

APPENDIX

APPENDIX

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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

April 22, 2010

Plaintiff-Appellee,

v

ANDREW JOHN MILLER,

No. 286580
Kalamazoo Circuit Court
LC No. 2007-000606-FC

Defendant-Appellant.

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of felony murder, MCL 750.316(1)(b); perjury, MCL 767A.9(1)(b); and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment for the felony murder convictions, 127 months to 40 years' imprisonment for the perjury conviction, and 210 months to 40 years' imprisonment for the home invasion conviction. We affirm.

During the preliminary examination codefendant Angela McConnell testified pursuant to a plea agreement and implicated defendant in the August 2000 home invasion and murders of Marinus and Sary Polderman and their daughter Anna Lewis. Before trial, McConnell withdrew from her plea agreement and sent a letter to the trial court recanting her preliminary examination testimony. McConnell invoked her Fifth Amendment right and refused to testify at defendant's trial. At trial, the trial court allowed the prosecutor to introduce McConnell's preliminary examination testimony. On appeal, defendant first argues that the trial court violated his rights under the Confrontation Clause when it admitted McConnell's preliminary examination testimony. Whether admission of evidence constitutes a violation of a defendant's Confrontation Clause rights involves a question of constitutional law that we review *de novo*. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Pursuant to the Confrontation Clause of the Sixth Amendment of the United States Constitution, an accused in a criminal prosecution is guaranteed the right to be confronted with witnesses against him. US Const Am, VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). This right applies in both state and federal prosecutions. *Id*. The Confrontation Clause excludes "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id*. at 53-54. "[T]he Confrontation Clause guarantees an *opportunity* for

effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985).

In this case, the crux of defendant's argument involves whether he had an adequate opportunity to cross-examine McConnell at the preliminary examination. Defendant asserts that his defense counsel did not have a proper opportunity to cross-examine McConnell because, after the preliminary examination, she recanted her testimony and wrote a letter wherein she stated that her prior testimony was fabricated. Defendant contends that he was not afforded the opportunity to cross-examine McConnell regarding the contents of her later letter. A review of the record indicates that defense counsel effectively cross-examined McConnell on all of the relevant aspects of the case and attacked McConnell's credibility at the preliminary examination. Then, at trial, defense counsel impeached McConnell by introducing her letter. No further questioning regarding the contents of the letter was necessary to impeach McConnell. Defendant fails to show how any cross-examination concerning the letter would not have been duplicative of the contents of the letter itself. Because defendant had a prior opportunity to effectively cross-examine McConnell, the trial court did not violate defendant's Confrontation Clause rights when it admitted her preliminary examination testimony. *Crawford*, 541 US at 53-54; *Fensterer*, 474 US at 20.

Next, defendant argues that the trial court violated his constitutional rights when it admitted statements he made to police. Specifically, defendant argues that the police violated his due process rights when they waited two days after a warrant was issued on an unrelated weapons charge to arrest him. Before and after the warrant was issued, defendant voluntarily appeared at the police department and made incriminating statements. Defendant argues that the statements were involuntary and obtained in violation of his due process rights.

In reviewing a trial court's decision whether to suppress a confession, we review *de novo* the trial court's conclusions of law and application of law to the facts. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). A trial court's factual findings are reviewed for clear error. *Id.* A factual finding is clearly erroneous where, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *Id.* at 564. Review of a trial court's decision whether a statement was involuntary requires this Court to conduct an independent analysis of the record to determine whether the trial court's ruling was clearly erroneous. *People v Cipriano*, 431 Mich 315, 339; 429 NW2d 781 (1988). We give "deference to the trial court's findings, especially where the demeanor of the witnesses is important, as where credibility is a major factor." *Id.* (quotations omitted). And, we will reverse a trial court's finding on the voluntary nature of a defendant's statements only if it we are left with a "definite and firm conviction that a mistake has been made." *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

First, we conclude that law enforcement did not deprive defendant of his due process rights when defendant was arrested on the unrelated weapons charge two days after the warrant was issued. "Michigan applies a balancing test to determine if a prearrest delay requires reversing a defendant's conviction because the state may have an interest in delaying a prosecution that conflicts with a defendant's interest in a prompt adjudication of the case." *People v Cain*, 238 Mich App 95, 108-109; 605 NW2d 28 (1999). A defendant must first show that the prearrest delay resulted in prejudice. *Id.* Defendant must show "actual and substantial"

prejudice that “meaningfully impaired his ability to defend the charge and, as a result, the disposition of the criminal proceeding was likely affected.” *Id.* at 110 (quotations omitted). Here, defendant has failed to show that any delay in relation to his arrest on the unrelated weapons charge amounted to “actual and substantial” prejudice in this proceeding. *Cain*, 238 Mich App at 110. Defendant’s statements to the contrary are self-serving and speculative.

Second, we conclude that the trial court did not clearly err in ruling that defendant’s statements to the police were voluntary. *Cipriano*, 431 Mich at 339. An involuntary statement made by a defendant introduced in a criminal trial for any purpose violates that defendant’s due process rights. *Id.* at 331. The determination whether a statement was voluntary involves considering the totality of all the surrounding circumstances, and determining whether the confession is “the product of an essentially free and unconstrained choice by its maker” or whether the accused’s “will has been overborne and his capacity for self determination critically impaired.” *Id.* at 333-334, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). In making this determination a trial court should consider factors including:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

The presence or absence of one of these factors is not dispositive. *Id.* Instead, whether a statement is voluntary depends on the totality of the circumstances surrounding the statement. *Id.* Applying the relevant factors set forth by the Court in *Cipriano*, 431 Mich at 334, and reviewing the totality of the circumstances in the instant case, we conclude that the trial court properly found that defendant’s statements to the police were voluntary.

The record indicates that at the time defendant made the incriminating statements he was 31 years old, had a high-school diploma, and had prior encounters with police. The police interviews took place over a three-day period and the longest interview session lasted nine hours. Defendant voluntarily appeared at all three interviews before he was arrested. In fact, he initiated two of the interviews. He was not in custody, he was permitted to take breaks and leave whenever he wanted. Police provided defendant with food, drinks, cigarettes, access to a restroom, and anything else he wanted. Defendant was not threatened or promised anything and no force was used against him. Defendant was not under the influence of drugs, alcohol, or any other intoxicants, and he was not sick or in need of medical attention. Although defendant stated that his hands were shaking because he recently quit drinking alcohol, defendant also stated that the symptom was not severe, and the interviewing officers testified that the symptom did not affect defendant’s ability to make decisions. In sum, the trial court did not violate defendant’s constitutional rights when it admitted statements he made to police. *Cipriano*, 431 Mich at 339.

Next, defendant argues that there was insufficient evidence to convict him of the charged offenses. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, this Court must construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). On review, we will not interfere with the trier of fact's determination with respect to the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

With respect to Count 1, Count 2 and Count 3, defendant was charged and convicted of felony murder with the predicate felony being first-degree home invasion (Count 5). The elements of felony murder with the applicable predicate felony of first-degree home invasion are:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of [first-degree home invasion]. [*People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009), citing MCL 750.316(1)(b).]

The prosecutor was required to prove the following elements to convict defendant of first-degree home invasion: 1) defendant entered a dwelling without permission with intent to commit larceny in the dwelling, 2) that at some time while defendant was entering, present in, or exiting the dwelling, committed larceny, 3) at some time while defendant was entering, present in, or exiting the dwelling another person was lawfully present in the dwelling. MCL 750.110a(2).

The jury was given an instruction on the elements necessary to convict defendant under a direct theory or alternatively as an aider and abettor. "A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001).

To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*Id.* (quotation omitted).]

The jury was also given an instruction on attempt for purposes of home invasion. An "attempt" consists of "(1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

We find that there was sufficient evidence to convict defendant of three counts of felony murder and the predicate felony first-degree home invasion. A codefendant, Brandy Miller, testified that she, defendant and three other codefendants planned to gain access to the Polderman home to take money. Brandy testified that defendant and the other men beat one of the victims and that defendant slashed a second victim's throat. McConnell testified at the preliminary examination that defendant stabbed a third victim in the chest and dragged her away. Brandy testified that defendant brought items out of the home and placed them into a vehicle and that defendant was covered in blood when he came out of the home. Evidence showed that defendant burned the bloody clothing, the seat cover to his pickup truck, and the floor mats from the pickup truck to conceal his involvement in the murders. Defendant admitted to Detective Jim Mallery that he helped clean up after the murders and acknowledged that he entered the Polderman home that day. Defendant explained certain details of the crime to Mallery that would allow a rational juror to conclude that he participated in the home invasion and murders. Nathan McDaniel testified that he was in jail with defendant and defendant told him he was ashamed of why he was in jail. Defendant told McDaniel that he and the four codefendants went to the Polderman home with intent to burglarize it and that during the burglary he and the others beat, stabbed, and killed all three elderly persons at the home. The prosecutor introduced a recorded telephone call between defendant and a codefendant wherein the two men discuss a third codefendant telling "secrets that shouldn't be told." Defendant also told McDaniel that he took a .22-caliber rifle from the Polderman home and eventually threw it into a river behind his father's duplex in Galesburg. Evidence showed that a .22-caliber rifle was missing from the home, and Mallery testified that, near the time of the murders, defendant's father owned a riverfront duplex in Galesburg. In sum, on this record we conclude that a rational jury could convict defendant of three counts of felony murder and one count of first-degree home invasion beyond a reasonable doubt. *Johnson*, 460 Mich at 722-723.

Similarly, we conclude that there was sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendant was guilty of perjury. *Id.* MCL 767A.9 governs, in part, a prosecuting attorney's issuance of an investigative subpoena and provides in relevant part as follows:

- (1) A person who makes a false statement under oath in an examination conducted under this chapter knowing the statement is false is guilty of perjury punishable as follows:

* * *

- (b) If the false statement was made during the investigation of a crime punishable by imprisonment for life, by imprisonment for life or for any term of years.

In this case, a detective testified that defendant was summoned for two investigative subpoena hearings during the investigation of the Polderman-Lewis murders and that during the hearings defendant denied all involvement in the murders. He later admitted involvement, and the evidence overwhelmingly confirmed his involvement. In addition, during the second hearing defendant acknowledged that he lied about his pickup truck at the first hearing. This evidence was sufficient to support the jury finding defendant guilty of perjury beyond a reasonable doubt.

Next, defendant argues that the trial court erred in excluding evidence that McConnell withdrew from her plea agreement. The trial court excluded evidence of the withdrawn plea agreement on relevance grounds and because it found the evidence was more prejudicial than probative and because it would confuse the jury. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, preliminary questions of law such as whether a rule of evidence precludes admission of evidence are reviewed *de novo*. *Id.* With respect to a preserved evidentiary error, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

After reviewing the record, we conclude that, regardless of whether the trial court erroneously excluded evidence of the plea agreement, defendant cannot show that any error in this respect affected the outcome of the lower court proceedings. *Lukity*, 460 Mich at 495. The jury could have easily surmised that when McConnell failed to appear and testify at trial she had withdrawn from her plea agreement. Additionally, there was significant other evidence introduced against defendant.

Finally, defendant argues that the trial court erred in allowing the prosecutor to introduce a recorded telephone conversation that took place four years after the murders between defendant and a codefendant. During the telephone conversation, defendant threatened to kill a third codefendant, Benjamin Platt, for telling "secrets that shouldn't be told." The trial court admitted the recording under MRE 801(d)(2) as a party admission. On appeal, defendant contends that the recording was not an "admission" because he never explicitly referred to the Polderman murders during the telephone call. Defendant also argues that the recording was inadmissible other-acts evidence under MRE 404(b) because he made threats and referred to "marijuana and murder" during the telephone call. Finally, defendant contends that the probative value of the recording was substantially outweighed by the danger of unfair prejudice. We review a trial court's decision whether to admit evidence for an abuse of discretion. *Katt*, 468 Mich at 278.

First, the recorded conversation was admissible under MRE 801(d). Pursuant to MRE 801(d)(2) an "admission by a party-opponent" is not hearsay and is admissible at trial if "[f]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity...." Under this rule, "[a] party's own statement when offered against him is not hearsay." *People v Bracey*, 124 Mich App 401, 403; 335 NW2d 49 (1983). However, the statement must also be relevant. *Id.* In this case, defendant made statements during the telephone conversation and those statements were offered against him at trial. Therefore, the statements were not hearsay pursuant to MRE 801(d)(2). *Id.* The statements were also relevant. Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, a rational juror could infer that defendant was referencing the Polderman-Lewis murders when he told the codefendant that "Ben" was "telling secrets that shouldn't be told," indicated his anger about that fact, and referenced a television show called "Marijuana and Murder" and then laughed. Brandy testified at trial that she initially lied to police when she told them that she brought her boyfriend near the Polderman's residence on the day of the murders to look for marijuana in the fields. Evidence at trial implicated defendant, the codefendant, and Ben Platt in the home invasion and triple homicide. In addition,

Brandy and McConnell testified that the five codefendants conspired to keep secret their involvement in the crime and to try to frame Brandy's boyfriend for the murders. A reasonable juror could infer that defendant's statements related to the group's effort to conceal their involvement in the murders and were therefore relevant to show consciousness of guilt. See *People v Cutchall*, 200 Mich App 396, 400-401, 404-405; 504 NW2d 666 (1993) (conduct or statements by a defendant to conceal the commission of a crime are relevant to show consciousness of guilt).

Second, the recorded conversation was not inadmissible other-acts evidence under MRE 404(b). Defendant's threats and other statements during the telephone call did not amount to other-acts evidence because they were statements and not acts. See *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988) ("MRE 404(b) does not apply to a defendant's prior statements of intent" because a statement is not a prior act); *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989) ("a prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act").

Third, and finally, the probative value of the recording was not "substantially outweighed by the danger of unfair prejudice," and thus, it was not inadmissible under MRE 403. MRE 403 provides in relevant part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Evidence is not unfairly prejudicial simply because it is damaging to a defendant's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Instead, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case the recording was not only "marginally probative" because it showed that defendant and other people involved in the crime were engaged in a deliberate effort to conceal their participation in the murders. Additionally, there was little danger that the jury gave the recording undue or preemptive weight. *Crawford*, 458 Mich at 398. As discussed, *supra*, there was a significant amount of other evidence introduced by the prosecution including the testimonies of Brandy, McConnell, McDaniel and Mallery.

In sum, the trial court did not abuse its discretion in ruling that the audio recording was admissible at trial. *Katt*, 468 Mich at 278.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDREW JOHN MILLER,

Petitioner,

Case No. 1:12-cv-117

v.

HON. ROBERT HOLMES BELL

DUNCAN MACLAREN,

Respondent.

MEMORANDUM OPINION AND ORDER
ADOPTING THE REPORT AND RECOMMENDATION

This is a habeas corpus petition brought by a state prisoner under 28 U.S.C. § 2244. The matter was referred to Magistrate Judge Phillip Green, who issued a Report and Recommendation (“R&R”) on November 11, 2016, recommending that this Court deny the petition on its merits. (ECF No. 27.) The matter is before the Court on Petitioner’s objections to the R&R. (ECF No. 28.)

This Court is required to make a *de novo* review upon the record of those portions of the R&R to which specific objections have been made, and may accept, reject, or modify any or all of the magistrate judge’s findings or recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see also Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995) (“[A] general objection to a magistrate’s report, which fails to specify the issues of contention, does not satisfy the requirement that an objection be filed. The objections must be clear enough to

enable the district court to discern those issues that are dispositive and contentious.”).

Petitioner objects to the Magistrate Judge’s conclusion that his petition is without merit. Petitioner raises the same arguments, practically word for word, that he already set forth in his petition. The Court has conducted a *de novo* review of the record, and finds that the R&R accurately recites the facts and correctly applies pertinent law. Thus, the Court agrees with and adopts the Magistrate Judge’s analysis. Accordingly,

IT IS HEREBY ORDERED that Petitioner’s objections to the R&R (ECF No. 28) are **OVERRULED**.

IT IS FURTHER ORDERED that the R&R (ECF No. 27) is **APPROVED** and **ADOPTED** as the opinion of the Court.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c). Reasonable jurists would not disagree with the Court’s conclusion that Petitioner’s claims are meritless. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Dated: December 19, 2016

/s/ Robert Holmes Bell

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

NOT RECOMMENDED FOR PUBLICATION

No. 17-1061

UNITED STATES COURTS OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW JOHN MILLER,

)

Petitioner-Appellant,

)

v.

)

DUNCAN MACLAREN, Warden,

)

Respondent-Appellee.

)

)

)

FILED

Jun 12, 2018

DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF MICHIGAN

BEFORE: SUHRHEINRICH, GIBBONS, and KETHLEDGE, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. This case arises out of the August 31, 2000 murders of Marinus and Sary Polderman, aged 93 and 91, respectively, and their daughter, Anna Lewis, aged 63. Petitioner Andrew John Miller was convicted in Michigan state court of felony murder, perjury, and first-degree home invasion for his involvement in the murders. He appealed his convictions, raising, among other arguments, the claim that his Confrontation Clause rights were violated when an unavailable witness's preliminary examination transcript was read to the jury at trial. The state court affirmed his convictions and he filed a petition for a writ of habeas corpus, which was denied by the district court. Because the Michigan state court's decision was not contrary to, or an unreasonable application of, clearly established federal law, we affirm the district court's judgment.

I.

A.

The Poldermans and Lewis were killed in a home invasion perpetrated by Andrew John Miller (the petitioner), his sister Brandy Miller (“Brandy,” for ease of identification), Jerome Williams, Ben Platt, and Angela McConnell. Planning to steal money from the Poldermans, the group took Miller’s truck and his mother-in-law’s Lincoln to the residence, where Brandy and McConnell pretended to have car trouble in order to gain entry into the home. The men entered the residence shortly thereafter without permission. The attempted robbery devolved into violence when Mr. Polderman tried to get the group to leave the house. Miller and Williams started beating him and dragged him into the basement, while Brandy and McConnell struggled with Mrs. Polderman, who fell down the basement stairs. Miller then cut Mrs. Polderman’s throat. Anna Lewis, who lived nearby and had arrived to drop off some groceries, came into the house, saw blood in the kitchen and started calling for her parents. McConnell hit her on the head several times with a tire iron, and Miller stabbed Lewis in the chest. The group left the Polderman residence, took showers at Miller’s home, and burned their clothes. The seat cover in Miller’s truck was also removed and burned.

After almost seven years, the police developed leads that finally led them to Miller, Brandy, Williams, Platt, and McConnell. During the investigation, Miller was summoned for two investigative subpoenas and gave statements to police on March 13, 14, and 15, 2007. He initially admitted that he had been at the Poldermans’ house on the day of the murders, that the women had pretended to have car trouble to gain access, and that he had gone back to the house after the murders with Williams and Platt to wipe fingerprints and destroy evidence. At the end of his final

interview, though, Miller changed his story and denied that he had ever been at the Poldermans' house.

Miller and the four other group members were charged with the murders in 2007. Brandy and McConnell both entered into plea agreements in exchange for their cooperation, but McConnell withdrew her plea before Miller's trial. Before withdrawing her plea, she had testified under oath at Miller's preliminary hearing, where she was subjected to cross-examination.

B.

Miller's trial began on May 14, 2008. McConnell, who would be going to trial herself after the revocation of her plea, invoked her Fifth Amendment right against self-incrimination. The court declared her unavailable, so the prosecution sought to introduce her preliminary hearing transcript at trial. Miller moved to suppress the transcript, arguing that admitting it would violate his Confrontation Clause rights because, although he had been able to cross-examine McConnell at the preliminary hearing, he did not have the opportunity to cross-examine her about the withdrawal of her plea deal and her contention that her previous statements were lies. The court denied Miller's motion, finding that he had an adequate opportunity to cross-examine McConnell during the preliminary hearing. However, it agreed to allow the defense to read McConnell's letter recanting her testimony for impeachment purposes. It refused to allow the defense to introduce evidence of McConnell's formal plea withdrawal because it found that such evidence would be more unfairly prejudicial than probative under Rule 403 and was not relevant to McConnell's character for truthfulness. *See* Mich. R. Evid. 403.

