

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TYRELL HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeal
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a mistrial should have been declared after the prosecutor improperly introduced evidence of the defendant's prior federal conviction where the outcome of the case depended on the jury's credibility determinations.

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PETITION FOR A WRIT OF CERTIORARI

Tyrell Henderson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's memorandum opinion is available at 730 Fed.Appx. 565. An order of the District Court, which is not at issue in this petition, is available at 2017 WL 2636570.

JURISDICTION

The Ninth Circuit entered its judgment on July 16, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and the district court had jurisdiction pursuant to 18 U.S.C. § 3231.

RELEVANT RULE OF EVIDENCE

The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

[...]

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.

Federal Rule of Evidence 609(a)(1)(B).

STATEMENT OF THE CASE

A motor vehicle collision occurred at about 4:00 a.m. on September 19, 2015 near a bend in a road on the Rocky Boy's Indian Reservation in central Montana. Henderson drove one of the vehicles and survived. The driver and one of the two passengers in the other vehicle died. Toxicology reports revealed methamphetamine in Henderson's blood. Henderson admitted at trial that he had used methamphetamine about twelve hours before the crash and stated that he no longer felt any effects from it. Henderson was indicted for two counts of involuntary manslaughter on February 4, 2016. At trial, two Troopers with the Montana Highway Patrol testified as to how they reconstructed the accident based on physical evidence they observed at the scene. The Troopers testified that they based their conclusions of how this accident happened on the damage they observed on each vehicle and on the skid marks they observed on the roadway. They also stated that skid marks would generally be created when a vehicle braked hard, skidded, or entered a yaw. Appx. B, p. 12a. Since they observed skid marks from the other vehicle before the impact, but none from Henderson's vehicle until after the impact, they concluded that Henderson had not taken any evasive action. *Id.*, p. 12a-15a. Henderson testified that he had taken evasive action. He testified that the other vehicle had been in his lane when he rounded the bend and it first

came into view, that to try to avoid it he swerved into the other lane without braking, that the other vehicle also swerved back into the other lane, and that the two vehicles then collided. Appx. C, p. 19a-22a. The jury convicted Henderson on both counts.

Thus, the case came down to whether the jury believed the Troopers' reconstruction of the accident (and to a lesser extent, the surviving passenger, who testified that she had not seen much), or whether the jury believed Henderson. Henderson's credibility was absolutely essential to the outcome. Unfortunately, the jury's ability to fairly assess Henderson's credibility was tainted by the prosecutor's surprise introduction of the fact that Henderson had a "prior federal conviction." Appx. C., p. 23a. The jury was told only that he had a "prior federal conviction," without being told for what or from when—in fact, it was for assault on a federal officer. *See U.S. v. Henderson*, 478 Fed. Appx. 459, 460 (9th Cir. 2012)(unpublished). Henderson's prior conviction was inadmissible but was presented to the jury without the district court having the opportunity to balance its probative value against its prejudicial effects to Henderson as required by Federal Rule of Evidence 609.

Rather than address the initial question of whether Henderson's conviction was admissible, the Ninth Circuit decided that any error in admitting Henderson's

conviction “did not affect Henderson’s substantial rights.” *U.S. v. Henderson*, 730 Fed. Appx. 565, 566 (9th Cir. 2018)(unpublished). The Ninth Circuit based this conclusion on its determination that Henderson’s account of the accident was not plausible. *Id.* This overlooked that Henderson’s testimony was not necessarily inconsistent with the Troopers’ testimony. In a case that came down to whether the jury would credit the defendant or law enforcement, erroneously admitting Henderson’s prior conviction violated his right to a fair trial.

ARGUMENT

A Mistrial Should Have Been Declared after the Prosecutor Improperly Introduced Highly Prejudicial Evidence of Henderson’s Prior Federal Conviction

A mistrial was necessary after the jury was presented with inadmissible evidence that Henderson had a prior federal conviction. Henderson’s 2012 conviction for assault on a federal officer was not probative of Henderson’s truthfulness, and its admission caused Henderson substantial prejudice. A criminal defendant’s credibility may only be impeached with evidence of a prior felony conviction that does not involve dishonesty or a false statement “if the probative value of the evidence outweighs its prejudicial effect.” Fed. R. Evid. 609(a)(1)(B). The Ninth Circuit “assum[ed] without deciding that the district court erred in allowing the government to introduce evidence of Henderson’s prior

federal conviction at trial,” but it determined that this error was harmless because it deemed that Henderson’s testimony was not plausible. *Henderson*, 730 Fed. at 566. This mischaracterization of Henderson’s testimony led to the incorrect conclusion that the error in admitting Henderson’s prior conviction was harmless. On the contrary, Henderson’s account of how the accident occurred was plausible because his testimony that he had switched lanes without braking or skidding could have been consistent with the Montana Highway Patrol Troopers’ testimony that when a vehicle brakes hard or skids, it typically leaves behind skid marks that can be used to reconstruct an accident.

