of those
11 -- you know, for people like me the only time we see them is on
12 TV -- those shields, so that if somebody shot at you, you
13 wouldn't get shot. Did you use one of those?

14 A. I did not. Deputy Redetzke had one in his possession.

15 Q. Okay. And you said that Mr. -- the first time you were able
16 to see Mr. Waters, he was at the base of the stairs in the living
17 room. It's sort of the same thing --

18 A. In the living room --

19 Q. -- at the bottom of the stairs.

20 A. -- from the area of the stairwell.

21 Q. Okay. So, in the area at the bottom of the stairwell in the
22 living room. And he was cooperative. He followed your
23 directions?

24 A. At that point, he did, yes.

25 Q. Okay. And you took him into custody. And then you

1 immediately took him outside.

2 A. Not immediately, no.

3 Q. How quickly do you think you took him outside?

4 A. Probably within five minutes.

5 Q. Okay. What happened in that five minutes? What was going on
6 then?

7 A. It's just the process of taking him into custody, handcuffing
8 him, searching him for weapons, just securing Mr. Waters.

9 Q. Okay. Okay. And then you took him outside?

10 A. I believe so.

11 Q. Okay. And you did not -- and were you a part of that process
12 of making sure he was secure and didn't have any weapons and then
13 taking him outside? Was that part of your duty?

14 A. Once -- I was part of securing him and assisting in making
15 sure he didn't have any weapons, and then he would have been
16 handed off to somebody else, and I participated in clearing the
17 rest of the residence.

18 Q. Okay. And that clearing the rest of the residence, that
19 happened after you secured him and got him out.

20 A. It happened after securing. I'm not sure. I don't recall if
21 he was still in the kitchen when we started. At some point, he
22 was removed from the house.

23 Q. Okay. Because he was arrested?

24 A. Yes.

25 Q. Okay. Oh, do you know anything about this person -- now, I

1 can't remember their names -- the detective and the agent spoke
2 to and said he made a phone call. Do you know anything about
3 that?

4 A. I was not part of that process.

5 Q. Okay. You -- I knew I was going to forget this -- you
6 prepared a report, basically the return, the search warrant
7 return, documenting what was seized during the search warrant?

8 A. Yes.

9 Q. And I'm going to show you what's been marked as Defendant's
10 Exhibit #5 and see if you recognize that?

11 A. Yes, that is the execution of the search warrant report.

12 Q. Okay. And that's your report?

13 A. Yes, it is.

14 Q. Okay.

15 MS. CARDARELLA: So, Judge, I will offer Defendant's
16 Exhibit #5. That is Detective Miller's report and the execution
17 of the search warrant.

18 THE COURT: That's the return on the search warrant? Is
19 it?

20 MS. CARDARELLA: It's not the return. It's not a copy
21 of the return that they left, but --

22 THE COURT: It's the --

23 MS. CARDARELLA: -- it does document everything that was
24 taken.

25 THE COURT: It's an inventory? What is it, Detective?

1 THE WITNESS: It's basically a description of everything
2 that we located, where we located it and what we did with it as
3 far as recovery.

4 THE COURT: And is that part of your reporting system
5 within the police department?

6 THE WITNESS: Yes, that's a standard --

7 THE COURT: Yeah. Yeah. I just want to make sure we
8 know what it is. Yeah, no, without objection --

9 MR. CLARK: No objection.

10 THE COURT: -- it's in. Right.

11 BY MS. CARDARELLA:

12 Q. We're going to have to share again. You don't have this
13 report with you, do you?

14 A. No, I don't.

15 Q. Okay.

16 MR. CLARK: I have one.

17 THE COURT: Yeah, he's got a copy of it, if you want to
18 go ahead and give it to him.

19 MS. CARDARELLA: I don't even know if I have questions
20 about it, but just in case.

21 BY MS. CARDARELLA:

22 Q. This indicates that the firearm, it includes the firearm as
23 things that were seized with the execution of the search warrant,
24 is that right?

25 A. Yes, it is.

1 Q. And there was a plastic bag with -- it must have been
2 marijuana. I mean, it tested positive. Everybody thinks it's
3 marijuana. This green leafy substance, right?

4 A. Yes. Yes.

5 Q. That -- there's no weight listed. That was not a large
6 quantity.

7 A. No, it was a relatively small bag.

8 Q. Okay. A pipe. Some pills. There was a black digital scale
9 located, is that right?

10 A. Yes, that's correct.

11 Q. And that was in the kitchen cabinet?

12 A. Yes.

13 Q. Okay. And these other items, the marijuana, the grinder, the
14 pipe, those were all, I think we have an exhibit that the
15 Government offered, the plate with the items, that's where all
16 that stuff was found?

17 A. Yes, and two additional bags of marijuana were located in the
18 upstairs bedroom.

19 Q. Upstairs in a bedroom, a little bit more marijuana. Okay.
20 And again, you said two additional bags. There's no weight on
21 your report. Those were not large quantities of marijuana, is
22 that a fair statement?

23 A. Yeah, they were a little larger than the bag in the living
24 room, but they were not a large quantity.

25 Q. Okay. And they weren't packaged up for sale?

1 A. They were, I believe they were two individual bags.

2 Q. Okay. You did not find, during either the protective sweep
3 or the execution of the search warrant, large quantities of cash?

4 A. No.

5 Q. And you didn't find what we all might characterize of
6 distribution amounts of drugs?

7 A. No.

8 Q. Okay.

9 MS. CARDARELLA: Okay. I think that's all I have.
10 Thank you.

11 THE COURT: Can I see the two exhibits, the two -- or
12 the three defendant's exhibits? Bruce, do you have any
13 additional questions here?

14 MR. CLARK: No, Your Honor. Thank you.

15 THE COURT: I'm going to take a few minutes recess here.
16 And so, let me just look at this before we take a break.

17 MS. CARDARELLA: I mean, here's those two pictures I
18 offered, Judge, #11 and #12.

19 THE COURT: Thank you.

20 MS. CARDARELLA: I'm sorry. I should have used #11 just
21 so you could see the --

22 THE COURT: That's okay. Okay. The only question I
23 have, and maybe counsel can kind of help me understand this,
24 there seems to be a -- are all the photographs that were taken
25 here taken by the Crime Scene investigators and is that basically

1 after the search was done, did they come in and do that?

2 MS. CARDARELLA: Yeah. Detective Keil testified that
3 the photographs -- the only photographs that were taken were
4 taken by Crime Scene after the execution of the search warrant.

5 THE COURT: Okay. And so, everybody's in agreement
6 about that. We've only got one set of photographs I need to be
7 concerned about.

8 MR. CLARK: The photographs have been introduced into
9 evidence, that is correct, Judge.

10 MS. CARDARELLA: Yeah.

11 THE COURT: Right. Okay. All right. Then let me just
12 ask a couple of -- or at least one follow-up question. When you
13 went to breach the door, was the female who had been there
14 earlier that you had contact with, was she there with you as you
15 were doing that?

16 THE WITNESS: She was probably, I'd say, 20 to 30 yards
17 away from the doorway. She was on the scene, but she was in the
18 alleyway --

19 THE COURT: Okay.

20 THE WITNESS: -- where her car and her vehicle was at.

21 THE COURT: Okay. All right. Any follow-up questions
22 for that?

23 MR. CLARK: No, Your Honor.

24 THE COURT: And, Ms. Cardarella, anything?

25 MS. CARDARELLA: No. Thank you, Judge.

1 THE COURT: All right. Thank you. We're going to take
2 about ten minutes. The only thing I would point out is if
3 anybody wants to go through these pictures with the detective and
4 see what's different between the pictures as moved, I think
5 you've covered it probably, but at least you'll have an
6 opportunity to do that. Other than that, we'll take about ten
7 minutes.

8 (Court in Recess from 2:38 p.m. until 2:47 p.m.)

9 THE COURT: Be seated, please. Go ahead and call your
10 next witness.

11 MR. CLARK: Your Honor, the United States calls Deputy
12 U.S. Marshal Jason Roberts.

13 THE COURT: Thank you. Raise your right hand, please.

14 JASON ROBERTS, GOVERNMENT'S WITNESS, SWORN

15 THE COURT: Thank you. Go ahead and on your left there
16 take the stand.

17 DIRECT EXAMINATION

18 BY MR. CLARK:

19 Q. Afternoon.

20 A. Hello.

21 Q. Could you state your name, spell your last name for the
22 record, please?

23 A. Jason Roberts, R-O-B-E-R-T-S.

24 Q. How are you employed?

25 A. I'm a deputy with the United States Marshal's Service.

1 Q. And how long have you had that position?

2 A. Almost five years.

3 Q. And what was your employment before that?

4 A. I was a police officer in Morton, Illinois, for just over ten
5 years.

6 Q. Okay. In your capacity in both of those positions, have you
7 been involved in arrests of suspects?

8 A. Yes, sir.

9 Q. Approximately how many times?

10 A. Over 15 years, hundreds.

11 Q. Okay. When you joined the Marshal's Service or even when you
12 were with the police department, did you receive training in how
13 to conduct an in-custody -- or an in-home arrest?

14 A. Yes, sir.

15 Q. And did part of that involve protective sweeps?

16 A. Yes, sir.

17 Q. And what was your training with respect to protective sweeps?

18 A. It was more so with the Marshal's Service than at the PD, but
19 the -- any adjacent areas or any area where we had effected the
20 arrest and any area where that subject had either been in or we'd
21 been in contact with that subject, we're going to check that
22 area.

