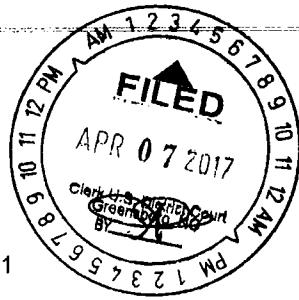


United States District Court

Middle District of North Carolina

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.
GARY GIOVON LYNNCase Number: 1:16-CR-00287-1
USM Number: 33521-057John A. Dusenbury, Jr., Assistant Federal Public Defender
Defendant's Attorney**THE DEFENDANT:**

pleaded guilty to Count 1.
 pleaded nolo contendere to count(s) _____ which was accepted by the court.
 was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	January 4, 2016	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 Count(s) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

February 28, 2017

Date of Imposition of Judgment

William L. Osteen, Jr., Chief United States District Judge

Name & Title of Judge

Date

APPENDIX B

DEFENDANT: GARY GIOVON LYNN
CASE NUMBER: 1:16-CR-00287-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **120 months**.

The court makes the following recommendations to the Bureau of Prisons: the defendant be designated to a facility where he may participate in intensive substance abuse treatment and to a facility as close to his home as possible. Further, that the defendant be designated to a facility where he may receive a psychological evaluation and any recommended mental health treatment while in the custody of the Bureau of Prisons.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district.

at _____ am/pm on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 pm on .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____

_____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: GARY GIOVON LYNN
CASE NUMBER: 1:16-CR-00287-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
6. You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any I conditions on the attached page.

DEFENDANT: GARY GIOVON LYNN
CASE NUMBER: 1:16-CR-00287-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: GARY GIOVON LYNN
CASE NUMBER: 1:16-CR-00287-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall cooperatively participate in a mental health treatment program, which may include inpatient treatment, and pay for those treatment services, as directed by the probation officer

The defendant shall submit to substance abuse testing, at any time, as directed by the probation officer. The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing and inpatient or residential treatment, and pay for those treatment services, as directed by the probation officer. During the course of any treatment, the defendant shall abstain from the use of any alcoholic beverages.

The defendant shall not associate with or be in the company of any gang member or security threat group member, including but not limited to the United Blood Nation. The defendant shall not frequent any locations where gangs or security threat groups congregate or meet. The defendant shall not wear, display, use or possess any clothing or accessories which have any gang or security threat group significance.

The defendant shall submit his person, residence, office, vehicle, or any property under his control to a warrantless search. Such a search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; Mr. Lynn shall warn any residents that the premises may be subject to such searches.

DEFENDANT: GARY GIOVON LYNN
 CASE NUMBER: 1:16-CR-00287-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment</u>	<u>Fine</u>	<u>Restitution</u>
	\$100.00		\$0.00	\$0.00

The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GARY GIOVON LYNN
CASE NUMBER: 1:16-CR-00287-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$100.00 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, 324 West Market Street, Greensboro, NC 27401-2544, unless otherwise directed by the court, the probation officer, or the United States Attorney. **Nothing herein shall prohibit the United States Attorney from pursuing collection of outstanding criminal monetary penalties.**

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3 UNITED STATES OF AMERICA) CASE NO. 1:16CR287-1
4 vs.)
5 GARY GIOVON LYNN) Winston-Salem, North Carolina
) February 28, 2017
) 9:51 a.m.

TRANSCRIPT OF THE **SENTENCING HEARING**
BEFORE THE HONORABLE WILLIAM L. OSTEEN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: KIMBERLY DAVIS, SAUSA
Office of the U.S. Attorney
251 N. Main Street, Suite 726
Winston-Salem, North Carolina 27101

For the Defendant: JOHN A. DUSENBURY, AFPD
Office of the Federal Public Defender
301 N. Elm Street, Suite 410
Greensboro, North Carolina 27401

Court Reporter: BRIANA L. BELL, RPR
Official Court Reporter
P.O. Box 20991
Winston-Salem, North Carolina 27120

APPENDIX B

25 Proceedings recorded by mechanical stenotype reporter.
Transcript produced by computer-aided transcription.

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18 EXHIBITS

19 **Exhibits:**20 **Identified** **Received**

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1 P R O C E E D I N G S

2 (The Defendant was present.)

3 **THE COURT:** All right. Ms. Davis.4 **MS. DAVIS:** Good morning, Your Honor. Your Honor,
5 the next matter this morning is United States versus Gary
6 Giovon Lynn, File Number 1:16CR287. He is present in Court
7 represented by his attorney, Mr. John Dusenbury. This matter
8 is being called for sentencing.9 **THE COURT:** All right. Good morning, Mr. Dusenbury.10 **MR. DUSENBURY:** Good morning, Your Honor.11 **THE COURT:** Are you and Mr. Lynn ready to proceed?12 **MR. DUSENBURY:** Yes, sir.13 **THE COURT:** Have you reviewed the presentence report
14 with him?15 **MR. DUSENBURY:** I have, Your Honor.16 **THE COURT:** At this point, as I understand it, there
17 is no objection to the facts as set forth in the revised
18 presentence report, but there is an objection to -- well, there
19 are several objections. The primary objection is being the
20 application of the cross-reference to the attempted murder
21 guideline as well as the plus-two for obstructing by fleeing
22 law enforcement. Then, ultimately, if those adjustments do not
23 apply, there are some objections with respect to the
24 calculation otherwise with respect to common law robbery and
25 whether it constitutes a crime of violence under *Johnson*, and

1 then I think under that one, there is also the bodily injury
2 objection as well.

3 **MR. DUSENBURY:** Yes, sir, that's correct.

4 **THE COURT:** All right. Any -- Mr. Lynn, let me ask
5 you: Have you reviewed the presentence report with Mr.
6 Dusenbury?

7 **THE DEFENDANT:** Yes, sir.

8 **THE COURT:** And do you agree with the facts in the
9 report? Not the guideline calculations. We'll talk about that
10 in a minute.

11 **THE DEFENDANT:** Yes, sir.

12 **THE COURT:** With respect to the guideline
13 calculations, do you understand that Mr. Dusenbury has made an
14 objection on your behalf with respect to the matters I've just
15 described, that is, the cross-reference to attempted murder,
16 the obstruction adjustment, and then an alternate calculation,
17 if it were to apply, to the use of -- to the classification of
18 common law robbery as a crime of violence as well as the bodily
19 injury adjustment? Do you agree with all that?

20 **THE DEFENDANT:** Yes, sir.

21 **THE COURT:** All right. You may have a seat.

22 Will there be any additional -- let's see. I guess
23 the cross-reference and the obstruction burden is on the
24 Government. We'll talk about the others once we get past those
25 two. Will there be any additional evidence, Ms. Davis?

1 **MS. DAVIS:** Yes, Your Honor, there will be. The
2 Government would call Officer Nicholas Powell. It's my
3 understanding that Mr. Dusenbury has -- would request that the
4 witnesses be sequestered, so I have them in a separate room, if
5 that's appropriate.

6 | THE COURT: All right.

7 **MR. DUSENBURY:** Your Honor, as the witness is
8 approaching, Mr. Lynn just mentioned to me that apparently he's
9 got a pretty urgent need to use the restroom.

10 **THE COURT:** All right. Let's take about a 10-minute
11 recess. The witness, when he gets back, can just remain in the
12 courtroom. We'll be at ease for 10 minutes.

13 (The court recessed at 10:25 a.m.)

14 (The court was called back to order at 10:35 a.m.)

15 (The Defendant was present.)

16 **MS. DAVIS:** Your Honor, the Government calls Officer
17 Nicholas Powell.

18 **OFFICER NICHOLAS POWELL**, GOVERNMENT'S WITNESS, being first duly
19 sworn at 10:36 a.m., testified as follows:

DIRECT EXAMINATION

21 | BY MS. DAVIS

22 Q Sir, if you would please state your first and last name.

23 A Nicholas Powell.

24 Q And how do you spell your first name?

25 A N-I-C-H-O-L-A-S.

1 Q And how do you spell your last name?

2 A P-O-W-E-L-L.

3 Q And how are you employed?

4 A Police officer with the Winston-Salem Police Department.

5 Q And how long have you been employed there?

6 A Approximately six years.

7 Q And what are your duties?

8 A Patrol, crime deterrence, investigative reports, calls for
9 service.

10 Q And were you performing those duties on January 4, 2016?

11 A Yes, I was.

12 Q And do you recall being called out to a traffic stop from
13 Officer Gardner?

14 A Yes, I was.

15 Q And could you tell the Court what happened that day.

16 A I responded out as backup to Officer Gardner, who had
17 stopped a vehicle on 421. When I had arrived, he told me that
18 they were -- he was going to search the vehicle, and we were
19 going to get the occupants out one at a time. Officer Gardner
20 walks over to the driver's side door. I walk over to the
21 passenger side. When I get there, Officer Gardner opens up the
22 driver's side door, gets the driver out of the vehicle. I
23 stand there at the passenger side -- front passenger side door.
24 The front passenger, Gary Lynn, opened the door and was looking
25 around; at which point, I told him, no, stay in the car for a

1 moment. We'll get you out in a second. He got back in the
2 car, closed the door.

3 After he -- after the front driver was searched, frisked,
4 Officer Gardner told me to get the front passenger, Mr. Lynn,
5 out of the vehicle; at which point, I stepped on the other side
6 of the door, opened the door to me, and then Mr. Lynn stepped
7 out and walked towards the back of the car towards Officer
8 Gardner. Officer Gardner frisked, searched Mr. Lynn, had him
9 step back by the guardrail with the driver of the vehicle; at
10 which point, I got the rear right passenger out of the vehicle.

11 As the rear right passenger is getting frisked and
12 searched, I asked another officer, who was at the scene, to get
13 Mr. Lynn's information. As -- after he got the information, I
14 observed Mr. Lynn take a couple steps forward between the
15 patrol vehicle and the stopped vehicle. I believed that
16 Mr. Lynn was going to try to leave the scene, and I started to
17 follow; at which point, Mr. Lynn ran and then jumped in the
18 front -- jumped into the driver's seat of the vehicle. While
19 in the driver's seat of the vehicle, I ran and jumped in the
20 vehicle essentially on top of him.

21 Q Officer Powell, could you describe where you were -- you
22 said Highway 421. Where specifically were you on that road?

23 A We were -- when the vehicle was stopped, it was on the
24 right side of the road prior to Lowery Street.

25 Q And this is in Winston-Salem, North Carolina?

1 A Yes.

2 Q Is that road also referred to as Business 40?

3 A Yes.

4 Q And what exit were you near, if you recall?

5 A We were close to the -- we were prior to Lowery Street.

6 We were just after the Martin Luther King Jr. Drive exit.

7 Q And what time of day or night did this occur?

8 A Approximately 2:00 in the morning.

9 Q You said that Mr. Lynn went to the front driver's side of
10 the car, and you went in there with him. Could you describe
11 what happened when you went to that car?

12 **THE COURT:** Let me ask you: Was the door opened or
13 closed when you jumped on top of him?