A criminal defendant’s credibility may only be impeached with evidence of a prior felony conviction that does not involve dishonesty or a false statement “if the probative value of the evidence outweighs its prejudicial effect.” Fed. R. Evid. 609(a)(1)(B). The government bears the burden of proving the admissibility of any prior felony convictions. *U.S. v. Portillo*, 633 F.2d 1313, 1323 (9th Cir. 1980). The Ninth Circuit requires a district court to balance five factors to determine whether a prior felony conviction should be admitted: “(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’ subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and, (5) the

centrality of the defendant’s credibility.” *U.S. v. Browne*, 829 F.2d 760, 762–63 (9th Cir. 1987). Most of the other circuits consider the same five factors, which are occasionally pared down to four and which were first articulated by then-Judge Burger in *Gordon v. United States*, 383 F.2d 936, 940 (D. C. Cir. 1967). *U.S. v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976). *See e.g. U.S. v. Grandmont*, 680 F.2d 867, 872 n. 4 (1st Cir. 1982); *U.S. v. Hayes*, 553 F.2d 824, 828 (2nd Cir. 1977); *U.S. v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014); *U.S. v. Acosta*, 763 F.2d 671, 695 (5th Cir. 1985); *U.S. v. Moore*, 917 F.2d 215, 234 (6th Cir.1990); *U.S. v. Smalls*, 752 F.3d 1227, 1240 (10th Cir. 2014); *U.S. v. Pritchard*, 973 F.2d 905, 909 (11th Cir. 1992). Careful balancing of these factors is essential because evidence that the defendant is a felon is very prejudicial. “[T]here is a substantial risk that all exculpatory evidence will be overwhelmed by a jury’s fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again.” *U.S. v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985). Within the narrow constraints of Rule 609, evidence of a prior conviction may be used to attack a defendant’s credibility, but it may not be used to try to establish criminal propensity.

In cases where the jury’s verdict depends on whether the jury believes the defendant or the government’s witnesses about what happened, erroneously

admitting a defendant's criminal conviction is grounds for reversal. In *U.S. v. Jimenez*, a police officer testified that he heard a metallic clang when a suspect walked behind a parked vehicle, partially out of the officer's view, and that he later discovered a gun behind that same vehicle. The defendant, charged with being a felon in possession of a firearm, testified that while he was walking behind the parked vehicle, his foot kicked something that made a metallic sound. *U.S. v. Jimenez*, 214 F.3d 1097, 1097 (9th Cir. 2000). The district court allowed admission of the fact that the defendant had a prior conviction for a "felony involving a firearm." The case "came down to a question of witness credibility," whether the jury believed the officer that the defendant dropped the gun or whether it believed the defendant that he happened to kick a gun that was already on the ground. *Id.*, at 1099. To admit evidence of a prior conviction is reversible error unless there is a "a 'fair assurance' that the error did not substantially sway the verdict." *Id.* The government could not meet this burden because the possibility was too great that the jury had been swayed by the prior conviction that should not have been admitted. "When presented with the two plausible but conflicting stories, the jury may well have given weight to the fact that Jimenez had been convicted of a firearm felony before." *Id.*

The Second Circuit reached a similar conclusion in *U.S. v. Figueroa*. In that drug conspiracy case, a law enforcement officer testified about an encounter with the three co-defendants. Defendant Acosta denied that the encounter had even occurred, and based his defense on the officer “fabricating the episode.” *U.S. v. Figueroa*, 618 F.2d 934, 940 (2d Cir. 1980). The trial court erroneously admitted evidence of Acosta’s prior narcotics offense. As in *Jimenez*, the outcome of the case depended on whether the jury believed the officer or the defendant about what had happened. The Court reversed Acosta’s conviction because it was “inconceivable that knowledge of Acosta’s prior conviction did not play some significant part in the decision of at least some of the jurors to find [the officer’s] accusations of Acosta credible.” *Id.*, at 944.