At trial, McConnell's preliminary hearing testimony was read to the jury in the following manner: the prosecutor and defense counsel read the questions that they had asked McConnell, and another person read the answers that she had given. Miller's attorney also read the questions

that another defendant's attorney had asked her on cross-examination during the preliminary hearing. McConnell's letter of recantation was also read to the jury, although certain statements were redacted to exclude information about her formal plea withdrawal. The version read to the jury still included many statements that McConnell fabricated her testimony, such as: "I have lied. I went with the stories that I have been told"; "I was spoon fed these stories"; and "I have lied about everything that I have testified to." CA6 R. 16, Appendix: Jury Trial Vol. 5 Excerpt, at 116. The letter read to the jury also claimed that McConnell was told by her attorney that she should plead guilty because she "would not be able to beat the case," and that she "was scared and told that [she] would never see [her] kids or family outside of bars." *Id.* at 117.

In accordance with her plea agreement, Brandy Miller testified at her brother's trial, and her testimony implicated Miller's direct involvement in the murders. She stated that she was in the Polderman house with Miller, Williams, Platt, and McConnell. She testified that she saw Miller and Williams forcing Mr. Polderman from the back bedroom towards the front of the house, and that Mr. Polderman had a bleeding cut on his forehead. She stated that after Mr. Polderman tried to reach for the phone, he was "attacked again in the kitchen" by Miller and Williams, who then dragged him into the basement, where she later saw him on the ground and "there was a lot of blood." CA6 R. 16, Appendix: Jury Trial Vol. 3 Excerpt, at 103–04. She also testified that Miller cut Mrs. Polderman's throat after she fell down the stairs.

The jury heard and saw excerpts from the recordings of the March 2007 interviews between Miller and the police. Additionally, another witness, Nathan McDaniel, testified that he had been an inmate at the Kalamazoo County Jail with Miller, and Miller confessed to him that he was involved in the murders and that he took a .22-caliber rifle from the home. *People v. Miller*, No. 286580, 2010 WL 1629084, at *4 (Mich. Ct. App. 2010).

On May 22, 2008, the jury convicted Miller of three counts of felony murder, one count of perjury, and one count of first-degree home invasion. He was sentenced to life in prison without the possibility of parole. Miller appealed his convictions and raised several issues, including the argument that the admission of McConnell's statement violated his Confrontation Clause rights. *Miller*, 2010 WL 1629084, at *1. The Michigan Court of Appeals affirmed his convictions, holding that “[a] review of the record indicates that defense counsel effectively cross-examined McConnell on all of the relevant aspects of the case and attacked McConnell's credibility at the preliminary examination.” *Id.* at *1, *7. Miller also was able to impeach McConnell at trial by reading her letter recanting her testimony into evidence, and he “fail[ed] to show how any cross-examination concerning the letter would not have been duplicative of the contents of the letter itself.” *Id.* at *1. Miller then filed for leave to appeal to the Michigan Supreme Court, which denied his petition. *People v. Miller*, 794 N.W.2d 35, 36 (Mich. 2011).

C.

In February 2012, Miller filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The magistrate judge recommended denying the petition, and the district court adopted the report in full. The district court also denied a certificate of appealability. This court subsequently granted a certificate of appealability with respect to his Confrontation Clause claim.

II.

This court “review[s] the district court's legal conclusions in a habeas proceeding de novo and its factual findings under the clear-error standard.” *Davis v. Lafler*, 658 F.3d 525, 530 (6th

Cir. 2011). Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), we may not grant a state prisoner habeas relief unless the state court’s determination:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). AEDPA presents a very difficult standard for habeas petitioners to meet. *See, e.g., Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (“AEDPA’s standard is intentionally difficult to meet.” (internal quotation marks and citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 19 (2013) (“AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.”). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

III.

Miller argues that the admission of McConnell’s preliminary examination transcript entitles him to habeas relief because it is clearly established federal law that a preliminary examination never affords a defendant the opportunity for adequate cross examination, or, in the alternative, under the specific facts of his case he was not afforded an adequate opportunity for cross examination, and the state court’s determination was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d). Miller fails to meet AEDPA’s high bar, since he cannot show that there is clearly established federal law supporting his arguments. Furthermore, even if there was error, it was harmless because Miller was able to impeach McConnell’s credibility at trial by reading her recantation letter to the jury, and there was ample

additional evidence of Miller's involvement in the murders, including eyewitness testimony from Miller's sister and incriminating statements made by Miller himself.

A.

"Identifying clearly established federal law is . . . the 'threshold question under AEDPA.'" *Dewald v. Wriggelsworth*, 748 F.3d 295, 299 (6th Cir. 2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 390 (2000)). In determining what constitutes clearly established federal law, "we must consult 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.'" *Id.* (quoting *Carey v. Musladin*, 549 U.S. 70, 74 (2006)) (alteration in original).

The Sixth Amendment states: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI. Certain Sixth Amendment principles are, without a doubt, clearly established in federal jurisprudence. *Crawford v. Washington* provides the governing standard for admission of testimonial hearsay in a criminal trial: "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. 36, 68 (2004). Both parties agree that McConnell was unavailable. Thus, the only issue is whether Miller had a prior opportunity to cross-examine McConnell. The question then becomes how clearly established federal law defines "prior opportunity to cross-examine."

The Confrontation Clause "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." *United States v. Owens*, 484 U.S. 554, 557 (1988). Miller argues that under clearly established federal law, a preliminary examination *never* affords the required "adequate opportunity" for cross-examination, quoting the following statement from the Supreme Court decision in *Barber v. Page*:

The right to confrontation is basically a trial right. . . . A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

390 U.S. 719, 725 (1968). In *Barber*, a witness testified at the petitioner's preliminary hearing and the petitioner chose not to cross-examine him at that time. *Id.* at 720. At the time of trial, the witness was incarcerated over 200 miles from the trial court, and the state argued that this distance rendered him unavailable. *Id.* The Court held that admission of the witness's preliminary hearing transcript violated the petitioner's Confrontation Clause rights. *Id.* at 721.

Miller's interpretation of *Barber*—as establishing a clear rule that preliminary hearings never provide an adequate opportunity for cross-examination—is incorrect. First, *Barber*'s statements about the nature of the right to confrontation left room for exceptions. The Court stated that the confrontation right is “basically” a trial right, and that a preliminary examination hearing is “ordinarily” less probing into the merits than a trial. *Id.* at 725. Additionally, the *Barber* petitioner had not actually exercised his right to cross-examine the witness at the preliminary hearing. *Id.* at 720. More importantly, the witness in *Barber* was not, in fact, unavailable; instead, the State had failed to make a “good-faith effort to obtain his presence at trial.” *Id.* at 724–25. The Court noted that there could be exceptions in different circumstances: “[w]hile there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.” *Id.* at 725–26.

Indeed, in a case decided just two years later, the Court was careful to emphasize that *Barber* left space for exceptions, holding that where a witness was uncooperative on the stand at trial, admission of the witness's preliminary hearing testimony was not prohibited by the Sixth Amendment. *California v. Green*, 399 U.S. 149, 151–52, 166 (1970). Therefore, it is not “clearly

established law” that a preliminary hearing never provides an adequate opportunity for cross-examination; on the contrary, the law is clear that sometimes it *can* provide such an opportunity.

Furthermore, this circuit has already rejected the argument that Miller now makes. In *Williams v. Bauman*, we held that the petitioner’s “suggestion that his preliminary hearing categorically did not afford him an adequate opportunity to cross-examine” failed under AEDPA because he did not “identify any Supreme Court precedent supporting his contention.” 759 F.3d 630, 635–36 (6th Cir. 2014). While the efficacy of cross-examination during a preliminary hearing may be debatable, “[i]f there is room for reasonable debate on the issue, the state court’s decision to align itself with one side of the argument is necessarily beyond th[e] court’s power to remedy under § 2254, even if it turns out to be wrong.” *Id.* at 636. Similarly, in *Al-Timimi v. Jackson*, we held that while “the Supreme Court has acknowledged that a preliminary hearing generally involves a less searching exploration into the merits of a case than does a trial[,] . . . this statement was dicta, not clearly established law for the purposes of AEDPA.” 379 F. App’x 435, 438 (6th Cir. 2010) (internal citation omitted). Finally, at least two other circuits have rejected habeas petitioners’ claims that introduction of unavailable witnesses’ preliminary examination transcripts violated their Confrontation Clause rights. *See Howell v. Trammell*, 728 F.3d 1202, 1215–18 (10th Cir. 2013); *Maxwell v. Roe*, 628 F.3d 486, 491 n.1 (9th Cir. 2010).

Thus, the only clearly established federal law that is applicable here is *Crawford*’s mandate that where testimonial hearsay is admitted, the declarant must have been unavailable and the defendant must have had a prior opportunity to cross-examine the declarant. *See* 541 U.S. at 68.

B.

Next, we must decide whether the state court’s decision was contrary to, or an unreasonable application of, *Crawford*’s requirement that Miller must have had a prior opportunity to adequately

cross-examine McConnell. Miller argues that the state courts unreasonably applied federal law because under the facts of his case, he was not afforded an adequate opportunity to cross-examine McConnell. McConnell's recantation of her original testimony and formal plea withdrawal, he claims, raised new factual issues that could not have been subject to cross-examination during the preliminary hearing.

"A state court judgment is the result of an unreasonable application of clearly established law for AEDPA purposes when the state court 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Hill v. Anderson*, 881 F.3d 483, 490 (6th Cir. 2018) (quoting *Williams*, 529 U.S. at 408–09). A state court's decision is only an unreasonable application of clearly established law where it is "'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003)). "The Supreme Court has repeatedly instructed that a state court's resolution of an issue is not necessarily unreasonable, even if it is incorrect." *Williams*, 759 F.3d at 635. We hold that the Michigan court did not "unreasonably apply" *Crawford*'s requirement that a defendant have a prior opportunity to adequately cross-examine an unavailable declarant.

Miller relies primarily on our case *Blackston v. Rapelje* for his argument that the state court's decision was an unreasonable application of clearly established federal law. In *Blackston*, the petitioner was granted a retrial, but two of the prosecution's key witnesses recanted their testimony via written statements before the second trial. 780 F.3d 340, 346 (6th Cir. 2015). The judge declared them unavailable at trial since they refused to respond to questioning and ordered their testimony from the petitioner's first trial read into the record. *Id.* at 346–47. The judge also overruled the defense's request that the witnesses' recanting statements be read to the jury. *Id.* at

347. A panel of this court affirmed the district court's conditional grant of a writ of habeas corpus, holding that the petitioner's Confrontation Clause rights were violated and that the error was not harmless. *Id.* at 362. We concluded that "[t]here is a clearly established right to impeach the credibility of an adverse witness using the witness's own inconsistent statements." *Id.* at 348. Because the witnesses' recantations were inconsistent with their trial testimony and were "prototypical impeachment material," the state court's decision to exclude the statements unreasonably denied the petitioner that right. *Id.* at 353–54.

Blackston is easily distinguishable, as it only recognized a clearly established right to impeach witnesses—and here, Miller was able to do just that. Unlike the petitioner in *Blackston*, Miller's defense *was* permitted to read McConnell's recantation letter into the record. The jury heard her statements, "I have lied. . . . I was told these lies by the detective I was spoon fed these stories and told that someone else told this by the detectives." CA6 R. 16, Appendix: Jury Trial Vol. 5 Excerpt, at 116. The fact that Miller was unable to introduce evidence of McConnell's formal plea withdrawal does not run afoul of *Blackston* because, as the district court noted, her plea withdrawal in and of itself had nothing to do with her character for truthfulness. *See Nevada v. Jackson*, 569 U.S. 505, 512 (2013) ("[T]his Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes."). What mattered for impeachment purposes were McConnell's statements that she had lied, and the jury heard those statements.

Moreover, Miller was not denied the ability to effectively cross-examine McConnell simply because he was unable to cross-examine her about her plea withdrawal. He cross-examined her extensively at the preliminary hearing, he was able to introduce her letter of recantation at trial, and he points to no Supreme Court precedent that would support his argument that the

Confrontation Clause requires the ability to cross-examine an unavailable witness about her inconsistent statements *when those statements were read to the jury*. In fact, there is language from *Green* that points to the opposite conclusion: “The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant.” 399 U.S. at 159. Here, it is not clear what else Miller would have accomplished by cross-examining McConnell about her plea withdrawal. Indeed, such cross-examination could have been counter-productive, because McConnell’s new version of events was favorable to Miller. Miller is asking this court not to apply *Blackston*, but to expand it and create a new right. And a newly-created right cannot be “clearly established,” nor can it be announced on habeas review.

Because the state court’s decision comports with clearly established federal law, in that McConnell was unavailable, Miller had a prior opportunity to cross-examine McConnell, and he was able to impeach her by reading her inconsistent statements to the jury, Miller cannot show that there was constitutional error that warrants habeas relief.

IV.

Even if there was constitutional error, Miller is not entitled to habeas relief unless he can show that the error “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). A “substantial and injurious effect or influence” means “actual prejudice.” *See id.* at 637–38; *see also*, e.g., *Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Gover v. Perry*, 698 F.3d 295, 299 (6th Cir. 2012). “The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the

error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.” *O’Neal v. McAninch*, 513 U.S. 432, 438 (1995) (quoting *Kotteakos*, 328 U.S. at 764–65) (emphasis omitted). Miller fails to meet *Brecht*’s “substantial and injurious effect” requirement.

Any error from admitting McConnell’s preliminary examination testimony was mitigated by admission of her recantation statement, where she repeatedly asserted that she lied. In fact, her recantation letter explicitly states: “I have lied”; “I was spoon fed these stories”; “I have lied about everything that I have testified to.” CA6 R. 16, Appendix: Jury Trial Vol. 5 Excerpt, at 116. She stated specifically that she fabricated all of her testimony about the events in the Polderman house: “[A]nother lie that I told was that I seen [sic] Jerome, Ben, and Andrew [Miller] come out of the house with blood on them. I was never there to see anyone [sic] of them come out of the house at all.” *Id.* at 117. At the very least, those statements cast serious doubt on McConnell’s credibility, making it less likely that the jury would rely heavily on her preliminary examination testimony when deciding whether Miller was guilty.

Further, although courts are instructed not to conduct a bare sufficiency of the evidence inquiry when determining whether the error had a substantial and injurious effect on the verdict, we note that the other evidence introduced against Miller was more than adequate to support his conviction. Brandy testified against Miller in court, describing the murders and Miller’s role in them in great detail (and it’s worth remarking that Brandy was testifying against her own brother, whereas McConnell had no such familial relationship with Miller). Miller also admitted to police officers that he had been at the Poldermans’ house on the day of the murders, that the women had pretended to have car trouble to gain access, and that he had gone back to the house after the murders with Williams and Platt to wipe fingerprints and destroy evidence. The jury heard and saw recordings from these interviews with police. The jury also heard from Nathan McDaniel,

who had been an inmate at the Kalamazoo County Jail with Miller, and who testified that Miller confessed to involvement with the murders. *Miller*, 2010 WL 1629084, at *4. Even without McConnell's testimony, there was ample evidence for a jury to find Miller guilty beyond a reasonable doubt. Since McConnell's statement of recantation was read to the jury, mitigating any error introduced by reading her preliminary hearing testimony, and there was abundant additional evidence implicating Miller in the crimes, we conclude that any error was harmless and did not have a "substantial and injurious effect or influence" on the verdict.

V.

We therefore affirm the judgment of the district court.

No. 17-1061
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 10, 2018
DEBORAH S. HUNT, Clerk

ANDREW JOHN MILLER,

Petitioner-Appellant,

v.

DUNCAN MacLAREN, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: SUHRHEINRICH, GIBBONS, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

* Judges Griffin, White, and Larsen recused themselves from participation in this ruling.

1 MS. MCCONNELL: I do.

2 THE COURT: Please sit down. State your response
3 again, I don't know if that was picked up.

4 MS. MCCONNELL: I do.

5 THE COURT: Okay.

6 State your name for the record ma'am.

7 MS. MCCONNELL: Angela McConnell.

8 THE COURT: You understand that you have been
9 called as a witness to testify in this case?

10 MS. MCCONNELL: Yes.

11 THE COURT: And you also have your own case
12 pending arising out of the same incident or incidents?

13 MS. MCCONNELL: Yes.

14 THE COURT: And my understanding is that
15 initially you plead and now you have withdrawn that plea,
16 is that right?

17 MS. MCCONNELL: Yes.

18 THE COURT: And you do understand that under the
19 state and federal constitutions that you cannot be
20 compelled to be a witness against yourself and you do not
21 have to give testimony that may incriminate yourself. Do
22 you understand that?

23 MS. MCCONNELL: Yes.

24 THE COURT: You have an attorney and your
25 attorney is here, Ms. Kathryn Russell, is that correct?

1 MS. MCCONNELL: Yes.

2 THE COURT: You have had an opportunity to speak
3 with her about your fifth amendment right?

4 MS. MCCONNELL: Yes.

5 THE COURT: Is it your intention, ma'am to assert
6 that right during this trial?

7 MS. MCCONNELL: Yes.

8 THE COURT: Counsel, any further questions?

9 MR. BROWER: I believe that is satisfactory, your
10 Honor.

11 MR. MARKOU: I have no questions, your Honor.

12 THE COURT: Again, it is indicated for the record
13 that Kathryn Russell is here and Ms. Russell why don't you
14 indicate -- you are the attorney for Ms. Russell, is that
15 correct?

16 MS. RUSSELL: Yes, your Honor, Kathryn Russell
17 appearing on behalf of Angela McConnell.

18 THE COURT: All right, you may step down, ma'am.

19 Now Counsel, we also have a number of --

20 MR. BROWER: Just one formality related to that,
21 your Honor.

22 THE COURT: Yes.

23 MR. BROWER: In light of that, your Honor, the
24 People would ask that she be declared unavailable for
25 purposes of the rules of evidence and unavailable witness.

1 THE COURT: Mr. Markou, anything in regards to
2 that?

18 So, anything further with regards to that issue,
19 Counsel?

20 MR. MARKOU: Not regarding her assertion of the
21 fifth amendment. I think that the prosecutor has a motion
22 to introduce certain evidence in this case.

23 MR. BROWER: Your Honor, there are a couple of
24 motions to be addressed. One regarding People's motion to
25 exclude testimony regarding polygraph and the second to

1 preclude evidence the Defendant withdrew her plea. The
2 Court has both of those. Related to the fifth amendment
3 Angela McConnell issue, however, is the defense motion to
4 preclude her testimony under Crawford and confrontation
5 issues and opportunity to cross-examination. I don't know
6 how the Court wants to handle those and when. It might be
7 appropriate to go into that portion of it because of Angela
8 right now.

9 THE COURT: That is what I was planning on doing
10 is addressing that issue right now.

11 MR. MARKOU: Your Honor, I believe that the
12 prosecutor based on the trial involving Jerome Williams
13 intends to introduce the preliminary examination transcript
14 of Angela McConnell. And I understand that under the
15 hearsay rules, that is admissible. However, your Honor,
16 there is a separate -- a separate standard and it is the
17 confrontational clause of the United States Constitution.

18 Under the case of, I think Crawford v Washington,
19 the Supreme Court has said that whenever there is a
20 testimonial statement made by a witness, the defendant has
21 a right -- it is defendant's right, to confront that
22 witness about the testimonial statement.