14 **THE WITNESS:** The door was opened.

15 **THE COURT:** Okay.

16 **THE WITNESS:** When we got in the vehicle, Mr. Lynn
17 put the car in drive; at which point, I pulled the E brake
18 while the vehicle was still in motion. I then put the
19 gearshifter into park, and this happened -- he put it back in
20 drive. I put it in park. It happened I don't know how many
21 times, but while we were driving, the vehicle was slowly moving
22 toward the left lane, which is also -- there is a large
23 concrete median on the left side of the highway. While in the
24 car, I was thinking "do not hit this" because I was concerned
25 that possible injury may occur due to my legs not necessarily

1 being inside the vehicle and hitting the concrete barrier at
2 the time.

3 **THE COURT:** Was the door still open while this is
4 going on?

5 **THE WITNESS:** The door is still open. We then -- it
6 starts to go over to the right, and we are still fighting over
7 the gearshifter and putting in everything. Once we get to
8 around the Lowery Street exit, I -- the car is in park and I
9 turn the car off. After the car is placed into park, I call
10 for backup; at which point, Mr. Lynn dives between the
11 driver -- front driver's seat and the front passenger seat.

12 I go to get -- I turn around on him; at which point,
13 I hear click, boom, and I feel the first round hit me in my
14 vest; at which point in time, I realize this is real.

15 I then try to draw my firearm, but as I reach for it,
16 my hand will not open up to allow me to grasp my firearm. It
17 only brushes against it; at which point, I then use my left
18 hand to try and control the firearm and Mr. Lynn's hands.
19 After an unknown amount of time, the back passenger door opens
20 up; at which point, I ripped the gun from Mr. Lynn's hands and
21 throw it out of the vehicle. After the gun is out of the
22 vehicle, Officer Gardner comes over to the rear driver's side
23 door, shines a light inside, and then breaks the window.

24 After -- when he shines the light into the vehicle, I
25 look at my right arm; at which point, my uniform appears as

1 though it has exploded, and I have blood pouring out of the
2 hole in the uniform. Officer Gardner helps me out of the
3 vehicle while another officer, Officer Norman, places Mr. Lynn
4 in handcuffs. After I get out of the car, we walk around to
5 behind the vehicle in front of Officer Gardner's patrol
6 vehicle. I sit down on the ground. As I'm sitting there, they
7 are asking me, "Are you okay?" I tell them, "I've been shot,
8 but I'm breathing."

9 My corporal walks past the patrol vehicle and looks
10 at me and says, "Are you okay?" I repeat the same thing. She
11 then tells Officer Gardner to put me back in his patrol car and
12 take me to Baptist Hospital, which I get in the back of the
13 patrol vehicle, and we go to Baptist Hospital.

14 **BY MS. DAVIS**

15 Q Officer Powell, when -- you said the Defendant reached
16 between the front driver's seat and front passenger seat. How
17 did he reach? Do you recall which hand he used to reach for
18 the firearm?

19 A I do not recall.

20 Q Did he turn his body in any sort of fashion to --

21 A He moved his whole body as if he was turning himself
22 between the seats.

23 Q And prior to hearing the click or the boom, did you see a
24 firearm?

25 A No.

1 Q And did you hear any other fire shots or gunshots after
2 the click and then the boom?

3 A I do not recall hearing anything else, but due to the
4 close proximity of everything, the noise was all -- was just
5 extremely loud.

6 Q You testified that you told other officers when they asked
7 how you were that you had been shot. Could you tell the Court
8 how many times you were shot and where on your body you were
9 shot?

10 A I was shot four times. One round hit me right in the vest
11 right around in the chest area. I had one round hit me in the
12 right forearm, which went through and through and shattered my
13 right radius. I had one round hit me in the upper left arm,
14 went right through. I had another round hit me in the left
15 armpit area, and it came out my back around my shoulder blade
16 area.

17 Q So when you say it went through and through, it entered
18 your body and went out your body at those different points?

19 A Yes.

20 Q Were pictures taken of you at the hospital?

21 A Yes.

22 Q And were those pictures of your injuries?

23 A Yes.

24 **MS. DAVIS:** Your Honor, may I approach?

25

1 **BY MS. DAVIS**

2 Q I'm handing you what's been marked as a group,
3 Government's 1 through Government's 16. If you will take a
4 moment to look at those photographs and see whether or not
5 those are consistent with the photographs that were taken of
6 you at the hospital?

7 A (Complies.) Yes, they are.

8 Q And those are the photographs of your injuries that you
9 sustained on this day?

10 A Yes, sir.

11 **MS. DAVIS:** Your Honor, the Government moves for
12 admission of Government's Exhibits 1 through 16.

13 **MR. DUSENBURY:** No objection, Your Honor.

14 **THE COURT:** All right.

15 **BY MS. DAVIS**

16 Q Just for clarification, Government's 1 and 2 -- 1 is a
17 picture of your face. What is the red substance that is
18 speckled on your face?

19 A Blood.

20 Q And Government's Exhibit 2, is that an overall picture of
21 your body as you are in the hospital bed?

22 A Yes.

23 Q And Government's Exhibit 3, is this a picture of your --
24 kind of your chest area with one of your arms also in the
25 picture?

1 A Yes.

2 Q Does Government's Exhibit 3 show the injury you received
3 when the bullet hit your protective vest, your bulletproof
4 vest, your right underarm area, and your right arm -- I'm
5 sorry -- your left arm?

6 A Yes.

7 Q And then does 4, 5, 6, 7, and 8 -- are those closeups of
8 the injury to your left arm?

9 A Yes.

10 Q Picture Number 9, is that a picture of the injury of your
11 chest area from the bulletproof vest?

12 A Yes, sir.

13 Q And Number 10, is that a closeup of that injury?

14 A Yes.

15 Q And Number 11, is that an even closer closeup?

16 A Yes.

17 Q And then Numbers 12, 13, and 14, are those pictures of
18 your right arm?

19 A Yes.

20 Q And 15 and 16, is that the underarm area that you referred
21 to earlier?

22 A Yes.

23 **MS. DAVIS:** Your Honor, permission to publish these
24 to the Court?

25 **THE COURT:** All right. Government's Exhibit 1

1 through 16 are admitted.

2 Further questions?

3 **MS. DAVIS:** Yes, Your Honor.

4 **BY MS. DAVIS**

5 Q Officer Powell, at any point did you fire a weapon during
6 this incident?

7 A No.

8 Q Were you able to fire a weapon during this incident?

9 A No.

10 Q And is the only time you possessed a gun is when you threw
11 it out of the car?

12 A Yes.

13 Q Was that -- how -- where did you throw it? Was it through
14 the passenger's side or the driver's side?

15 A It was through the rear passenger door.

16 Q And you said that prior to the shooting happening, that
17 you were concerned about the median on -- I believe it was on
18 the left side of the road. What was your concern about that in
19 particular?

20 A I was concerned that the vehicle would run into the median
21 and my legs, or some other part of my body, would then be
22 pushed up against the median and the vehicle.

23 Q And were you afraid that that would cause some injury to
24 yourself?

25 **MR. DUSENBURY:** Object to the leading.

1 **THE WITNESS:** Yes.

2 **THE COURT:** I think it's readily apparent. You may
3 continue.

4 **BY MS. DAVIS**

5 Q Do you see the person that you referred to during your
6 testimony as Mr. Lynn? Do you see that person in the
7 courtroom?

8 A Yes, I do.

9 Q And can you point him out for the Court?

10 A (Indicating) Wearing the blue.

11 Q The blue jumpsuit?

12 A Yes.

13 **MS. DAVIS:** Your Honor, I have no further questions
14 of this witness at this time.

15 **THE COURT:** Cross-examination, Mr. Dusenbury?

16 **MR. DUSENBURY:** Yes, sir, thank you, Your Honor.

17 CROSS-EXAMINATION

18 **BY MR. DUSENBURY**

19 Q Officer Powell, the shots -- the first shot that you fired
20 that you testified about was when Mr. Lynn -- you and Mr. Lynn
21 were struggling for the weapon; is that true?

22 A No.

23 Q So is it true that when you entered the vehicle, Mr. Lynn
24 was seated in the driver's seat?

25 A Yes.

1 Q And he was attempting to drive away; is that true?

2 A Yes.

3 Q And when you jumped into the driver's seat, you jumped on
4 top of him; is that right?

5 A Yes.

6 Q And there was a struggle that ensued for control of the
7 steering wheel?

8 A To prevent the vehicle from being maneuvered.

9 Q Would included trying to gain control of the steering
10 wheel; is that right?

11 A Possibly. I remember the gearshift and the emergency
12 brake.

13 Q And so there was also some attempt to gain control of the
14 gearshift?

15 A Yes, sir.

16 Q What did you do with respect to trying to access the
17 emergency brake?

18 A I grabbed ahold of the emergency brake and pulled the same
19 into the engaged position.

20 Q And as you were doing these things with the gearshift and
21 the emergency brake and the steering wheel, Mr. Lynn was seated
22 in the driver's seat; correct?

23 A Yes.

24 Q And he was actively resisting you, that is, trying to gain
25 control of the steering wheel; true?

1 A Yes.

2 Q And trying to gain control of the gearshift?

3 A Yes.

4 Q And in order to overcome his resistance, you struck him
5 with your elbow, didn't you?

6 A I do not recall.

7 Q Okay. So do you recall him at some point moving away from
8 you as you were trying to struggle with him over control of the
9 gearshift and the emergency brake and the steering wheel,
10 moving away from you?

11 A He was leaning back in the seat.

12 Q All right. And would that have been in response to
13 something that you were doing?

14 A I'm not 100 percent certain.

15 Q Well, so it's possible, but you're not certain?

16 A Possibly.

17 Q Is it also possible that his -- when he ended up with his
18 torso in the right rear passenger compartment, that is where he
19 was when he -- when the shooting occurred; is that right?

20 A All I remember is he was between the seats.

21 Q Is it correct to say that his torso, the upper part of his
22 body, was in the floorboard of the right rear passenger
23 compartment?

24 A I do not remember seeing that.

25 Q Okay. Well, his torso was between the front two seats; is

1 that true?

2 A Yes, sir.

3 Q And is it your testimony then that you don't recall
4 whether he was in the -- if his torso was more toward the
5 passenger side of the vehicle or the driver's rear passenger
6 side?

7 A I do not -- I do not remember exactly which direction his
8 torso was.

9 Q Did you dive or fall on top of him when his torso was in
10 that position?

11 A I moved towards him in that position, and then I heard a
12 click and then a boom.

13 Q So how was your body positioned when the shots were fired?
14 Were you seated upright? Were you leaning over? Were you on
15 top of Mr. Lynn?

16 A I was turned and I was probably on top of Mr. Lynn at the
17 time.

18 Q And Mr. Lynn was lying on -- was lying -- he was in a
19 horizontal position; is that true?

20 A He was between the seats. I don't know -- I don't
21 remember if he was lying down as an extended position
22 horizontal or if he was turned and angled and reaching. I only
23 recall turning my body, hearing a click, boom, and then feeling
24 the first round impact my vest.