Since Henderson’s prior conviction was presented to the jury before its probativeness could be balanced against its prejudice, both the district court and the Ninth Circuit engaged in harmless error analysis. The lower courts’ avoidance of the essential issue, whether or not Henderson’s prior conviction was admissible in the first place, requires reversal, or at least a remand, in a case that demanded the jury choose between two plausible accounts of how the collision occurred. Like *Jimenez* and *Figueroa*, Henderson’s case came down to whether the jury believed the accident occurred as described by Henderson or as described by the

prosecution's accident reconstructionists. Faced with "two plausible but conflicting stories" about how the accident occurred, there is no fair assurance that the jury was not swayed to convict Henderson because he already had a prior federal conviction. The Ninth Circuit sought to distinguish this case from *Jimenez* and *Figueroa* by dismissing Henderson's testimony: "But Henderson provides no reason to believe that his version of events, which contravenes all the physical evidence, as well as lay and expert testimony, presented at trial is plausible." *Henderson*, 730 Fed. Appx. at 566. However, the physical evidence in this case—specifically, the lack of skid marks from Henderson's vehicle before the point of impact—does not necessarily contradict Henderson's testimony. The government's accident reconstruction experts testified that "most collisions" leave evidence on the roadway, and that the roadway in this case would "leave black tire marks when the vehicle applies the brakes hard, uhm, and enters a skid or yaw." Appx. B, p. 12a. Henderson testified that he did not apply the brakes when he swerved into the other lane to avoid the oncoming vehicle in his lane. If he was able to switch lanes without entering a skid or yaw, then he likely would not have left skid marks before the collision. The lack of skid marks from Henderson's vehicle before the collision could be consistent with Henderson's account of the accident. Thus, contrary to the Ninth Circuit's dismissive treatment of

Henderson's testimony, the jury was presented with "two plausible but conflicting stories" about how the accident occurred. There is no fair assurance that the jury did not break the tie by relying on Henderson's prior conviction.

Because any error in admitting Henderson's prior conviction was not harmless, the admissibility of Henderson's prior conviction needed to be determined. On balance, the five factors considered under Rule 609 weigh against admitting Henderson's conviction. First, the impeachment value of assault on a federal officer is very low. Assault does not involve dishonesty. Second, the assault occurred on November 5, 2010, almost five years before the accident at issue in this case. Although not so old as to be subject to the heightened restrictions of Rule 609(b), it is still a stale conviction. Third, Henderson's current charge and his prior conviction are very similar as assault and involuntary manslaughter both involve the use of force. The more similar the prior offense is to the current charge, the greater the likelihood of prejudice. *Bagley*, 772 F.2d at 488. Fourth, Henderson's testimony was very important to his defense. He was the only defense witness and the only witness whose testimony directly contradicted the prosecution's accident reconstructionists. Fifth, while Henderson's credibility was central to his case, the assault conviction was simply not central to probing whether or not he was truthful. "[T]he probative value of

[the witness's] conviction is measured by how well it demonstrates his lack of trustworthiness, not how badly [the opposing party] wants to impeach him.” *U.S. v. Bensimon*, 172 F.3d 1121, 1126 (9th Cir. 1999), *quoting American Home Assurance Co. v. American President Lines, Ltd.*, 44 F.3d 774, 779 (9th Cir.1994).

The prosecution’s presentation of Henderson’s prior conviction was especially unhelpful to probing his truthfulness because the prosecutor presented highly prejudicial information to the jury without giving the jury any way to relate that information to Henderson’s truthfulness. Factors one, two, three, and five weigh against admitting the prior conviction, and only factor four supports its admission. On balance, the very low probative value of the prior assault conviction is far outweighed by the considerable prejudice that its admission caused to Henderson. The assault conviction should not have been admitted, and when it was sprung on the jury by surprise, a mistrial should have been ordered.

Because Henderson’s prior conviction was inadmissible, a mistrial was required when Henderson’s credibility was unfairly attacked and the jury was invited to conclude: “because he did it before, he must have done it again.” *Bagley*, 772 F.2d at 488. Henderson’s convictions must be reversed, or in the alternative, this case must be remanded to the district court for a determination of whether Henderson’s prior conviction was admissible.

VI. CONCLUSION

For all of the reasons set forth above, it is respectfully requested that this Court grant the petition for a writ of certiorari.

Respectfully submitted.

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October 12, 2018.

APPENDIX A

Opinion of the Court of Appeals for the Ninth Circuit (July 16, 2018)

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 16 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-30136

Plaintiff-Appellee,

D.C. No.