23 In this case, there are a lot of statements she
24 made prior to withdrawing her plea, including the statement
25 she gave under oath at the preliminary examination. I am

1 not disputing that up until that time period, I had the
2 opportunity to cross-examine her on those portions of the
3 testimonial statements. However, your Honor, subsequent to
4 her giving her testimony, she has recanted. She signed a
5 letter, I think a three-page letter indicating that her
6 testimony at the preliminary examination was a lie. She
7 said that she has essentially been coached in what to say
8 in this case.

9 The prosecuting attorney then sent two officers
10 out to conduct an interview of Angela McConnell. She was
11 taken, I think at that time she was at that time in the
12 Calhoun County Jail. She was in a neighboring county's
13 jail and brought back to Kalamazoo where she was
14 interviewed by two officers.

15 During that interview, she affirmed what she said
16 in the three page letter in which she recanted. She
17 indicated that she had lied at the preliminary examination
18 and that she was going to bring a motion to withdraw her
19 plea. I have had absolutely no ability to cross-examine or
20 confront Ms. McConnell on that statement. No question it
21 is testimonial, your Honor, under Crawford. It is a
22 statement in response to police questioning with the
23 possibility of testimony with that being used later at
24 trial. Clearly testimonial, no ability to confront. And
25 because of that, your Honor, I don't believe then as a

1 matter of completeness, the prosecutor can bring in the
2 preliminary examination transcript and I believe that is a
3 pretty clear violation of the sixth amendment right, I'm
4 sorry, the right to confrontation, if the prosecutor is
5 allowed to bring in her preliminary examination transcript.

6 If the Court does permit that, I would ask the
7 Court -- I know that in the other case there was a
8 stipulation that the defense attorney be allowed to bring
9 in her three-page statement recanting. I am sure that the
10 Prosecuting Attorney has no problem with me cross-examining
11 the officers about her recantation. However, the off --
12 however, the prosecuting attorney has objected to and has
13 submitted a motion to the court precluding me from
14 producing any evidence at all that she has withdrawn her
15 plea.

16 Your Honor, the crux of her testimony, the only
17 reason that she testified at preliminary examination was
18 because of the plea. She testified because of a plea
19 agreement. That is why she testified. She is now deciding
20 to withdraw her plea. Not only is she deciding to do that,
21 that is actually happened.

22 I am not asking for there to be any testimony at
23 all that she has asserted the fifth amendment in this case.
24 There can be many reasons for the jury to think about why
25 she is not testifying today. Just like if the Defendant

1 doesn't testify, the jury may think, well why is he not
2 testifying. That is irrelevant, that is a red herring by
3 the prosecutor on that part it. But when her whole
4 testimony at the preliminary examination, your Honor, was
5 based on a plea agreement, I believe that it is entirely
6 relevant to bring in the fact that she has now said I don't
7 want that plea agreement. That goes into her motive for
8 her statements at the time of the preliminary examination.
9 And it goes into her motive for making the recantation that
10 she has made in this case. I am not allowed to do that,
11 your Honor. The jury is going to be left with half a
12 picture of why she has recanted in this case. She has
13 recanted because she doesn't like the plea agreement and
14 she doesn't want the plea agreement and she wants to go to
15 trial in this case.

16 So, I should be allowed to bring in -- if nothing
17 else, your Honor, a certified copy of the court order
18 granting the motion to withdraw the plea or anything else.
19 I don't want any references made to her asserting her fifth
20 amendment right and I don't want to bring something that is
21 obviously error into this case. But in this situation, her
22 motive to testify was the plea agreement. She no longer
23 wants that plea agreement and she has brought on a motion
24 to withdraw. It goes to her credibility of her preliminary
25 examination transcript and even the credibility of her

1 recantation. So, I would ask the Court to permit me to
2 introduce at least some evidence that she has withdrawn her
3 plea. And I'll leave it to the Court's discretion on how
4 the Court wants me to do that to try and sanitize it as
5 much as possible so it doesn't unduly prejudice this case.

6 THE COURT: Thank you Mr. Markou. Mr. Brower.

7 MR. BROWER: Your Honor, I believe -- with all due
8 respect to defense counsel, he is confusing the ability to
9 confront the witness with the ability to impeach the
10 witness, Angela McConnell.

11 The opportunity to confront occurred. He was
12 able to cross-examine and cross-exam at length and
13 effectively the witness's credibility at the preliminary
14 examination. That was the testimonial statement. Her
15 testimony at the preliminary examination. Whatever she may
16 have said or done afterwards is not part of the testimonial
17 statement from the preliminary examination. It is other
18 evidence. It is other evidence that impeaches that
19 testimonial statement, but the rules of evidence provide
20 him with an opportunity to impeach her through MRE 806.
21 So, the letters that she writes recanting, the statements
22 that she makes recanting, they come in. He has that
23 ability. What she wrote and what she said subsequently
24 can come in as evidence as if she had been present here in
25 the courtroom. So, his ability to impeach is not hindered.

16 Regarding his opportunity to cross-exam. The
17 opportunity to cross-exam goes to his opportunity at the
18 time of the testimony at the preliminary examination. If
19 someone had taken the stand -- if Angie had taken the stand
20 or now chose to, he would be able to impeach her with her
21 subsequent and inconsistent statements. He can still do
22 that. Nothing changes.

23 I'd ask that the Court deny Defendant's motion to
24 suppress or keep out the preliminary exam transcript and
25 testimony for the reasons stated and grant the People's

1 motion prohibiting any reference to the withdrawal of the
2 plea.

3 As a side note, your Honor, and as an offer of
4 proof, I would indicate that the recanting letter that has
5 been distributed between the parties and defense counsel is
6 aware of, does mention that was her intent. So, in that
7 essence, there is a reference to it already. But whether
8 or not it took place or whether or not she is presently set
9 for trial, that part should not come in.

10 One final thing. Jurors will know that her
11 unavailability is because she has a pending case now. They
12 will know that her lack of presence here is because she
13 asserted her fifth amendment and that is improper in any --
14 by either party to orchestrate it in such a way that the
15 jury is informed of the witness's unavailability because of
16 -- exercise of a constitutional right.

17 For all of those reasons, I would ask the Court
18 for the decisions that I have asked for -- indicated a
19 moment ago.

20 THE COURT: Mr. Markou, anything further?

21 MR. MARKOU: Yes, your Honor.

22 The assertion that the statements made to the
23 officer is not testimonial is just patently wrong.

24 MR. BROWER: That is not what I was referring to.

25 MR. MARKOU: Okay. The statement to the officers

1 is clearly testimonial and I have no right to confront.
2 The confusion that the prosecutor has is he is saying that
3 the confrontation means impeachment.. The Court knows that
4 is not what confrontation is. Confrontation does not
5 equate with impeach. Confrontation has to do with cross-
6 examining. There are many things that an attorney can do
7 in cross-examining a witness.

8 For instance, on her testimonial statement to the
9 police, she says, I am withdrawing the plea because you
10 coached me. I should be allowed to confront her, examine
11 her, question her about what she means. I have absolutely
12 no ability to do that now. None. And it is because she
13 has given a testimonial statement post preliminary
14 examination in this case and I think that is clearly a
15 Crawford violation.

16 Now regarding the red herring again that if we
17 say that she has withdrawn her plea, that is somehow or
18 other that creates this image in the jury's mind that she
19 has asserted her fifth amendment right. Well I am going to
20 be naming the other co-defendants as potential witnesses in
21 this case. I don't know whether or not Jerome Williams may
22 decide to testify for me. I don't know whether or not Ben
23 Platt may be willing to testify for me. Clearly I have to
24 name them as potential witnesses. That is what I have to
25 do for the Court to know whether or not there is going to

1 be any conflicts with -- with the prospective jurors.
2 Because of that, if they don't testify that maybe the jury
3 might think they are asserting their fifth? Sure. Sure,
4 that is a possibility. But that is the nature of a murder
5 case involving five defendants when only a couple of them
6 are testifying.

7 The reality is, the jury is going to wonder why
8 they are not testifying and every juror -- at least
9 reasonable jurors are going to realize that it is because
10 they have their own pending case and they don't want to --
11 want to testify in this one. That is the reasonable
12 assumption. No one is going to argue it. I am not going
13 to say it. I don't want to prejudice the jury by saying
14 that. But Angela McConnell is not hopping in a vacuum here
15 and we have Ben Platt, Jerome Williams as possible
16 witnesses also in this case. And they may not testify. I
17 assume the will assert their fifth amendment rights.

18 If it is the same argument that the prosecutor is
19 making, that I can't even list them as a witness? Is that
20 what he is saying that I can't even mention their names as
21 potential witnesses. That doesn't make any sense, your
22 Honor, so I would ask the Court to preclude the prosecutor
23 from bringing in the testimony to begin with and if he does
24 -- if he is allowed to do that, I should be allowed to at
25 least bring up the fact that she did withdraw her plea.

1 Thank you.

2 THE COURT: Thank you, Mr. Markou.

3 The Court is going to deny the Defendant's
4 request to suppress the preliminary examination transcript,
5 that may be read. The Defendant did have an opportunity to
6 cross-examine her during that examination and the -- her
7 letter recanting her testimony and the statements that she
8 made afterward, those will allowed to be brought in also
9 for impeachment purposes.

10 I am not going to make a ruling at this time with
11 regards to whether the jury should be advised or informed
12 that she has withdrawn her plea. The Court will listen to
13 the testimony that is given by way of reading the
14 preliminary transc -- the preliminary examination
15 transcript. And as Mr. Markou indicated, she may very well
16 change her mind and come in and testify later. But we will
17 address that later. There is to be no mention of that,
18 however, until the Court makes a ruling on that issue.

19 I think -- now, we have one more motion and that
20 is with regard to the polygraph, is that correct?

21 MR. BROWER: Yes, your Honor.

22 MR. MARKOU: That is correct, your Honor.

23 THE COURT: I believe that is your motion.

24 MR. MARKOU: That is the People's motion.

25 THE COURT: I'm sorry, that is your motion Mr.

1 A It was as the corner of Bishop Road and Sprinkle, I got
2 fuel for my car and also bought another lottery ticket.
3 Q And Bishop Road would be P Avenue?
4 A East P Avenue.
5 Q P Avenue.
6 A Bishop and Sprinkle, that is what it is called. But when
7 you get down farther east, it becomes East P Avenue.
8 Q So you travel from that particular location to your home on
9 East P Avenue, you do not drive by 26th Street?
10 A No I do not.
11 Q I just wanted to make sure I got that clarified.
12 So you get home some time around 4:00 or 4:15,
13 you are not exactly sure.
14 A No.
15 Q Sometime in that time period. And then you said you left
16 and you were going to go pick up Tom around 5:50?
17 A Yes I did.
18 Q So you left earlier than that?
19 A It is possible, a couple of minutes, because it don't take
20 that long to go over there and pick Tom up.
21 Q Okay, it is about a three or four minute drive from your
22 home -- at most.
23 A If -- yeah, depending on traffic and backing out of my
24 driveway.
25 Q Is this house about a mile or two away?

1 A No.

2 Q How far was it?

3 A Quarter of a mile, maybe.

4 Q And on this particular day, assuming that the police

5 officers get dispatched sometime between 6:05 and 6: -- ten

6 -- 6:12, okay, that is about the time period that your

7 phone calls are being relayed to the police officers, okay.

8 A All right.

9 Q So I just want to kind of back track a little bit so I have

10 a sense of when you first drove by the Polderman home. All

11 right.

12 So as I understand it, during this time period

13 from say 6:10 backwards. You had first stopped by the

14 Polderman home and had looked in the window and noticed

15 something was wrong?

16 A Yes.

17 Q You had tried to get into the home?

18 A Yes.

19 Q And the garage was closed?

20 A Yes.

21 Q And that is not unusual -- the overhead garage. That is

22 not unusual for that to be closed?

23 A No, that is not unusual for that to be closed.

24 Q But the side door, the service door, I think you described

25 to get into the garage, that was also locked?

1 A Yes it was.

2 Q And that is the part that you described as being unusual
3 for that to be locked?

4 A Yes, especially if my wife was there.

5 Q Okay.

6 A Because she would have no reason to lock it when she went
7 in.

8 Q But when you are there, you are checking the service door?

9 A Yes.

10 Q And it is locked.

11 A It is locked.

12 Q And then, um, I think you said that you holler in and see
13 if you can get somebody to respond -- into that window that
14 was shown in the picture?

15 A Yes.

16 Q And nobody responds?

17 A Nobody responded.

18 Q And then at that point, do you go directly in your car and
19 go over to Mr. Gibson's home?

20 A I did.

21 Q Okay.

22 And how far is Mr. Gibson's home from the
23 Polderman's?

24 A Maybe a 1/3 of a mile or less.

25 Q Takes a couple of minutes to get there, no more than that,

1 right?

2 A No.

3 Q And then you have a conversation with Tom while you are
4 there?

5 A Yes.

6 Q And when you have that conversation with Tom, you tell him
7 that we have to get back there because there is something
8 going on?

9 A I said yeah, he was getting his bowling ball and his shirt
10 on and I said, -- I said, if you could speed it up a little
11 bit, there is something wrong at grandpa and Oma's.

12 Q And this point you are not really sure what it is?

13 A I have no idea.

14 Q Could be that something that happened that they were at the
15 hospital or whatever, you are just not sure.

16 A Exactly.

17 Q You wanted to bring somebody else along that you thought
18 may be able to help you out?

19 A Right.

20 Q So you have Tom come back with you.

21 A (Inaudible response)

22 Q And that takes a couple of minutes to get back there?

23 A Sure.

24 Q When you are there, you approach the service door, you and
25 Tom?

1 A Yes.

2 Q And had Tom looked inside the window and noticed that there
3 was blood before he kicked in the door?

4 A Yes.

5 Q That was part of the reason why I assume that he wanted to
6 get in?

7 A Exactly.

8 Q Because he knew that there was something more going on --
9 it was something that was scaring him, obviously, he was
10 concerned about.

11 A Right.

12 Q So he kicks in the service door and you get into the
13 garage?

14 A True.

15 Q Both of you?

16 A Yes.

17 Q That is when you say that you saw the blood that looked
18 like somebody had been attacked in the garage?

19 A I can't say that.

20 Q All right.

21 Q You then try the door that was inside the garage,
22 not leading back outside, but the one leading into the
23 home?

24 A Yes.

25 Q And that one was also locked.

1 A That was also locked.

2 Q But you could tell there was blood in the garage?

3 A Yes.

4 Q You could tell that it was a situation more than just

5 somebody got hurt, this was something a lot more serious.

6 A I am not --

7 Q Not sure yet?

8 A I am not an expert on that because you know that sometimes

9 -- grandpa had hurt himself before and bled in the garage,

10 you know.

11 Q So you are still not sure at that point?

12 A I am not sure what is going on.

13 Q So you were seeking advice by going back out to the car and

14 making the phone call?

15 A Yes.

16 Q Now we have listened to the phone calls and I was timing

17 them, the different phones call that you made. And those

18 phone conversations lasted anywhere between two to four

19 minutes or so.

20 A Approximately.

21 Q It doesn't have to be exact. And they tell you to go back

22 to your home -- or they suggest that you go back to your

23 home so you can get a key so you can get in.

24 A That is true.

25 Q And all that again, that is another three to four minute

1 drive?

2 A Right.

3 Q Assuming again that the dispatch is anywhere between 6:05
4 and 6:12 somewhere in that time range to send the officers
5 out there, your initial drive around the Polderman home was
6 somewhere between -- at the very earliest would have been
7 5:30, there is no way it could have been earlier than that
8 based on your memory, is that correct?

9 A It was not earlier than 5:30.

10 Q No way of that?

11 A No way.

12 Q Probably closer to 5:40 or 5:45?

13 A I am not sure. Because I just left my house and went to
14 25th -- 26th Street and turned left and I seen my wife's van
15 there and I pulled in. I did not go by the house on 26th
16 Street.

17 Q Right.

18 So when you are driving by and you stop into
19 there -- I'm sorry. When you leave your house and you
20 arrive at the Polderman's, that is what I meant to get at.
21 It is somewhere -- the first time you arrived there -- the
22 first time that you arrived there by yourself, it is
23 somewhere between 5:30 and 5:45.

24 A No.

25 Q You think that it was later than 5:45?

1 A Yes.

2 Q So you are saying that all of those things that you did,
3 including driving back and forth several times and making
4 those phone calls and checking in the house and going down
5 to the basement before the police are dispatched, all of
6 that occurred in 10 to 15 minutes?

7 A Approximately, yes.

8 Q So the -- when you got into the garage, did you observe --
9 did you see the blood on the car too?

10 A Tom pointed it out to me, yes.

11 Q Okay.

12 So you actually did see that?

13 A Yes.

14 Q Now, you have given other statements in this case, is that
15 fair to say?

16 A I have given other statements, yes.

17 Q And I know that this has been very difficult for you and I
18 know that you have given statements in the companion cases
19 also and I know that you have tried to be as complete as
20 you can because you want the Jury to know what happened.
21 Is that fair to say?

22 A That is fair to say.

23 Q And when you entered the home, you went -- you saw the
24 blood that was in the kitchen?

25 A Yes.

1 paper, I don't know what that is and I just want to make
2 sure.

3 Okay.

4 Appreciate that.

5 Please state your first name and your last name
6 and spell both your first name and last name for the
7 record.

8 THE WITNESS: Marty Johnson, M-a-r-t-y- J-o-h-n-
9 s-o-n.

10 MARTY JOHNSON

11 Called as a witness at 9:27 a.m., testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BROWER:

14 Q Lieutenant Johnson, where are you employed, sir?

15 A Kalamazoo County Sheriff's Department.

16 Q In what capacity?

17 A I am the officer in charge of the joint City and County
18 forensic laboratory.

19 Q What is your job function, what do you do?

20 A To respond to crime scenes. Collect and preserve evidence.

21 To analyze and report out on items of evidence that are
22 examined in the laboratory. Test drugs. Compare
23 fingerprints and things like that.

24 Q How long have you been doing that kind of work?

25 A Four approximately 34 years.

1 Mr. Markou.

2 MR. MARKOU: Thank you, your Honor.

3 THE COURT: Please remember you are still under
4 oath.

CROSS-EXAMINATION

6 BY MR. MARKOU:

7 Q Good morning, Lieutenant Johnson?

8 A Good morning.

9 Q Now as I understand it, you have been doing this crime
10 scene investigation for approximately 34 years?

11 A Correct. It is even for the brief time that I worked
12 patrol and jail, the lab was part of my duties.

13 Q So you have a lot of experience in crime scene
14 investigation?

15 A Correct, I do.

16 Q And not only your experience, but you have had a lot of
17 training in crime scene investigation?

18 A Yes I have.

19 Q You have had a lot of training in the gathering of
20 fingerprints?

21 A That is correct

22 Q You have had a lot training in the gathering of blood type
23 evidence?

24 A Yes I have

25 Q You have also had training in how to find DNA evidence.

1 independent of blood evidence?

2 A Yes that is also correct.

3 Q And as part of your continuing obligation to do a good job

4 for your department, you continue to educate yourself on

5 all the newest and best research on all of those topics?

6 A Yes I do.

7 Q Including -- you continue to read research on the finding

8 of DNA evidence?

9 A Yes I do. I read all the journals that relate to that

10 subject.

11 Q I'm sorry, you read all the journals?

12 A Relating to the subject of DNA collection and development.

13 I do get the journals on-line.

14 Q And there is another thing that you do as part of your job

15 and that is to look -- look for blood in an area that might

16 be hard to find blood?

17 A That is also correct.

18 Q And again, that is an area where you have an expertise in?

19 A It is.

20 Q And you have kept up on the research on that?

21 A Yes I have.

22 Q Just like the other areas where you continue to read

23 journals to make sure that you are keeping up-to-date on

24 all the available research on finding -- finding blood

25 samples?