23 Q. Okay. And does part of that training involve exercises as
24 well?

25 A. Oh, yes.

1 Q. These are practical exercises?

2 A. Yes, sir.

3 Q. And what have you learned from those exercises with respect
4 to where people can be?

5 A. Okay. Anywhere a body can hide, like they can -- people can
6 hide in just about anywhere, closets, behind doors, behind
7 couches, behind water heaters. We've --

8 Q. Can they also hide inside furniture?

9 A. Absolutely.

10 Q. Were you involved in the arrest of Arthur Waters?

11 A. Yes, sir.

12 Q. What was your job in that arrest? Where were you located?

13 A. I was with -- I was with the surveillance team for part of
14 the time, for a short time leading up to the arrest. And then I
15 was with the entry team --

16 Q. All right.

17 A. -- at the time of the arrest.

18 Q. Now, when the arrest was -- prior to making entry into the
19 residence, --

20 A. Uh-huh.

21 Q. -- did the police announce their presence?

22 A. Yes.

23 Q. All right. Was there a reaction from inside the house? Did
24 you see anything, any movement or anything like that?

25 A. I did not because my -- there were five or six of us at the

1 back door waiting to gain access to the apartment. And someone
2 on the exterior had said they saw some movement upstairs. They
3 saw some blinds move.

4 Q. Uh-huh. Did you --

5 A. But I did not see that.

6 Q. Okay. You didn't see the upstairs movement?

7 A. No.

8 Q. Did you see anything downstairs in the kitchen area?

9 A. No, sir.

10 Q. Okay. All right. So, when the -- what was your position on
11 the entry team then?

12 A. I was either the third or fourth one in the stack of police
13 officers.

14 Q. And after -- you all entered one after the other, is that
15 correct?

16 A. Yes.

17 Q. Disbursed into the kitchen, is that right?

18 A. As you entered in the back door, there's like a mudroom area.

19 Q. Uh-huh.

20 A. So, either one or two of us cleared that. That was a very
21 small area. We cleared that, and then moved into the kitchen.

22 Q. All right. When you got to the kitchen, what happened?

23 A. Again, we attempted to announce our presence and try to get
24 the subject to come to us. And I think at that point, we were
25 kind of in the middle of the kitchen, and he said I'm coming

1 down. But we couldn't see him until he was in the living room
2 area. And that's when we ordered him back to us and effected the
3 arrest.

4 Q. So, he approached you. He walked to the living room, is that
5 right?

6 A. Yes. He walked through the living room and into the kitchen.

7 Q. Is that a fairly small area where the living room is?

8 A. Yeah.

9 Q. The living room and the kitchen, both together are, would you
10 characterize that as a fairly small area?

11 A. Yes.

12 Q. Following taking Mr. Waters into custody, what did you do?

13 A. After we effected the arrest?

14 Q. Yes.

15 A. We did a protective sweep of that area --

16 Q. And --

17 A. -- of the kitchen and living room.

18 Q. And what did that entail? What did you do?

19 A. I think I was the second one into the living room. We just
20 kind of break off. One guy will go one way. One guy will go the
21 other. I went to the right, and that's where, you know I, the
22 couch was over on that side of the room, so.

23 Q. Okay. Let me show you Government's #6 and #7 and #9. Do you
24 recognize those pictures?

25 A. Yes.

1 Q. Is that the living room area of Mr. Waters' residence?

2 A. Yes.

3 Q. Is that how it appeared that day?

4 A. No.

5 Q. Why?

6 A. Well, I -- at the time it was more organized than that, upon
7 our entry.

8 Q. Okay. But this, that's his residence that day?

9 A. Right.

10 Q. But this is after the search, is that right?

11 A. Yes.

12 Q. Okay. So, you went to the right, is that correct?

13 A. Uh-huh, yes. Yes.

14 Q. There's -- as you mentioned, there's a couch over to the
15 right?

16 A. Yes.

17 Q. And in that couch -- or when you approached that couch, what
18 did you do?

19 A. I kind of gave it a hip check, just to try and move it and
20 see, you know, the weight of the couch, and then I just moved it
21 away from the wall, so that I could check behind it.

22 Q. And what were you checking behind it for?

23 A. Anyone hiding back there that could harm us.

24 Q. Okay. The couch was large enough that an individual could
25 hide behind the couch?

1 A. Oh, yes, easily.

2 Q. It was large enough for an individual to hide inside the
3 couch?

4 A. Absolutely.

5 Q. Okay. And while you were -- there was -- and there was a
6 table next to that couch, is that correct?

7 A. I believe so.

8 Q. I think you can see it in maybe #6.

9 A. Yes.

10 Q. There were two end tables on either side of the couch, is
11 that right?

12 A. Yes.

13 Q. Those are not the best photographs in the world. So, you
14 move the couch with your hip to check weight and the push it to
15 see if anybody was hiding behind it?

16 A. Correct. Correct.

17 Q. Okay.

18 MR. CLARK: Thank you. No further questions at this
19 time.

20 THE COURT: Okay. Cross.

21 CROSS-EXAMINATION

22 BY MS. CARDARELLA:

23 Q. Hi, Deputy Roberts.

24 A. Hello.

25 Q. Did you say that you were trained that -- I missed -- I just

1 can't write fast enough. I want to talk about your training on
2 protective sweeps. Did you say you're trained that you should
3 look in any area where the suspect had been?

4 A. Yes, in that general area, yes. Because he was kind of in
5 between the living room and kitchen area, so, yes.

6 Q. After he was under arrest, you can look in any -- you believe
7 that you can look in area where the suspect had been after he's
8 been taken into custody?

9 A. I -- no, I don't think that we can check every single room,
10 no.

11 Q. Okay.

12 A. We didn't go -- yeah.

13 Q. Okay. Well, let's talk about this protective sweep.

14 A. Okay.

15 Q. So, you went in. You can't see the kitchen -- or the -- you
16 can't see the stairs from the kitchen?

17 A. Correct.

18 Q. If you were to walk in the front door and keep walking, you'd
19 go up the stairs?

20 A. Yes.

21 Q. And from the kitchen, that is ahead and around to the left?

22 A. Yes.

23 Q. Okay. So, you said that you didn't see Mr. Waters until he
24 came into the living room, and he complied with your directions?

25 A. Yes, we actually couldn't see him until he was like in the

1 doorway of the living room.

2 Q. Okay.

3 A. But there was a short time from the steps to the middle of
4 the living room, you know, where we could not see him.

5 Q. Okay. Is that because of the shield that Deputy Redetzke
6 had?

7 A. Yeah.

8 Q. Because there's nothing between the stairs and the living
9 room.

10 A. There's a wall there.

11 Q. And the wall ends at the bottom of the stairs, right?

12 A. No, the wall for the living room.

13 Q. Oh. I don't think I have a picture of the stairs. That's
14 okay. You had him turn around and walk backwards, is that right?

15 A. Correct.

16 Q. Okay. And he --

17 A. I did not. Another person was giving him commands, but, yes.

18 Q. Yeah, either one of the detectives or deputies.

19 A. Yes, ma'am.

20 Q. And he complied with that request?

21 A. Absolutely.

22 Q. And he was taken into custody. And Detective Miller told us
23 that he was like patted down for weapons and that kind of thing?

24 A. Yes.

25 Q. Okay. So, you testified that after the arrest, you all broke

1 out and did the protective sweep.

2 A. Yes.

3 Q. After the arrest, is that after he's been patted down and
4 everything?

5 A. Yes.

6 Q. Okay.

7 A. It would have been.

8 Q. And then after he was patted down, didn't have anything and
9 was, you know, under arrest, he was taken outside?

10 A. I believe so.

11 Q. Okay. And then you did the protective sweep. You go to the
12 right, and somebody else did something else?

13 A. Correct.

14 Q. Okay. So, looking at -- I can't tell if we have the same
15 picture. It think we do. Looking at Government's Exhibit #6.

16 A. Okay.

17 Q. Is yours really dark?

18 A. It is.

19 Q. It is.

20 A. It's okay.

21 MS. CARDARELLA: Can I borrow yours again, Judge? I'm
22 sorry. Just for the deputy to be able to see what I'm talking
23 about. Thank you.

24 THE COURT: Uh-huh.

25 BY MS. CARDARELLA:

1 Q. So, this is Government's Exhibit #6. And that's the couch in
2 the living room? We're looking at the couch?

3 A. Yes, ma'am.

4 Q. Okay. There are two lamps. They are on tables.

5 A. Yes.

6 Q. The lamp to the right, if we followed that wall, we'd see the
7 door to the kitchen, is that right?

8 A. Yes.

9 Q. That's the wall where the door to the kitchen is?

10 A. Yes, and there's a wall like that on the other side as well.
11 You know what I mean?

12 Q. Yes. Yes. Okay. That is the couch under which the firearm
13 was located.

14 A. Correct.

15 Q. Okay. And the couch in this picture, which was taken after
16 the execution of the search warrant, the couch has been pulled
17 away from wall.

18 A. Yes.

19 Q. And the cushions have been taken off.

20 A. Correct.

21 Q. Okay. So, going back prior to the protective sweep, that
22 couch was flush against the wall?

23 A. Honestly, I don't know.

24 Q. Is that the couch that you moved, that you did the hip check
25 on and the --

1 A. Yes.

2 Q. But you don't know if it was flush against the wall?

3 A. I don't, ma'am.

4 Q. It was between the two tables, right?

5 A. Yes.

6 Q. And it's a fairly tight fit between the two tables. Would
7 you agree?

8 A. Yes.

9 Q. Okay. Then we can see -- if this were three dimensional I
10 would say in front of the couch -- but sort of to the left in
11 this photograph in the foreground, that's a loveseat. And it
12 looks -- they're matching furniture, right?

13 A. Yes.

14 Q. Okay.

15 A. It appears.

16 Q. And then Government's Exhibit, you looked at Government's
17 Exhibit #9, and that's the firearm.

18 MS. CARDARELLA: Can I see my #12 again?

19 BY MS. CARDARELLA:

20 Q. Was it #9 that has the picture of the gun?

21 A. Yes, ma'am.

22 Q. Okay. That's -- that gun is on the floor in that picture, is
23 that right?

24 A. Yes.

25 Q. I'm going to show you Defendant's Exhibit #12. It kind of

1 shows it with the perspective of the couch, right?