25 Q So when all of that happened, were you lying on top of

1 him?

2 A I was -- it was close proximity inside of a vehicle. It's
3 possible, but I do not recall lying physically on top of him.
4 I may have been pushed up against him.

5 Q Now, you characterized his movements as diving toward the
6 right rear passenger compartment; is that what you said?

7 A I said he moved between the seats; at which point, I
8 called backup -- called for backup after the vehicle stopped.
9 He got between the seats; at which point, I went towards him,
10 heard a click and then felt the -- heard a boom and felt the
11 round impact my bulletproof vest.

12 Q I see. So you recall that, but you don't recall whether
13 his movement between the seat was in response to you striking
14 him in the chest or in the upper torso?

15 A I don't believe that it had been, but I'm -- I do not know
16 his intentions or what his responses would have been at that
17 time.

18 Q Well, do you know whether you were striking him?

19 A I don't recall.

20 Q I see. Well, in a situation like this, would it be fair
21 to say that your training -- if a person is inside a vehicle
22 that you are trying to gain control over and makes some
23 movement toward the floor, as you described Mr. Lynn doing,
24 would it be your customary response to at least be concerned
25 about what they might be doing, the possibility of accessing a

1 weapon?

2 A It's a possibility, but due to the amount of time that had
3 passed between the vehicle stopping, calling for backup, and
4 Mr. Lynn moving was an extremely short amount of time.

5 Q So I understood your direct testimony, your testimony in
6 response to Ms. Davis' questions, to be that you were able
7 to -- after some period of struggle, you were actually able to
8 put the vehicle in park and bring it to stop; is that true?

9 A I was able to turn the vehicle off.

10 Q Turn it off. All right. Is it also your testimony that
11 it was after that point, after the vehicle had been brought to
12 a stop, that Mr. Lynn, as you characterized it, dived toward
13 the right rear passenger compartment?

14 A He dived between the seats.

15 Q Between the seats?

16 A Yes, sir.

17 Q And is it your testimony that you don't remember what you
18 did when he dived between the seats?

19 A I do not recall, other than moving towards him. I do not
20 remember striking him.

21 Q I see. So have you had an opportunity to review the --
22 now, were you wearing a body camera on that occasion?

23 A Yes.

24 Q Have you had the opportunity to review the footage from
25 that camera in preparation for coming here to testify today?

1 A I have reviewed the video.

2 Q And having reviewed the video, that doesn't refresh your
3 recollection as to what you did?

4 A Due to the initial struggle as we were moving down the
5 road, the camera had got knocked off, and so, essentially, it
6 is hanging, showing my leg area and not showing exactly what I
7 did.

8 Q So you don't recall seeing yourself striking him in any of
9 that footage?

10 A I do not.

11 Q How long ago was it that you reviewed that footage?

12 A More than five months ago.

13 Q I see. Now, when you were struck, were you lying down --
14 were you lying on top of Mr. Lynn, rather?

15 A We were -- I was not -- I would say that I was almost at
16 an angle. There was part of me that was touching, but my back,
17 as far as I recall, was not directly on top of his back.

18 Q But is it true that you were in the position that you were
19 in because you were trying to prevent Mr. Lynn from possibly
20 gaining control of a weapon or something in the back of the
21 car? Is that fair?

22 A I was moving towards him.

23 Q And your purpose for moving towards him was try to prevent
24 him -- was to try to prevent him from doing something that
25 might harm you, wasn't it?

1 A It was attempting to gain control of Mr. Lynn.

2 Q Right. And in attempting to gain control of Mr. Lynn, you
3 fell on top of him or dove on top of him, did you not?

4 A Quite possible.

5 Q I mean, do you not remember?

6 A Everything happened so quickly, I'm not 100 percent
7 certain at which point -- the direction of my body, I'm not
8 100 percent certain how my body was positioned.

9 Q Yes, sir, but with respect to whether you were top of
10 Mr. Lynn or not, regardless of the specific direction, is it
11 the case that you were on top of him?

12 **MS. DAVIS:** Objection, asked and answered.

13 **THE COURT:** Well, I am going to overrule, but I think
14 we have a semantics thing going, Mr. Dusenbury. You're
15 asking -- as I understand the testimony, you're asking
16 specifically if he was laying on top, as I understand the
17 question, with his stomach on top of Mr. Lynn, and I understand
18 the officer to be saying, I can't remember if I was directly on
19 top of him with my back facing the ceiling of the car, or if I
20 was slightly at an angle as we struggled to gain control. Do
21 you understand?

22 **MR. DUSENBURY:** I do understand.

23 **THE COURT:** I don't mean to put words in your mouth,
24 but just make sure, in terms of the questions -- I do
25 understand the officer has answered the question once in terms

1 of I can't remember if I was directly -- we were both
2 horizontal, and I was directly on top of him, or if we were
3 slightly at angels. That's the way I understand the answer to
4 the question.

5 **MR. DUSENBURY:** I appreciate the Court's
6 clarification.

7 **BY MR. DUSENBURY**

8 Q So, Officer Powell, is what the judge just said
9 essentially your testimony?

10 A Yes, I'm not sure if I was on top of him stomach to back
11 or if I was at a slight angle.

12 Q But you had responded to his actions by going --

13 A I had reacted to his action.

14 Q I see. All right. Now, which hand did Mr. Lynn use to
15 access the gun?

16 A I do not recall.

17 Q So you don't recall seeing him point the gun at you then?

18 A I did not remember -- I did not see him point the gun at
19 me.

20 Q Was Mr. Lynn in a facedown or faceup or other position as
21 you recall him?

22 A Facedown.

23 Q All right. Is it true that at no point did he turn around
24 and aim the gun at you?

25 A I'm not -- I do not know.

1 Q Okay. You don't have any recollection of him having done
2 that, do you?

3 A I do not remember the specifics of the exact actions
4 between the first round hitting my vest to grabbing the gun
5 from his hand and throwing it out.

6 Q I was actually -- Officer, I was actually inquiring about
7 the period just before the first round was fired. That's
8 the -- and I realize that this is a very tight time frame that
9 we're talking about. About -- what would your estimate be,
10 based on your recollection, however that might have been
11 refreshed by reviewing the footage, what -- approximately how
12 much time would you say elapsed from the time you entered the
13 vehicle until the end of the confrontation?

14 A Less than a minute, maybe 30 seconds.

15 Q Do you know, Officer Powell, whether any of the wounds
16 that you sustained were the result of ricochets inside the
17 vehicle?

18 A I do not know if they were the result of ricochets.

19 **MR. DUSENBURY:** If I might have a moment?

20 (Mr. Dusenbury conferred with the Defendant.)

21 **BY MR. DUSENBURY**

22 Q Officer Powell, did you have an opportunity to be
23 interviewed about these events by other Winston-Salem police
24 officers as part of this investigation?

25 A Yes.

1 Q And you gave a recorded statement, did you not?

2 A Yes.

3 Q Did you have the opportunity to review that footage in
4 preparation for testifying here?

5 A I did not review the footage.

6 Q Do you recall whether or not, in the course of that
7 interview, you said that you saw the gun that -- that Mr. Lynn
8 had the gun in his left hand? Does that refresh your
9 recollection about which hand the gun was in?

10 A I remember after -- when the door had opened, I had taken
11 it from his hand and then threw it out of the vehicle.

12 Q And which hand did you take it from?

13 A I believe it was the left hand.

14 **MR. DUSENBURY:** I think those are all my questions,
15 Your Honor.

16 **THE COURT:** Officer Powell, were you giving any --
17 were you saying anything while this went on when you tackled
18 Mr. Lynn in the car or giving any instructions?

19 **THE WITNESS:** I told him to -- I believe I told him
20 to stop when we were trying to drive. After the first round
21 had gone off, I had shouted some inappropriate language, we'll
22 say.

23 **THE COURT:** All right. Anything -- do you have
24 anything in response to that?

25 **MR. DUSENBURY:** No, sir.

1 **THE COURT:** Any redirect?

2 **MS. DAVIS:** No, Your Honor, thank you.

3 **THE COURT:** All right. You may step down.

4 (At 11:09 a.m., witness excused.)

5 **THE COURT:** Further evidence?

6 **MS. DAVIS:** Your Honor, at this time the Government
7 would call Detective Ron Davis.

8 **DETECTIVE RONALD J. DAVIS**, GOVERNMENT'S WITNESS, being first
9 duly sworn at 11:10 a.m., testified as follows:

10 DIRECT EXAMINATION

11 **BY MS. DAVIS**

12 Q Sir, if you would please state your name for the Court.

13 A My name is Ronald J. Davis.

14 Q And where are you employed?

15 A I'm employed as a detective with the City of Winston-Salem
16 Police Department.

17 Q And with what unit do you work with?

18 A I serve as a detective with the Special Victims Unit.

19 Q And through your employment, did you go to the scene on
20 January 4 of 2016 in regards to the officer shooting?

21 A Yes, ma'am, I did.

22 Q And as part of your duties there or your job there, did
23 you search the vehicle which was the Defendant's or the one
24 that the Defendant was in?

25 A Yes, ma'am, I did.

1 Q What, if anything, did you locate of significance within
2 that vehicle?

3 A Initially, we located -- within the vehicle itself?

4 Q Yes, sir.

5 A We located several projectiles -- or two projectiles
6 specifically and several shell casings.

7 Q You said "two projectiles specifically." Where were those
8 projectiles located?

9 A One projectile was located inside the roof of the vehicle
10 on the right rear corner, and the second projectile was located
11 in a side curtain airbag on, I believe, the right side of the
12 vehicle, ma'am.

13 Q And you said you located several shell casings.

14 Q Approximately how many did you locate?

15 A I believe it was located were -- three shell casings were
16 inside the vehicle, I believe, and one was outside.

17 Q Did you collect that evidence?

18 A That evidence was collected by the forensic services
19 technician, ma'am.

20 Q And was that person with you when that was collected?

21 A Correct, yes, ma'am.

22 Q Did you do anything with the weapon that was used that
23 day?

24 A Yes, ma'am, I did.

25 Q What did you do with that weapon?

1 A The weapon had earlier been secured by patrol officers on
2 the scene. It was placed in the trunk of one of the patrol
3 vehicles for security. When the weapon was to be seized by
4 forensic technicians, this -- I went ahead and, using latex
5 gloves, rendered the weapon safe simply by sliding the slide
6 back to make sure there were no weapons [sic] in it. I located
7 one cartridge in the magazine, which was removed, and then
8 there was one shell casing located in the chamber of the
9 weapon.

10 **MS. DAVIS:** That's all the questions, Your Honor.

11 **THE COURT:** Empty shell casing in the chamber?

12 **THE WITNESS:** That's correct, yes, sir.

13 **THE COURT:** Mr. Dusenbury, cross-examination?

14 **MR. DUSENBURY:** Just briefly, Your Honor.