1 A That is correct.

2 Q And how many -- you said that you have investigated

3 hundreds of different crime scenes?

4 A Well I have testified on the subjects relating to crime

5 scene in probably over a hundred cases; but I have been to

6 a lot more than that in crime scenes.

7 Q And also you have done your own experimentation on some

8 different things over the years to kind of verify or not

9 verify different things that you are learning about through

10 your experience?

11 A That is correct. Issues that come up in court, I often

12 times will do an experiment at some point, so I can give an

13 educated and correct answer to questions such as what is

14 the longevity of a fingerprint.

15 Q Okay.

16 That was something that you testified to earlier?

17 A Correct.

18 Q Now, this was an experiment that you did on your own?

19 A That is correct.

20 Q And these experiments that you have described are

21 experiments you do on your own?

22 A Yes, that is also correct.

23 Q And you compare, I assume, your experiments against other

24 research that is being conducted by people across the

25 country?

1 A That is certainly one of the reasons that we have these
2 associations. We get together occasionally and discuss
3 what each of us has done in various areas. Plus, there are
4 written reports of experimentation done by various
5 scientists throughout the country.

6 Q And the research that you have has been fairly consistent
7 with conversations that you have had with other experts in
8 the field and the published reports that you have seen?

9 A That's correct.

10 Q Now, in this case you have given -- you have given a
11 statement early on that this -- when you go to a murder
12 case, it is a very serious investigation?

13 A Yes it is.

14 Q And when you go to a crime scene investigation, you want to
15 make sure to the best of your ability that you do not
16 contaminate the scene in any way?

17 A That is a major consideration.

18 Q Contamination, for purposes of the Jury, is introducing
19 something that may appear to be evidence where it is not --
20 or could you explain to the Jury what contamination means?

21 A That would be a good summation of it. Introducing
22 something that can interfere with the detection of a
23 particular item of evidence or they can introduce evidence
24 that is not related to the crime.

25 Q And in this case, you arrived as he crime scene

1 investigator how much -- um -- how much time after the
2 initial finding of the bodies? Do you have any idea?

3 A I am not absolutely certain, but I would say that it was
4 within an hour of finding the bodies.

5 Q And from that point forward, anything that was done in or
6 out of the house involving the crime scene investigation
7 would have been under your supervision?

8 A That is correct.

9 Q You were the lead crime scene investigator for this scene?

10 A Yes, that is also correct.

11 Q So, you would have been keeping track of, some way or
12 another, people going in and out of the home from the
13 moment that you took over the investigation?

14 A Our dispatcher actually had the list -- to make sure that
15 there was continuous coverage, but that information was
16 reported directly back to me.

17 Q And that's -- and the purpose of that is to keep track of
18 who is going in and out of this -- the whole crime scene,
19 from the point that you take over until you are done
20 clearing the -- clearing the investigation?

21 A Yes, that is correct.

22 Q So prior to the time that you took over the crime scene
23 investigation, are you aware of any sort of similar keeping
24 of who was going in and out of the house? Was there any
25 other dispatcher that you are aware of?

1 A Prior to my arriving at the scene, it would have been a
2 situation of the fire department response and the initial
3 officers that cleared the house to make sure that a suspect
4 was not still there and that kind of thing. But no, there
5 would have probably been no formal record of it at that
6 point. The formal record would have occurred at the time I
7 arrived.

8 Q So, we don't know formally who was in and out of the crime
9 scene prior to you taking over?

10 A Other than by looking at the reports of the individuals
11 that initially responded and they do indicate that there
12 was a fire department response. The fire department has a
13 report as well as do our individuals. But there was not
14 specifically someone assigned for scene security until
15 probably just before I got there.

16 Q All right.

17 And the crime scene that we have described, now
18 we have seen pictures already of the -- of the house, that
19 is part of the crime scene, is that correct?

20 A Yes it is.

21 Q The interior of the house?

22 A Yes that is also correct.

23 Q You also have the exterior of the house, that I am sure
24 that you walked around to make sure there was no evidence
25 that you could find.

1 A Yes I did.

2 Q There is also the van, Anna Lewis' van, that is part of the
3 crime scene?

4 A Yes, we considered the vehicles in the driveway part of it.

5 Q Including Mr. -- including Fred Lewis' vehicle.

6 A Correct.

7 Q Okay, I didn't realize that. Okay, so his vehicle is also
8 considered part of the crime scene?

9 A It was.

10 Q And then there is the garage that is attached to the house.
11 That is another part of the crime scene.

12 A It was.

13 Q And then there is a variety of other out buildings that we
14 have seen on diagrams that also was part of the crime
15 scene.

16 A That is also correct.

17 Q So all of those areas are areas that you consider to be
18 important for you to look at, investigation, check to see
19 if there is any evidence at all linking these murders with
20 specific individuals?

21 A Yes that is correct.

22 Q And through this -- and you did this over approximately a
23 six day period where you investigated the crime scene?

24 A Yes I did.

25 Q And through your investigation over six days, you were as

1 thorough as you could possibly be?

2 A I was.

3 Q And not just you, but everybody else on the job.

4 A There were a number of people and they were all indicated
5 in the reports. But that is correct, we did all work on
6 that crime scene.

7 Q And now when you say that you described earlier for the
8 Jury that you take blood samples to determine whether or
9 not they match known people to people who were deceased or
10 somebody that you needed to compare it against otherwise.
11 You took blood samples from essentially every available
12 spot that you could in this case?

13 A I did. In some cases, we don't take a sample a every
14 particular bloodstain, but we will take a sample from a
15 particular area where all of the stains would imply a
16 similar origin and that type of thing.

17 Q So based on your experience, you were able to determine
18 from an area whether or not the blood in that area is from
19 a similar source, at least based on your experience?

20 A Correct. It is through examination of the droplets using
21 magnifying glasses and getting very close and then
22 examining the directionality of the pattern.

23 Q And you've described that part of your training has been in
24 fluid dynamics?

25 A It is. It is in applied fluid dynamics that taught in the

1 bloodstain pattern and interpretation courses.

2 Q So you feel confident sitting here today, as an expert for
3 the government, that the samples you took accurately
4 reflected all of the known samples that you could find in
5 this case?

6 A Yes.

7 Q Now you also, because this was such a serious investigation
8 and possible also because of manpower, you brought in the
9 Michigan State Police lab to assist.

10 A There was an additional reason for that, but those are two
11 of the considerations.

12 Q Can you tell me all the reasons why you brought in the
13 Michigan State Police?

14 A The primary reason was that I wanted the people that were
15 going to be examining the evidence to have a part in the
16 collection of it.

17 Q Why is that?

18 A At that time, DNA was not as well established as it is now.
19 The analysts were revising regularly the protocol on how
20 they wanted things collected. And I wanted to be certain
21 that the protocol that we collected these items under were
22 precisely the one that they wanted for that time period.

23 Q Okay.

24 A So what better to accomplish that, then to have the very
25 analysts that handle it at the one end to be the ones to

1 collect it.

2 Q You -- did you -- were you assisting them during the
3 collection of these DNA samples?

4 A I had an officer present when they collected theirs, but we
5 also collected an entire set of our own.

6 Q Okay.

7 So, there was two independent samples taken of
8 all available DNA in this case?

9 A Correct. We did have some overlap and we did have some
10 that we collected and they didn't and vice versa. But
11 there were two actual independent sets of DNA collected
12 from these bloodstain patterns.

13 Q And not just from the bloodstain patterns, you also have
14 the fingertip gloves, you have eyelashes found at the
15 scene. There is other -- um -- other forms of DNA that
16 were evaluated?

17 A Also from items of clothing.

18 Q What's that.

19 A From items of clothing in addition to that.

20 Q So it wasn't just blood when you were talking about DNA.
21 DNA covers a lot bigger topic -- DNA evidence covers a lot
22 bigger topic than just blood stains, correct?

23 A It does.

24 Q And because of the overlap, again, you feel confident that
25 you guys covered every possible area to find physical

1 evidence on who may have committed these crimes?

2 A I do.

3 Q And you have read through Michigan State Police Officer,
4 Forensic Scientist, Joel Schultze's report in this case?

5 A That's correct.

6 Q And I think that was also co-authored by James Pierson, I
7 think that you testified earlier too? James Pierson was
8 also part of that?

9 A Yes he was. They -- the two of them did the bloodstain
10 pattern work. The actual formal report that you have is
11 probably relative to that.

12 Q Okay. And you have had a chance to review that report?

13 A I have.

14 Q And that report -- the contents of that report are
15 consistent with your own findings in this case?

16 A Yes they are.

17 Q There are no significant differences in the findings made
18 by these Michigan State Police officers from your findings,
19 is that correct?

20 A That is correct.

21 Q And just so the Jury can understand this a little bit,
22 there is -- there are terms of art in your field to
23 describe blood patterns, correct?

24 A There are.

25 Q And these terms of art, aren't necessarily things that the

1 jurors or regular people are you going to understand, but
2 they are things that you and other forensic scientists
3 understand and use to describe blood patterns?

4 A That's correct.

5 Q For instance, there is a phrase called drip pattern.

6 A That is correct.

7 Q Can you describe for the Jury what drip pattern means?

8 A A drip pattern tends to be a passive bleeding situation
9 where the blood is simply dripping from something and then
10 striking a surface acted upon by nothing more than gravity.

11 Q And there is something also called an impact pattern. Can
12 you tell the Jury what that means?

13 A That is a pattern where blood is cast off from a wound site
14 or something that is struck and the droplets are broken
15 into smaller than what you would get in an ordinary drip
16 pattern size range. They strike, typically, at an angle,
17 dependent upon where the item that is struck is, relative
18 to the area where the blood is deposited.

19 Q Okay. Not the easiest thing to keep track of, but it
20 basically helps you describe where you believe somebody was
21 struck based on the pattern of blood found.

22 A That is correct.

23 Q There is also two other points of definition that I would
24 like the Jury to understand. There is something called a
25 spatter. Can you tell the Jury what that is?

1 A Spatter would be a general definition of any blood that is
2 cast off at a crime scene dripped or otherwise. It is
3 blood that contains those characteristics that allow us to
4 make an analysis on it. We call is bloodstain spatter as
5 opposed splatter which is often incorrectly used in
6 terminology.

7 Q Now there's -- there's a -- the last term that I want you
8 to kind of define for the Jury is a swipe pattern. Can you
9 tell me what a swipe pattern is?

10 A A swipe pattern is a transfer of blood from something --
11 like I mentioned earlier in testimony where blood, perhaps,
12 would be on a sleeve or on a person's hair or on something
13 -- on their fingertips where they rubbed against an item or
14 surface and then left a transfer of that blood along that
15 surface. In some cases it shows the shape of the item that
16 touched the surface and in other cases it is indistinct
17 pattern that is difficult to really identify as to what
18 left it.

19 Q Just so I understand. A swipe pattern, there is -- there
20 is evidence in this case where Marinus Polderman being
21 dragged, correct?

22 A Yes, it is.

23 Q It -- I don't want to get into the details of that right
24 now. But is that pattern that you analyzing to determine
25 that he is being dragged, is that considered swipe pattern;

1 just so the Jury understands?

2 A Yes, that would be considered a transfer or a swipe
3 pattern.

4 Q Okay. They can be somewhat interchangeable depending on
5 how you are referring to them?

6 A It is.

7 Q Okay. Just so I understood that.

8 And based on the terminology, this is all
9 terminology based on the known science of fluid dynamics on
10 drips, transfers, swipe patterns. Those are all things
11 that you use to describe different principles that you have
12 learned in fluid dynamics?

13 A That is correct.

14 Q And the research on this and the science on this is solid,
15 is that fair to say?

16 A That is fair to say.

17 Q Now, in this particular crime scene, you are looking for
18 any possible physical evidence tying someone to the murders
19 of the Poldermans and Anna Lewis?

20 A That is correct.

21 Q One of the things you are trying to do?

22 A Absolutely.

23 Q You are also trying to piece together how the murder may
24 have occurred by figuring out how people were moved and
25 things like that?

1 A Information of that nature is sometimes very necessary for
2 the detectives that are investigating a case.
3 Q So is part of your -- part of your work on this case, you
4 were looking at bloodstain patterns?
5 A Yes.
6 Q You were looking for DNA samples anywhere and everywhere
7 you could find them?
8 A That is also correct.
9 Q You were looking for any fingerprints that you could find?
10 A That is correct.
11 Q You were looking for footprints if you could find any?
12 A That is also correct.
13 Q You were you not only that, but you were aware that there
14 was further investigation done of the deceased in this
15 case?
16 A Yes I am.
17 Q And as part of that investigation, fingernail clippings
18 were taken from all of the deceased?
19 A Yes, that is also correct.
20 Q The point of that is that the DNA from one of the
21 assailants, the persons who committed this crime, may have
22 been underneath the fingernails of the people who were
23 killed?
24 A That is correct.
25 Q And you are aware from your review of the reports in this

1 case, that all of this was done in this case. The
2 fingernails were taken from the two Poldermans and Anna
3 Lewis?

4 A Yes it was.

5 Q You also do an analysis of -- you look at all the potential
6 weapons that were involved in the case too?

7 A That is also correct.

8 Q Like in this case we know that there was a bat found in the
9 basement?

10 A Correct.

11 Q And when you look at the bat, you want to see if there is
12 any evidence on it to help you figure out how somebody may
13 have been killed?

14 A That is certainly one of the considerations.

15 Q And who may have done it?

16 A That is also a consideration.

17 Q Now I want to talk to you a little bit about the
18 fingerprint evidence that you found at the scene. As I
19 understand it -- how many that were not matched?

20 A Out of all of them, there were three that were and remain
21 unidentified.

22 Q Can you describe for me where those were found?

23 A One of them was from Fred Lewis' hood. A second one was
24 from the passenger side door of Marinus' car on the outside
25 and then the third one was from the doorknob of the door

1 leading from the hallway into the bathroom. It was on the
2 inside doorknob, the one being inside the bathroom.

3 Q Now, you've testified that based on the -- on the physical
4 condition of the person that is leaving a fingerprint, some
5 times -- some times you find fingerprints and some times
6 you don't. The physiology, I think the word is you used?

7 A That is certainly one of the considerations to determine if
8 an individual may or may not have deposited a print at a
9 given time.

10 Q Another thing that you described is the environment that
11 the fingerprint is left in?

12 A That is also correct.

13 Q Certain surfaces retain fingerprints for a longer period of
14 time.

15 A That is also correct.

16 Q You have done research on that yourself?

17 A I have.

18 Q You have determined it on glass and paper and that it can
19 last -- I think that you said seven years?

20 A Yes that is correct.

21 Q And that research that you did, that was done on two
22 surfaces that you are aware of that can hold fingerprints
23 for the longest period of time?

24 A Those are certainly two surfaces that I have found that
25 retains fingerprints quite well.

1 Q And you also put them in a safe that would have eliminated
2 some of the environmental concerns that you have about
3 losing the quality of a fingerprint?

4 A In this case, the safe was in a climate control area. Plus
5 the other consideration was to make sure that somebody else
6 didn't touch it and overlay one of the fingerprints that I
7 had put on there.

8 Q Okay.

9 Two -- I don't -- I don't want to get into the
10 fingerprint found on Fred Lewis' vehicle.

11 Let's talk about the two that were found, one on
12 the vehicle found in the garage of the Polderman home and
13 the other found on the door way (sic) found inside the home
14 -- door handle. Okay.

15 A Okay.

16 Q Neither one of those are under controlled atmospheric
17 conditions, is that fair to say?

18 A That is fair.

19 Q They were also not found on the two items that you have
20 described that hold fingerprints the longest period of
21 time.

22 A They were both smooth surfaces of the same type, meaning a
23 non-porous surface painted metal and a chrome doorknob are
24 very similar to glass in their ability to retain a
25 fingerprint.

1 Q Okay, but the environmental conditions were not under
2 control.
3 A That is correct.
4 Q So based on that, you really do not have a definitive
5 opinion on how long those fingerprints may have been there?
6 A There would be no way that I could tell how long they had
7 been there.
8 Q Do you expect, given the environmental conditions, okay,
9 and expect that this is a vehicle, that it is a vehicle
10 that somebody may or may not be using. Okay. Assuming
11 they are using the vehicle. People are going in and out of
12 the home. Would you expect to find fingerprints of that
13 quality lasting -- lasting two or three months under those
14 conditions? Remember this was a home that people were
15 living in.
16 A Yes. I have found fingerprints that were probably months
17 old within a residence that people were living in.
18 Q Would you expect to find fingerprints that were there more
19 than a year on the same door handle that people are going
20 in and out a car?
21 A I would really have no way to know exactly that would be
22 the case.
23 Q Okay.
24 A But I could not rule out that prints could last long on a
25 car.

1 Q One of the problems that you have on claiming fingerprint
2 evidence is that if the fingerprint is left on the item and
3 somebody puts their hand over that same fingerprint, puts
4 their own hand over it, it distorts the ability for the
5 fingerprint to be lifted by the police?

6 A Or it could completely obliterate it.

7 Q Or completely obliterate it.

8 So if these are items that are part door handles,
9 you know as well as I do that door handles are things that
10 people use on a regular basis?

11 A Correct, but they may touch it in different locations each
12 time.

13 Q Do you remember where these fingerprints were found on the
14 door handle and -- on the door handle of the car and the
15 door handle inside the home?

16 A The one from the doorknob I certainly do. On the car
17 itself, only in the general area that it was on the mid
18 range area on the outside of the door.

19 Q Door handle out -- out -- in the home.

20 A In the car it was actually on the door itself, not on the
21 handle. And on the home, it was on the chrome doorknob
22 itself in a way very similar if someone were to grab the
23 knob to turn it.

24 Q So it looked like a common usage for a fingerprint to
25 opening a door?

1 A That would be correct.

2 Q And you said that you compared these fingerprints -- and
3 again I am only interested in the three unknown
4 fingerprints. You compared them against the known deceased
5 in this case?

6 A Yes I did.

7 Q Their fingerprints were taken so the Jury understands that.

8 A Yes they were taken at autopsy.

9 Q Okay.

10 You also compared it based on the history that
11 was provided to you as a history of family of people who
12 may have come in and out of that home as visitors -- as
13 visitors.

14 A That is correct.

15 Q Okay. And as part of this, you wanted to make sure as a
16 police investigation that you get as many as possible
17 comparisons from family and friends.

18 A Yes.

19 Q And can you tell the Jury how many family and friends were
20 compared for these two fingerprints?

21 A I did not count the exact number, only than to know that it
22 was approaching 300 when I included the scene officers in
23 the comparisons.

24 Q How many scene officers were involved?

25 A I don't have that number, you would have to get it from the

1 report.

2 Q Is it more than 20?

3 A I'd say it was more than 20.

4 Q Was it more than 50?

5 A It would have been under 50.

6 Q Okay. So the known samples that we are talking about here

7 from people that the family provide you, is at minimum of

8 250 people who could have come in and out of that home?

9 A And that would have also included the fire personnel and

10 the initial -- from the initial response. But yes, that is

11 correct.

12 Q So the 50 that you are talking about -- I am doing this

13 safely. The 50 people who were part of law enforcement

14 and/or fire personnel (inaudible, moved away from

15 microphone)

16 A That is correct.

17 Q So I am saying 250 people provided by the family as

18 possible friends and family that came in and out of that

19 home?

20 A That would also include other persons that may have been

21 mentioned as suspects or that could have come in on tips

22 and that kind of thing also.

23 Q Okay, so the 250 also included some of that?

24 A That is correct.

25 Q And based on your memory, there might have been 20, 30, or

1 40 of those suspects?

2 A It could have been.

3 Q It wasn't more than 50?

4 A I don't think so.

5 Q So again, family members and friends that are being

6 compared against that is a lot, 200 people.