4:16-cr-00010-BMM-1

v.

TYRELL HENDERSON,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Submitted July 12, 2018**
Portland, Oregon

Before: WARDLAW and OWENS, Circuit Judges, and LEFKOW,*** District Judge.

Tyrell Henderson appeals from his conviction for two counts of involuntary manslaughter in violation of 18 U.S.C. §§ 1112, 1153(a). As the parties are

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Joan Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Assuming without deciding that the district court erred in allowing the government to introduce evidence of Henderson’s prior federal conviction at trial, the alleged error did not affect Henderson’s substantial rights. *See United States v. Segal*, 852 F.2d 1152, 1155–56 (9th Cir. 1988); *see also United States v. Olano*, 507 U.S. 725, 732 (1993). Henderson argues that he was prejudiced by the alleged error because the jury was presented with “two plausible but conflicting” accounts of the car accident and the jury’s verdict thus depended on its view of his credibility. *United States v. Jimenez*, 214 F.3d 1095, 1099 (9th Cir. 2000). But Henderson provides no reason to believe that his version of events, which contravenes all the physical evidence, as well as lay and expert testimony, presented at trial, is plausible. We therefore decline to grant Henderson a new trial on this ground. *See United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982).

2. The district court did not err in denying Henderson’s motion for a new trial based on his *Brady/Giglio* claim. The government concedes that the evidence at issue—that one of the government’s witnesses was the subject of two unrelated misconduct investigations—was favorable to Henderson and was inadvertently suppressed. *See United States v. Kohring*, 637 F.3d 895, 901 (9th Cir. 2011). But the government also rightly maintains that no prejudice ensued from the omission

of this impeachment evidence. *See id.* At trial, the witness in question provided testimony that was cumulative of other evidence presented to the jury. *See Turner v. United States*, 137 S. Ct. 1885, 1893–95 (2017). And given the strength of the government’s other evidence against Henderson—including photographs of the scene, the surviving victim’s testimony, and expert and lay witnesses who testified about the accident—Henderson has failed to establish materiality, as the third prong of the *Brady/Giglio* test requires. *See Kohring*, 637 F.3d at 901–02.

AFFIRMED.

APPENDIX B

Excerpts of January 10, 2017 Trial Transcript:
A Portion of the Testimony of Zachary J. Freeman

1 evening. There was no moisture. The road surface, itself,
2 was dry.

3 Q. Okay. After you spoke with some of the law enforcement
4 officers, what did you do next?

5 A. Uhm, I next spoke with -- the deceased, Rylin Burns, I
6 spoke with her sister and got -- she informed me of some --

7 MR. JENSEN: Objection.

8 BY MR. DAKE:

9 Q. I'll stop you just right there Trooper Freeman. Just not
10 have any testimony about what other people said to you.

11 A. Sure.

12 Q. Keep the testimony to yourself.

13 A. Okay.

14 Q. Thank you, Trooper Freeman. So, Trooper Freeman, did you
15 observe -- I think you said that you observed two cars at the
16 scene; is that right?

17 A. Yes, sir. The red Impala, uhm, was facing north in the
18 southbound lane, partially in the southbound lane and in the
19 southbound shoulder. Uhm, it was -- as I said, it was facing
20 north. It had severe front end damage. Uhm, so as I observed
21 this, I began documenting the scene, myself, and Trooper
22 Finley. We marked it with paint, and I took digital
23 photographs of the scene.

24 Uhm, but the red Impala had severe front end damage, it
25 was angle damage. It was severe -- much more severe on the

1 driver's side and less severe on the passenger side, so it was
2 angled with much -- with the engine compartment shoved back
3 towards that front driver's-side tire. And on the passenger
4 side, it was -- there was damaged, shoved in a little bit, but
5 not very far.

6 I continued to observe -- make observations with the red
7 Impala and working along the driver's side. That driver --
8 that front driver's side tire was deflated, it was flat. The
9 driver's-side door was open; and as I walked around the door
10 and looked at the interior, I noticed that the steering
11 wheel, the airbag had deployed, there was blood on that
12 airbag.

13 The steering wheel, itself, was no longer round, but it
14 was more of an oval shape. And this always makes me curious,
15 so I looked at the driver's side seatbelt, it was retracted
16 and locked, which indicated that it had not been used. So,
17 that would make sense of why the steering wheel was no longer
18 round, if a body was thrown up against that it would deform.