15 CROSS-EXAMINATION

16 **BY MR. DUSENBURY**

17 Q Detective Davis?

18 A Yes, sir.

19 Q Is it -- the casings that you recovered, did they total
20 three or four?

21 A If I may refer to my notes, sir?

22 Q Please.

23 A I have in my notes two shell casings were also recovered.

24 Q Two?

25 A Yes, sir.

1 Q And would the casing recovered from the weapon itself be
2 the third?

3 A Yes, sir, that's correct.

4 Q All right. But no fourth casing was ever recovered?

5 A I believe there was one laying outside the vehicle, sir.

6 Q I see. I see. Now, the projectile, this is the spent
7 round, right, the bullet? Is that what you are referring to?

8 A Yes, sir, that's correct.

9 Q The one that was received from the curtain airbag above
10 the right passenger seat --

11 A Yes, sir.

12 Q -- did -- from your observations, did you draw a
13 conclusion about whether that particular projectile had hit
14 other objects inside the vehicle?

15 A Yes, sir, I did.

16 Q And what conclusion did you reach regarding that?

17 A It appeared -- now, understand I am not a forensics
18 expert. Just kind of looking at trajectories, it appeared that
19 that -- well, at least one projectile appeared to have gone
20 through the driver's seat, had collided with the interior door
21 panel of the left rear passenger door. It looks to have
22 ricocheted at some point and either gone into -- I have it here
23 it appears to have gone into the side curtain airbag. Like I
24 said, I'm not an expert. It was just an observation.

25 Q I see. Were you able to, with the expertise that you do

1 have -- by the way, let me ask -- withdraw that question and
2 ask this: Is this -- the investigation that you did in this
3 case, is that consistent with your normal duties in your
4 capacity?

5 A For purposes of working crime scenes, yes, sir, that's
6 correct.

7 Q How long have you been doing this type of work?

8 A I have been actively doing crime scenes since, I am going
9 to say, approximately 2006.

10 Q I see. If you can estimate, about how many crime scenes
11 involving shootings have you investigated in that time?

12 A Maybe 30 or 40.

13 Q I see. And have you ever been called upon to testify in
14 court with respect to the findings of the crime scene
15 investigations you've done?

16 A Maybe once or twice in state court, sir.

17 Q I see. Based on your observations about the interior of
18 the vehicle, do you have an opinion as to -- or the approximate
19 trajectory of the round that you said ended up in the curtain
20 airbag?

21 A As far as an opinion, sir, like I said, I'm not an expert.
22 I have not been trained to do that. That projectile, I
23 believe, hit the door, if that's the one that ended up in the
24 roof of the vehicle, or the one that ended up in the curtain
25 airbag. I can't render an exact opinion on that. I know in my

1 report it said, "it appears," but I couldn't render an exact
2 opinion on that, sir.

3 Q Is the door that you are referring to the left rear
4 passenger door?

5 A Where the -- where I believe the round initially hit and
6 ricocheted?

7 Q Yes, sir.

8 A Yes, sir, left rear passenger door.

9 Q I see. I see. So at least with respect to that round,
10 you concluded from what you saw that it involved a ricochet?

11 A I believe so, yes, sir.

12 Q Finally, were you able to make a determination from your
13 investigation as to whether that particular round struck
14 Officer Powell or not?

15 A That I do not know, sir.

16 **MR. DUSENBURY:** Thank you. Nothing further.

17 **MS. DAVIS:** Nothing further, Your Honor.

18 **THE COURT:** You may step down.

19 (At 11:17 a.m., witness excused.)

20 **THE COURT:** Further evidence?

21 **MS. DAVIS:** One other witness, Your Honor, Allyson
22 Anderson.

23 **ALLYSON ANDERSON, GOVERNMENT'S WITNESS,** being first duly sworn
24 at 11:18 a.m., testified as follows:

25 DIRECT EXAMINATION

1 **BY MS. DAVIS**

2 Q Ma'am, if you would please state your first and last name.

3 A Allyson Anderson.

4 Q How do you spell your first name?

5 A A-L-L-Y-S-O-N.

6 Q And how do you spell your last name?

7 A A-N-D-E-R-S-O-N.

8 Q How are you employed?

9 A I'm a fire [sic] and toolmark examiner for the
10 Winston-Salem Police Department.

11 Q And have you received any training to perform those duties
12 with the Winston-Salem Police Department?

13 A Yes, I have.

14 Q And what were those training or experiences that you
15 received?

16 **THE COURT:** Did you say "fire"?

17 **THE WITNESS:** Firearm.

18 **BY MS. DAVIS**

19 Q Can you describe the training that you received?

20 A I started my training in 2012. One of the notable classes
21 that I was enrolled in was a yearlong program done by the ATF.
22 It was from 2013 to 2014.

23 Q And what did that comprise of?

24 A It's called the National Firearms Examiner Academy. Like
25 I said, it's a yearlong program where it is -- teaches you how

1 to do the job as a firearms examiner, which goes through the
2 functionality of firearms, the examination of ammunition
3 components and firearms to determine whether or not they are
4 fired from a particular firearm or fired in the same firearm.

5 Q Did you complete that course?

6 A Yes, I did.

7 Q Did you receive any kind of certificate or recognition for
8 completing that course?

9 A Yes.

10 Q And I just ask: Did you complete it successfully?

11 A Yes I did.

12 Q And have you been performing firearm and toolmark
13 examination for a duration during your work with the police
14 department?

15 A Yes, I have.

16 Q And how long?

17 A After the training in 2014, I did about six months with my
18 mentor, Gene Bishop with the Cumberland County Sheriff's
19 Office, where then I was released to do casework.

20 Q Have you ever performed a firearm examination or toolmark
21 examination?

22 A Yes.

23 Q About how many times?

24 A I have examined over hundreds of ammunition components and
25 firearms for this job.

1 Q And have you ever been tendered as an expert before?

2 A Yes, I have.

3 Q How many times?

4 A Two times.

5 Q And in what court?

6 A In superior court.

7 Q Of North Carolina?

8 A Yes.

9 **MS. DAVIS:** I would tender Ms. Anderson as an expert
10 in firearm and toolmark examination.

11 **MR. DUSENBURY:** No objection.

12 **THE COURT:** All right. She may testify as an expert
13 and render her opinion.

14 **BY MS. DAVIS**

15 Q All right. Ms. Anderson, in your job, were you working on
16 January 4, 2014, with the Winston-Salem -- 2016 with the
17 Winston-Salem Police Department?

18 A I'm unsure about that date.

19 Q Were you working with the police department?

20 A I was working with the police department, yes.

21 Q And did you have an occasion to examine a firearm seized
22 from Gary Giovon Lynn as part of your duties with the
23 Winston-Salem Police Department?

24 A Yes, I did.

25 Q And did you recover any projectiles or any projectiles

1 given to you as part of that investigation?

2 A I was given firearms evidence for this case, yes.

3 Q And when you say "firearms evidence," what would that be?

4 A May I refer to my notes?

5 Q Yes, ma'am.

6 A I was given a Ruger firearm, an unfired cartridge, three
7 fired bullets, and four fired cartridge cases.

8 Q And were you able to -- as you testified earlier, were you
9 able to match any of the fired bullets to that Ruger that you
10 examined?

11 A Yes. Of the three fired bullets, I was able to identify
12 that all three bullets were fired from that Ruger pistol that
13 was submitted in this case. I was also -- examined the four
14 cartridge cases that were submitted in this case, and those
15 four were -- I was able to identify them to be fired in the
16 firearm -- the Ruger firearm for this case.

17 Q The three fired bullets, did any of them have any kind of
18 biological matter on them?

19 A Yes, they did.

20 Q Just one or two or three?

21 A One of them had notable biological matter on it that I was
22 able to clean off the bullet before I did my examination.

23 Q And do you know where that bullet came from?

24 A That bullet was from the hospital.

25 Q And in your examination of the firearm by itself, did you

1 ever test-fire it to make sure that firearm did function
2 properly?

3 A Yes, I did.

4 Q And did it function properly?

5 A It functioned perfectly for me.

6 Q And in your experience, if there was a casing in the, I
7 guess, slide of the firearm, would that make the firearm
8 function differently or in any sort of way affect the way that
9 firearm operated?

10 A Yes. If a cartridge casing that had already been fired
11 was still located in the chamber of the firearm, it would be
12 from some type of failure to extract, and what that means is
13 when a firearm functions normally, especially a semiautomatic
14 one like in this case, that once the bullet has been fired from
15 the barrel, the recoil or the pressure built up from that fired
16 cartridge will pull that slide to the rear. Well, if the
17 cartridge casing was still inside the firearm, it means
18 something were to have happened in order for that slide to not
19 fire -- not to be pulled to the rear, and that can be done by
20 an obstruction, or at some point that would cause that slide to
21 stay stationary as opposed to the pressure pulling it back.

22 Q How would the firearm then be able to function or not
23 function?

24 A So at that point the firearm is not cocked, and there is
25 no live ammunition sitting in the chamber. So you can pull

1 that trigger, and it's just going to be a dead trigger where it
2 just pulls and clicks and clicks and nothing will actually
3 happen with the firearm where it will cycle properly.

4 Q Did you notice anything -- or during your examination of
5 this firearm, did you notice any -- well, not notice anything,
6 anything about the trigger, like how hard, I guess, you would
7 have to pull the trigger or not to pull the trigger to make it
8 fire?

9 A Yeah, so when we do our examination for the firearm, we
10 examine the trigger pull of the firearm, and to do that, we
11 have certain weights that are dead weights that we utilize in
12 order to see what type of trigger pull each firearm has by
13 adding different weights to that system. And for this firearm,
14 I was able to determine a trigger pull, yes.

15 Q And what is the trigger pull?

16 A I calculated the same to be roughly 5.65 to 6 pounds.

17 Q And that would be what you would need to use to pull the
18 trigger?

19 A Yes, the force that would be needed to pull the trigger in
20 order to cycle the firearm.

21 Q In your experience as examining firearms, is that average,
22 above average, below average of force that would need to be
23 used to pull that trigger?

24 A Yes. I actually pulled other firearms of the same make
25 and model and made sure that it was within the same realm of

1 those firearms.

2 Q And compared to other types of firearms that are handguns,
3 is that an average pressure, or is that more than normal
4 pressure that you would need to fire a particular firearm or
5 less that you would need to pull? Is there, like, a gun that
6 requires 10 pounds or a gun that requires 2 pounds I guess is
7 what I'm asking?

8 A It's all manufacture driven on what the trigger pull is
9 going to be. Plus, you can also do modifications to make it
10 either more or less, but that would be a fairly average, very
11 simple trigger pull to pull.

12 **MS. DAVIS:** I don't think I have any further
13 questions for Ms. Anderson.

14 **THE COURT:** Cross-examine?

15 **MR. DUSENBURY:** Yes, briefly, Your Honor.

16 CROSS-EXAMINATION

17 **BY MR. DUSENBURY**

18 Q Ms Anderson, as part of your examination, was the
19 condition of the fired bullets that you examined -- was that a
20 relevant factor, the condition that the recovered round was in?