7 A There were additional names submitted to me, but it would

8 have been probably close to that number.

9 Q And not one of those people that was provided to you

10 matched the fingerprints found in the vehicle in the garage

11 or the door handle in the home.

12 A That is correct.

13 Q And you then did a comparison against the -- the five

14 people who were accused in this case.

15 A Yes I did.

16 Q You did a comparison against Benjamin Platt, correct?

17 A Yes that is correct.

18 Q Angela McConnell.

19 A Also correct.

20 Q Brandy Miller.

21 A Also correct.

22 Q Jerome Williams.

23 A Also correct.

24 Q And Andrew Miller.

25 A That is also correct.

1 Q And those two fingerprints did not match any of those five
2 people?

3 A Those three, the three unidentified did not match any of
4 those people.

5 Q In fact, none of the fingerprints found in the home matched
6 any of those five people.

7 A That is correct.

8 Q Now, you also did a comparison against, I think the state -
9 - I'm sorry, the local fingerprint database, the state
10 database and the FBI database?

11 A As well as many other states, both the ones adjoining ours
12 and essentially any other state that I could get to accept
13 our latent print and put into their system.

14 Q And when is the last time that you ran that comparison?

15 A I would have been a week ago Sunday.

16 Q Part of your job is to be thorough to make sure that when
17 you come before court there is no fingerprints that have
18 been entered into the system that may have been found at
19 the scene?

20 A That is correct.

21 Q And the reason why you do that is that you want to make
22 sure that you are not missing somebody that may have been
23 at the scene?

24 A That is correct.

25 Q So you are continuing to do this investigation to find out

1 if there was somebody in the home, even though it is a week
2 before trial?

3 A That is correct.

4 Q And the DNA -- I'm sorry, the fingerprints that are being
5 entered into these systems are the ones that are taken from
6 people who have been charged with crimes?

7 A In addition to people that are applying for jobs as
8 teachers and concealed weapon permits and things like that
9 also.

10 Q And as time passes so the Jury understands this, more and
11 more people are actually -- more and more fingerprints are
12 entered into this system.

13 A Yes that is correct.

14 Q That is why you want to make sure that you are not missing
15 something before you go to trial.

16 A That is also correct.

17 Q I want to talk a little bit about the unknown DNA samples
18 that you were able to find in this case, okay.

19 A Okay.

20 Q And I believe they were depicted in -- I don't think I have
21 the exhibit number on this. There were two items found in
22 the garage that were latex gloves -- portions of latex
23 gloves.

24 A The latex rubber was of the same type that would be used in
25 a latex glove. I really do not have information to

1 directly tell me that those were latex gloves.

2 Q Okay. They keep saying latex.

3 A Correct.

4 Q And you are saying that it is latex.

5 A That is correct.

6 Q But you are saying you are not sure if it was part of a
7 glove.

8 A That is also correct.

9 Q Okay. I didn't understand that.

10 MR. MARKOU: If you could put up picture number or
11 exhibit number 13, please.

12 BY MR. MARKOU:

13 Q Now, I think that you described for the Jury that there was
14 a portion of latex found at -- where it is marked number
15 four.

16 A That is correct.

17 Q Okay. What you do when you start a crime scene, is that
18 you take all the photographs before you place numbers, is
19 that fair to say --

20 A It is.

21 Q (Inaudible, moved away from microphone).

22 A That is correct.

23 Q And then someone then has the responsibility of number
24 things to keep track of evidence found in the case.

25 A Yes they do.

1 Q And those numbers -- those numbers that are used, stay with
2 that piece of evidence from that point forward, so that
3 everyone that is involved in the case knows the evidence
4 number and where it was found.

5 A That is also correct.

6 Q That is to make sure that no one gets confused that item
7 number four here would be item number four somewhere else.
8 It is sequentially one through however many you find at the
9 total crime scene.

10 A It gives some order in being able to look at a lot of
11 evidence and being able to tell what it was.

12 Q It sure does. And somebody has marked in this case, item
13 number four, correct?

14 A Yes, that is correct.

15 Q Item number four being marked as the blood that was found
16 there and the latex that was found.

17 A The way we do it. That would generally refer to anything
18 within proximity of that number. It just gives us a
19 reference point to talk about -- if I were to say --
20 testify to blood patterns for example. I could say that it
21 was a pattern near the number four. Just to give, you
22 know, geographic context to what I am testifying to.

23 Q In this case, were you part of the decision making to place
24 the number four there?

25 A Probably not. That would have been the person that

1 actually did the mapping. But I did direct that they start
2 in the garage.

3 Q And that particular number four not only depicts the latex
4 glove or latex piece, which I believe is that -- is that
5 the tiny little item at the base of the marker?

6 A Correct.

7 Q It also depicts the -- the blood samples found around the
8 latex glove?

9 A That is also correct.

10 Q Not latex glove, I apologize, the piece of latex.

11 A That is correct.

12 Q And for your purposes, that is marking a general area so
13 that you can testify that this is where a blood spatter was
14 found and a latex piece?

15 A Just used it as a geographic reference point.

16 Q Okay, you did the same for the other piece of latex found
17 out in the garage. You marked it, you marked the area
18 where it was found.

19 A Yes I did.

20 Q And it also has blood in that area?

21 A That is correct. That follows along that trail of blood
22 that you see there.

23 Q And eventually after gathering all of the possible sources
24 of DNA in a case, you submit all of those or the Police
25 Michigan State Police lab takes all of those to a separate

1 lab to test them for DNA.

2 A That would be correct.

3 Q And in this case, how many different samples were provided?

4 A I could not remember, but it's quite a few, it is listed on

5 the legend.

6 Q More than a hundred?

7 A It would have been more than a hundred that we collected.

8 Q That you thought might have different versions of DNA in

9 it?

10 A We collect specifically for the purpose of checking for

11 DNA.

12 Q And, what you do and what the State lab does at that point

13 is, they determine whether or not the particular item

14 submitted -- let's say the latex piece -- has a sufficient

15 amount of DNA to be compared against known DNA.

16 A That is also correct.

17 Q And in this case the only two pieces of any evidence found

18 that had DNA in it, they were unknown donor -- matches

19 unknown donor were the latex pieces found -- the two latex

20 pieces found in the garage.

21 A That is correct.

22 Q In the same vicinity as blood droppings.

23 A That is also correct.

24 Q And when they came back as unknown donor, similar to the

25 fingerprint evidence, you do an exhaustive comparison of

1 every known person who may have been in the home at any
2 point that you can find, essentially.

3 A That is also correct.

4 Q Much like the fingerprint evidence, you were given
5 information about family members who were -- who may have
6 been in the home.

7 A I was.

8 Q And friends that may have been in the home.

9 A That is also correct.

10 Q And everybody throughout this case, I assume, family and
11 friends, were cooperative with law enforcement.

12 A I think they were.

13 Q They wanted to find out -- help find out who did this --

14 A (Inaudible response)

15 Q People were providing their DNA voluntarily to you,

16 A Yes they were.

17 Q So you were able to get all of the family and friends DNA
18 to run a comparison against? Based on the information that
19 you had.

20 A Correct. With the information that we had. We did obtain
21 DNA from all of those people.

22 Q How many -- how many samples of DNA did you obtain from the
23 family and friends? Now fingerprints you said it was
24 around 200.

25 A I did not count that list up to know what the amount was.

1 Q More than a hundred?
2 A It would be more than a hundred.
3 Q And that is just of family and friends.
4 A It would also have included the fire personnel and the
5 police personnel from the scene.
6 Q Not as many --
7 A And the victims also.
8 Q Okay.

9 And not as many as the fingerprints, but -- as
10 close to that or was it the same number?

11 A No, it would have been less than the number for
12 fingerprints.

13 Q Okay.

14 And the reason for that is because -- in your
15 determination, this latex was tied to the people who may
16 have committed this crime.

17 A We wouldn't actually know if it was tied to the people who
18 committed the crime.

19 Q Is it just harder to get DNA evidence from people, is that
20 what it was?

21 A The reason why we didn't do DNA on all the same people that
22 we did for fingerprints --

23 Q Yeah, that is really what I am getting to.

24 A Well it is more intrusive for one thing. That would
25 probably be the -- the primary reason. When we started

1 this, it required someone to actually appearing in front of
2 a nurse and you know getting it taken with a needle. By
3 the time we took some of the latter samples, it was simply
4 a swab of the inside of the cheek.

5 Q (Inaudible response, standing by the jury box away from
6 microphone)

7 A It became much easier.

8 Q (Inaudible) getting the DNA sometimes -- DNA samples
9 sometimes is less intrusive than giving fingerprints. It
10 is a lot less time.

11 A That is correct.

12 Q But back then it was more intrusive, so that is why the
13 number is more in the 100 to 150 range instead of 250.

14 A I think the number would probably be under a hundred that
15 we actually submitted against the DNA.

16 Q But it was -- it is still was a sufficient enough -- it was
17 still a sufficient enough sample that you felt comfortable
18 that you could not identify who the donor was of the DNA
19 found in the latex gloves?

20 A That is correct. We wanted -- our intention was certainly
21 to eliminate someone that would have legitimate access to
22 the residence. Or in some cases comparing people that came
23 up again as suspects, again, as we did with the
24 fingerprints.

25 Q Now, something that I couldn't tell from the report. Is

1 the DNA that was found in item number four and the DNA that
2 was found on the other latex piece, were they compared
3 against each other?

4 A They were.

5 Q And are they from the same donor?

6 A They were a mixture between Marinus and an unknown donor
7 indicated as male.

8 Q A male donor?

9 A Correct.

10 Q And the male donor is also identified in number four?

11 A That is also correct.

12 Q And what I am saying is that the male donor, is it one
13 donor from both samples?

14 A That would also be correct.

15 Q Now you also did a comparison of this DNA against -- from
16 those two -- from the latex -- pieces of latex glove, you
17 did a comparison of DNA against the five people who have
18 been charged in this case?

19 A Yes, it was conducted.

20 Q You we able to obtain DNA samples from all five of them?

21 A That is correct.

22 Q And it did not match Andrew Miller?

23 A That is also correct.

24 Q It did not match the other four?

25 A It did not.

1 Q And you also ran his DNA through the entire database of DNA
2 samples that you had at the time.
3 A That is also correct.
4 Q And it did not match anything in the FBI files or anything
5 else in the databases that you had?
6 A It did not match anyone in the CODIS, which is the FBI's
7 database.
8 Q Did it match -- did you run it through other databases too?
9 A That is the only database that I am aware of.
10 Q And when is the last time that you ran the DNA?
11 A It would have been a considerable time ago. It would have
12 been well before any of these trials started.
13 Q So --
14 A I don't remember the date, but whatever the date of the
15 last report that you would have in the file.
16 Q A year ago or more?
17 A I think that it would be less than a year.
18 Q But since that time period, no one has done any comparison
19 of this DNA against -- against new samples that are in the
20 CODIS database?
21 A It is compared against every sample that comes into the
22 CODIS database and that would even be taking place right
23 now.
24 Q Okay. That is what I didn't understand. So that is
25 something that is done as a routine process.

1 A It is.
2 Q You don't have a report on it.
3 A They would not issue a report, just simply because it is an
4 automated comparison that would kick out a potential
5 candidate to the Michigan State Police in Grand Rapids.
6 Who would then send us a directive stating that they have
7 identified a potential donor. And then we would -- it
8 would be up to us to contact that individual and then
9 obtain a directly obtained sample for another comparison.
10 Q Okay.

11 Just so that we don't confuse the Jury. You are
12 confident in the procedures that are set forth that this is
13 being done -- that this unknown donor DNA is being run
14 through the CODIS on a regular basis and that you have not
15 gotten a report indicating that they found a donor match?

16 A Correct. I have spoken with the analyst that does this and
17 he has indicated that it is still in the database.

18 Q Right. All right.

19 Lieutenant Johnson, I am going to have you look
20 at what is entered as 37b. This is a diagram that was
21 prepared by another officer who takes -- who does an
22 overall diagram and takes measurements also.

23 A The particular officer that did this was called
24 specifically for that reason. Him and another assistant -
25 - two assistants did this diagram.

1 Q And the diagram depicts not only the evidence cards that we
2 have been talking about that were found in the home and in
3 the garage, but it also has a scale at the top.

4 A That is correct. That would be the main floor of the
5 residence.

6 Q Okay.

7 And the purpose of having a scale on that is that
8 people who see this can get a sense of how big of an area
9 that we are talking about.

10 A Yes that is correct.

11 Q So somebody that can look at this can determine that this
12 item right here in the kitchen -- if you look at the scale,
13 it is approximately five feet across in the kitchen,
14 somewhere around in there.

15 A Correct. It is to give you the ability to tell special
16 distances between items on the diagram.

17 Q And you have been through this kitchen?

18 A I have.

19 Q And it is not an exceptionally large kitchen, is that fair
20 to say?

21 A That would be fair to say.

22 Q And in the kitchen, there are blood samples found in a
23 variety of places?

24 A That is also correct.

25 Q There were blood samples found on the floor?

1 A That is correct.

2 Q There was blood samples found in the hallway leading to the
3 basement?

4 A Also correct.

5 Q And there are no footprints found anywhere leading from the
6 -- from the garage coming in through the kitchen to the
7 stairs, correct?

8 A That would be correct.

9 Q Okay.

10 And there is no evidence of any cleaning, swiping
11 of any other type of effort to clean footprints from the
12 floor leading from the entry way of the -- into the kitchen
13 to the stairs -- to the stairs?

14 A It would be difficult for me to tell if there was evidence
15 that someone had cleaned up something in that location.
16 But I didn't see anything that would lead me to believe
17 that cleaning had taken place there.

18 Q You have already described that you have seen things that
19 looked like swiping of the railing, correct?

20 A Correct.

21 Q And when you say swiping of the railing, it has a pattern
22 where it looks like blood is being dragged.

23 A Meaning that it had been wiped with something.

24 Q You didn't see anything like that in the kitchen on the
25 floor?

1 A I did not.

2 Q Can you estimate for me how many people at a time could
3 work in that kitchen to do the kind of work that you need
4 to do, that pain staking work of taking samples?

5 A I don't think that we ever had more than two or three
6 people in the kitchen at one time.

7 Q Is that because of the size of the kitchen? Did that have
8 influence on it?

9 A That or it probably would have been influenced more by the
10 fact that I would not have had that many people working on,
11 for example, latent prints or developing blood. It is just
12 that there should not have been that many people needed for
13 the task at hand.

14 Q Yeah, but you have a table in the kitchen, correct?

15 A That is correct.

16 Q That also restricts the amount of space that people have in
17 the kitchen to do the work that you are doing?

18 A It does.

19 Q It would be difficult anyway, spacially, for you to have
20 four or five people working in the kitchen area anyways?

21 A I could probably have four or five people working in that
22 kitchen if I had, you know, that many different items that
23 needed to be processed by people with a particular
24 expertise in each -- in each discipline that required
25 collection.

1 Q Let's talk about that.

2 Let's say that you have three or four or five
3 people working in there. Each of these people are trained
4 in gathering evidence, correct?

5 A Yes.

6 Q Each of these people, even if you could get for or five in
7 that area to do their job, are fully aware of their
8 responsibility to not contaminate the scene.

9 A That is also correct.

10 Q They are trained to not step on blood samples?

11 A Absolutely.

12 Q They are trained to not touch blood samples where their
13 fingerprints may contaminate a blood sample.

14 A That is also correct.

15 Q So these are people who are taking their time, very
16 carefully stepping over these items to make sure that they
17 are not contaminating the crime scene at any point.

18 A That is also correct.

19 Q And they did a good job, they did not contaminate the crime
20 scene.

21 A That is correct.

22 Q I want to talk about some of the findings that we have in
23 the kitchen, okay.

24 A Okay.

25 Q The kitchen area -- there is a pointer.

1 The kitchen area is an area that I am kind of
2 going to mark off. I am going to include the hallway
3 getting down to the stairs. The area all in through here
4 is kind of the area that I want to talk about, okay.

5 | A Okay.

6 Q Now you --

7 THE COURT: Hold on. You are standing in front
8 of the jurors and you are not by a microphone.

9 MR. MARKOU: I'll go back.

10 THE COURT: Thank you.

11 | Why don't you repeat that.

12 MR. MARKOU: Thank you very much, your Honor.

13 BY MR. MARKOU:

14 Q So, the area that I want to focus on is not the stairs
15 leading down, but the area around the kitchen, around where
16 the table is and leading to the area going down stairs,
17 okay.

18 A Okay.

19 Q Now, you -- when you did the comparisons of all the blood
20 samples that were found, you went back and put letters to
21 depict whose blood was found?

22 A Yes, as indicated on this diagram.

23 | Q Correct.

24 So, the M's -- all of the M's found in here are
25 the samples of Marinus' -- Marinus Polderman's blood.

1 A That is correct.

2 Q And you marked every blood sample that you could identify
3 belonging to any of the victims on this diagram in the
4 kitchen?

5 A That is correct.

6 Q And from looking at that diagram and reading your reports,
7 Sary Polderman's blood or Sary Polderman's blood was not
8 found in the kitchen area, is that fair to say?

9 A Yes, that is fair to say.

10 Q It was not also found in the area leading down the stairs,
11 is that also fair to say?

12 A That is.

13 Q And looking through the rest of the main floor, could you
14 point to anywhere where Sary Polderman's blood was found?

15 A No, I can't on the main floor.

16 Q Now you also have on this main floor a -- a bedroom that I
17 am kind of circling over here and there was -- there was
18 quite a few blood samples found in that bedroom, is that
19 fair to say?

20 A Yes it is.

21 Q And in that bedroom you have marked on the diagram an M and
22 an A. The M, I assume is for Marinus.

23 A It is.

24 Q And an A is for Anna Lewis?

25 A That is also correct.

1 Q Now the A for Anna Lewis, you can marked in the bedroom
2 that it is one, two, three, and four different locations.
3 A That is also correct.
4 Q Now, you have done an analysis that was found in the
5 bedroom of Anna Lewis, correct?
6 A Well I have examined the stains, but the actual analysis
7 that determined whose they were came from the Michigan
8 State Police.
9 Q You have examined the stains that were found in the
10 bedroom?
11 A That is correct.
12 Q And can you tell from your examination of the stains or can
13 you give an opinion based on the stain pattern whether or
14 not Anna Lewis was bleeding in that bedroom?
15 A Anna Lewis was bleeding in that bedroom.
16 Q And can you also -- can you also determined whether or not
17 Marinus Polderman was bleeding in that bedroom?
18 A That is also correct.
19 Q And when -- the reason that you know that is the way that
20 because of the way the blood is dripping the patterns
21 (inaudible, walked away from microphone).
22 A In this case, the blood is in the carpet, in many cases.
23 But the actual determination of whose it is, again, comes
24 from the DNA that was conducted by the Michigan State
25 Police.

1 Q Okay.

2 And the -- and you also see that there is -- I
3 think another bedroom where Marinus Polderman's blood was
4 found.

5 A Yes there was.

6 Q But Anna Lewis' blood was not found there neither was Sary
7 Polderman's, correct?

8 A No, that is also correct.

9 Q And looking through the map again, looking through the
10 kitchen area, stairs, the hallway, the dining area, I do
11 not see anywhere on the main floor, except for in the
12 bedroom. Am I wrong -- am I missing that?

13 A No, you are correct in that.

14 Q So the only blood samples that you were able to find of
15 Anna Lewis anywhere on the main floor was in the bedroom?

16 A That is correct.

17 Q Now we also have a -- blood samples found in the garage,
18 correct?

19 A We do.

20 Q And those blood samples all belong to Marinus Polderman?

21 A Correct, other than the unknown DNA from the latex.

22 Q I was asking about blood samples.

23 A Blood samples, those all belong to Marinus.

24 Q And you and the Michigan State Police officers have
25 analyzed the bloodstain patterns found in the garage,

1 correct?