19 There was -- the windshield, itself, was shattered
20 severely on the driver's side, uhm, and, then, lesser cracks
21 on the passenger side. Working along the driver's side of the
22 vehicle, the gas door was open. But aside from the gas door
23 being open, the rear of that front driver's side door, there
24 was no damage to the driver's side of the vehicle.

25 The rear of the vehicle, there was no damage (shakes head

1 | negatively). And then on the passenger side of the vehicle,
2 | there was no damage, except on, uhm, that front portion of the
3 | engine compartment, where there was some minor damage there.
4 | The front passenger door opened freely.

5 | I did look in and I checked, and the seatbelt, the
6 | passenger seatbelt was also retracted and locked in that
7 | position, indicating that it had not been used -- been in use
8 | at the time of the crash.

9 | I looked at the dash on the passenger side and it was in
10 | good condition, no cracks that I could see. Which, if there
11 | had been someone in the passenger seat and they were
12 | unrestrained, there would be a lot of damage to that side and
13 | to the windshield, and there was not that damage that I could
14 | observe.

15 | Uhm, that was my documentation of the red Impala at that
16 | time.

17 | Q. Trooper Freeman, let's shift, then, to the silver Grand
18 | Prix. Can you tell the jury what you observed about the
19 | silver Grand Prix at this time?

20 | A. Yes, sir. The silver Grand Prix was in the west ditch, and
21 | it was facing -- it was facing west, it was facing away from
22 | the road. Uhm, and if you were to -- I also began to document
23 | that, as well, with paint, and mark the final rest of the
24 | tires and take digital photographs.

25 | And, uhm, walking -- walking to the front of the vehicle

1 and looking down on that driver's side, I noticed that there
2 was severe damage to that driver's side. There was no damage
3 to the front section of the vehicle, but the damage was -- it
4 started just behind that driver's -- that front driver's-side
5 tire.

6 And if you looked along the edge of the vehicle, the
7 damage sustained by that Grand Prix had -- it was pushed in
8 approximately two feet towards the interior of the vehicle.
9 And there was severe damage to that driver's-side door. It
10 was no longer attached at the hinges, as all doors are, but it
11 was attached at locking mechanism. So, it opened from the
12 front, much like a suicide door, as a result of the damage.

13 There was between that door and the frame portions of the
14 red Impala's front bumper still attached there, and the
15 deceased, Ms. Burns, she was lying on her back. She was
16 covered with a blanket, but her feet were still in the
17 driver's compartment of the vehicle. It did not appear as
18 though she had been restrained. The driver's-side airbag had
19 also deployed, and that steering wheel, itself, was also
20 deformed and bent upwards.

21 Continuing along the driver's side, the B pillar, which
22 is right behind -- it's right in between the front and the
23 rear driver's-side door, we call that the B pillar, that was
24 also crushed in approximately two feet. Severe damage also
25 sustained to that rear driver's-side door. Uhm, and, then,

1 the tire was missing from the rear of the driver's side of the
2 Impala -- or, excuse me, of the Grand Prix.

3 Working around the vehicle towards the trunk, uhm, the
4 trunk would no longer close correctly, it would not shut
5 because of the damage sustained, uhm, to the vehicle. And
6 then walking around on the passenger side, uhm, there was no
7 damage (shakes head negatively) that I could see to that
8 passenger side of the Grand Prix.

9 In the rear bench seat of the Grand Prix, the deceased,
10 Leandra Thomas, was lying face down, with her head on the
11 passenger side and her feet with her knees on the driver's
12 side, and her legs were bent up at the knees resting against
13 the door. Uhm, and she also appeared to have not been
14 restrained.

15 Uhm, (nods head affirmatively) yes, sir, that's what I
16 observed.

17 Q. Did you observe anything about the passenger-side front of
18 the Grand Prix?

19 A. Yes. The airbags had also been deployed on the
20 passenger-side front.

21 Q. And what did that tell you about the front passenger
22 compartment of the Grand Prix?

23 A. Uhm, most of the time, those vehicles will not -- if there
24 was a passenger there who -- yeah, most of the time, there is
25 sensors in those vehicles; and if those sensors are not

1 triggered, the airbags will not deploy. So, there was a
2 passenger there.

3 Q. Trooper Freeman, do you recall if you checked the seatbelt
4 on the front passenger side of the Grand Prix?

5 A. I do not recall at this point.

6 Q. So, based on your initial review of the two vehicles, what
7 was your assumption about what had occurred at this point?