21 A All the bullets that I recovered, I actually drew little
22 sketches of them, and they were all -- some of them had some
23 type of defects that they had hit other surfaces, but the
24 bearing surface, which is where my lands and grooves are going
25 to be for those bullets, and that's the information that I use

1 for my examination, were in pristine condition.

2 Q So there was some indication with respect to at least some
3 of the three rounds that they may have impacted multiple
4 surfaces before coming to rest?

5 A I cannot speak to multiple surfaces, but there were some
6 that had small defects on the noses of the bullets, which would
7 show that they possibly hit something.

8 Q I see. That was going to be my question. What conclusion
9 would you draw from that particular characteristic?

10 A Just that it may have had conduct with something. Without
11 being on scene, I couldn't really give you an accurate
12 examination of that.

13 Q Is crime scene, specifically shooting -- crime scenes
14 involving shooting reconstruction part of your expertise?

15 A It is, yes.

16 Q You were not called upon to do that in case?

17 A I was not, no, sir.

18 Q Is it also within your bailiwick to consider the
19 significance of gunshot residue evidence where it's available?

20 A In my job, we do gunshot residue testing on clothing or on
21 different items that we can do chemical testing for, but as
22 of -- like hand gunshot residue, that's done by the state lab.
23 We don't handle that part.

24 Q I see. Do the findings that are made by the state lab
25 come to your attention as part of your work?

1 A No, I don't ever see those results.

2 Q I see. So do you ever take -- to the extent that you are
3 doing accident -- I mean, crime scene reconstructive work,
4 which I understand was not the case here, but when you do that,
5 is the gunshot residue evidence relevant to your inquiry?

6 A If there's something that is like a surface -- like a
7 T-shirt or some type of fabric that would be used, I would take
8 that into consideration, but as for gunshot residue on
9 somebody's hands, I would never take that into consideration --

10 Q Is that right?

11 A -- in my unbiased examination of the scene.

12 Q Finally, that notwithstanding, do you have an opinion
13 about how close typically with a gun like the Ruger that we are
14 dealing with in this case -- how close to the weapon one's
15 hands would need to be in order to receive gunshot residue?

16 A I'm not an expert in that field, so I wouldn't be able to
17 give an accurate --

18 Q Very well.

19 **MR. DUSENBURY:** No further questions.

20 **MS. DAVIS:** No further questions, Your Honor.

21 **THE COURT:** You may step down.

22 (At 1:55 p.m., witness excused.)

23 **MS. DAVIS:** No further evidence.

24 **THE COURT:** Any evidence, Mr. Dusenbury?

25 **MR. DUSENBURY:** Might -- I'm sure we will have some

1 evidence. Your Honor, just one second to confer.

2 (Off-the-record discussion.)

3 Your Honor, we will have evidence. I wondered if I
4 might ask the Court -- I would like to play the video from the
5 footage from Officer Powell's body camera, Your Honor, and then
6 I believe Mr. Lynn would like to testify, but I --

7 **THE COURT:** How much footage -- like the 30 seconds
8 they were struggling, or do you want to play more than that?

9 **MR. DUSENBURY:** Just a little more. From the time he
10 actually left the guardrail and jumped into the car until --
11 I'm thinking maybe 60 seconds or there, give or take.

12 **THE COURT:** Have you got it?

13 **MR. DUSENBURY:** I thought I had it, Judge. I picked
14 up the wrong flash drive. It's in my car right outside. It
15 will take me two minutes to run to it and pick it up.

16 **THE COURT:** Why don't we take a 10-minute recess and
17 then come back.

18 (The court recessed at 11:31 a.m.)

19 (The court was called back to order at 11:45 a.m.)

20 (The Defendant was present.)

21 **THE COURT:** All right. Mr. Dusenbury?

22 **MR. DUSENBURY:** Thank you, Your Honor. We are
23 prepared to proceed. Your Honor, what I propose to do is play
24 the relevant footage from Officer Powell's body cam.

25 **THE COURT:** Any objection to that?

1 **MS. DAVIS:** No, Your Honor, we have no doubts about
2 its authenticity.

3 **MR. DUSENBURY:** This is obviously still the traffic
4 stop.

5 **THE COURT:** So this occurred in the nighttime?

6 **MR. DUSENBURY:** Yes, sir. Your Honor, I just
7 realized that the audio apparently is not being picked up, but
8 nevertheless....

9 (Video played.)

10 **MR. DUSENBURY:** Your Honor, that is what we would be
11 interested in introducing.

12 | THE COURT: All right.

13 MR. DUSENBURY: Call Mr. Lynn.

14 **GARY G. LYNN**, DEFENDANT'S WITNESS, being first duly sworn at
15 11:52 a.m., testified as follows:

DIRECT EXAMINATION

17 | BY MR. DUSENBURY

18 Q You're Gary Lynn; is that correct?

19 A Yes, sir.

20 Q And, Mr. Lynn, where were you living in January of 2016
21 when these events occurred?

22 A I was staying with a friend, but my main address was 164
23 Stagecrest Drive, Raleigh, North Carolina, 27603.

24 Q And was Raleigh your city of residence at that time?

25 A Yes, sir.

1 Q Now, how is it that you came to be in Winston-Salem on the
2 night of these events?

3 A Well, I had a friend named Diyancy, and he kept calling,
4 asking if I could please come pick him up because he had court
5 in Raleigh the next day, and he didn't have a ride and he
6 didn't want to go get a failure to appear and go to jail
7 because he was on parole, and so I told him I'd try to see what
8 I could do.

9 Q Now, is this Diyancy Ladsen-Seabrook?

10 A Yes, sir.

11 Q And where did he live at that time?

12 A Winston-Salem, North Carolina.

13 Q I see. You live in Raleigh; he lived in Winston-Salem?

14 A Yes, sir.

15 Q And his court appearance was in Raleigh?

16 A Yes, sir, on January 4 at 9:00 a.m.

17 Q Okay. So I think I filed a sentencing pleading in this
18 case indicating that he lived in Raleigh and had court in
19 Winston-Salem, but that's not correct; is that right?

20 A No, sir.

21 Q All right. So what were your plans that night regarding
22 Mr. Ladsen?

23 A Well, I was going to pick him up, and we were supposed to
24 stay at his mom's house until I took -- basically, we went to
25 court the next morning, and his mom was going to give him a

1 ride back, but she wasn't going to come pick him up because she
2 had to work the next morning, and he waited late to call to ask
3 for a ride.

4 Q And his mother lived in Raleigh?

5 A Yes, sir.

6 Q So about what time did you leave Raleigh approximately?

7 A Approximately 10:00, 10:30ish.

8 Q P.M.?

9 A Yes, sir.

10 Q All right. Now, prior to leaving to pick up Mr. Ladsen,
11 had you consumed any kind of controlled substances?

12 A I had smoked some weed, marijuana, and I had took a drug
13 called Molly.

14 Q About how long before these events had you done that?

15 A Maybe an hour before I picked him up or maybe 45 minutes
16 to an hour before I picked him up.

17 Q Do you recall -- do you happen to recall over the
18 preceding two or three days whether you had used any drugs?

19 A Yes, sir. It was actually New Year's weekend, and I was
20 going through a lot of stress because me and my girlfriend, we
21 was kind of like arguing back and forth. I wasn't working at
22 the time because my job -- it ended in November, but I -- I did
23 concrete, and my job ended in November, and it was supposed to
24 start back up in February, so I was kind of going through the
25 changes of not having a lot of money, and so I was kind of,

1 say, partying and just doing the wrong things around that time.

2 Q What did that involve specifically regarding drug use?

3 A I had drunk some liquor and smoked some marijuana, and I
4 was doing Molly and Xanax.

5 Q I see. Did that affect your ability to sleep the previous
6 night?

7 A I really didn't have any sleep because I had dropped
8 Diyancy off that Friday night, and he wanted me to come pick
9 him back up, and I was basically not -- I didn't get any sleep
10 at all.

11 Q I see. So when you left Raleigh around 10:30, heading to
12 Winston-Salem, about how long did it take you to get there?

13 A I had stopped in Durham with a friend. That's where the
14 drug consumptions came from because that day I had -- I would
15 say I left there around 11:30, Durham going to Winston. So it
16 was -- it probably took me about an hour and -- maybe an hour
17 and 15 minutes to get to Winston-Salem.

18 Q So you arrived at Winston some time after midnight?

19 A Yes, sir.

20 Q When you got into Winston, what did you do?

21 A I went to Diyancy's house, and they was getting ready
22 basically to leave. So he was getting his clothes and stuff
23 ready, and after he got his clothes and stuff ready, that's
24 when we left from his house.

25 Q Now, let me ask you: The Ruger semiautomatic pistol that

1 you've pled guilty to possessing that night, was it in your
2 vehicle when you left Raleigh and drove to Winston-Salem?

3 A No, sir.

4 Q Okay. When was the first time that you saw that gun?

5 A The night of this situation.

6 Q So you picked up Diyancy, and then did what?

7 A He had a friend with him named Kwame.

8 Q Did you know him?

9 A Briefly, but not that I was friends with him because we
10 had broke up our friendship because he had previously stole
11 some money and a phone from me, so I really didn't converse
12 with him.

13 Q So when you picked the two of them up, what did you do
14 next?

15 A I picked them up. So Diyancy had a license, so I got in
16 the passenger seat and I kind of, like, laid -- you know, got
17 comfortable, and we got on the highway and started to go to
18 Raleigh.

19 Q Were you in the front passenger seat?

20 A Yes, sir.

21 Q Then what happened?

22 A Next thing I know, we get pulled over by the police, and
23 I'm thinking everything is cool, and the police comes asking
24 for a driver's license and registration for the car, and we
25 give them the stuff, and then after he goes back to the car, I

1 hear, "There's a gun in the car."

2 Q Do you know who said that?

3 A I don't recall.

4 Q And you heard that while you were still in the car?

5 A Yes, sir.

6 Q So while the officer is running the registration and
7 license, what -- or after he does that, what is the next thing
8 that happens?

9 A There was other officers there, and I kind of tried to
10 panic where -- I don't know if you've seen it from the video.
11 I kind of, like, opened the door the first time because I never
12 been in a situation like this. So I kind of panicked and I
13 just wanted to get away because I didn't know what was going on
14 or what was going to happen, and I was just trying to basically
15 get away from the situation.

16 Q Why were you trying to get away from the situation?

17 A Because that's not my character, and I'm not -- I don't be
18 around guns and stuff like that, so I don't -- I just panicked
19 because of the drugs and the situation, I guess.

20 Q Did you know where the gun was?

21 A No, sir.

22 Q So when you got out of the car and were placed next to the
23 guardrail, what were you thinking?

24 A My main thought was just get out of there because I don't
25 know where the gun is, who has the gun, what they planned to do

1 with the gun, just get away from the situation. I guess the
2 fastest way I could possibly probably get away was the car, so
3 I chose the car because I didn't know my surroundings to run
4 down the highway or jump over the overpass, bridge, or how --

5 Q So when you ran and jumped into the car, what was your
6 intention?

7 A Just to get away from the situation.

8 Q Was the vehicle running when you got in, or did you have
9 to turn the ignition?

10 A Yeah, the vehicle was running when I got inside.

11 Q So when you got in, what did you do?

12 A I basically jumped in, and I was trying to get in and
13 drive, and the officer jumped on top of me, and we're fighting
14 over the gearshift and the steering wheel basically.