2 A. Yes, ma'am.

3 Q. This is the couch, not the loveseat?

4 A. Correct.

5 Q. And this is a picture -- the gun was placed back in the
6 location where you found it for the purpose of a picture?

7 A. I'm sure. Yes. That was after I had gone.

8 Q. Oh, so you weren't there when this picture was taken?

9 A. Correct.

10 Q. Would you agree that Defendant's Exhibit #12 fairly and
11 accurately represents the location of the firearm when you found
12 it?

13 A. Yes.

14 Q. Okay. It doesn't represent the condition of the firearm --

15 A. Correct. Yes.

16 Q. Okay. And that's because the firearm had been unloaded and
17 made safe --

18 A. Yes, ma'am.

19 Q. -- before that picture was taken. When you did the hip check
20 on the couch, it was up -- well, it didn't move, right?

21 A. No, it moved a little bit.

22 Q. It did move. So, it -- and then you moved it to see if there
23 was someone behind it?

24 A. Correct.

25 Q. Okay. What made you think there was somebody else in the

1 home besides Mr. Waters?

2 A. That's why we were doing the sweep. We didn't know if anyone
3 else was in the home.

4 Q. But did you have reason to think someone else was? You just
5 didn't know.

6 A. Like we said, we did not know, and --

7 Q. Okay.

8 A. -- for officer safety reasons, we want to make sure that
9 there's nobody else there that's going to harm us.

10 Q. Okay.

11 A. And we'd seen the blinds move upstairs. There were just
12 several things that, we wanted to make sure everything was safe.

13 Q. You were not part of the team that detained Ms. James, the
14 woman that left the house?

15 A. No, I think I was in the car --

16 Q. Okay.

17 A. -- where, you know, we went up there and stopped her. And
18 then I went straight up to the house.

19 Q. Okay.

20 A. Another deputy stayed with her.

21 Q. Okay. Were you aware that she reported that Mr. Waters was
22 in the house?

23 A. I don't remember that, ma'am.

24 Q. Okay.

25 A. That's --

1 Q. Okay. That's fine. And so, you didn't know that she said
2 nobody else is in the house? You didn't -- you were not aware of
3 that?

4 A. No. I -- no.

5 Q. Okay.

6 MS. CARDARELLA: I think I'm done, Judge. Thank you.
7 Thank you.

8 THE COURT: Okay. Anything else?

9 REDIRECT EXAMINATION

10 BY MR. CLARK:

11 Q. Deputy Roberts?

12 A. Yes, sir.

13 Q. I just want to ask you a couple questions. When you did your
14 protective sweep, you went over and you hip checked the couch and
15 then pushed it out a little bit to see if anybody was hiding back
16 there?

17 A. Yes.

18 Q. Is that correct? What did you see when that happened?

19 A. I just saw half of a firearm in the back, you know, under the
20 couch and --

21 Q. Okay. So, what did you do when you saw the half of the
22 firearm?

23 A. I just alerted one of the detectives. I don't even remember
24 which detective it was, one of the KCPD detectives --

25 Q. Okay.

1 A. -- and let them know what I had located and where.

2 Q. All right. So, do you recall which half of the firearm you
3 saw?

4 A. I honestly do not, no.

5 Q. All right.

6 A. I'm not sure if it was the barrel or the grip.

7 Q. All right. When you take a look at Government's #9 then --
8 and you were not there when this picture was taken, is that
9 right?

10 A. No, sir. Correct.

11 Q. You can see the whole firearm, a magazine and the bullets
12 there.

13 A. Yes.

14 Q. Is that what you saw?

15 A. No. No. Like I say, I only saw half of the gun, so I did
16 not -- it was not set up like that.

17 Q. If the gun was -- is roughly in the same position in which it
18 was found, you didn't -- did you push the couch that far out?

19 A. No. Not even that far, no.

20 Q. Okay.

21 A. Because I could only -- like I say, I could only see half of
22 a gun at the time.

23 Q. All right. So, in this picture, the couch is pushed out much
24 further than you pushed it out, is that correct?

25 A. Yes, correct.

1 Q. Okay. Thank you.

2 MR. CLARK: No further questions.

3 MS. CARDARELLA: I don't --

4 THE COURT: Anything else?

5 RECROSS EXAMINATION

6 BY MS. CARDARELLA:

7 Q. Well, do you recall that Mr. Waters was on the phone as he
8 came through the living room? You don't remember that?

9 A. I do not, ma'am.

10 MS. CARDARELLA: Okay. Thank you. I don't have
11 anything else, Judge.

12 EXAMINATION BY THE COURT:

13 Q. Okay. Let me see if I understand. You were there when the
14 defendant was taken into custody, right?

15 A. Yes, sir.

16 Q. And he's then cuffed and he's been arrested. You then
17 continue to do a sweep along with other officers, right?

18 A. Yes. Into the adjoining room, yes.

19 Q. Right. And so, well, what area are you confining your search
20 to there? I mean, are you going up to the second floor or are
21 you just --

22 A. I did not. I don't know if anyone else did. Like I say, I
23 was just in the living room where we -- where I first saw him,
24 so.

25 Q. Okay. But -- all right. So, that's all you know is just

1 you --

2 A. Yeah.

3 Q. You just did the first floor and --

4 A. Correct.

5 Q. Did somebody else do the first floor too?

6 A. The first floor? I don't remember who was in the living room
7 with me to be honest with you.

8 Q. Okay.

9 A. I'm not sure.

10 Q. You just know you swept part of the first floor?

11 A. Yes.

12 Q. Okay.

13 A. The right-hand side, just --

14 THE COURT: Any additional questions by the United
15 States attorney?

16 MR. CLARK: No, Your Honor. Oh.

17 FURTHER REDIRECT EXAMINATION

18 BY MR. CLARK:

19 Q. Did you actually put the cuffs on Mr. Waters?

20 A. I believe I did.

21 Q. Okay. Where were you when you did that?

22 A. We had called him -- one of the deputies or officers had
23 called him into the kitchen and I was like, like I said, the
24 third or fourth guy, so I stepped up there because there was a
25 shield guy and the other person giving the orders and I stepped

1 up and handcuffed him.

2 Q. Okay. So, was that --

3 A. And someone else took him out.

4 Q. Was that in the entranceway between the kitchen and the
5 living room?

6 A. It was more -- no, it was in the kitchen where we effected
7 the arrest.

8 Q. Okay. All right. Thank you.

9 THE COURT: Ms. Cardarella?

10 MS. CARDARELLA: I don't have any questions. Thank you.

11

12 THE COURT: Okay. You may step down. Any additional
13 evidence by the United States?

14 MR. CLARK: No, Your Honor.

15 THE COURT: Any evidence by the defense?

16 (Off Record Talking)

17 MS. CARDARELLA: Did you ask me something?

18 THE COURT: Yeah.

19 MS. CARDARELLA: Sorry. There was that pause.

20 THE COURT: Yeah. Any -- is the case closed or --

21 MS. CARDARELLA: I keep giving Bruce the chance, but I'm
22 going to call Dannaica James.

23 THE COURT: Okay. I'll have her spell her name because
24 I'm not sure I know how.

25 THE COURT: Sure. Just come right up here. Good

1 afternoon. Would you raise your right hand for me, please?

2 DANNAICA JAMES, DEFENDANT'S WITNESS, SWORN

3 THE COURT: Go ahead and take the stand on your left
4 over here. Yeah. Now, it may make a noise when you get up
5 there, don't get concerned about it. Sometimes it adjusts for
6 weight. Ms. Cardarella.

7 DIRECT EXAMINATION

8 BY MS. CARDARELLA:

9 Q. Can you tell us your name, please?

10 A. Dannaica James.

11 THE COURT: I think you better get her to move forward.
12 We're trying to get a good recording of you, Ms. James.

13 BY MS. CARDARELLA:

14 Q. The microphone doesn't move, so I'm going to put it a little
15 bit under your chin. Okay. What's your name?

16 A. Dannaica James.

17 Q. And can you spell your first name?

18 A. D-A-N-N-A-I-C-A.

19 Q. And your last name is James, J-A-M-E-S?

20 A. Yes.

21 Q. Ms. James, do you know Arthur Waters?

22 A. Yes.

23 Q. And how do you know him?

24 A. He's my fiancé.

25 Q. And do you live with him?

1 A. Yes.

2 Q. Where do you live?

3 A. 22nd and Monroe.

4 Q. Okay. We've been talking about an address today 2202 Monroe.

5 A. Yes.

6 Q. Is that your address?

7 A. Yes.

8 Q. Okay. Do you recall the police being at your home on
9 September 3rd of last year?

10 A. Yes.

11 Q. And did you have contact with the police that day?

12 A. Yes.

13 Q. Can you tell us what happened? I know you left the house.
14 What happened next?

15 A. Well, as I was leaving, they had blocked my car from me from
16 leaving, so I got out the car. I was about to, you know, start
17 yelling, but then they had let me know that they were police, and
18 I asked what was going on. They was like well we're looking for
19 someone. I'm like who. They was like Arthur Waters. I'm like
20 okay. They was like is he in the home. And I'm like yes. They
21 asked me is --

22 Q. Okay. I'm going to slow you down just in case Mr. Clark has
23 objections and to I make sure I don't miss anything. So, the
24 police blocked you in from leaving --

25 A. Uh-huh.

1 Q. -- and you got out. You didn't know it was the police?

2 A. No, not at all.

3 Q. Okay. And then they asked you if you know Arthur?

4 A. Yes.

5 Q. And you said yes. And you told them he was inside the home?

6 A. Yes.

7 Q. Did you tell them -- or did they ask you anything about
8 anybody else being in the home?

9 A. Yes.

10 Q. What did they ask you?

11 A. They asked was there anyone there, I said no. No one else is
12 in the home but him.

13 Q. Okay. And did they have you try to make any contact with Mr.
14 Waters?

15 A. I told them -- well, as they were going to my back door, I
16 said would they kick it in, they said they will. And I said,
17 well, hold on, let me call him.