8 A. Uhm, looking at the -- matching the damage to the vehicles,
9 uhm, with the severe front-end damage to the Impala, and then
10 the damage sustained to that driver's side, it was an angled
11 collision, it was not -- it was not a head-on.

12 Uhm, and, as a crash investigator, I began to look -- to
13 wonder why it was an angle collision, why the vehicle had been
14 off-centered enough to make that more of an angled, almost a
15 t-boned collision. So, with -- also with the damage to the
16 Grand Prix, I could see red paint marks, red paint transfer
17 along just behind that driver's-side tire, so that's where I
18 determined that the Impala had first struck the Grand Prix
19 right on the driver's-side tire. So, it was more of an
20 angled, almost t-bone collision.

21 Q. And as part of your investigation, did you then look for
22 marks in the road indicating where the vehicles had
23 traveled?

24 A. Yes, sir.

25 Q. Can you describe that process for the jury and what you

1 did?

2 A. Yes, sir. Most collisions will leave evidence on the
3 blacktop or concrete, whatever surface is being used. In this
4 instance, the roadway was a -- it was asphalt, chip sealed,
5 and, uhm, it will leave black tire marks when the vehicle
6 applies the brakes hard, uhm, and enters a skid or a yaw.

7 I was -- what I try to do is take photographs before and
8 after I put down paint to mark, so I do that. I photograph --
9 photograph as I go, and I use paint to mark -- mark the skid
10 marks. And it helps preserve it for a longer period of time,
11 it helps to show up in the pictures a little more easily.

12 And, so, that's what I did, I began -- I began painting
13 and observing the final rest of the vehicles and matching up
14 the tire marks with where the vehicle had been. And, so, as a
15 result of that, I determined that the Grand Prix had been
16 traveling southbound on Laredo Road, and was traveling further
17 in towards the reservation, because we could match up with the
18 tire marks where she had been. (Nods head affirmatively)

19 With those tire marks, uhm, they veered off to the right,
20 and they entered -- they became -- from skid marks, it became
21 -- they became yaw marks, which means the vehicle had entered
22 a rotation. So, the driver had observed some kind of threat
23 in her lane, she had stepped on the brakes and began steering
24 to the right, and the vehicle entered a rotation. And this
25 would have been a clockwise rotation at first.

1 Q. Trooper Freeman, before we go to that, we are going to get
2 to that aspect of things here in just a second, when you are
3 looking for skid marks, are you searching the entire roadway
4 for skid marks?

5 A. We search the -- yeah, the area around the crash. Uhm,
6 when we are driving up, I drove up from the north, and I
7 observed, as I parked about 50 yards off, I saw where these
8 skid marks began. And as a result of my investigation, I
9 walked on the other side to try to find the skid marks that
10 belong to the other vehicle, as well, and I was -- there were
11 no skid marks left by the Impala.

12 Q. So, as part of your investigation, you searched both the
13 north side of the crash and the south side of the crash?

14 A. Yes, sir.

15 Q. And is it correct that you searched both lanes for skid
16 marks?

17 A. Yes, sir.

18 Q. And why are you doing that?

19 A. Uhm, we will try to make a complete investigation, trying
20 to see if there was some marks of evasion by this red Impala,
21 whether being on the brakes, acceleration marks, or steering
22 marks. Just trying to add more pieces to the puzzle, is why
23 we do that. But in this case, as I said, there were none.

24 Q. And you walked back southbound away from the vehicles; is
25 that accurate, Trooper Freeman?

1 A. Yes, sir.

2 Q. And when you were searching the scene, I know you said that
3 you arrived there at night, did you conduct your investigation
4 during the day?

5 A. It bled over into the day. I arrived at 5:15, which was
6 dark, and, uhm, as I continued, it -- the sun rose and it
7 became daylight. And with daylight, uhm, it often sheds a
8 little bit more light, so more skid marks appeared, at which
9 time I painted those and photographed those, as well. But not
10 just the dark, it was also daytime during my investigation.

11 Q. And you searched the scene for skid marks during the
12 daylight to try to find the marks?

13 A. Yes, sir.

14 Q. Let's talk about just in general the north side of where
15 the crash was located, on the northbound side of where the
16 crash was located. Did you find skid marks in that area?

17 A. Yes, sir, from the north side.

18 Q. Okay. And what direction were those skid marks coming?

19 A. They were -- they started in -- so the north side would
20 have been the Grand Prix's lane, and it started from within
21 its own lane. And it continued -- as it continued south, they
22 steered off towards the right, or toward the shoulder, and
23 entered a rotation, entered a yaw at that point.