15 Q I see. And what is the officer doing as he is struggling
16 with you for control of the gearshift and steering wheel?

17 A After we start struggling for a slight moment, he then
18 starts striking me with his elbow and also his flashlight.
19 He's just trying to hit me, and he's using profane language
20 telling me, basically, stop the D car.

21 Q What are you doing in response?

22 A I'm just -- I don't know. My mind was just saying get
23 away, get away. So I was trying to control the wheel and the
24 gearshift.

25 Q Did you struck the officer back?

1 A No, sir.

2 Q How is it that you -- that your torso ended up between the
3 front two seats?

4 A My torso ended up in the back because he kept striking me,
5 and I was trying to get away from the blows, and he was just
6 still striking me after I told him, you know, I'm done, and he
7 told me to shut the F up, and he kept striking me, striking me.

8 Q You heard Officer Powell testify that you dove toward the
9 rear of the car?

10 A Yes, sir.

11 Q Is that an accurate description of what you did?

12 A No, sir, I never dove because he was on top of me. So I
13 really couldn't control my moving because his weight was on top
14 of my body. He was striking me, and I was, like, in a
15 defense -- I was just trying to get away from his striking
16 blows because he was elbowing me and pressing his elbow against
17 my neck and my body, and he was just striking me and striking
18 me, telling me to stop the dang car, like.

19 Q So at the point that you're describing right now, are you
20 still trying to struggle to gain control of the steering wheel,
21 or had you abandoned that at that point?

22 A Well, I abandoned it after it started, like, coming to a
23 stop, because he was striking me, and I was trying to get away
24 from the blows.

25 Q So at the point that you decided you weren't going to be

1 able to control the vehicle, what did you do next?

2 A I was just trying to get away from him hitting me.

3 Q So what do you recall about the gun being fired?

4 A I know we was just struggling and I heard shots, and I
5 kind of started ducking, and I just seen blood on me and my
6 body was stiff and I couldn't move.

7 Q Now, did you point the gun at Officer Powell at any point?

8 A No, sir.

9 Q Did you attempt to point the gun at Officer Powell at any
10 point?

11 A No, sir.

12 Q Which hand of yours was closer to the gun -- let me strike
13 that. Did you have the gun in one hand or both hands?

14 A No, sir. When I noticed the gun, I was -- we was going
15 back and forth, so it wasn't more on the right hand or more on
16 the left hand. It was kind of like we was fighting back and
17 forth, and once the shots went off, like I said, I started
18 ducking.

19 Q Where was the gun when you first noticed it?

20 A It was in the backseat on the floor.

21 Q And is it your testimony that that was the first time you
22 saw that gun?

23 A Yes, sir.

24 Q You'd never seen it before that instant?

25 A No, sir.

1 Q All right. You say "we" were struggling. So where were
2 Officer Powell's hands in relation to the gun?

3 A His hands were also on the gun when it started going off.

4 Q Were his hands or your hands?

5 A His --

6 Q If you recall?

7 A I wouldn't -- I wouldn't say his hands was more on my
8 hands. I don't recall how much of his hands was on me or on
9 the gun or -- it was a struggle, and I was kind of, like, down
10 on the floor, so I really couldn't see that much.

11 Q Now, in addition to the wounds that Officer Powell
12 sustained, did you also sustain a gunshot wound?

13 A Yes, sir.

14 Q And where were you struck?

15 A In my right shoulder -- back, right shoulder blade.

16 Q Was the bullet -- you were taken to the hospital?

17 A Yes, sir.

18 Q Was the bullet removed?

19 A No, it's still lodged in my back.

20 Q I see. So when you got into the vehicle, your objective
21 was to do what?

22 A Just get away from the situation because I didn't know who
23 had the gun, or where the gun was or where it had come from
24 or -- I just basically panicked because, like I said, that's
25 not my character.

1 Q And when you ended up with your torso in the right rear
2 passenger seat and you and Officer Powell are struggling and
3 the gun goes off, what was your objective?

4 A My objective, when I first seen the gun, was to get rid of
5 it. Why is it still in the car? How did it get near you? And
6 I was just trying to get rid of it. I didn't intend to hurt
7 nobody or harm anyone with it.

8 **MR. DUSENBURY:** I think those are all my questions,
9 Your Honor. Thank you.

10 **THE COURT:** Cross-examination?

11 **MS. DAVIS:** Yes, Your Honor, thank you.

12 CROSS-EXAMINATION

13 **BY MS. DAVIS**

14 Q Mr. Lynn, you said Diyancy Ladson-Seabrook is -- he was a
15 friend of yours?

16 A Yes, ma'am.

17 Q And you had known him for how long?

18 A A short little period of time. Not too long.

19 Q If Mr. Diyancy made a statement that he had known you for
20 a couple of months, would that be a fair statement?

21 A Approximately a couple of months, yes.

22 Q And the car that you drove from Raleigh to Winston-Salem,
23 whose car was that?

24 A It was a friend's rental car.

25 Q And you drove it from Raleigh to Winston?

1 A Yes, ma'am.

2 Q And did you have a license at the time?

3 A No, ma'am.

4 Q And you went to pick up Diyancy to take him back to

5 Raleigh that night or the next morning?

6 A Well, we were supposed to go back and stay at his mom's

7 house so he can go to court the next morning.

8 Q And you let Diyancy drive the car because he had a

9 license?

10 A Yes, ma'am.

11 Q And you said that when you drove from Durham -- when you

12 made a stop in Durham and you drove to Winston, you had at that

13 point used marijuana and a drug called molly?

14 A Yes, ma'am.

15 Q And at that point, you drove from Durham to Winston-Salem?

16 A Yes, ma'am.

17 Q And then you let -- you picked up Diyancy and is it Kwame

18 Redmond, the other person who was in the car?

19 A Yes, ma'am.

20 Q Would it be -- would it surprise you to know that Diyancy

21 said that he did not have a gun and did not know if you carried

22 guns?

23 A I don't carry guns.

24 Q Would it be fair to say that he didn't know that there was

25 any guns in the car?

1 **MR. DUSENBURY:** Object, speculation.

2 **THE COURT:** What was the question again? Would it be
3 fair to say what?

4 **MS. DAVIS:** That he did not know that there were any
5 cars -- or he made a statement that there were not any guns in
6 the car.

7 **THE COURT:** I think you can ask him about his
8 awareness of the statement.

9 **BY MS. DAVIS**

10 Q Would it surprise you that Mr. Diyancy made a statement
11 that he did not know that there were any guns in the car?

12 A I seen that statement.

13 Q And is that an accurate statement?

14 **MR. DUSENBURY:** Well, that's the question I objected
15 to, Your Honor. I think she's asking him to speculate about
16 what Mr. Ladson knew or didn't know, as I understand it.

17 **THE COURT:** Well, he said the gun is laying in the
18 floorboard, according to the testimony; right?

19 **MR. DUSENBURY:** Yes, sir.

20 **THE COURT:** So I think it's, to some degree,
21 probative since all three of them -- there's no evidence at
22 this point when the gun may have been laying in the floorboard,
23 but all three of them were sitting in the car; right? So you
24 may -- I'll overrule the objection. You may answer the
25 question, if you know the answer. Do you mind restating the

1 question?

2 **BY MS. DAVIS**

3 Q Would it be an accurate statement that Mr. Diyancy did not
4 know that there was a gun in the car?

5 A I don't know what you mean by "accurate statement." I
6 can't -- I don't know what he knew.

7 **THE COURT:** Let's -- how about let's go at it a
8 little differently in terms of who heard what was said and
9 whether or not they may have seen anything.

10 **BY MS. DAVIS**

11 Q Who made the statement that "There's a gun in the car"?

12 A I don't recall. I just -- when I heard it, I kind of
13 panicked. I just panicked, like, "What?" They like -- both of
14 them was, like, "Just chill. Just chill." I was, like, "No,
15 like, what do you mean?" I kind of panicked because, like I
16 said, it's not my character.

17 Q When you say it's not your character, what's not your
18 character?

19 A Just around the wrong people. I'm a good person. I don't
20 be around the wrong people.

21 Q Well, you went to Durham and you made a stop at a friend's
22 house and consumed controlled substances. Do you consider that
23 the right people?

24 A No.

25 Q And you do have a criminal past; is that correct?

1 A Yes.

2 Q And you've had other encounters with law enforcement; is
3 that correct?

4 A Can you state that question again?

5 Q You've had other encounters or occasion to be around law
6 enforcement; is that correct?

7 A Yes.

8 Q And in those encounters, some of those may have involved
9 and did involve your criminal charges coming from those
10 encounters? Officers have charged you with crimes; is that
11 correct?

12 A Just simple possession marijuana charges.

13 Q And were you ever charged with a felony?

14 A Yes.

15 Q And did an officer charge you with that crime?

16 A The State charged me with that crime.

17 Q Were you ever interviewed or talked to an officer about
18 that charge?

19 A Yes.

20 Q And were you arrested by an officer for that charge?

21 A I don't get what you're saying because I had to go down to
22 the police station to be interviewed, and after the interview,
23 I got arrested, but it was by, they said, the State of North
24 Carolina. So it wasn't, I wouldn't say, one certain officer
25 that I got arrested by --

1 Q I'm sorry. When you say you've never been in a situation
2 like this or that you don't hang around this type of people,
3 what are you referring to?

4 A Like guns and just of that nature.

5 Q So just guns?

6 A I just felt like I was around the wrong people at that
7 time. The drug consumption, that's the wrong people, too. I
8 just say the gun situation, yes.

9 Q And when you got into the car to get away, did you know
10 there was a gun in the car at that time?

11 A No, I didn't know where the gun was at.

12 Q But you knew there was a gun in the car?

13 A No, I didn't know where the gun was at.

14 Q Did you know that there was a gun or firearm in that car
15 when you got into it, not where it was, but that there was one
16 in there?

17 A I did not know where the gun was.

18 Q So when you reached for the gun, why did you do that?

19 A I never reached for the gun.

20 Q Did you possess a gun?

21 A What it was was when we was fighting -- when I was in the
22 back of the car on the -- struggling with the officer, that's
23 when I noticed the gun on the floorboard of the car.

24 Q And did you pick it up?

25 A I attempted to get the gun away -- attempted to throw it

1 away.

2 Q So you did pick it up?

3 A I wouldn't say that I possessed it all the way fully, but
4 it was a struggle between me and the officer.

5 Q Where was the gun when you saw it?

6 A It was on the floorboard of the backseat kind of towards
7 the door.

8 Q The back passenger seat?

9 A Yes.

10 Q Not behind the driver's seat?

11 A No, it was behind the passenger seat.

12 Q And so you saw it there, and you say that you didn't
13 really possess it?

14 A No, what I'm saying is it was a struggle between me and
15 the officer, so I didn't just grab the gun. It was -- we was
16 basically struggling, and it all happened through the struggle.