18 Q. Okay. And did you call him?

19 A. Yes.

20 Q. And what happened then?

21 A. I said, hey, the police is out here waiting for you, can you
22 please come to the door. He said, well, hold on.

23 Q. Did he tell you what he was doing?

24 A. I think he was in the restroom.

25 Q. Okay. And where is the restroom in the house?

1 A. Upstairs.

2 Q. Okay. So, what -- did you have any communication with the
3 officers to let them know you had spoken to Mr. Waters on the
4 phone?

5 A. I was standing next to one --

6 Q. Okay. And what did you do?

7 A. -- while I was on the phone.

8 Q. And did you say anything?

9 A. I said hold on, don't kick in my door, he's coming to the
10 door. They kicked it in right after that.

11 Q. Okay. So, that's the back door of the residence. And we've
12 some pictures of your home. That opens into like a little
13 utility storage area.

14 A. Uh-huh.

15 Q. Right?

16 A. Yes.

17 Q. Okay. And then it goes into the kitchen?

18 A. Yes.

19 Q. Okay. From the kitchen then into the living room?

20 A. Yes.

21 Q. And you have in your living room what big pieces of
22 furniture?

23 A. Two couches, a table, a couple of side tables, TV stand,
24 bookshelf.

25 Q. Okay. We've been talking today about a couch and a loveseat

1 which is a smaller couch.

2 A. Yeah.

3 Q. Is that fair?

4 A. Yeah.

5 Q. Is one bigger than the other?

6 A. Yes.

7 Q. Okay. So, I'm going to show you some photographs. These are
8 of Defendant's Exhibits #1, #2 -- #1 and #2. It's right there.

9 And I'll ask you if you recognize what's pictured in these
10 photographs?

11 THE COURT: Let's identify which one she's looking at,
12 #1 or #2.

13 BY MS. CARDARELLA:

14 Q. They're the same, Judge. So, Photograph Number 1 is? What
15 is that?

16 A. This is the big couch. No, this is my loveseat.

17 Q. Okay. And this Photograph Number 2?

18 A. These are the same couch.

19 Q. Okay. So, and are these pieces of furniture, this couch and
20 this loveseat, do they match?

21 A. Yes.

22 Q. When on September 3rd -- I'm going to try to find a picture
23 that you can look at. I know where it is. We're going to talk
24 about which couch was where. So, here is Government's Exhibit
25 #11.

1 A. This is the --

2 Q. And this picture was taken on September 3rd after the police
3 executed a search warrant at your house.

4 A. Uh-huh.

5 Q. Is this couch, is this piece of furniture that we're looking
6 at in Government's Exhibit #11, the big couch or the little
7 couch?

8 A. It's the big couch.

9 Q. Okay. And is that the wall that it was up against on
10 September 3rd?

11 A. Yes.

12 Q. Okay. Tell me about that couch and that wall. How much
13 space was there between the couch and the wall on September 3rd?

14 A. About a inch or two.

15 Q. Okay. And looking at Defendant's Exhibits -- look at
16 Defendant's Exhibit #1. Is that -- the placement of that couch
17 against the wall the same as the placement --

18 A. No.

19 Q. -- on September 3rd? How is it different?

20 A. This couch is pulled out.

21 Q. I meant before the police came in. Looking at Defendant's
22 Exhibit #1, is this how you would have had the couch respective
23 to the wall prior to the police coming in?

24 A. Well, like next to it or up against the wall?

25 Q. Did you have it so -- describe how the couch is in

1 Defendant's Exhibit #1? Is it up against the wall or is it away
2 from the wall?

3 A. It's basically up against the wall.

4 Q. Okay. And looking at Defendant's Exhibit #2, is it up
5 against the wall or away from the wall?

6 A. Basically up against the wall.

7 Q. Okay. Do Defendant's Exhibits #1 and #2 fairly and
8 accurately represent the way the couch was on September 3rd
9 before the police came in?

10 A. Yes.

11 Q. Okay. I know and you were telling us that Defendant's
12 Exhibit #11 -- I'm not sure it's in, I'll offer it. Let me show
13 you this one instead. Government's Exhibit #6, the couch is
14 pulled away from the wall.

15 A. Yes.

16 Q. Did you pull the couch away from the wall?

17 A. No.

18 Q. Did you ever leave the couch in that condition?

19 A. Not at all.

20 Q. How was the couch when you left the house on September 3rd
21 and then encountered the police in your back yard, what was the
22 placement of the couch?

23 A. Up against the wall.

24 Q. Up against the wall. Okay.

25 MS. CARDARELLA: Judge, I'm going to offer Defendant's

1 Exhibits #1 and #2.

2 THE COURT: Any objection?

3 MR. CLARK: No objection.

4 THE COURT: They're both in.

5 BY MS. CARDARELLA:

6 Q. I'm going to show you Defendant's Exhibit #3. Do you
7 remember that Mr. Bush and I came out to your house one day to
8 look at the house, to look at the living room?

9 A. Uh-huh.

10 Q. Is that a yes?

11 A. Yes.

12 Q. And do you remember that Mr. Bush took some photographs of
13 the furniture?

14 A. Yes.

15 Q. Can you tell us what is pictured in Defendant's Exhibit #3?

16 A. This one?

17 Q. Yeah. Here you go. What is -- do you recognize what this is
18 a photograph of?

19 A. The bottom of my couch.

20 Q. Okay. Do you remember that photograph being taken?

21 A. Yes.

22 Q. Okay. Can you tell us how that photograph is taken, what was
23 happening?

24 A. He practically had to get on the floor just to take the
25 picture.

1 Q. Okay. And what's -- there's a dollar bill and the bottom of
2 the couch, is that right?

3 A. Uh-huh. Yes.

4 Q. Is that a yes? And it shows us the space at the bottom of
5 the couch, is that right?

6 A. Yes.

7 Q. Okay. And does that photograph fairly and accurately
8 represent what the bottom edge of your couch looked like on
9 September 3rd, 2015?

10 A. Of course.

11 MS. CARDARELLA: Okay. Judge, I offer Defendant's
12 Exhibit #3.

13 THE COURT: No objection?

14 MR. CLARK: No objection.

15 THE COURT: It's in.

16 MS. CARDARELLA: Judge, I don't think I have any other
17 questions for Ms. James. Mr. Clark might have some questions for
18 you.

19 THE COURT: Yes?

20 MR. CLARK: A few.

21 CROSS-EXAMINATION

22 BY MR. CLARK:

23 Q. Good afternoon, Ms. James.

24 A. Good afternoon.

25 Q. I want to refer your attention then to the Defendant's

1 Exhibit #1. Do you recall when this picture was taken?

2 Defendant's #1, it's the black and white one.

3 THE COURT: Why don't you show her what it is we're
4 referring to? She's got a bunch of photographs up there and I
5 don't want her to get confused.

6 BY MR. CLARK:

7 Q. Well, I've got the black and white one. It's this one. This
8 is #1 and this is #2. Do you see that?

9 A. Uh-huh. Yes.

10 Q. Could I see it? Okey-doke. Thank you. Do you recall when
11 those pictures were taken?

12 A. This was one of the ones where he came and took a picture of
13 my house.

14 Q. When Mr. Bush came with Ms. Cardarella?

15 A. I believe so. I never got a chance to see any of the
16 pictures, so I wouldn't know --

17 Q. Okay.

18 A. -- if it was taken then.

19 Q. But these were taken after Mr. Waters' arrest, is that
20 correct?

21 A. Yes.

22 Q. All right. These weren't pictures taken before Mr. Waters'
23 arrest?

24 A. No, not this one.

25 Q. Okay. So, in Government's #1, if you take a look, that couch

1 is pushed up pretty much against the wall, is that right?

2 A. Correct.

3 Q. Okay. If you look at the -- oh, in the lower -- take a look
4 at the lower left portion. You can see a lamp there over on the
5 left-hand side, is that right?

6 A. Yes.

7 Q. And then there is a -- there's an outlet, is that correct?

8 A. Yes.

9 Q. All right. And the outlet has one of those, like -- is that
10 like multi-prong things where you put more than --

11 A. Yes, an adaptor.

12 Q. It's an adaptor?

13 A. A plug adaptor.

14 Q. Okay. And there is a -- something plugged in there, right?

15 The light is -- some of the light's plugged in there, is that
16 correct?

17 A. It looks like it.

18 Q. Okay. So, that's -- so that's the light. And you have to be
19 able to plug that in, right?

20 A. Yes.

21 Q. So, when you plug a plug inside the adaptor inside the
22 socket, you've got to have room for your hand to move in there,
23 right?

24 A. No. Because it's -- the way it's positioned I didn't have to
25 go around the couch or anything. It's where you could just

1 straight plug it straight up.

2 Q. Well, if you take a look at this picture though, it looks
3 like the socket is behind the couch.

4 A. Of course, because that part of the adapter isn't used.

5 Q. But that's where -- I'm just saying -- I'm just asking you if
6 that's where the plug in is behind the couch?

7 A. Yes.

8 Q. Okay. And so when you plug it in you have to have room to
9 plug it -- to push it in behind the couch, right?

10 A. The part of the adaptor I was using was not directly behind
11 the couch.

12 Q. Well, okay. Safe to say you don't go around measuring the
13 distance between your furniture and the wall, is that right?

14 A. Not too much.

15 Q. Okay. So, you don't -- you don't have a clear recollection
16 of how close or how far the couch was from the wall prior to Mr.
17 Waters' arrest, is that right?