24 Q. And then just in general, on the south side, then, of the
25 crash area, what were you able to identify as far as marks

1 | were concerned?

2 | A. From the south side, prior to the collision, I was not able
3 | (shakes head negatively) to find any marks. At the point
4 | where I determined the collision had taken place, from that
5 | point to the final rest of the Impala, there were skid marks.
6 | Uhm, but prior to where I determined the collision to take
7 | place, there were no skid marks.

8 | Q. And just based off of, then, the first pieces of your
9 | investigation and review of the cars and review of the skid
10 | marks, what were you able to determine about the crash?

11 | A. I determined that the driver of the Pontiac, Ms. Burns, had
12 | been attempting to avoid a collision, had been attempting to
13 | -- she saw a threat in her lane and she tried to avoid it.
14 | And from no driving input that I could see from the Impala, I
15 | could not say the same for the driver of the Impala.

16 | Q. All right. Let's look at some of the photographs from the
17 | scene and have you describe some of the things that you were
18 | marking.

19 | MR. DAKE: Could you please show Government's
20 | Exhibit 19, please?

21 | **BY MR. DAKE:**

22 | Q. And, Trooper Freeman, just provide in general what we are
23 | looking at in this photograph. And, then, this is a
24 | touchscreen. And you either can use your finger, or there is
25 | a stylus pen up there, as well, for the touchscreen that you

APPENDIX C:

Excerpts of January 10, 2017 Trial Transcript:
A Portion of the Testimony of Tyrell Henderson

1 case.

2 Mr. Jensen.

3 MR. JENSEN: Judge, I would call my client to the
4 stand.

5 THE COURT: Okay.

6 CLERK OF COURT: Please raise your right hand.

7

8 (The defendant was duly sworn.)

9

10 THE DEFENDANT: I do.

11 CLERK OF COURT: Thank you.

12 THE COURT: Mr. Henderson, would you please state
13 your full name and spell your last name.

14 THE DEFENDANT: Tyrell Henderson,
15 H-E-N-D-E-R-S-O-N.

16 THE COURT: Go ahead, Mr. Jensen.

17

18 **DIRECT EXAMINATION**

19 **BY MR. JENSEN:**

20 Q. Mr. Henderson, I'm going to take you back to the morning of
21 the accident. Do you remember back then?

22 A. (Nods head affirmatively) Yes.

23 Q. Okay. Do you remember approximately 3:30 in the morning?

24 A. Yes.

25 Q. And where were you at that time?

1 A. At 3:30, I was at my friend's house.

2 Q. Okay. Who is your friend?

3 A. Shawna.

4 Q. Okay. Is that the person you borrowed the car from?

5 A. Yes.

6 Q. Okay. So, the red Impala was not actually your vehicle.

7 A. No. (Shakes head negatively)

8 Q. All right. You borrowed the vehicle to do what?

9 A. I was going to go pick up my girlfriend and go home.

10 Q. Okay. And where is home?

11 A. About 500 yards from where the accident actually
12 happened.

13 Q. Okay. And Shawna's house, how far away is that from your
14 home?

15 A. Maybe, two-and-a-half, three miles.

16 Q. Okay. So, were you heading to pick up your girlfriend?

17 A. Yes.

18 Q. Okay. And where does she live?

19 A. On Lower Box Elder Road, so maybe three or four miles from
20 where the accident happened.

21 Q. Okay. Is that where you were heading?

22 A. Yes.

23 Q. Okay. Do you remember what that night was like?

24 A. Yes.

25 Q. What was the weather was?

1 A. Yes. It was cold, but it was a clear -- a clear night, but
2 it was really dark, you know.

3 Q. Okay. Dark?

4 A. Yes.

5 Q. Okay. And do you recall driving along that stretch of
6 Laredo Road?

7 A. Yes, I do.

8 Q. All right. And do you recall how fast you were going?

9 A. (Pause) Coming down the hill (indicating), I mean, I
10 remember looking at the speedometer and it was at 45, and it
11 was going, you know, but I don't remember speeding.

12 Q. Okay. All right. But you were going down a little bit of
13 an incline at that point?

14 A. Yes.

15 Q. All right. Did you see another car on the -- coming
16 towards you?

17 A. Yes. Uhm, as I'm coming down the hill (indicating), I see
18 a car, maybe -- I don't know how far, but we were coming
19 around the turn and it appears that they are coming towards
20 me.