17 Q So did the officer pick up the gun?

18 A Neither one of us had full possession of the firearm. We
19 was kind of, like, struggling in the car back and forth.

20 Q Did you pull the trigger?

21 A I don't recall.

22 Q You don't recall whether or not you pulled the trigger?

23 A No.

24 Q Do you recall the gun going off?

25 A I do recall the gun going off, but as far as me pulling

1 the trigger, I don't recall because we were struggling.

2 Q And you did get an injury from that? You have a bullet in
3 your back; is that correct?

4 A Yes, in my back.

5 Q And it's still there?

6 A Yes, it's lodged in my back.

7 **MS. DAVIS:** Your Honor, may I approach the witness?

8 **THE COURT:** Uh-huh.

9 **BY MS. DAVIS**

10 Q I'm going to show you four photographs, and I ask whether
11 or not you recognize these photographs? The first one is
12 marked as Defendant's Exhibit Number 1, the second one is
13 marked as Defendant's Exhibit Number 5, Defendant's Exhibit
14 Number 6, and Defendant's Exhibit Number 4. Do you recognize
15 those photos?

16 A It looks like it's the wound to my back.

17 Q And is that -- Defendant's Exhibit Number 1, is that the
18 overall picture of your back?

19 A Yes.

20 Q And the other ones appear to be closeups?

21 A Yes.

22 **MS. DAVIS:** Your Honor, I move for admission of these
23 for illustrative purposes.

24 **MR. DUSENBURY:** No objection, Your Honor.

25 **THE COURT:** All right.

1 **BY MS. DAVIS**

2 Q And, Mr. Lynn, that's the only injury you received from a
3 gun that night; is that correct?

4 A Besides the face swelling, yes.

5 Q But that wasn't from being shot, was it?

6 A No, it was between the struggle of me and the officer.

7 Q And you never saw Officer Powell reach for his firearm,
8 did you -- or, I mean, grab -- not reach, but pick up his
9 firearm, did you?

10 A It happened so fast. We was in the struggle. I don't
11 recall if he tried to attempt to reach for his firearm. I know
12 we was struggling over the firearm that was in the car.

13 Q You heard Officer Powell testify that there was a click
14 and then a boom. Do you recall hearing a click and a boom in
15 the car?

16 A No. It was more so of we was fighting in the car. Like I
17 said, he was striking me, and we both went down and did that,
18 came about, and it was just like -- I heard the shot so fast.
19 It was, like, kind of, like, boom, boom. I don't even remember
20 how many shots that I heard. I just started getting into the
21 position that -- kind of get down because I didn't know where
22 they was coming from. I didn't know if it was another officer
23 out of the car or whether that weapon did go off or what -- I
24 mean, it just all happened so fast.

25 **MS. DAVIS:** I don't have any further questions.

1 **MR. DUSENBURY:** No questions, Your Honor.

2 **THE COURT:** Mr. Lynn, let me ask you: In terms of
3 the firearm itself, did you possess that firearm on January 4,
4 2016?

5 **THE DEFENDANT:** Yes, sir.

6 **THE COURT:** Why did you have such a hard time
7 answering Ms. Davis' question?

8 **THE DEFENDANT:** I don't -- I understand the
9 possession, but I never solely had the gun all the way in my
10 hand, sir.

11 **THE COURT:** So how do you know you possessed it as
12 opposed to the law enforcement officer?

13 **THE DEFENDANT:** Because we was both struggling over
14 the weapon.

15 **THE COURT:** No, why do you say you possessed it if
16 both of you had it. Why didn't Officer Powell possess it?

17 **THE DEFENDANT:** It was neither -- can you explain the
18 question a little, like --

19 **THE COURT:** Well, let's talk -- let me ask you about
20 this common law robbery offense in 2009. You gave a statement
21 to law enforcement then?

22 **THE DEFENDANT:** Yes, sir.

23 **THE COURT:** And what did you tell them you did?

24 **THE DEFENDANT:** I had went inside the jewelry store
25 and took various items of jewelry.

1 **THE COURT:** What did you use to take the jewelry?

2 Any weapons?

3 **THE DEFENDANT:** No. It was just a can of mace.

4 **THE COURT:** So you threatened an employee of the
5 jewelry store with a can of mace?

6 **THE DEFENDANT:** No, I never threatened anyone.

7 That's why the charge was dropped down to common law because no
8 -- I never threatened her at any time.

9 **THE COURT:** Did you say anything to her?

10 **THE DEFENDANT:** No, sir.

11 **THE COURT:** Show her the mace?

12 **THE DEFENDANT:** I attempted to spray her with the
13 mace.

14 **THE COURT:** And she ran? What happened after you
15 tried to spray her with the mace?

16 **THE DEFENDANT:** She reached for a gun and shot off a
17 gun.

18 **THE COURT:** And when did you grab the jewelry?

19 **THE DEFENDANT:** I necessarily didn't grab the
20 jewelry. I had a co-defendant that started grabbing the
21 jewelry.

22 **THE COURT:** So while you were attacking her with the
23 mace, a co-defendant was grabbing the jewelry?

24 **THE DEFENDANT:** I wouldn't say I attacked her with
25 the mace.

1 **THE COURT:** While you were attempting to spray her
2 with the mace --

3 **THE DEFENDANT:** Yes.

4 **THE COURT:** -- someone else was grabbing the jewelry?

5 **THE DEFENDANT:** Yes, sir.

6 **THE COURT:** That's a pretty intimidating
7 circumstance, isn't it? Do you agree with that?

8 **THE DEFENDANT:** Intimidating? I wouldn't say --

9 **THE COURT:** You were trying to intimidate her;
10 correct?

11 **THE DEFENDANT:** I wasn't trying to harm her.

12 **THE COURT:** What did you think would happen when you
13 sprayed her with mace?

14 **THE DEFENDANT:** I mean, I knew she maybe risked being
15 sprayed with mace, but I didn't attempt to do any, like, bodily
16 harm or bodily injury to her.

17 **THE COURT:** All right. Did you learn about the
18 firearm being in the car while you were sitting in the car
19 after the traffic stop had started?

20 **THE DEFENDANT:** I didn't know the firearm was
21 particularly in the car. I just --

22 **THE COURT:** What did someone say?

23 **THE DEFENDANT:** It was, like, "I got a gun" and I
24 just panicked, "Like what?" They like, "Just chill." So I
25 didn't know if they had it in their pocket, in their shoe,

1 where -- in their waistband or where it particularly was. I
2 just panicked.

3 **THE COURT:** And so the first time you learned there
4 was a gun in the car, either on someone in the car or in the
5 car itself, was during the course of the traffic stop; correct?

6 **THE DEFENDANT:** Yes, sir.

7 **THE COURT:** I don't have anything further. Anything
8 in response to that, Mr. Dusenbury?

9 **MR. DUSENBURY:** No, sir, thank you.

10 **THE COURT:** Ms. Davis?

11 **MS. DAVIS:** No, Your Honor.

12 **THE COURT:** You may step down, Mr. Lynn.

13 (At 12:19 p.m., Defendant departed witness stand.)

14 **MR. DUSENBURY:** That would be our evidence, Your
15 Honor.

16 **THE COURT:** Any rebuttal evidence?

17 **MS. DAVIS:** No, Your Honor, thank you.

18 **THE COURT:** Well, let's see. The Government -- both
19 sides have filed pleadings in relation to this issue. I think
20 it's been well briefed overall.

21 I will tell both sides -- I don't think this case was
22 cited by either one of you, but *U.S. v. Ashford*, it's a
23 published Fourth Circuit opinion, 718 F.3d 377, the Court went
24 through the application of the cross-reference. The facts are
25 different in *Ashford* from those presented here. Maybe arguably

1 in *Ashford* there is a little bit longer -- well, not arguably,
2 there is a little bit longer period for deliberation than what
3 is present here, but I think some of the language in *Ashford* is
4 very similar to that which has been cited by the parties.

5 Do you want to be heard further on anything at this
6 point, Ms. Davis?

7 **MS. DAVIS:** Your Honor, you're asking for argument at
8 this point? Yes, Your Honor, I would. I would like to point
9 out a few things.

10 Parts of this case just scream common sense, that we
11 have photos of Officer Powell who has been shot four times. In
12 looking at those injuries and the way those injuries occurred,
13 compared to the Defendant's injury and how that occurred, it's
14 clear that Officer Powell was shot four times: One in the
15 chest, one in the arm, and two in -- two in one arm and one in
16 one arm, but just the images of those photographs and how those
17 injuries look compared to the Defendant's injuries.

18 When we talk about premeditation and deliberation, it
19 doesn't have to be a long term. It doesn't have to be an hour,
20 two hours. It doesn't have to be five minutes or a minute.
21 It's just a thought process, a decision at the time, and the
22 Defendant made that decision. He picked up the gun. He fired
23 it four times. He pulled the trigger four times. The officer
24 didn't pull the trigger at all.

25 You heard from Officer Powell. He said he heard a

1 click and a boom, and at that point he was already shot. There
2 wasn't a struggle over a gun at that time. He heard a click
3 and a boom, and he was shot. He said he felt it in his chest,
4 but we know that he was also shot in the arm at that point
5 because he went to reach for his firearm, and he couldn't. I
6 mean, at that point he's defenseless. He's a law enforcement
7 officer trying to conduct a traffic stop, trying to prevent
8 himself from being killed, and he can't even use the arm he
9 uses to reach for his firearm. We know that he was shot other
10 times, and we don't know when or how that happened because he
11 just didn't remember.

12 You can imagine the adrenaline that was flowing
13 through Officer Powell at the time, too: Wow. This is real.
14 I'm trying to get my firearm. I can't. I can't use that arm.
15 The only thing he can do is put his hand on that firearm so he
16 won't get shot anymore.

17 And the reason I called Detective Davis and
18 Ms. Anderson was to talk about one other issue that's present
19 in this case. When he tried to -- when Detective Davis tried
20 to clear that firearm, there was that casing that was still in
21 the firearm. Then Ms Anderson was able to testify that if that
22 happens, it doesn't reload, and pull the trigger, but nothing
23 else happens. The Government contends that when that happened,
24 that's why there were no more trigger pulls that caused a
25 bullet or another injury to Officer Powell.

1 When he testified -- when Mr. Lynn testified that
2 this was just a struggle over the gun -- and I guess in his
3 testimony he is trying to say that was just all an accident
4 that he reached for the gun. He made the decision, that he
5 knew there was a gun in the car, he saw the gun, and he picked
6 it up. His testimony that he doesn't quite want to say he
7 picked up, that maybe the officer and him picked it up at the
8 same time just doesn't seem that credible and completely almost
9 dishonest, because that's just not what happened and physically
10 don't think it could have happened the way they were situated.
11 Clearly, Officer Powell didn't shoot himself. He just didn't,
12 and I don't know how else to say that. It's just common sense
13 that he didn't take a gun and point it towards himself and
14 shoot himself. He doesn't -- Officer Powell was honest in his
15 testimony. He recalled what he could recall, and some things
16 he just couldn't recall because he did say it happened so fast.