18 A. I do.

19 Q. Because you remember that's the way your furniture is
20 arranged?

21 A. Yes.

22 Q. Okay. So, you're absolutely certain that the furniture was
23 pushed up against the wall and not that there was, oh, I think
24 you said an inch or two space, is that right?

25 A. What you mean by inch or two space?

1 Q. I thought in response to what Ms. Cardarella said you said it
2 was an inch or two of space, is that correct?

3 A. I'm not understanding your question.

4 Q. I thought on direct examination Ms. Cardarella asked you
5 where the couch was in relationship to the wall and you said
6 there was an inch or two of space between the wall?

7 A. Yes.

8 Q. And the -- okay. So, it wasn't pushed up next -- right up to
9 the wall?

10 A. Not right up against it.

11 Q. Okay. So, there was a gap there?

12 A. About a inch or two gap.

13 Q. Okay. And then there was this plug in issue here, is that
14 correct?

15 A. Correct.

16 Q. All right. So, there has to be enough -- I mean, there has
17 to be enough space there for you to get to the electric device,
18 is that correct?

19 A. The way the couch is positioned it is enough space.

20 MR. CLARK: Okay. Thank you. No further questions,
21 Judge.

22 THE COURT: Anything else?

23 MS. CARDARELLA: I do, Judge. Thanks.

24 REDIRECT EXAMINATION

25 BY MS. CARDARELLA:

1 Q. Ms. James, I was out at your house in November. Does that
2 sound about right?

3 A. Yes.

4 Q. Was the furniture in November in the exact same place it had
5 been in September or had it been moved?

6 A. I had moved it.

7 Q. Okay. I forgot to cover that with you on your direct
8 examination.

9 A. Uh-huh.

10 Q. Looking at Government's #6, that's the big couch and it's
11 against the far wall of your house, is that right?

12 A. Correct.

13 Q. And the little couch was up against the front wall of the
14 house?

15 A. Correct.

16 Q. When I came out to see you, you had switched those, is that
17 right?

18 A. Well, moved them over, but, yes.

19 Q. Okay. So, the big couch was against the front wall?

20 A. Yes.

21 Q. So, when I was taking pictures -- when I had Mr. Bush take
22 pictures of the way the couch looked against the wall,
23 Defendant's Exhibit #1, that's the way the couch looks against
24 the wall. That's what you testified to, is that right?

25 A. Yes.

1 Q. But this isn't the wall it was up against at the time?

2 A. No, ma'am.

3 Q. But does this picture, Defendant's Exhibit #1, fairly and
4 accurately reflect how the couch was against a wall even though
5 it was a different wall?

6 A. Yes.

7 Q. Okay. And does this long wall in Government's Exhibit #6
8 where you used to have the couch, does it have plugs like this
9 too or is it different?

10 A. No, it doesn't have an adaptor in it.

11 Q. It doesn't have an adaptor plug like is pictured in
12 Defendant's #1. And then looking at Defendant's -- or
13 Government's #6 again, I can see two lamps. Are those lamps on
14 tables?

15 A. Yes, ma'am.

16 Q. How much room was between the tables and the edges of the
17 couch?

18 A. Maybe a foot or two.

19 Q. Okay. So, the couch fit between the two tables?

20 A. Yes.

21 Q. Okay.

22 MS. CARDARELLA: I think that's all I have.

23 THE COURT: Mr. Clark?

24 RECROSS EXAMINATION

25 BY MR. CLARK:

1 Q. Just to be clear. So, this isn't the way they were in
2 September when Mr. Waters was arrested?

3 A. No.

4 Q. This isn't a fair and accurate depiction of where the couches
5 were, is that correct?

6 MS. CARDARELLA: Judge, that wasn't the question I
7 asked, so I'm going to object.

8 THE COURT: Overruled. Go ahead.

9 BY MR. CLARK:

10 Q. This isn't the way they were that day, is that correct?

11 A. No, they're not in the same position.

12 Q. So, you had moved those. So, these are not a fair and
13 accurate representation of what was -- what the furniture was
14 like on September 3rd?

15 A. Pretty much it is.

16 MR. CLARK: Your Honor, I'm going to object now on
17 Plaintiff's -- or Defendant's #1 and #2 because I thought when
18 she said that they were the same as at the time of the incident,
19 I did not know that she had switched them around.

20 THE COURT: Let me see #1. Let me see #1, #2 and isn't
21 there a #3, too, as well?

22 MS. CARDARELLA: There is, Judge.

23 MR. CLARK: Yes. (Inaudible) picture.

24 MS. CARDARELLA: I've got the color ones here, Bruce.

25 THE COURT: Let me have the exhibits. Thank you.

1 MS. CARDARELLA: Uh-huh.

2
3 (Off Record Talking)

4 THE COURT: Ms. Cardarella, what's your response to what
5 Mr. Clark has said?

6 MS. CARDARELLA: Judge, what Ms. James testified to was
7 that the photographs fairly and accurately represent the position
8 of the back of the couch against the wall. And it doesn't matter
9 what wall, that's what she is saying. This photograph fairly and
10 accurately represents the position the back of the couch had
11 against the wall on September 3rd. I can ask her more questions
12 if the Court needs me to.

13 THE COURT: Is there any -- I'm sorry. I didn't mean to
14 interrupt you.

15 MS. CARDARELLA: That's all right.

16 THE COURT: Go ahead.

17 MS. CARDARELLA: I can ask her more questions if you
18 want me to, but that's what she said was a fair and accurate
19 representation.

20 THE COURT: Was there any reason why you didn't have the
21 couches moved back to their original position when -- or were you
22 unaware of it or what?

23 MS. CARDARELLA: No, I was aware of it, Judge. I mean,
24 this is where a family lives. There was, you know, the house is
25 lived in. It's a very tight space.

1 THE COURT: Yeah.

2 MS. CARDARELLA: I mean, it would have taken a great
3 effort to move the couches around.

4 THE COURT: So, let me have both counsel up here for a
5 minute. I just want you to be looking at the same items that I'm
6 looking at as we go through this here. With regard to
7 Defendant's Exhibit #1, the relevance of that for the defendant
8 is not the positioning of the couch in relationship to this lamp
9 or the item that's reflected on the bottom here, but simply to
10 show how close it was against the wall.

11 MS. CARDARELLA: Correct.

12 THE COURT: Not necessarily this wall, but close against
13 a wall, right?

14 MS. CARDARELLA: Right. It was really the back of the
15 couch that I was using it for.

16 THE COURT: Right. So, this is the part here, the back
17 of the couch to the wall. That's the relevance, correct?

18 MS. CARDARELLA: Yes, sir.

19 THE COURT: Okay. Now, with regard to -- and I'm going
20 to hear from you too. With regard to this second exhibit,
21 Defendant's Exhibit #2, that's the same principle that you had in
22 mind there, right?

23 MS. CARDARELLA: Yes, sir.

24 THE COURT: And then with regard to Defendant's #3, I'm
25 a little bit confused about what this is. Is this -- what does

1 this reflect?

2 MS. CARDARELLA: This is the bottom of the couch to show
3 the space between the bottom of the couch and the floor and the
4 dollar bill is there to give the Court that perspective.

5 THE COURT: Okay. So, this is just simply -- this has
6 nothing to do with the positioning to the wall, it just says the
7 bottom of the couch has --

8 MS. CARDARELLA: Exactly.

9 THE COURT: -- has a lip that ends about whatever that
10 is, an inch and a half, two inches off the floor, correct?

11 MS. CARDARELLA: Correct.

12 THE COURT: Was the floor where the couch original was,
13 was that carpeted though?

14 MS. CARDARELLA: No. It's just -- it's this laminar
15 surface.

16 THE COURT: Okay. You don't -- you're saying it was
17 laminated the same?

18 MS. CARDARELLA: I think it's a -- I mean I can ask the
19 witness if she (inaudible).

20 THE COURT: Yeah. I think you need to -- I want to know
21 kind of that if that was --

22 MS. CARDARELLA: Okay.

23 THE COURT: And then I want to hear from Mr. Clark
24 though before you do that. Go ahead.

25 MR. CLARK: Well, I guess my objection was I thought

1 that this was -- supposed to be a representation of the way that
2 the furniture was on September 3 of 2015.

3 THE COURT: Right.

4 MR. CLARK: I did not know that they had switched those
5 around. That's why I was asking all the questions about the
6 outlet because --

7 THE COURT: Right.

8 MR. CLARK: -- it does not appear from the picture that
9 one could put a light -- the plug into that outlet without
10 pushing the couch out a little bit more than it is right there if
11 it's right --

12 THE COURT: Right.

13 MR. CLARK: -- up against the wall.

14 THE COURT: For the limited purpose of showing the
15 distance between the back of the couch to a wall, do you have any
16 objection to that?

17 MR. CLARK: I guess we've got a question. Is this the
18 same side of the same couch?

19 MS. CARDARELLA: It's two different sides of the same
20 couch.

21 MR. CLARK: Oh, okay.

22 MS. CARDARELLA: I think. No, it's the same side of the
23 same couch.

24 MR. CLARK: It's the same side of the same couch?

25 MS. CARDARELLA: It might be.

1 MR. CLARK: Where's the lamp?

2 MS. CARDARELLA: It's not. It's the two couches. No,
3 it's the same. I can call Alan.

4 MR. CLARK: Okay.

5 MS. CARDARELLA: Alan took the pictures, he can tell us.

6 THE COURT: Let's do that. Let's get him up and why
7 don't you cover the --

8 MS. CARDARELLA: Bottom of the couch.

9 THE COURT: -- the bottom of the couch with her.

10 MS. CARDARELLA: Okay.

11 THE COURT: Okay.

12 MS. CARDARELLA: Can I have Alan look at those, Judge,
13 so he can refresh his memory before he testifies?

14 THE COURT: Yes, certainly. You bet.

15 FURTHER REDIRECT EXAMINATION

16 BY MS. CARDARELLA:

17 Q. Ms. James, I'm going to show you Defendant's Exhibit #3
18 again. And in this picture we see a dollar bill resting in front
19 of your couch, is that right?