21 Q. Okay.

22 MR. JENSEN: Could we see the Government's Exhibit
23 Number 24, please?

24 BY MR. JENSEN:

25 Q. Is that the hill that you saw that car coming down?

1 A. They are coming right here (indicating).

2 Q. Okay. Would you mark it on there? I think you can touch
3 it.

4 A. (Indicating)

5 Q. All right. They were coming down through there. You saw
6 them up ahead; is that right?

7 A. Yes.

8 Q. Were there any other cars at that point on the road that
9 you had noticed?

10 A. I didn't.

11 Q. Okay. And were there any other lights along that road that
12 you noticed?

13 A. No.

14 Q. Okay. So, you saw that, and it appeared, at that point,
15 when they are coming down the hill on that turn, that they
16 were in your lane?

17 A. Yes.

18 Q. Okay. Well, what did you do at that point?

19 A. I honked my horn and I swerved, I kind of panicked. You
20 know, I don't know. I got scared.

21 Q. Okay. And you swerved in which direction?

22 A. To my left.

23 Q. Why did you swerve in that direction and not to the
24 right?

25 A. (Pause) I don't know. There was a fence on the right side

1 of the road. And they are coming towards me, and I --

2 Q. Okay. Did you hit your brake?

3 A. No.

4 Q. Why didn't you hit your brake?

5 A. I didn't want to -- I don't know. I wasn't -- I didn't
6 want to stop and have them run into me or anything like that,
7 you know.

8 Q. Okay.

9 A. I seen them coming towards me. I don't know what was going
10 on in their minds, you know, or what they see.

11 Q. Okay. Did you accelerate to avoid them?

12 A. No, I didn't. (Shakes head negatively)

13 Q. Okay. What other actions did you take at that point?

14 A. I remember -- I remember seeing them like this
15 (indicating), kind of at a skid.

16 Q. Okay.

17 A. Maybe a second or two prior. I mean, I realized there was
18 going to be an accident, you know. I tried to turn back, and
19 then we hit, I collided with them (indicating).

20 Q. You tried to turn back to the right?

21 A. Yeah, tried, you know, and collided like that.

22 Q. You t-boned them.

23 A. Like, yeah, sideswiped, t-boned, yeah.

24 Q. What's the next thing you remember from that point, sir?

25 A. Waking up in the hospital the next day.

1 Q. Okay. And what's the first thing that you remember from
2 that day?

3 A. Them telling me what happened.

4 Q. Okay. And how did you react to that?

5 A. (Shakes head negatively) I thought it was a nightmare.

6 Q. Okay. Did you know the two deceased?

7 A. I didn't know Leandra, but I knew Rylin.

8 Q. Okay. All right. And is there anything else that you
9 remember from that accident that evening?

10 A. (shakes head negatively) That's the -- the reason why I
11 turned was I -- I seen a car coming towards me.

12 Q. Okay. And you thought it was in your lane of travel.

13 A. Yes.

14 Q. And you were trying to avoid it.

15 A. Yes.

16 MR. JENSEN: Okay. All right. No other
17 questions.

18 THE COURT: Cross-examination, Mr. Starnes.

19 MR. STARNES: Yes, Your Honor. Thank you.
20

21 **CROSS-EXAMINATION**

22 **BY MR. STARNES:**

23 Q. Good afternoon, Mr. Henderson.

24 A. Good afternoon.

25 Q. Give me just a moment to get settled here.

1 | they -- on which side of the road the crash happened or
2 | anything, or the -- you know, the -- I don't know the speeds
3 | of the vehicles or anything like that, what I'm disputing is
4 | why I turned into their lane.

5 | Q. Okay. So your testimony is that you saw a vehicle in your
6 | lane.

7 | A. Yes.

8 | Q. And so you swerved into the oncoming lane.

9 | A. Yes.

10 | Q. And that is in contradiction with the testimony that we
11 | heard from other witnesses in this case.

12 | A. Yes.

13 | Q. So, the ladies and gentlemen of the jury are now in the
14 | position of believing you or all of the other evidence
15 | presented.

16 | A. Yes.

17 | Q. And you would agree that you have a lot riding on that
18 | decision, don't you?

19 | A. I think we both do, yes.

20 | Q. And you're the only one that has a prior federal
21 | conviction.

22 | A. Yes.

23 | MR. STARNES: Thank you. No further questions.

24 | THE COURT: Redirect, Mr. Jensen?

25 | MR. JENSEN: No, I'm fine, Judge.