2 A That is correct.

3 Q And based on the way that the blood was situated and the

4 pattern that exhibits on the blood, you have reached the

5 determination that Marinus Polderman was in the garage?

6 A That is correct. Those are what we determined to be

7 passive bleeding type of stains.

8 Q When you say passive, you are saying that it was dripping

9 stains?

10 A That is correct.

11 Q And you have also determined that there was a pattern of

12 passive stains leading into the garage from Marinus

13 Polderman?

14 A Correct, from the kitchen. We really don't know the

15 direction that it is going because there was not enough

16 information imparted to allow us to determine that. But

17 they are within the area leading from the garage to the

18 kitchen, but we couldn't tell which direction the person

19 would have been traveling that left them.

20 Q But you have no question in your mind based on the evidence

21 that you were able to find that Marinus Polderman was

22 either traveling into the garage or out of the garage with

23 those -- with those -- with whatever wounds he had at the

24 time dripping blood?

25 A Right.

1 Q And you were able to find on the back of the vehicle and I
2 believe that it was marked --

3 MR. MARKOU: Could you please put up exhibit 13
4 BY MR. MARKOU:

5 Q You were able to find at the back of the vehicle various
6 blood stains, correct?

7 A Yes, that is correct.

8 Q You have marked on the exhibit, marker number two?

9 A Yes I do.

10 Q And that shows a dripping down on the bumper, blood?

11 A That is also correct.

12 Q There also appears to be -- I am not sure if this is
13 accurate, but there appears to be blood from my perspective
14 on the red portion of the taillight.

15 Was that blood there?

16 A No it wasn't.

17 Q That was just --

18 A An anomaly of how the light plays with the photograph. We
19 didn't have it on the taillight itself.

20 Q But there is also blood on the -- on the top of the car?

21 A That is also correct.

22 Q Now, are you able to determine or the Michigan State Police
23 lab or either one you determine whether or not there were -
24 - any of the blood spatterings indicated impact type blood
25 stains in the garage?

1 A There were no impact stains in the garage.

2 Q Now you have found -- just so I can clarify for the Jury.

3 There was a variety other pieces of evidence that

4 may have led to potential DNA in this case, correct?

5 A That is correct.

6 Q It isn't just the blood samples and it is not just the two

7 pieces of latex, correct?

8 A That is also correct.

9 Q You did -- the trimmings were done of the fingernails of

10 the deceased?

11 A They were.

12 Q And those did not show any sort of unknown DNA at all, is

13 that fair to say?

14 A Correct. No DNA foreign to the victims themselves.

15 Q So no DNA foreign to the victims was found in the

16 fingernails of any of the three deceased?

17 A That is correct.

18 Q You were able to find -- you were able to do such pain

19 staking work that you were even able to find an eyelash on

20 the stairs, is that true?

21 A It is.

22 Q And that is because you were being so thorough throughout

23 this case?

24 A Well it is certainly what we do at a crime scene. We try

25 and find details.

1 Q And that eyelash belonged to Marinus Polderman?

2 A I don't independently remember that, but I -- I guess that

3 I couldn't testify to that.

4 Q It matched one of the three deceased?

5 A It did.

6 Q We know that there are only two unknown ones.

7 A That is also correct.

8 Q We know that none of the DNA matched any of the five people

9 charged?

10 A That is also correct.

11 Q So it must have been one of the three deceased.

12 A I just couldn't say which one right at this minute.

13 Q That's fine.

14 And you found some other hair samples and I think

15 one was actually found in the hand of the deceased?

16 A That's correct.

17 Q I -- I could not track -- who was that traced to, that DNA?

18 A It was one of the deceased. I don't recall if it was the

19 one whose hand it was or if it was one of the others. But

20 it was not foreign to the victims.

21 Q So you looked at everything that you possibly could and you

22 could not find any DNA in any location matching anybody

23 other than the Poldermans or those two (inaudible) found in

24 the garage that are unknown donors.

25 A That is correct.

1 MR. MARKOU: Could I please have picture number 26
2 put up, please?

3 BY MR. MARKOU:

4 Q Now, you have described for the Court which you indicated
5 as three different pieces of evidence that may or what you
6 conclude is evidence of some sort of cleaning up, correct?

7 A That is correct.

8 Q You've got the bucket, right?

9 | A Yes.

10 Q Now, I didn't hear what you said. You said that it was
11 full of water or half full of water or --

12 A Somewhere between half full and full. It wasn't, obviously
13 to the rim, but it was more than half full of water.

14 Q You said that it was full of water, it didn't have any -- I
15 assume that you mean that it didn't have any blood in it,
16 is that correct?

17 A I could not detect any blood nor detergent in the water.

18 Q Okay. So, it was just plain water that you could tell?

19 A That is correct.

20 Q And this bucket, as you found it, was located at the end of
21 the basement near the end the double sink?

22 A That is also correct.

23 Q So in order to get to it, you need to be able to walk down
24 the stairs, correct?

25 A Certainly yeah, you would have to get into the basement

1 some way and that is the only entrance into it.

2 Q The stairs had droppings of blood on them, correct?

3 A That is correct.

4 Q There were no footprints found on the stairs, correct?

5 A There were footprints on the stairs.

6 Q There were?

7 A There were.

8 Q But they matched the deceased's footprints.

9 A That is correct.

10 Q And then you would have to walk around to the -- through

11 the areas that we can clearly see depict blood, correct?

12 A What we don't know is if the blood would have been on the

13 floor at the time the person would have traversed that

14 area.

15 Q We just don't know.

16 A No, we don't.

17 Q We know there -- we know there is a bucket there?

18 A Correct.

19 Q Now, when you look at the bucket, did you examine the

20 bucket to see if there was any blood on the bucket

21 anywhere?

22 A We did.

23 Q Who did that blood belong to?

24 A I don't right at this moment recall.

25 Q One of the deceased's?

1 A Yes, it would not have been foreign to the deceased.

2 Q Okay.

3 And, you then looked at the -- on the upper level
4 you said that there was a rag that was cylindrical in shape
5 found in the sink?

6 A The rag was just an ordinary wash rag.

7 Q Okay.

8 A But it had a stain within it that was typical of what you
9 would get if you wiped something -- it had a curvature to
10 it. I can't say cylindrical, it could be a half circle,
11 such as some of the other items in the residence. But it
12 certainly would be consistent with the rail leading down
13 the stairs.

14 Q And you have no other -- other than the rail being wiped,
15 there is no other evidence of cleaning anywhere else in the
16 house?

17 A No, there was no other evidence that I could find.

18 Q For instance, we know that there are two pieces of latex
19 found in the garage. There was no evidence of any cleaning
20 in there, is that fair to say?

21 A That would be fair to say.

22 Q We also have blood in the kitchen on the floor, correct?

23 A That is correct.

24 Q Blood on the -- on the table -- not the table tops, but the
25 counter tops in the kitchen.

1 A That would also be correct.

2 Q We also have doorknobs that you found a fingerprint on,
3 correct?

4 A That is correct.

5 Q None of that looked like it was wiped down, correct?

6 A The doorknobs did not, correct.

7 Q And nothing else, as far as you could tell, looked like it
8 had been wiped down at all?

9 A I saw nothing else that I could specifically identify wipe
10 patterns on. But we didn't necessarily process everything
11 with LCV.

12 Q But that is an important thing for you to be able to
13 determine whether or not there is wipe patterns or to
14 determine whether or not somebody is cleaning up?

15 A Certainly that would be important.

16 Q So -- based on your review of the file and you have
17 testified on the case, you are confident that the only
18 three evidences of cleaning up are the three that you have
19 already told us?

20 A Yes, that would be the only three items that I could
21 identify that would have related to clean up.

22 MR. MARKOU: Let me just have a moment, your
23 Honor.

24 BY MR. MARKOU:

25 Q What I would like to show you is what I have marked as

1 defense exhibits H, D, C, and A. And B.

2 Could you please look at these photographs?

3 THE COURT: I'm sorry. H, --

4 MR. MARKOU: B -- H, A, B, C, and D.

5 THE COURT: Are they all photos?

6 MR. MARKOU: They are.

7 THE WITNESS: Okay, I am familiar with them.

8 BY MR. MARKOU:

9 Q Those are photos that you are familiar with in review of
10 this case?

11 A They are.

12 Q And these were photos that were taken as part of the crime
13 scene investigation?

14 A That is correct.

15 Q I want to show you what I have marked as defendant's
16 exhibit H. Can you identify for the Jury what this
17 depicts?

18 A That is a blood pattern on a comforter in the -- what I
19 have often referred to as number two bedroom. It would be
20 not the master bedroom, but the other one.

21 Q Is the bedroom where you and I earlier pointed out the
22 blood from both Marinus and Anna Lewis?

23 A That is correct.

24 Q Now that blood sample that is found on that bed, how would
25 you depict -- I mean, what is your characterization? Is

1 that a dripping amount of blood or is that a substantial
2 amount of blood found on that?

3 A A substantial amount, probably a transfer.

4 Q What does a transfer mean?

5 A Meaning that something had blood on it and then the blood
6 was transferred to the comforter through contact.

7 Q What is your best opinion on how that occurred in this
8 case?

9 A Absent other information, I have no idea how it would have
10 occurred.

11 Q Whose blood was that on that?

12 A We have both Anna and Marinus on that.

13 MR. MARKOU: Your Honor, I would move for the
14 admission of Exhibit H.

15 THE COURT: Mr. Brower.

16 MR. BROWER: No objection.

17 THE COURT: H is received.

18 BY MR. MARKOU:

19 Q Now as part of your search into -- into this case and your
20 crime scene investigation, you were looking to see whether
21 or not any of the property of the Polderman's had been
22 disturbed, is that correct?

23 A It is.

24 Q Eventually you want to find out if items had been taken,
25 correct?

1 A That is correct.

2 Q You want to know whether or not robbery or somebody has
3 come in to take money, jewelry or whatever, whether or not
4 that was a motive for the crime?

5 A That is also correct.

6 Q You hope that maybe something was taken that you could
7 later track down and trace it to an individual?

8 A That is correct.

9 Q Now I have marked exhibits D and A which I would like to
10 show you.

11 Could you tell the Jury what those photographs
12 depict?

13 A One of those is a drawer, I think it was in the kitchen,
14 but I am not 100 percent certain of it, but --

15 Q The countertop in that, does that seem to be consistent
16 with the countertop in the kitchen?

17 A That would be the kitchen counter, so that would be a
18 kitchen --

19 THE COURT: What exhibit is that?

20 THE WITNESS: This would be exhibit D.

21 And then exhibit A would be another counter in
22 that same -- another drawer underneath that same
23 countertop, which contains jewelry.

24 BY MR. MARKOU:

25 Q And each of those drawers are open. Somebody in the crime

1 lab -- crime scene must have opened those drawers to take
2 those pictures?

3 A That is correct. We opened them so that we could get the
4 camera angled so we could show what was in them.

5 Q And for the Jury's information, one of the pictures depicts
6 a wallet with cash in it?

7 A It does.

8 Q And that was found in the drawer?

9 A That is correct.

10 Q And is this a separate drawer where the jewelry was found?

11 A That is a separate drawer.

12 Q And there was also jewelry that was in this drawer?

13 A That is also correct.

14 MR. MARKOU: I would move, your Honor, the
15 admission of exhibits A and D.

16 MR. BROWER: No objection.

17 THE COURT: A and D as is dog, is that correct?

18 MR. MARKOU: D as in dog, your Honor.

19 THE COURT: A and D are received.

20 BY MR. MARKOU:

21 Q The final two exhibits that I want you to identify for the
22 Jury are defendant's exhibit B and defendant's exhibit C.
23 Could you look at those two offers. Are you familiar with
24 what those pictures depict?

25 A Yes I am.

1 Q And those pictures depict either a couch or a chair found
2 in the Polderman home?

3 A That is correct.

4 Q And under the seat cushion in the house was a bag that
5 contained money?

6 A That is also correct.

7 Q Do you know how much money was found in that bag by the
8 police?

9 A No, I didn't count it. But it contains one dollar bills
10 mostly.

11 Q But throughout all of this, you eventually found that there
12 was money in the home?

13 A That is correct.

14 Q And somebody counted up the money that was found?

15 A They did.

16 Q And it was -- how much money was found in the home?

17 A I don't know, I would have to refer to the report.

18 Q Was it more than a thousand dollars?

19 A I think it was more than a thousand dollars, but I really
20 am not certain.

21 Q Would reviewing the report refresh your recollection?

22 A Provided that you can find the spot that gives the exact
23 count.

24 Q I am going to try.

25 I don't think that I have anything that is in

1 exhibit log that summarizes all the money that was found.
2 But there was also money found in the rafters in the
3 basement too, correct?

4 A I am not certain of it. There was money found in another
5 location.

6 Q All of the other -- was there a TV in the home and other
7 items found in the home?

8 A There were, that is correct.

9 Q And as far as you could tell, based on your prior
10 experience in investigating crime scenes, there were no big
11 ticket items or other items that appeared to be missing
12 from this home. . .

13 A No, that is also correct.

14 MR. MARKOU: Your Honor, I would move for the
15 admission of exhibits B and C.

16 MR. BROWER: No objection.

17 THE COURT: Can you describe --

18 I'm sorry.

19 MR. BROWER: No objection.

20 MR. MARKOU: I will describe -- exhibit B is a
21 picture of the bag or cash that was found underneath the
22 chair and defense exhibit C actually shows the cushion, I
23 believe being lifted showing where the bag is located.

24 THE COURT: And no objections to either one, is
25 that correct, Mr. Brower?

1 MR. BROWER: It is, your Honor.

2 MR. MARKOU: Your Honor, just --

3 THE COURT: B as in boy and C are received.

4 MR. MARKOU: I have one final topic, your Honor.

5 I don't know if the Court wants me to get into that now or
6 not, is should take me about ten minutes.

7 THE COURT: Anybody need a break or can we
8 continue on? If you need a break, raise your hand.

9 All right.

10 Let's continue on.

11 BY MR. MARKOU:

12 Q Now eventually in May of 2002, a search was conducted of a
13 truck belonging to Andrew Miller?

14 A That is correct.

15 Q And the reason for that search is that you had some
16 information -- there was a possibility that one of the
17 assailants had driven to and from the Polderman home in
18 that truck?

19 A That is correct.

20 Q And again the purpose of the investigation was to determine
21 whether or not there was any physical evidence in the truck
22 that could be tied to the Polderman murder case?

23 A That is correct.

24 Q And when you do an investigation involving a truck like
25 this, one of the things that you are looking for at this

1 point in time is blood stains, correct?

2 A That is correct.

3 Q And you are familiar with the research done on the best
4 methods to determine if there was a blood sample, blood
5 stain in a vehicle?

6 A I am.

7 Q And there are two types of chemicals, I don't know if they
8 are brand names or not, that are considered the two best
9 used to determine if blood exists, to detect blood,
10 correct?

11 A There are a lot of chemicals that are applied. Depending
12 on the surface and if you feel that cleansers have been
13 applied, you may choose one over another and that kind of
14 thing. But there are actually more than two.

15 Q Right.

16 And the two that were used in this case is -- one
17 is called Luminol.

18 A That is correct.

19 Q And the other one is called Hemasticks, Hemasticks.

20 A That is correct.

21 Q And what Luminol does is when you spray it on a surface, it
22 can detect the presence of blood, correct?

23 A That is correct.

24 Q The reason why it can detect the presence of blood is that
25 it has a chemical reaction with the iron present in

1 Hemoglobin, correct?

2 A That is correct.

3 Q One of the reasons why Luminol is so affective is that it
4 does not need fresh blood for you to be able to detect that
5 there had been blood present in the past?

6 A That is also correct.

7 Q Because it detects the iron, blood can evaporate and there
8 would still be the presence of iron -- the liquid portion
9 of the blood can evaporate, but there can still be the
10 presence of iron indicating past presence of hemoglobin,
11 correct?

12 A That is correct.

13 Q And when the Luminol is sprayed on the surface and it
14 reacts with iron, potentially Hemoglobin, it glows?

15 A That is correct.

16 Q You then determine whether or not you then take that
17 sample, I assume, and do further testing to determine
18 whether or not it is actually blood?

19 A That helps direct us to an area where we can find DNA or
20 even identify human versus animal blood.

21 Q Luminol itself is not sufficiently specific to determine
22 whether or not when something lights up that it is blood or
23 not?

24 A It is considered a presumptive reagent, meaning when you
25 see a reaction you can presume that blood could be there.

1 It doesn't specifically identify the presence of blood.

2 Q When you say the presence of blood, what you are really

3 saying is the iron content left in the blood.

4 A From the standpoint of the Luminol, that is correct.

5 Q If it were a -- a blood sample of fresh blood, you wouldn't

6 necessarily need Luminol to spray on it?

7 A Correct, I would just simply collect it.

8 Q The purpose of Luminol is to detect the presence of blood

9 where it may be at a very -- presence of old blood that may

10 be at a very small level?

11 A To help point me to an area, that's correct.

12 Q And you are aware that Luminol is capable of reacting,

13 showing the presence of iron up to a nanogram?

14 A It is very sensitive, that is also correct.

15 Q It is -- it is by all the tests done and all the research,

16 the most sensitive method to show a presence of potentially

17 (sic) blood?

18 A It is among the most sensitive, I don't think the most

19 sensitive. But it is in the category of being the more

20 sensitive reagents that we could use.

21 Q One of the reasons why you used Luminol in this case was

22 because it was such a sensitive product?

23 A Correct.

24 Q You knew that the search you were doing was approximately a

25 year and a half, maybe a little longer, a year and eight

1 months after the -- after the murder had occurred?

2 A That is also correct.

3 Q So you wanted to use the substance or substances that were

4 most likely to still detect the presence of iron or the

5 presence of blood in that vehicle?

6 A That is correct.

7 Q And Luminol -- because you used Luminol, I assume, it is

8 capable of detecting the presence of iron and/or blood

9 several years after the blood is evaporated -- after the

10 fluid from the blood is evaporated?

11 A It can detect blood years after the deposit.

12 Q And one of the -- one of the interesting parts about how

13 people try to clean up scenes, is that people use bleach.

14 Bleach can also show -- it can also glow or react with

15 Luminol, is that correct?

16 A That is correct.

17 Q Bleach doesn't actually wash away a blood sample, unless

18 you've -- unless you've flush it with a lot of bleach, it

19 actually shows a similar type reaction to the blood,

20 correct?

21 A It masks the presence of the blood with its own glow if --

22 depending on how much bleach is used and how much cleaning

23 is attempted, it is still distinguishable from blood, just

24 based on the color of the glow and the length of time that

25 it continues to glow.

1 Q Now research has been done on blood as a masking agent
2 shows that in general that type of -- type of covering of
3 bleach worked -- in its attempt to mask lasts maybe eight
4 to ten hours. Is that fair to say?

5 A That it will completely mask the presence of blood is that
6 what you are saying?

7 Q (Inaudible response, too far from microphone).

8 A That research is somewhat in dispute, but -- but it is a
9 finite amount of time that it lasts.

10 Q It is not going to last a year and a half?

11 A It is often still detectable, but like I said, the blood is
12 many times distinguishable from the bleach.

13 Q Okay.

14 A -- nature of the way it glows under the Luminol.

15 Q Right. So, a year and a half afterwards, there is still a
16 possibility that you can detect bleach in this vehicle, is
17 that correct?

18 A That is correct.

19 Q Using Luminol.

20 A That is correct.

21 Q Also of blood.

22 A That is correct.

23 Q If what I am hearing you, blood -- blood samples might last
24 longer than the bleach?

25 A Very typically could.

1 Q Because it is iron?

2 A That is also correct. And the sensitivity of the Luminol
3 is more to the blood than it is to the bleach. Smaller
4 amounts of blood can cause a reaction.