20 A. Yes.

21 Q. And it looks like the dollar bill is sitting on a hard
22 surface. What sort of flooring do you have in your living room?

23 A. Tile.

24 Q. Okay. When -- I'm going to show you -- I'm going to show you
25 Government's Exhibit #9. Is that the tile flooring in your

1 living room?

2 A. Yes.

3 Q. Okay. And that's the same tile flooring that's pictured in
4 Defendant's Exhibit #3?

5 A. Yes.

6 Q. Okay. On September 3rd, was the big couch sitting on that
7 tile floor or was it sitting on carpet?

8 A. The carpet was kind of tucked up underneath it.

9 Q. Okay. Like it is here in this photograph or more?

10 A. More.

11 Q. Okay. Did you change the bottom of your couch in any way
12 since September 3rd?

13 A. I couldn't. I can't.

14 Q. Okay. Did you lower the bottom of your couch in any way?

15 A. No.

16 Q. Did you raise the bottom of your couch in any way?

17 A. No.

18 Q. But on September 3rd, it was sitting on at least maybe the
19 front feet were on carpet?

20 A. Yes.

21 Q. Is that fair? Okay. Otherwise, does Defendant's Exhibit #3
22 fairly and accurately represent the bottom of your couch and its
23 relationship to the floor on September 3rd, 2015?

24 A. Yes.

25 MS. CARDARELLA: Okay.

1 THE COURT: Was that part of the couch, the back of the
2 couch sitting on the tile floor or was it sitting on the rugged
3 part?

4 MS. CARDARELLA: So, Judge, this is the front of the
5 couch. You asked about the back of the couch. This is the front
6 of the couch.

7 THE COURT: Right. And I'm trying to figure out -- the
8 gun though was found behind the couch, right?

9 MS. CARDARELLA: Right. Yeah.

10 THE COURT: So, what I'm trying to get to is --

11 MS. CARDARELLA: Okay.

12 THE COURT: -- was the back of your couch -- sometimes
13 when we have, at least some people put a carpet in the middle and
14 maybe the front legs of the couch are resting on top, but the
15 back is still tile. Do you understand what I've saying?

16 THE WITNESS: Yes.

17 THE COURT: And is that the situation that you had in
18 your house where the back of the couch would have been on the
19 tile portion, whereas the front might have been on the carpeted
20 portion, or how was it?

21 THE WITNESS: A little bit of the front of the couch was
22 on the carpet. The back of the couch was on the tile.

23 THE COURT: On the tile. Okay. All right.

24 MS. CARDARELLA: Judge, I have a photograph that might
25 help refresh her recollection.

1 THE COURT: Okay. I think she's got it though, but to
2 show it to her, yeah, go ahead.

3 BY MS. CARDARELLA:

4 Q. Yeah. I'm going to show you Defendant's Exhibit #11. This
5 is a picture of your home after the police did the search
6 warrant, is that right?

7 A. Correct.

8 Q. And we see the big couch.

9 A. Correct.

10 Q. Okay. Has the couch been -- in this photograph has the couch
11 been pulled away from the wall?

12 A. Yes.

13 Q. Okay.

14 A. Pulled away from the wall, carpet pulled up.

15 Q. Okay. And is this black carpet, is that the carpet you're
16 talking about?

17 A. Yes.

18 Q. And you're saying that this carpet has been moved as well.
19 They moved -- they pulled the carpet up a little bit too, is that
20 right?

21 A. The carpet has been moved.

22 Q. Okay. And that's the carpet that was just under the front
23 part of the couch?

24 A. Yes, ma'am.

25 Q. Would you say maybe two or three inches?

1 A. About, yeah.

2 Q. Okay. But the back part of the couch up against the wall,
3 that was on tile?

4 A. Yes.

5 MS. CARDARELLA: Okay. Judge, I've I refer to
6 Defendant's Exhibit #12. It is the same photograph -- I think
7 it's the same photograph as Government's #6. I'm sorry, I
8 referred to Defendant's #11. I think it's the same as #6, but
9 I'd like to offer it just in case.

10 THE COURT: You just offer it, yeah. Just go ahead and
11 Defendant's #11.

12 MR. CLARK: I have on objection.

13 THE COURT: It's in. It's in.

14 MS. CARDARELLA: Judge, I think I've laid the
15 foundation. I think that all of the photographs are admissible
16 through Ms. James, but I am also prepared to call Mr. Bush to
17 help --

18 THE COURT: Why don't we go ahead. I want to get at
19 least some clarity to what's going on with the other stuff.
20 Let's see if we can finish up with Ms. James first. Are there
21 any additional questions of her? And I'm going to ask her to
22 remain around --

23 MR. CLARK: Yeah.

24 THE COURT: -- in case some other issues come up after
25 Mr. Bush testifies.

1 MR. CLARK: I have no further questions. I guess I have
2 no further questions of her.

3 THE COURT: At this point, right.

4 MR. CLARK: Yeah.

5 THE COURT: Okay. Now, here is what I want you to do.
6 We're going -- unless, Ms. Cardarella, do you have any other
7 questions of her?

8 MS. CARDARELLA: I don't, Judge. Thank you.

9 THE COURT: We're going to ask you, if you would, to
10 step outside and we're going to take some additional evidence.
11 We may not have to have you brought back in here, but we may.
12 So, I'd just ask you, if you would, kindly just remain outside.
13 And if we don't need you we'll promptly tell you no, we don't
14 need you. Is that all right?

15 THE WITNESS: All right.

16 THE COURT: All right. Thank you.

17 MS. CARDARELLA: All right. Judge, I'll call --

18 THE COURT: Do you need a -- do you need some time to
19 visit with him?

20 MS. CARDARELLA: No, no, no. We're --

21 THE COURT: All right.

22 MS. CARDARELLA: The truth is what it is, so, get him up
23 there.

24 THE COURT: Okay. No, I know that. But sometimes you
25 need to talk, so I understand that.

1 MS. CARDARELLA: We're good. We're good.

2 THE COURT: All right.

3 ALAN BUSH, DEFENDANT'S WITNESS, SWORN

4 THE COURT: Take the stand on your left.

5 MS. CARDARELLA: Judge, do you need me to go through all
6 the identifying who he is what he does for a living?

7 THE COURT: No, just get his name. We all know that
8 he's an investigator for the FPD's office.

9 MS. CARDARELLA: Okay. Thanks.

10 DIRECT EXAMINATION

11 BY MS. CARDARELLA:

12 Q. Can you tell us your name?

13 A. My name is Alan Bush.

14 Q. And, Mr. Bush --

15 THE COURT: Hold on. Hold on one second. What?

16 (Off Record Talking)

17 THE COURT: Oh, yeah. Bruce, if you're going to talk to
18 your agent, you need to kind of move the microphone out of the
19 way --

20 MR. CLARK: Sorry.

21 THE COURT: -- so we're not picking you up on the
22 recording --

23 MR. CLARK: Thank you.

24 THE COURT: -- talking about the judge or something like
25 that.

1 MS. CARDARELLA: Who knows? I bet not.

2 THE COURT: All right. I know.

3 BY MS. CARDARELLA:

4 Q. Okay. Mr. Bush, have you been to 2202 Monroe?

5 A. I have.

6 Q. And when was that?

7 A. November 13th of 2015.

8 Q. And for what purpose?

9 A. To interview Ms. James and to look at the scene.

10 Q. Okay. When you were talking to Ms. James, did you talk to
11 her in particular about the furniture in her living room?

12 A. I did.

13 Q. And did you determine that there was any difference between
14 the furniture on November 13th and the furniture on September 3rd?

15 A. Yeah. Ms. James advised that she had swapped positions.
16 Instead of the long couch being against the living room wall on
17 the -- immediately to your left inside the door, it had been on
18 the far wall.

19 Q. Okay. Did you do a visual inspection of the couches and the
20 walls?

21 A. I did.

22 Q. How, if at all, were the two walls different?

23 A. They were basically the same. The -- I'm sorry, go ahead.

24 Q. Okay. What did Ms. James tell you about the couches versus
25 the walls, the relationship of the back of the couches to the

1 walls? Did she anything about those relationships in November
2 versus in September?

3 A. She said it was basically the same, just pushed up against
4 the wall, or near the wall.

5 Q. Can you give us a rough estimate of the size of that living
6 room?

7 A. Twelve by twelve, ten by twelve, something like that. It was
8 small.

9 Q. Okay. How much walking space was there with the couches
10 pushed all the way up against walls, as they were in November,
11 and then there was I think a coffee table. Was there a lot of
12 room to maneuver around?

13 A. Not, it pretty tight.

14 Q. Okay. Looking at Defendant's Exhibits #1 and #2. Are those
15 -- do you recognize those photographs?

16 A. I do.

17 Q. Did you take them?

18 A. I did.

19 Q. Okay. Are those pictures of the same couch?

20 A. They are pictures of the same couch, part of the same couch.

21 Q. Okay. And that's -- is that the big couch or the little
22 couch?

23 A. This is the big couch.

24 Q. And the wall then is a different wall than it was up against
25 on September 3rd?

1 A. It is.

2 Q. Did you talk to Ms. James about the placement of the couch
3 and then have, you know, have her place it against the wall in
4 the same way it would have been against the other wall on
5 September 3rd?

6 A. Yes.

7 Q. Okay. And she did that?

8 A. She did.

9 Q. Okay.

10 A. It was basically in the same position already.

11 Q. Okay. There is a -- I think in Defendant's #1 we can see a
12 plug with an outlet --

13 A. Yes.

14 Q. -- in the wall. We can't see that Defendant's #2. Are you
15 able to explain how it's the same house, but we can't see that
16 outlet?