5 Q And in this particular case when you conducted the search
6 of Andrew Miller's truck, you sprayed -- is it a spray
7 bottle of Luminol, I don't even know how it is applied?

8 A It is a spray bottle, that is correct.

9 Q Okay. You did as thorough of a search of the interior of
10 that vehicle that you possibly could?

11 A Both with the Luminol and the visually, that is correct.

12 Q And you did the same thing with the outside of the vehicle,
13 the bed area?

14 A Yes I did.

15 Q You sprayed it as thoroughly as possible with Luminol to
16 see whether or not -- to see the presence of blood
17 anywhere?

18 A I don't think we used Luminol on the bed, primarily because
19 it being a steel or iron vehicle and you would have rust
20 and reaction from that. So we typically don't use it on
21 something like the bed. We could have used it on items
22 that would have come from within the bed of the truck.

23 Q So, the interior of the truck you sprayed Luminol?

24 A That is correct.

25 Q Can you explain to me the role of the Hemasticks in this --

1 in this case, how you used the Hemasticks? Can you explain
2 to the Jury how that detects blood?

3 A Well the Hemasticks are really the very same ones used by
4 doctors to detect occult blood, blood that is not visible
5 in urine or feces of an individual to help diagnose medical
6 problems. So these are -- square pads that are on the end
7 of a stick for the purposes of reacting with the blood. It
8 allows the blood -- the very, very small amount of blood
9 that you might pick up with a swab and then using distilled
10 water to then being applied to that stick and we look for a
11 reaction. And it gives -- again, it is presumptive test.
12 It is not specific for human blood, but it is a good
13 presumptive test that if you get a reaction with the
14 Luminol, it is used to confirm that what you are looking at
15 is blood and not bleach or some other reactivity to the
16 iron in the truck.

17 Q All right. So those are -- you used both in this case in
18 the search of Andrew Miller's truck to determine whether or
19 not there was the presence of blood?

20 A That is correct.

21 Q You also took photos of the truck, is that correct?

22 A I did.

23 Q I have marked proposed exhibits F and G. F depicts the
24 interior of the vehicle looking in from the driver's side,
25 photograph out and then the other one, I believe, depicts

1 the bottom of the seat with cans and bottles and it looks
2 like it is from the passenger side. I'll have you looked
3 at those photos.

4 A Okay.

5 Q Do those photos accurately depict the way the truck looked
6 on the day you conducted your search?

7 A They do.

8 MR. MARKOU: Your Honor, I would move for the
9 admission of those two exhibits?

10 THE COURT: Mr. Brower.

11 MR. BROWER: No objection.

12 BY MR. MARKOU:

13 Q Now when you --

14 THE COURT: Just a minute.

15 MR. MARKOU: I'm sorry.

16 THE COURT: Exhibits F and G are received.

17 Right. F and G, correct?

18 MR. MARKOU: Yes.

19 THE COURT: Yes.

20 BY MR. MARKOU:

21 Q And the -- the one photograph of the passenger side shows
22 the bottom of the seat, correct?

23 A Yes it does.

24 Q And it shows that this is a fabric seat that looks like
25 there is some type of cover on it, correct?

1 A Yes that is correct.

2 Q Now when you sprayed the Luminol, I assume that you sprayed
3 both the cover that was on the seat, correct?

4 A Yes.

5 Q You removed that cover and sprayed underneath to the cloth
6 seat underneath as well?

7 A That is also correct.

8 Q You wanted to make sure that it was soaked through a seat
9 cover -- you wanted to see whether or not it would still
10 be on the underlying seat?

11 A That would be correct.

12 Q And it is possible for blood to soak through a seat cover
13 and get on a seat. You know that to be true?

14 A In sufficient volume it certainly is.

15 Q And you had an opportunity not only to spray Luminol on the
16 seats, but on every other item that a person could
17 potentially touch in a vehicle, that might soak up blood?

18 A I didn't use the Luminol that would have been anything
19 metallic. Many things I didn't choose to use it on, I
20 simply visually looked for stains on them; since you see
21 the pop cans and stuff like that in here, I would not have
22 Luminoled that stuff.

23 Q Did you use Hemasticks inside -- Hemasticks inside?

24 A In many cases I simply got to visually look at them only
25 using Hemasticks to confirm -- confirm any stain that I

1 could see visually.

2 Q Okay. Again, based on your experience, using a visual
3 overview is an appropriate method to determine when to use
4 Hemasticks or Luminol?

5 A On certain surfaces it is the only option available to you.

6 Q And you sprayed everything that you thought was appropriate
7 to spray in this case on the interior of the vehicle?

8 A I did.

9 Q And you did not find any evidence, whatsoever, of blood,
10 isn't that fair to say?

11 A That is fair to say.

12 Q Not only did you do that, but to be extra safe, you cut out
13 portions of the interior of this vehicle?

14 A That is also correct.

15 Q And you sent those portions of the vehicle, because they
16 might have showed -- there still might be some evidence of
17 blood in it, but you just weren't sure of?

18 A It could have been something that would have been below the
19 detection limits of the reagents that I was using.

20 Q So you wanted to make sure you -- you wanted to make sure
21 that there was absolutely no chance, based on what was
22 known at the time, of whether or not there was any blood in
23 that vehicle?

24 A That is correct.

25 Q So you sent those samples to the Michigan State Police lab?

1 A Actually they were taken by -- by the State Police
2 specialist that was sent down to assist me with this.
3 There was an additional person that came down from the lab.
4 Q This is about five or six hours over a couple of days that
5 you did this -- did the search of this vehicle?
6 A That is correct.
7 Q And the vehicle was obtained pursuant to Mr. Miller's
8 consent?
9 A Yes it was.
10 Q And when you did all that, all the samples that were taken,
11 those were taken back to the State Police lab?
12 A They were by the particular analyst that came down.
13 Q The testing that is under the State lab is even more
14 sensitive to the Luminol test to determine whether or not
15 there is blood?
16 A In many cases, much of the reagents that they would use
17 would be exactly the same ones. But they have access there
18 to the -- to the DNA people --
19 Q Okay.
20 A -- and would be able to select a stain that they would feel
21 suspicious or that they feel could be blood and additional
22 testing; with a specific eye toward the preservation of
23 even small amounts of DNA for the purpose of being able to
24 do a profile on it. I wouldn't want to use up the entire
25 stain --

1 Q Right.

2 A --- in a case like that and not leave something that the DNA
3 people can handle.

4 Q So there was no blood found at the State lab or DNA from
5 any of the samples that you provided to them?

6 A There were not.

7 Q And in conclusion, you did a thorough search of this truck,
8 did everything that you could to find the presence of blood
9 and nothing --- no blood was found in the truck, is that
10 correct?

11 A There was no blood found in the truck.

12 MR. MARKOU: I have no other questions, your
13 Honor.

14 THE COURT: Thank you, Mr. Markou.

15 Mr. Brower, any redirect?

16 MR. BROWER: I will have quite lengthy redirect.

17 THE COURT: Okay.

18 We will take a break then under the
19 circumstances.

20 Counsel --

21 Ladies and gentlemen, please remember my prior
22 instructions. Don't watch any media or news coverage in
23 regards to this trial. Make sure that you are not speaking
24 with anyone about what you have heard today or the case.

25 Make sure that you turn your notepads over on

1 your seats and Mr. Brooks will escort you out.

2 I would ask that you return at about 1:40, so
3 that gives you a little over an hour for lunch; so 1:40
4 upstairs if you would check in. I will try to bring you
5 down as close to a quarter to as possible.

6 Have a good lunch.

7 All rise.

8 (At 12:23 p.m., Jury departs for noon recess)

9 THE COURT: You may be seated.

10 Counsel -- Mr. Markou, do you have an exhibit log
11 or -- okay.

12 MR. MARKOU: I don't. I thought for some reason
13 or another all the pictures I wanted were included in the
14 Prosecutor's exhibit. I didn't notice it until last night.

15 THE COURT: That's fine. I have been making one.

16 Do you have an estimate of how many exhibits you
17 have?

18 MR. MARKOU: I think that --

19 THE COURT: That should be it then.

20 MR. MARKOU: That should be it.

21 THE COURT: I have a couple of pages of a log
22 started, but I wanted to make sure I would have enough for
23 you.

24 MR. MARKOU: There is -- I'm sorry, there is
25 Angela's handwritten recantation. I don't know whether or

1 not that is considered my -- that is probably my exhibit,
2 so there is probably that.

3 THE COURT: All right, that is fine.

4 Is there anything else that we need to address at
5 this time, Mr. Brower?

6 MR. BROWER: I don't believe so, your Honor.

7 THE COURT: Mr. Markou.

8 MR. MARKOU: No, your Honor.

9 THE COURT: Then as you heard, I plan to start
10 about a quarter to two.

11 MR. MARKOU: Thank you.

12 THE COURT: Court is in recess, have a good
13 lunch.

14 (At 12:25 p.m., court is in recess)

15 (At 2:06 p.m., court reconvenes)

16 COURT CLERK: The court calls the case of People
17 versus Andrew John Miller, case number C2007-0606FC.

18 Parties please restate your appearance for the
19 record.

20 MR. BROWER: Assistant Prosecuting Attorney, Scott
21 Brower, for the People of the State of Michigan, your
22 Honor. I believe that Mr. Markou will be here in just a
23 second.

24 THE COURT: We will wait for him.

25 Mr. Markou, why don't you put your appearance on

1 the record if you would.

2 MR. MARKOU: I will, your Honor.

3 Anastase Markou on behalf of Mr. Andrew Miller.

4 THE COURT: Counsel, the Jury should be brought
5 down shortly. It is my understanding, Mr. Markou that you
6 have one matter that needs to be addressed?

7 MR. MARKOU: Yes, your Honor.

8 I received a letter today from Benjamin Platt
9 that was sent on May 13th, 2008 and it is -- I have got the
10 original for the court's file and I'll hand it to the Court
11 and I would ask the Court to include this as an exhibit on
12 Mr. Platt's position on the fifth amendment in this case.

13 In the letter, Mr. Platt indicates that he is
14 going to be asserting his fifth amendment. That he
15 asserted his fifth amendment to the prior case. That he
16 does not want to be brought over. That even though he has
17 not talked to his appeal attorney, that is going to be his
18 intention to assert the fifth amendment. I do not expect
19 him to change his mind, given his position in the prior
20 trial and in this letter. And I believe that is an
21 adequate assertion of his fifth amendment right and I would
22 ask the Court to declare him unavailable for purposes of
23 this trial.

24 Mr. Miller, have you heard what I have stated?

25 THE DEFENDANT: Yes.

MR. MARKOU: Have you had an opportunity to review the letter written by Benjamin Platt?

THE DEFENDANT: Yes.

MR. MARKOU: And do you understand that he previously asserted the fifth amendment in the case involving Jerome Williams?

THE DEFENDANT: Uh, yeah.

MR. MARKOU: And you are aware that by this letter he is indicating that he is going to assert the fifth amendment in your case?

THE DEFENDANT: Yes.

MR. MARKOU: So I am going to ask and it is my position that we should not have him brought over for the limited purpose of him saying that on the record. Are you okay with that?

THE DEFENDANT: Yes.

MR. MARKOU: Your Honor, so I am going to ask that the Court declare him unavailable and if the Court does so, I will have my office inform the Department of Corrections to cancel the writ so that he does not have to be brought over for this case.

THE COURT: Mr. Brower, is there anything that you wish to indicate on the record with regards to this issue or not?

MR. BROWER: I believe that -- excuse me your

1 Honor.

2 THE COURT: I'll just give you a moment, Mr.
3 Brower, so you don't have a coughing attack here.

4 What I will do is read in the record what the
5 letter indicates.

6 It is has Benjamin Platt's name at the top and it
7 is addressed to Levine and Levine where Mr. Markou works.

8 It indicates, Dear Counselors. On May 12th, 2008, I
9 received a letter informing me that I would be required to
10 testify in the above referenced matter as I am going to
11 continue to perfect my fifth amendment rights, I will not
12 be able to testify in this case. I have yet to speak to my
13 attorney and so to protect my own interests regarding my
14 appeal, I will not be testifying. To save time and money,
15 I would ask -- I would ask you to have the subpoena lifted.
16 If you have any further questions for me, please feel free
17 to contact my attorney.

18 And that is -- at the bottom, the signature is
19 Benjamin Platt.

20 Mr. Brower, is there anything that you wish to
21 place on the record?

22 MR. BROWER: Your Honor, I believe that there has
23 been an adequate offer of proof for the Court to determine
24 that he is unavailable. I would state that -- I wouldn't
25 necessarily concede to anything beyond that, as far as

1 admissibility of evidence or statements, but that he is
2 unavailable for purposes of -- for application of rules of
3 evidence.

4 THE COURT: The Court will find that he is
5 unavailable based on the letter and the fact that he has
6 been -- was sent to him and to save time and money to have
7 him brought to court as Mr. Markou indicated, I will find
8 that he is unavailable under 804.

9 I am going to mark this as Defendant's exhibit X.
10 This letter will not be given to the jurors, obviously, but
11 I am going to include this as part of the record as
12 Defendant's exhibit X.

13 MR. MARKOU: Thank you, very much, your Honor.

17 MR. BROWER: No, your Honor.

18 | THE COURT: Mr. Markou.

19 MR. MARKOU: No, your Honor.

20 THE COURT: The Jury should be on their way down.

21 Counsel, we will need to address the issue with
22 Juror number two, either during the break -- during the
23 break, so we can address that before the end of the day.

24 All rise.

25 (At 2:15 p.m., Jury enters courtroom)

1 THE COURT: You may be seated.

2 Mr. Brower, I will turn it over to you for and
3 further direct.

4 MR. BROWER: Thank you, your Honor.

5 · REDIRECT EXAMINATION

6 BY MR. BROWER:

7 Q Lieutenant Johnson, during cross-examination, defense
8 counsel asked you if you would confirm that there was no
9 significant differences from your findings referring to
10 findings of Michigan State Police Laboratory Scientist,
11 Pierson and Schultze, do you recall that?

12 A I do.

13 Q Just to clarify, you did not obtain any results on DNA
14 evidence, is that correct?

15 A That is correct. All of the DNA results are directly from
16 the Michigan State Police.

17 Q The diagrams that we saw, the diagram of the garage area,
18 the main floor, and the basement that contained your
19 notation regarding Marinus' DNA located at this spot, Sary
20 or Anna or unknown. Those were not your results but simply
21 documenting the reports of the results from the Michigan
22 State Police, is that correct?

23 A That is correct.

24 Q All right.

25 Talking about the handle of -- the fingerprint

1 kill you if you told the truth?

2 A Correct.

3 Q Now you realized that at that time you had told the police
4 that you had helped somebody else clean up after a murder,
5 correct?

6 A Correct.

7 Q You knew that you were in trouble?

8 A Correct.

9 Q And from that point forward you continued to be interviewed
10 by the police?

11 A Yes I did.

12 Q And you knew that the Polderman murder was a big case for
13 the police?

14 A Yes, after time, yes.

15 Q During a later point, sometime between 2002 and 2007, you
16 were interviewed again by the police and you eventually
17 told the police that Mr. Vendeville was not part of the
18 murder that you didn't know anything about it, correct?

19 A Correct.

20 Q Now when you made that statement, you made that statement
21 under oath, correct?

22 A At the subpoena, yes when I got subpoenaed.

23 Q So you were advised at the time of the investigative
24 subpoena. You raised your right hand and told the person
25 or stenographer or the Prosecuting Attorney that you were

1 going to tell the truth, correct?

2 A Correct.

3 Q And you denied any involvement or knowledge of the
4 Polderman murders, correct?

5 A Correct.

6 Q So, you are fully capable of lying under oath, correct?

7 A Yes, I guess that you can say that.

8 Q And when you testified at the investigative subpoena
9 denying that you had any role in this or that Richard
10 Vendeville had any role in this, you indicated that you
11 were afraid of Richard Vendeville and that is why you made
12 up that story about him, correct?

13 A Yes.

14 Q And you told them that you were afraid of him because of
15 the way he had treated you?

16 A Correct.

17 Q The prosecuting attorney elicited some testimony that he
18 was a violent man towards you?

19 A Yes he was.

20 Q You were afraid of him?

21 A Yes I was.

22 Q You weren't sure what he would do to you?

23 A Yes.

24 Q Because that was they type of person he was?

25 A Yes he was.

1 Q You know that you are a suspect?

2 A Yes.

3 Q You know that you are a suspect to murder, correct?

4 A Correct.

5 Q You understand the seriousness of that type of crime?

6 A Yes.

7 Q You understood that if you were charged with something like

8 that, you are facing the possibility of a long time in

9 prison?

10 A Yes.

11 Q Did you have kids at this time period, 2006, 2007?

12 A Yes I did.

13 Q How many children did you have?

14 A I had three.

15 Q Was the father of one of those children, Richard

16 Vendeville?

17 A Yes.

18 Q And it was a pretty scaring thought for you in February of

19 2007, that you might be taken away from your kids for the

20 rest of your life; is that fair to say?

21 A Yes.

22 Q Still a scary thought for you, isn't it?

23 A Yes.

24 Q Then when the police reinterviewed you in March of 2007,

25 you knew that you were one of the primary suspects in this

1 A Somewhat.

2 Q Not that much with him, though?

3 A Correct.

4 Q Were you talking to anybody about your police interviews

5 other than your parents at this time period?

6 A Not that I remember, no.

7 Q But your parents were people that you felt like you could

8 confide in?

9 A Yes.

10 Q You felt they loved you?

11 A Yes.

12 Q They were somebody that you could trust with the

13 information that you were providing to them?

14 A Yes.

15 Q And you were telling your parents that during the

16 interviews of March of 2007 -- interviews of March of 2007,

17 the police were feeding you information or coaching you

18 about what to say?

19 A Correct.

20 Q And the information that they were coaching you or feeding

21 you about was your role inside the Polderman home, correct?

22 A Correct.

23 Q Your brother's role in the Polderman home, correct?

24 A Yes.

25 Q And that was the information that you were telling your

1 A To the Polderman home?

2 Q Yes.

3 A It was myself, Joe, and Ben in the truck and Angela and
4 Andrew in the Lincoln.

5 Q Andrew did not drive his own vehicle to the Polderman's,
6 you are claiming?

7 A Correct.

8 Q And Jerome Williams didn't drive his own car to the
9 Polderman's?

10 A Correct.

11 MR. MARKOU: May I please have up on the screen, I
12 believe it is exhibit number seven.

13 BY MR. MARKOU:

14 Q Now you testified on direct examination that this yellow
15 Lincoln was parked -- was it parked in the driveway or at
16 the base of the driveway?

17 A It was by the driveway, so at the base.

18 Q We have a picture up here that has already been admitted
19 into court. It is a picture that depicts, so you can
20 orient yourself. This vehicle located right there is a
21 police vehicle located in the driveway. Can you tell me
22 where the yellow Lincoln was park in reference to that?

23 A Somewhat kind of by the mailbox in that general area.

24 Q And when you say the mailbox, maybe you have a hard time
25 seeing it. Is that the item that is located right there?

1 A Yes.

2 Q So that is where you say the yellow Lincoln was parked
3 throughout this entire incident until you go and move it
4 when you leave the home?