17 A. Well, in #2 it's a little closer perspective of the end of
18 the couch and it is a little darker, so the plug would be a
19 little bit -- probably right down here just barely off the
20 photograph.

21 Q. Okay. What was your point of taking those pictures?

22 A. It's really the only way I could access the couch without
23 moving everything around and I didn't want to disturb her house.
24 So, the photograph was taken just basically to show the end of
25 the couch in proximity to the wall.

1 Q. Okay. And then Defendant's #3 I think is here.

2 A. I don't think --

3 Q. Here it is. Here is Defendant's Exhibit #3. Do you
4 recognize that?

5 A. I do.

6 Q. Is that a picture that you took?

7 A. Yes.

8 Q. What was the point of that picture?

9 A. This picture was taken to show the -- how close the bottom of
10 the couch was to the floor. I did not have a measuring device
11 with me. I didn't have a ruler or tape measure or anything, so I
12 improvised and pulled a dollar bill out of my pocket just so you
13 could get perspective of the distance.

14 Q. Okay. In your opinion, was that enough space for a person to
15 get under the couch?

16 A. No, it was not.

17 MS. CARDARELLA: Okay. Okay. Judge, I'd moved for the
18 admission of the pictures and they're in, but I'll move again
19 just to make sure.

20 THE COURT: Right. He's objected, now he's renewed his
21 objections, I think, to #1 and #2.

22 MR. CLARK: Yes.

23 THE COURT: I don't -- I think my questions were about
24 #3, but I don't think you objected to #3.

25 MR. CLARK: I actually did object to #3, Judge.

1 THE COURT: Right.

2 MR. CLARK: It was #1 and #2 because this -- they're not
3 a fair and accurate representation of where the couches were on
4 that day and they don't even appear to be arranged in the same
5 way, so.

6 THE COURT: Do you want to ask Mr. Bush any questions --

7 MR. CLARK: Yes, I will.

8 THE COURT: -- before we resolve that issue?

9 MR. CLARK: Sure.

10 CROSS-EXAMINATION

11 BY MR. CLARK:

12 Q. Okay. So, Mr. Bush.

13 A. Good afternoon.

14 Q. So, Defendant's #1 is a picture of the end of the couch, is
15 that right?

16 A. It is.

17 Q. And where that couch in this picture is located would be on
18 the side of the room with the front door?

19 A. It is, yes.

20 Q. Okay. So, you've got the front door and then you'd have the
21 couch there. Plus, in this picture, at least, it shows a lamp.

22 A. Yes.

23 Q. All right. And then there's a plug-in behind that couch, is
24 that correct?

25 A. There is.

1 Q. All right. Defendant's #2 is the same picture of that end of
2 the couch, right?

3 A. It is, yes.

4 Q. And at that point you have moved the lamp away from that
5 area?

6 A. Actually, no, I didn't. I moved my camera position a little
7 closer and a little farther down.

8 Q. Okay.

9 A. But I did not move anything.

10 Q. You didn't move the lamp. This is just a closer shot and you
11 can't see the plug-in at all, is that right?

12 A. Exactly. Right.

13 Q. Now, in -- let me show you Government's #4. And that's the
14 couch next to the front door. In this -- you've been here while
15 the testimony was going on?

16 A. Yes.

17 Q. So, you know what the layout of the house is, correct?

18 A. I do.

19 Q. All right. So, in this one, Government's #4 shows a picture
20 looking into the living room from the kitchen, is that right?

21 A. Yes.

22 Q. All right. So, in Government's #4 it would be a picture of
23 -- from that angle it would have to be the loveseat, is that
24 correct?

25 A. Approximately, yeah. This, where the loveseat is right

1 there, this end of it would be approximately in the same position
2 as where this picture was taken from.

3 Q. And in addition in Government's #4 there is no lamp at that
4 end, correct?

5 A. There is not.

6 Q. Okay. So, to be clear, the furniture was not in the same
7 position it was at the time of the arrest, is that right?

8 A. Yes, it had been moved.

9 Q. And the lamp wasn't there at -- in the same location, is that
10 right?

11 A. It does not appear to be, no.

12 MR. CLARK: Okay. Again, Your Honor, the United States
13 would renew its objections to Defendant's #1 and #2 as being --
14 this was --

15 BY MR. CLARK:

16 Q. So, everything had already been moved, is that right?

17 A. I'm sorry.

18 Q. Everything had already been moved?

19 A. It had.

20 MR. CLARK: Okay. Would object to Defendant's #1 and #2
21 as being relevant, I guess, as a fair and accurate portrayal of
22 the furniture.

23 THE COURT: Okay. Ms. Cardarella.

24 MS. CARDARELLA: Judge, a photograph needs to be fair
25 and accurate, it doesn't have to be exact, and people -- the

1 Government often introduces, for instance, photographs of a car
2 that looks like a suspect car because it fairly and accurately
3 represents the car they were looking for when they were looking
4 for a suspect. These photographs fairly and accurately represent
5 the back of the couch, which hasn't changed in its placement
6 against a wall. It's not the same wall and that may go to the
7 weight of the evidence that you choose to give it, although,
8 frankly, I don't know how it could possibly negatively affect the
9 weight of the evidence. But the fact is it's the same back of
10 the couch against a wall in the same room. And since the
11 Government, they're the only people who knew the relevance of
12 this couch, didn't take pictures before they moved everything
13 around for their search, this is the only photograph we have that
14 can tell the Court what it looked like, what that couch looked
15 like before Deputy Roberts moved it. So, it is relevant and it
16 is a fair and accurate representation of the back of that couch
17 with relationship to a wall.

18 THE COURT: Anything else, Mr. Clark?

19 MR. CLARK: No, Your Honor.

20 THE COURT: Okay. I'm going to admit the two exhibits
21 for the limited purpose of the testimony of the witness, Ms.
22 James, as to the distance between the back of the couch and the
23 wall at the time of this event. And so for that purpose, it's
24 going to come in. Okay. Now, any -- I'm sorry to leave you up
25 there. You can come down.

1 THE WITNESS: That's all right.

2 THE COURT: Is there any need to call back Ms. James at
3 this point?

4 MR. CLARK: I don't think so, Judge.

5 MS. CARDARELLA: I don't think so either, Judge.

6 THE COURT: Nobody else has any questions of her, so
7 she's free to go. Is there any additional evidence by the
8 defense?

9 MS. CARDARELLA: No evidence, Judge. You know I like to
10 summarize, so if you'll let us do that, I would appreciate it,
11 but I don't have any other evidence.

12 THE COURT: Okay. I'll give you a few minutes, but --
13 and there's no additional rebuttal evidence by the Government
14 or --

15 MR. CLARK: I don't believe so, Judge.

16 THE COURT: Okay. All right. So, with regard to that
17 -- Alan, would you maybe tell Ms. James that she's -- I promised
18 her I'd give her a heads up if we didn't need her, so if you'd do
19 that.

20 MR. BUSH: May she come in, Your Honor?

21 THE COURT: Yeah. Yeah. Sure. If the record has been
22 completed now. We've closed the record. And so, the burden is
23 on the part of the United States. Do you want to talk first or
24 how do you want to proceed?

25 MR. CLARK: Sure, Your Honor. Well, there's a -- the

1 United States filed a response in this case with respect to the
2 Motion to Suppress. We believe that the evidence shows that
3 during this protective sweep --

4 THE COURT: Get near the microphone, Bruce, so that
5 we're picking you up.

6 MR. CLARK: Oh, sorry.

7 THE COURT: You can come up here if you want.

8 MR. CLARK: Okay. The United States believes that the
9 evidence shows that the officers involved in this arrest were
10 conducting a proper protective sweep. Their training and
11 experience led them -- is that they need to check anything in the
12 immediate area where somebody could be hiding. And at that point
13 the couch was large enough for someone to be hiding in. And you
14 heard testimony from the officers that people hide in all sorts
15 of furniture even, for example, inside a hideaway bed. So, their
16 training and experience indicated to them that they should check
17 that couch, which they did. Deputy Roberts pushed the couch with
18 his leg to check the weight and then pushed it a little bit to
19 see if anybody was hiding back there. What he saw was part of a
20 gun. Now, in the pictures that we have with the Court, this is
21 after the search had been conducted and the gun had already been
22 secured and you see the entire gun and you see the bullets and
23 you see the magazine. That, clearly based on the testimony that
24 was presented, was not how far out Deputy Roberts pushed out the
25 couch because he didn't have that view at all. So, he pushed it

1 out far enough to see if somebody could be hiding behind that
2 couch or inside that couch. The United States suggests that that
3 is a proper protective sweep and that the evidence of the
4 firearms should be admitted on that basis.