5 A Correct.

6 Q Now you say that the -- the truck was parked in a different
7 location?

8 A Correct.

9 Q You say a different location, are you saying a different
10 driveway?

11 A Yes.

12 Q Not attached to this house?

13 A No.

14 Q There is only one driveway to this house, correct?

15 A Yes.

16 Q So you are saying that these individuals parked in some
17 stranger's driveway?

18 A It was off -- I don't know if it was in a driveway of a
19 house or if it was just off in a gravel area.

20 Q You said that it was a driveway; twice to the Prosecutor.

21 A Well it was up over the railroad tracks.

22 Q Where? Where was it in reference to this picture? Is it
23 on P Avenue or was it on 26th Street?

24 A It was on the other road.

25 Q P Avenue?

1 A Yes, that is the way I remembered it. At the time I gave
2 that statement I was very emotional, so I could have gotten
3 mixed up on who went in what vehicle.

4 Q Now, you've -- you've testified about the -- about what the
5 individuals looked like when they came out of the -- the
6 three men came out of the -- when they came out of the
7 Polderman home, okay.

8 A Okay.

9 Q You have already testified to that under direct
10 examination, right?

11 A Yes.

12 Q And one of the things that you said is that they had blood
13 on them, right?

14 A I'm sorry, say that again.

15 Q That the three men all had blood on them?

16 A Correct.

17 Q And we also know that Angela had blood on her at one point
18 or another but she may have wiped it off outside the
19 Lincoln?

20 A Yes.

21 Q Now, you have described for the Prosecutor on direct
22 examination where the blood was located on the individuals,
23 right?

24 A Yes.

25 Q And -- but you also told the police in your statement,

1 again after the plea that they were covered with blood from
2 head to toe?

3 A Yeah, it was all over the front of their body, yes.

4 Q And regardless of which vehicle each person went in, you
5 know for sure, at least right now, at least two of the guys
6 went in the truck, right?

7 A Correct.

8 Q And potentially one of the guys went in the Lincoln, right?

9 A What do you mean?

10 Q Went back to Steger Street in the Lincoln?

11 A It is possible, yes.

12 Q Now during this incident -- you have given some
13 descriptions about what happened inside and you talked a
14 little bit about Ben Platt's role in this, correct?

15 A Correct.

16 Q Now getting into what you saw when they were leaving, you
17 noticed that when the three men left the incident -- left
18 the Polderman home, Ben Platt had a cut on his arm?

19 A Correct.

20 Q And it was a pretty significant cut, correct?

21 A Yes it was.

22 Q It looked like something where he need stitches?

23 A It looked -- I mean it was bigger than just a little
24 scratch, yes.

25 Q He was bleeding from that cut, correct?

1 A Yes.

2 Q And that is something that he came out of the Polderman
3 home with blood coming out of his arm?

4 A Correct.

5 Q And later on you needed to cover -- he needed to cover that
6 blood and wrap it?

7 A Yeah, he came out of the house with it covered.

8 Q Eventually -- and we'll get to that down the road. He went
9 back to Steger Street and he wrapped it up in gauze,
10 correct?

11 A Yes, it was taken care of.

12 Q Now I want to get into some of the details that you
13 testified to about the incidents that occurred inside the
14 home, okay.

15 A Okay.

16 Q Your testimony is that initially the plan was for you and -
17 - you and Angela to knock on the door and try to gain entry
18 into the home?

19 A Yes to see if anybody was home.

20 Q Can you testify or tell the Jury where the three men were
21 located on the property prior to you going up to the door
22 and knocking on it?

23 A There in the back field there kind off by the barn.

24 Q Off by where?

25 A The barn.

1 A No I did not.

2 Q Did you see them carry anything to the barn?

3 A No I did not.

4 Q Now you said that they came to the -- you came around to

5 the front door and you knocked on the front door and Sary

6 Polderman eventually opened the door for you?

7 A Yes.

8 Q And when she opened the door for you, you explained or you

9 or Angela explained the ruse that you described as to why

10 you were there?

11 A Yes.

12 Q And there was some discussions in there about how you

13 wanted to use the phone?

14 A Correct.

15 Q Did you have an opportunity to grab the phone before the

16 boys arrived?

17 A Yes, Angela did.

18 Q You did? Angela grabbed the phone before you (sic)

19 arrived?

20 A Yes.

21 Q And then the boys came in?

22 A Correct.

23 Q And then they came in and had a conversation with Marinus

24 Polderman asking what are you doing here?

25 A With Mr. Polderman, yes.

1 Q Did you testify that he was struck by a weapon or with
2 hands?

3 A Both.

4 Q At the first time he was struck more than once?

5 A What do you mean?

6 Q The first time that he walked up to them, there was a
7 confrontation and a physical assault, was Mr. Polderman
8 struck more than once?

9 A No.

10 Q Was he struck by a weapon or by fists that first time?

11 A With a fist.

12 Q And he went down?

13 A Yes.

14 Q And at that point your testimony is that Mr. Polderman was
15 taken into the back bedroom.

16 A He was hit another time before he was taken into the back
17 bedroom.

18 Q Okay.

19 A So it was more --

20 THE COURT: I didn't hear the last part of that.

21 THE WITNESS: He was hit more than one time
22 before he went into the back room.

23 BY MR. MARKOU:

24 Q So he goes into the back room and there is stuff going on
25 in the back room that you don't know what is happening

1 because you are still in the kitchen area with, I think you
2 said, Ben.

3 A Angela, myself and Mrs. Polderman.

4 Q Andrew and Jerome are in the back bedroom?

5 A Correct.

6 Q I think you then said that they are bring Mr. Polderman
7 back and they are kind of -- um -- don't have a better
8 word, but you said they were kind of shoving him towards
9 the front of the house. That is what you see?

10 A Yeah, forcing him, yes.

11 Q Okay. And you testified previously about what you have
12 observed on Mr. Polderman at that time when he came back,
13 correct?

14 A Correct.

15 Q And what you see on him is a little bit of a cut over his
16 eye, correct?

17 A Yes, he had blood coming from his head, yes.

18 Q And that was the only injury that you saw was a cut over
19 the eye, correct?

20 A Correct.

21 Q You did not see any other blood coming from him from any
22 other spot, correct?

23 A No, correct.

24 Q He is then -- there is an incident that occurs where he
25 gets up and he tries to reach for the phone and he is

1 attacked again in the kitchen, correct?

2 A Correct.

3 Q And immediately thereafter he is taken into the basement,
4 correct?

5 A Yes.

6 Q And later on you go into the basement and see Mr. Polderman
7 on the ground, right?

8 A Right.

9 Q And you know that he is not moving at all, right?

10 A Right.

11 Q He had blood coming from him in all different spots of him
12 at that point?

13 A Yes there was a lot of blood.

14 Q There is not question, at least in your mind, that he is
15 dead at that point?

16 A Yes.

17 Q And at no time did you see Mr. Polderman enter the garage,
18 isn't that fair to say?

19 A Correct.

20 Q Now you have testified that when you were holding Sary
21 Polderman back -- I'm sorry, let me go back a step.
22 When Mr. Polderman was in the kitchen, he was
23 fighting for his life, correct?

24 A Correct.

25 Q And he was struggling with the boys?

1 For the portion that you were at. When Anna
2 Lewis came into -- when Anna Lewis came into the home,
3 there was -- there was a conversation between you and --
4 you, Angela and Mrs. Lewis, right?

5 A Before going inside the house, yes.

6 Q Okay.

7 And then she went inside the house?

8 A Correct.

9 Q And then is it immediately thereafter that one of the boys
10 comes up from the basement?

11 A No.

12 Q How long is it before one of the boys comes up from the
13 basement and assaults Anna Lewis?

14 A What do you mean?

15 Q You've described for the Jury -- I'm sorry, I apologize.

16 I apologize for that, I have little confusion
17 there.

18 There was one point in time in which Anna Lewis
19 decides she is trying to head toward the basement, is that
20 correct?

21 A Correct.

22 Q I apologize for that.

23 And Angela McConnell has a crow bar in her hands?

24 A Correct.

25 Q And she hits Anna Lewis over the head with the crow bar?

1 A Correct.

2 Q And that is at the foot of the stairs leading to the

3 basement?

4 A Yes.

5 Q And that is on the main floor of the house?

6 A Yes.

7 Q And there is a sufficient amount of blood that there is

8 some of it on Anna Lewis -- I'm sorry Angela McConnell's

9 arm, correct?

10 A Yes.

11 Q So that means that Anna Lewis is bleeding from that hit to

12 the head, right?

13 A Yes, she --

14 Q And --

15 A I'm sorry, she got hit more than one time.

16 Q And this is all on the main floor of the house?

17 A Yes.

18 Q So Anna Lewis is bleeding on the main floor of the house in

19 the kitchen and stairs area, according to your testimony?

20 A On the stair area, yes, by the stairs.

21 Q By the stairs but before you actually go down the stairs?

22 A Yes.

23 Q Now you also testified that after Sary Polderman went to

24 the basement that you also went to the basement -- you also

25 went to the basement and followed her down the steps,

1 correct?

2 A Yes, after she fell, yes.

3 Q And at this time, they had already taken Mr. Polderman down

4 the stairs, correct?

5 A Correct.

6 Q And there was blood on the stairs, I assume?

7 A I don't remember.

8 Q You don't remember, but you are walking up and down the

9 stairs?

10 A Correct.

11 Q And this is after Mr. Polderman, as you described, was

12 attacked in the kitchen and is bleeding?

13 A Correct.

14 Q And they are carrying him down the stairs, right?

15 A Right.

16 Q And you are walking after that down the stairs?

17 A After Mrs. Polderman fell down, yes.

18 Q And when you walk down the stairs, you see Mr. Polderman

19 down there, right?

20 A Yes.

21 Q And you see what you have described as the assault of Mr.

22 Polderman by your brother?

23 A Yes.

24 Q You then claim that you start heading back up the stairs at

25 that point? That was your testimony today on direct

1 examination, right?

2 A Yes.

3 Q You have also testified on direct examination that you
4 threw up outside the home, right?

5 A Correct.

6 Q This is a pretty -- pretty important thing to remember
7 where you threw up, isn't that fair to say?

8 A It was by the driveway.

9 Q Okay.

10 And if you have given a statement previous to
11 this that you threw up in the basement, that isn't true?

12 A No.

13 Q Now when you gave your statement after your plea agreement,
14 again, July 13, 2007, you explained to the police what
15 happened in the basement on that date, right?

16 A I'm sorry, on what day?

17 Q On July 13, 2007 after you reached your plea agreement in
18 this case, right?

19 A Yes I told them.

20 Q And you described for them what happened in the basement,
21 right?

22 A Yes.

23 Q And you told the police at that statement that you vomited
24 in the basement?

25 A Yes I remember that.

1 Q You also told the police that the guy said, you can't be
2 doing that here, you got to get out of here.
3 A Yes I remember that too.
4 Q And you also told the police that the guys told you to
5 clean up the vomit in the basement?
6 A Yes I did.
7 Q That's not true?
8 A No it is not.
9 Q Now eventually you went back to the -- you went back to the
10 Steger Street home, is that fair to say?
11 A Yes.
12 Q And how long of a drive is it from Steger Street to the
13 Polderman home time wise?
14 A Not very long, like 10 to 15 minutes, I think.
15 Q About eight to ten miles a 10 to 15 minute drive?
16 A Something like that.
17 Q So it takes 10 to 15 to get out there and 10 to 15 minutes
18 to get back.
19 A Yes.
20 Q Before I get into that, I just want to ask one last
21 question. When Anna Lewis was trying to get to the
22 basement, was she struggling with either you, Angela or
23 anybody else before she was struck over the head? Were one
24 of you trying to grab her and prevent her from getting to
25 the basement?

1 A Yes.

2 Q You have told a lot of lies in this case, is that fair to
3 say?

4 A Yes I have.

5 Q Before the preliminary examination in which you were -- let
6 me rephrase that.

7 Before the preliminary examination in which you
8 testified against your brother, you told your parents that
9 you were going to testify but that it was a lie?

10 A Yes I did.

11 Q You told the same thing to Mark Black too, didn't you?

12 A Yes I have.

13 Q You even sent a letter to your brother telling him that it
14 was all a lie and he knew it was all a lie?

15 A Yes I did.

16 Q And that was all before the preliminary examination,
17 correct?

18 A Yes.

19 Q You even told your parents before the preliminary
20 examination that the police were continuing to help you
21 fill in the details of what had happened in this case?

22 A Correct.

23 Q After the preliminary examination and prior to trial in
24 this case, you have had other conversations with -- at
25 least with your mother, verbal conversations with her,

1 right?

2 A Yes.

3 Q And you sent a letter to your mom?

4 A Yes I have.

5 Q You sent a letter to your dad?

6 A Yes.

7 Q In the letter to your mom, you told her, I just told them
8 what they wanted to hear, isn't that right?

9 A Yes.

10 Q And again, your mother is somebody that you can confide in
11 and that you trust?

12 A Yes.

13 Q You also told her that you just made shit up as they went
14 along.

15 A Yes.

16 Q You also told her that you were scared to death of them
17 mom.

18 A Yes.

19 Q When you say them, who do you mean?

20 A The detectives.

21 Q You sent a similar letter to your father, correct?

22 A Yes I did.

23 Q And that letter also says that you were just telling the
24 police what they wanted to hear.

25 A Correct.

1 Q And that is all they have anyways.
2 A Correct.
3 Q Is what you are telling them?
4 A Correct.
5 Q You have also spoken to your mom?
6 A Yes I have.
7 Q Both in a phone conversation and a visit to the County
8 Jail?
9 A Yes I have.
10 Q And that was in March and April of this year?
11 A Yes.
12 Q And you told her that you needed to lie in this case to
13 save yourself?
14 A Yes I did.
15 Q You told her that you were afraid of spending the rest of
16 your life in prison.
17 A Yes I did.
18 Q You knew that you had put yourself at the scene of this
19 crime?
20 A Yes.
21 Q You wanted to have a chance to come out and see your
22 children again?
23 A Yep.
24 Q And you told your mom that is why you were going to lie?
25 A Yes.

1 Q You also told your mom in a face-to-face meeting at the
2 County Jail the same thing, didn't you?

3 A You mean on a visit?

4 Q In a visit.

5 A Yes.

6 Q And you knew that when you reached this plea agreement what
7 the consequences were if you were convicted without a plea
8 agreement, right?

9 A Yes.

10 Q You had an attorney who explained to you the possible
11 sentence if you lost at trial in this case?

12 A Yes.

13 Q You understood fully before you reached a plea agreement in
14 this case that if you lost on this case without reaching a
15 plea agreement, that you were going to spend the rest of
16 your life in prison?

17 A Yes.

18 Q And you understood that under the plea agreement, you had
19 the possibility of getting out and seeing your kids again
20 after 15 years?

21 A Correct.

22 Q And on the top end, even if they don't give you parole, no
23 matter what, you are going to get out in 22 1/2 years?

24 A Correct.

25 Q And you knew that by reaching this plea agreement, you had

1 a chance to see your children again and be a free woman one
2 more time?

3 A Yes.

4 Q And you told your parents that is why you are lying in this
5 case?

6 A Yes.

7 MR. MARKOU: I have no other questions, your
8 Honor.

9 THE COURT: Thank you, Mr. Markou.

10 Mr. Brower, any further questions?

11 MR. BROWER: Yes, your Honor.

12 REDIRECT EXAMINATION

13 BY MR. BROWER:

14 Q Brandy, are you -- do you recall dates of specific
15 statements and when you made this statement or when you
16 made that statement?

17 A No, not exactly.

18 Q When you were first contacted in -- after the period that
19 you denied for several years, denied knowing anything about
20 anything and in the first interview in January of '07, you
21 made a statement about Richard and Ben and dropping them
22 off, is that right?

23 A Yes.

24 Q That -- you were involved in -- Ben was involved, but
25 Richard was not involved, is that right?

1 testimony in the investigative subpoena process, yes?

2 A Yes.

3 Q Um, have you, after being charged and after a preliminary
4 examination, entered a plea of guilty to three counts to
5 second degree murder, guilty of home invasion, guilty of
6 perjury for the investigative subpoena? Is that right?

7 A Yes.

8 Q That was pursuant to a plea agreement in which you agreed to
9 give truthful testimony against others at all future
10 proceedings?

11 A Yes.

12 Q And to -- Uh, with a recommendation from the Prosecutor's
13 Office receiving a -- a prison term of 35 years to 52 and a
14 half years? Is that right?

15 A Yes.

16 Q Was some hope on your part that maybe there would be a
17 recommendation for less, but there was no agreement
18 regarding that? Is that right?

19 A Yes.

20 Q Ma'am, I'm going to refer you to or direct your attention to
21 August of the year 2000. Do you recall where you were
22 living back then?

23 A I don't.

24 Q Okay. Do you recall -- are you familiar with Andrew Miller?

25 A Yes.

1 A That would be safe to say, yes.

2 Q One of the things that you did do, actually, was to put
3 flyers at a variety of locations including supermarkets,
4 the courthouse and a variety of places?

5 A I have knowledge that that happened, I was not involved in
6 the investigation at the time.

7 Q But you actually saw some of those flyers yourself at some
8 time or another?

9 A I have seen those flyers, yes.

10 Q And Mr. Miller at some point or other, indicating that he
11 had -- that the knowledge he had of the Polderman murders
12 came from the flyers?

13 A That is correct.

14 Q Now the second interview in February of 2007, again that
15 was conducted pursuant to the Prosecutor's investigative
16 subpoena powers?

17 A Yes sir.

18 Q And that would have been in the Kalamazoo Public Safety
19 office?

20 A Yes.

21 Q Was this done in an interview room or was this done in a
22 larger office?

23 A I believe an interview room was employed.

24 Q You are not really sure?

25 A Not really sure, I think so yes.

1 witness testimony.

2 MR. MARKOU: Your Honor, in fact, he is not going
3 to be excused, I think that he is going to be brought back
4 up on the stand in about five minutes.

5 THE COURT: You may step down, sir.

6 (At 10:36 a.m., witness steps down)

7 MR. MARKOU: Your Honor, at this time the defense
8 would call out of order and present to the Jury a letter
9 written by Angela McConnell.

10 THE COURT: All right.

11 Why don't you provide some background for the
12 Jury Mr. Markou.

13 MR. MARKOU: This letter was written for and
14 provided to Carl Clatterbuck, an investigator for Jerome
15 Williams on March 18, 2008. And it is a letter written by
16 Angela McConnell. Ms. Sarissa Montague, from the office of
17 Levine and Levine will be reading the letter into the
18 record.

19 THE COURT: Go ahead.

20 MS. MONTAGUE: My name is Angela Renee McConnell
21 Branch. My date of birth is 8-22-83. Today's date is
22 March 18, 2008.

23 I am currently an inmate at Van Buren County Jail
24 where I am pending sentencing on the Polderman murder case.
25 The time is currently 2:52 p.m.

1 I have lied. I went with the stories that I have
2 been told. I was told these lies by the detective -- by
3 the detectives. I was spoon fed these stories and told
4 that someone else told this by the detectives.

5 The Detective Slancik said that I would not be in
6 any trouble and I wasn't, but that he wanted me to tell him
7 pretty much what Brandy was saying.

8 He said that Brandy said me, Angela, and her,
9 Brandy, stood at the top of the stairs with our hands
10 interlocked so that the old lady couldn't go down there. I
11 said that we were upstairs holding our arms together so
12 that she couldn't go down there. He said, Angela, there is
13 no upstairs, it is a one-story house. The reason that I
14 said upstairs was because that I had never been to the
15 house and I didn't know that there was not an upstairs.

16 I lied when I said that Jerome came in the house
17 or when he told us to see who was in the driveway. I lied
18 about the whole story. I have lied about everything that I
19 have testified to. I was scared, confused, and didn't know
20 what else to do. During the year that I have been locked
21 up, I have had a lot of time to think.

22 I do not feel that is the right thing to do to
23 innocent people. I have told other people that I have lied
24 about this case because I was scared. My mom, Lonna
25 McConnell; my aunt, Sheila Russell; my sister, Brook