5 THE COURT: Okay. Ms. Cardarella.

6 MS. CARDARELLA: Thank you, Judge. Okay. Judge, this
7 was not a valid protective search. And if these officers are
8 trained that they get to look anywhere they want after they do an
9 arrest, then they're being trained wrong and that doesn't make it
10 right. This was not a valid protective sweep. *Maryland vs.*
11 *Buie*, which I cite in my motion and which is a Supreme Court case
12 says if your suspect is already under arrest, you can only do
13 that protective sweep when the searching officer possesses a
14 reasonable belief, based on specific and articulable facts that
15 the area to be swept harbors an individual posing a danger to
16 those on the scene. And Deputy Roberts said he didn't have any
17 facts that led him to believe anybody was there. He just didn't
18 have any facts to lead him to believe somebody else wasn't there.
19 That's not the standard. The standard is you have to have an
20 articulable reason to believe somebody else is in the home. In
21 fact, other officers on the scene had been told that there wasn't
22 anybody else there and they had been doing surveillance on the
23 house for five hours and nobody else was seen coming in or
24 leaving the home. So, there was no reasonable and articulable
25 basis to believe that there was somebody else in the home who

1 might pose a danger to them. Mr. Waters had already been taken
2 out of the home before they conducted the protective sweep. They
3 took him into custody. They frisked him, made sure he didn't
4 have any weapons on him and then he was immediately taken out of
5 the house. So, there's no lunge area here. There's nothing he
6 could have done. He was gone by the time they did the protective
7 sweep. It wasn't a protective sweep, it was an unlawful search.
8 The Government in their response, Judge, suggests that this is an
9 inevitable discovery case. It's not. They found that gun during
10 an illegal search and then they used that gun as part of the
11 basis for their search warrant. So, their search warrant says
12 they're at the house because they're going to execute an arrest
13 warrant. They're allowed to do that. Then their search warrant
14 says we think he's a drug dealer because this unnamed person that
15 nobody knows who it is gave us -- made a phone call for us and
16 said that it was a phone call about narcotics. Nobody knows what
17 kind of narcotics. Nobody knows what language was used to
18 describe those narcotics so that you, the Court, could determine
19 whether or not it really was a phone call about narcotics. Judge
20 Bushur who issued the warrant couldn't make that determination.
21 There is nothing in there that tells us, A, who this person is,
22 or, B, that he's a reliable person. So, even though they can
23 sometimes rely on confidential informants in their search
24 warrants, they can only do so when that confidential informant
25 has a reliable history of proof of reliability. And that

1 information, that proof of reliability is transmitted to the
2 court. That wasn't done. And, in fact, Detective Keil, who
3 wrote the application for the warrant said, no, I don't think he
4 is a CI. This is just some guy they stopped on the street
5 because they thought he knew Mr. Waters and they're -- I think
6 what they were trying to do was to make sure they were at the
7 right house. But that was part of their basis for a search
8 warrant. That alone isn't going to get them a search warrant.
9 The user quantity of narcotics they found in their protective
10 search, that wasn't going to get them that search warrant alone.
11 They relied on the gun that they found in an illegal search and
12 now they're trying to piggy-back it into a search warrant. That
13 search warrant is no good and you can't say this is an inevitable
14 discovery case when the very seizure we're complaining about is
15 relied upon to get the warrant that they're saying leads to
16 inevitable discovery. So, Judge, this is an illegal search and
17 the evidence should be suppressed.

18 THE COURT: Let me ask you kind of for -- so, I
19 understand kind of what your point was with regard to the couch
20 and its distance away from the wall. Your theory is that once
21 they took him out of the house, they should have packed up and
22 left, right?

23 MS. CARDARELLA: Judge, I do believe that once they took
24 him out of the house, they don't get to do a protective sweep.
25 That's what *Maryland vs. Buie* says. But even if -- even if they

1 can, even if the Court says, yeah, I do find that, even though he
2 couldn't articulate it, there is an articulable reason to believe
3 there's somebody else in the house, even if you take that step,
4 they can only look somewhere where it's reasonable to believe a
5 person might be hiding. That couch is right up against the wall.
6 There was no testimony that anything, that the end tables that
7 are right next to it were disturbed, that the lamps were
8 disturbed, that it was askew in any way. So, to believe that
9 somebody is hiding behind the couch --

10 THE COURT: I just wanted to make sure I understood that
11 you're talking about the first -- the authorization to even begin
12 a search, but then even if it was authorized under a theory here,
13 then --

14 MS. CARDARELLA: They have -- right.

15 THE COURT: -- they went beyond the scope of what a
16 protective search would be, right?

17 MS. CARDARELLA: Yes.

18 THE COURT: That's your second --

19 MS. CARDARELLA: So, for instance you can't look in
20 dresser drawers for people. You can't look in shoe boxes for
21 people and you can't look behind furniture that has the back that
22 this furniture has that's pressed up against the wall which is
23 what the undisputed testimony is.

24 THE COURT: But your first theory is that they shouldn't
25 have even done it?

1 MS. CARDARELLA: Right.

2 THE COURT: And then secondly they went beyond the scope
3 of it, right?

4 MS. CARDARELLA: Right.

5 THE COURT: Is there a third theory that we're
6 advocating here?

7 MS. CARDARELLA: No, Judge. I think the pictures --

8 THE COURT: Well, other than the inevitable discovery
9 thing that you've mentioned.

10 MS. CARDARELLA: Right. They mentioned that. I don't
11 believe I did.

12 THE COURT: No, that you addressed.

13 MS. CARDARELLA: Right.

14 THE COURT: That you've already addressed.

15 MS. CARDARELLA: Right. No.

16 THE COURT: That's another theory that you're --

17 MS. CARDARELLA: Judge, I think both -- or all of the
18 Defendant's Exhibits #1, #2 and #3 show that this isn't a couch
19 where somebody could have been hiding under. That's why we have
20 the picture of the bottom of the couch. In Deputy Roberts' own
21 testimony was that when he did his hip check it moved. That
22 doesn't sound like it's got the weight of a person in it or
23 behind.

24 THE COURT: Okay.

25 MS. CARDARELLA: Because it sits right up against the

1 wall.

2 THE COURT: Right. Let me ask you one final question
3 that really is not, I don't think really comes into play here,
4 but I always get concerned when the Federal Public Defender makes
5 an objection and based on, for example, the hearsay rule. I
6 think it's been pretty well acknowledged that under Rule 1101 of
7 the Federal Rules of Evidence that hearsay is admissible. And so
8 I don't know if you were trying to protect the record for
9 something or if there's some additional information that you want
10 me to be aware of about that, because if there is, I'll be happy
11 to let you submit cases to me --

12 MS. CARDARELLA: Sure. Thank you.

13 THE COURT: -- so that I can understand where my
14 failings may be. And I'll let Mr. -- you know, Mr. Clark to do
15 the same. But I think it's clear --

16 MS. CARDARELLA: Judge, I think that hearsay is
17 admissible at proceedings, but the hearsay still needs to have an
18 indicia of reliability. So, while hearsay is hearsay because
19 it's generally not reliable and we let it in at this type of a
20 hearing, it still has to have an indicia of reliability.

21 THE COURT: I agree.

22 MS. CARDARELLA: I make it my practice to just go ahead
23 and make the objection. If nothing else, it brings it to the
24 Court's attention, hey, you're hearing hearsay. Please, as your
25 reviewing the testimony, please make sure that it is -- it does

1 have that indicia of reliability before you give it weight.

2 THE COURT: Right.

3 MS. CARDARELLA: In this case, you know, I'm fine with
4 the objection that I made and with the ruling that you made.

5 THE COURT: No. I just wanted to make sure I wasn't
6 missing something here.

7 MS. CARDARELLA: No, sir.

8 THE COURT: So, I understand the fact that it's
9 admissible, but, you know, I have to consider the weight to give
10 it, if any, --

11 MS. CARDARELLA: Right.

12 THE COURT: -- based on what is reported to me, so I
13 can't just kind of assume that they're not going to make that
14 finding, so. Okay. All right. Now, Mr. Clark, anything else?

15 MR. CLARK: Well, I would point out, and the Court will
16 know when it takes a look through the affidavit, that they didn't
17 get the search warrant based on the statement by the individual
18 that they talked to. They got it based on the fact that they
19 went in, that they talked to the individual, plus, they went into
20 the residence and they plain viewed -- and nobody is arguing
21 about that -- they plain viewed the drugs that they found. And
22 that was part of the basis for the search warrant. It also does
23 mention the firearm, but there was an independent basis for that
24 search warrant independent of the firearm. And so I do think
25 that the inevitable discovery rule kicks in on this case. There

1 was, in fact, if you reviewed the testimony, there was movement
2 at both upstairs and then downstairs. And when they went in, the
3 defendant was upstairs which could indicate to them that somebody
4 else could have been in that house. Also, you do a protective
5 sweep for officer safety, not as a search, but for officer
6 safety. So, you look anywhere someone could be hidden. Probably
7 the most vulnerable time is when you're -- if you turn around and
8 you start leaving without checking an area and your back is
9 turned to that area, that's where the greatest officer danger
10 occurs and you would naturally, it would just make sense, to
11 check an area before you turn your back on it. And so that's why
12 the protective sweep is done. And that's all that I want to say.

13 THE COURT: Okay. Anything else?

14 MS. CARDARELLA: Judge, I just refer the Court back to
15 *Maryland vs. Buie* that says -- and I don't know, I have not
16 researched whether or not the searching officer's knowledge
17 includes the knowledge of his peers.

18 THE COURT: Right.

19 MS. CARDARELLA: I don't know, but it doesn't say that.
20 When a searching officer possesses a reasonable belief based on
21 specific and articulable facts that an area to be swept harbors
22 an individual posing a danger to those on the scene. That's when
23 you can do a protective sweep during an in-home search. And we
24 don't have that here. I've already talked about the inevitable
25 discovery. And, Judge, I do want to mention about that couch

1 again. Deputy Roberts said that what he found is people hiding
2 inside couches like inside of the folding part of the couch. You
3 access that from the front of the couch. So, why is he moving
4 the couch? He's looking for stuff. They found -- they saw the
5 drugs in plain view. They think they hit the mother lode and
6 that's why he's moving the couch and looking behind and under the
7 couch, not in a place where a person could be in the first place,
8 not where they should have been looking anyway. They're done.
9 They're done there. They had an arrest warrant. They executed
10 the arrest warrant. They should have left.

11 THE COURT: Okay. I think we've exhausted that, haven't
12 we? All right. Thank you both very much. I'll try to get a
13 transcript promptly and get it resolved for you. Can I get all
14 the exhibits up here so that we've got all of them in one place?

15 MS. CARDARELLA: I think you might have -- oh, there's a
16 bunch right here.

17 THE COURT: Yeah. Just --

18 (Court Adjourned at 3:57 p.m.)
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6 I certify that the foregoing is a correct transcript
7 from the electronic sound recording of the proceeding in the
8 above-entitled matter.

9
10 /s/ Lissa C. Whittaker
Signature of transcriber

January 25, 2016
Date

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