17 The Government is asking that the cross-reference
18 apply. If there was ever a case where this cross-reference
19 should apply, it's case this where the officer is shot four
20 times, through and through, to the point where he is
21 defenseless, and the Defendant is the one who pulled the
22 trigger four times, because -- and the reason I say that is
23 because Officer Powell was shot before he even realized there
24 was a gun. He heard a shot and said, "This is real. He's got
25 a gun," can't reach his gun and puts his hand on the other gun.

1 If there was ever a case where this cross-reference applies,
2 it's this case, and we're asking that it apply. Thank you,
3 Your Honor.

4 **THE COURT:** Mr. Dusenbury?

5 **MR. DUSENBURY:** Yes, sir. Your Honor, counsel makes
6 reference to common sense, and I would -- it should -- the role
7 that it should play in resolving this issue, and I certainly
8 agree with that statement, as far as it goes. Of course, it
9 wouldn't -- I'm sure it comes as no surprise to the Court that
10 I come to a different conclusion, and, that is, that I think
11 common sense suggests that this is the farthest thing from
12 attempted first-degree murder. That is to say, I would go so
13 far as to say --

14 **THE COURT:** Well, the application is based on
15 second-degree murder, isn't it? Thirty-three --wouldn't it be
16 a 33 if it was attempted first?

17 **MR. DUSENBURY:** It would be.

18 **THE COURT:** It's 27 --

19 **MR. DUSENBURY:** It's 27.

20 **THE COURT:** -- recommended, so we're talking about
21 second-degree murder.

22 **MR. DUSENBURY:** So premeditation and deliberation --

23 **THE COURT:** Deliberation only. First degree would be
24 premeditation and deliberation.

25 **MR. DUSENBURY:** And deliberation, yes, sir. So here

1 we are talking about an intentional killing or an attempted
2 intentional killing with malice with the specific intent to
3 kill.

4 And, Your Honor, I would say that if these facts are
5 deemed to be sufficient to satisfy the elements of attempted
6 murder, then they're scarcely -- it's hard to imagine a
7 scenario where -- that would not justify a cross-reference,
8 obviously a scenario involving a shooting after a struggle.

9 Judge, I think it's clear that -- at no point will
10 the Court hear me suggest that Mr. Lynn's thought process or
11 what -- that his thought process was clear or rational. That's
12 certainly not the suggestion, far from it. He was drug
13 impaired, sleep deprived, but, clearly, his objective and the
14 objective evidence, the video, confirms his account. His --
15 it's pretty much undisputed that when he first got in the car,
16 his objective was to try to drive away, and he made a
17 concerted -- that is to say, that he did not get in the car and
18 look immediately for the gun and try to attack the officers.
19 His objective was to get away, and he remained committed to
20 that objective for most of the time that this encounter
21 unfolded.

22 After Officer Powell understandingly jumped on him
23 and tried to prevent that from happening, Officer Powell --
24 and, again, I certainly emphasize with the officer, and this is
25 a classic example of the thankless nature of the work that they

1 do.

2 **THE COURT:** It seems to me your argument comes down
3 to a factual question --

4 **MR. DUSENBURY:** Absolutely.

5 **THE COURT:** -- in some degree?

6 **MR. DUSENBURY:** Yes, sir.

7 **THE COURT:** And, that is, do you believe Officer
8 Powell's testimony that he didn't see the gun until a shot was
9 fired, hitting him in the chest, or do you believe Mr. Lynn's
10 testimony that when he picked up the gun, he and Officer Powell
11 were then struggling for the gun?

12 **MR. DUSENBURY:** Judge, I start to think of that --
13 that that might not be as much of a dichotomy as it appears,
14 but, on further reflection, I think you're right.

15 **THE COURT:** So I understand even if Officer Powell
16 didn't see the gun until after it had been discharged and he
17 was hit in the chest, you may still have some issues about
18 second degree, but that's the core -- it seems to me that
19 that's the core factual issue, which of those two things is
20 true, because that presents two very different scenarios.

21 **MR. DUSENBURY:** I think it depends on what position
22 Officer Powell was in when he was struck the first time
23 because -- and he did not recall because I was trying to --

24 **THE COURT:** If he didn't see the gun and the first
25 indication he has there's a gun now as part of this exchange is

1 when he gets shot in the chest, doesn't that suggest that
2 Mr. Lynn picked the gun up and pulled the trigger?

3 **MR. DUSENBURY:** Not necessarily, Your Honor,
4 because -- in fact, I think the more plausible
5 interpretation -- clearly the -- because this is the point at
6 which the video footage loses relevance for the most part,
7 because the last image that I recall seeing before the body
8 camera became dislodged was Mr. Lynn in a position where he was
9 leaning toward the right passenger seat and probably falling
10 back. He was still in a somewhat upright position, but it was
11 as if he was falling down, and it's shortly after that -- and
12 we do see, I think fairly plainly, Officer Powell striking
13 him -- well, you see Officer Powell's hand moving in this
14 direction, suggesting that he was trying to gain control by
15 moving Lynn out of the way with his elbow, and you see Lynn
16 falling back.

17 I think the most plausible interpretation of what
18 follows after we lose any kind of visual of the situation is
19 that officer -- because I think it's also important to note
20 that, according to Officer Powell's testimony, at the point in
21 time we're referring to now he had stopped the car and put it
22 in park. It wasn't a situation where he was both trying to
23 wrestle with Mr. Lynn essentially and steal the car. He had --
24 the vehicle had come to a stop, he put it in park, and now he
25 was dealing with Lynn.

1 I think the most plausible interpretation was once
2 Mr. Lynn goes to the right rear passenger seat, the officer is
3 going to go with him. In a situation like that, it's almost
4 inconceivable to think that Mr. Lynn could fall into the --
5 behind the front passenger seat, and Officer Powell would
6 simply stand up and observe what was going to happen next.

7 Again, I'm not a law enforcement officer, but I would
8 certainly think that in a situation like that, at least
9 believing that Lynn is more familiar with the interior of the
10 vehicle where there might be weapons or contraband or something
11 else that he could use to harm him, the officer would almost
12 certainly follow, and that was what Mr. Lynn's testimony -- and
13 Officer Powell, as I recall it, was not clear about that. He
14 did not unequivocally say anything -- in fact, his testimony,
15 as I recall it, Judge, was he didn't remember, when we were at
16 this point, as to whether he was on top or just kind of what
17 his body position was relevant to Lynn's horizontal position
18 with the torso in the back. Where Officer Powell was, he did
19 not recall.

20 My point is the most plausible thing is that Officer
21 Powell was on top of him because you no longer need to worry
22 about the vehicle getting out of control, and now he's got to
23 be concerned with a weapon. If his first awareness of the
24 presence of the weapon was being struck, that's not necessarily
25 inconsistent with the two of them grappling for control. It

1 could be that Mr. Lynn had more control, but it's almost -- I
2 think it's almost inconceivable that Officer Powell was not
3 engaged in the fray because he had to -- the instinctive
4 reaction in a situation like that has to be what in the world
5 is he looking for? I need to get in there and try to prevent
6 whatever he might be trying to do.

7 So that's why I think it may not -- that question may
8 not be as much of a dichotomy as it would seem in the abstract,
9 and so, Judge, that's -- but I think the other factual issue,
10 though -- because the Court is correct; this is a purely
11 factual issue, but it is informed by intent, and, in fact,
12 that's what we're talking about. The thing that will either
13 sustain or overrule my objection is going to be what the Court
14 finds with respect to intent.

15 That's why I find the case involving the robbery from
16 South Carolina to be instructive -- well, actually, both of
17 those Supreme Court cases, *Braxton* and *Edwards*, I believe is
18 the case. *Braxton* involved the marshal serving a warrant on a
19 gentleman, knocking on the apartment door, and the guy fires
20 two rounds right about torso -- right solar plexus height at
21 the door, charged with intent to kill. The Court finds no
22 specific intent to kill in a situation like that. And the
23 other case, the *Kwong* case, involved a situation where a woman
24 is actually killed and is killed by one -- a single stab wound
25 rendered in a melee between three people in a convenience

1 store. Even though the woman was actually killed by a stab --
2 a single stab wound, the Court finds that the evidence of
3 specific intent to kill, given the dynamics of what was going
4 on at the time, was insufficient to clearly establish specific
5 intent.

6 I think those cases are highly instructive, Your
7 Honor, of the issue here because we have -- there's no dispute
8 but that is a dynamic engagement between Mr. Lynn and the
9 officer. Who had how much control over the weapon obviously is
10 unknowable, but the fact that -- but I also, Your Honor, don't
11 think we can say that officer -- that all of Officer Powell's
12 wounds were intentionally inflicted and at the same time
13 maintain that the wound that Mr. Lynn sustained was an
14 accident. I don't think the Government can have it both ways.

15 It's -- so -- and it's the -- it's the utterly
16 ambiguous nature of the evidence that I -- is -- which is my
17 reason for saying this factual record is insufficient to
18 support the notion that Mr. Lynn acted, one, deliberately, that
19 is, in a deliberate attempt to assault the officer with the
20 weapon because his testimony, and I think it's credible -- I
21 mean, if someone thinks that it makes sense in a situation
22 where you're stopped on the side of the road, surrounded by
23 police officers, to run and jump into a car and try to drive
24 away, if you think that's rational, that same mindset might
25 also think that they can get rid -- now that their attempt to

1 drive away has been thwarted, that the next -- okay, plan B now
2 is to get rid of the gun while I'm still inside the car and the
3 officer is on top of me. None of this is rational, but I think
4 not being rational is not -- does not equate to specific intent
5 to kill, and that's where I think the evidence fails, and what
6 we have here is, at most, an aggravated assault.

7 That's my position.

8 **THE COURT:** All right. Any rebuttal?

9 **MS. DAVIS:** Yes, Your Honor. I just want to point
10 out that the Defendant made a concerted effort to get the
11 firearm. This wasn't, you know, a firearm that just happened
12 to be on his person that he was trying to get rid of. This was
13 a thoughtful action. This was a concerted action to get the
14 firearm.

15 The Government doesn't believe that he -- we're not
16 under the opinion that he didn't know about the gun or that
17 this was a surprise to him, that he just said, oh, wow, look, I
18 found a gun. I mean, even if that was the true, the fact that
19 he made a concerted effort to reach around, pull for that gun,
20 to grab that gun, and then pull the trigger at least once,
21 maybe twice, before Officer Powell even realized that he had a
22 gun and to shoot that gun in such close proximity to that
23 officer -- I mean, we look at the injuries to his bulletproof
24 vest. The Government was somewhat surprised that he would
25 still have that much of an injury that it would cause that

1 bleeding and indentation and abrasion to him, even though he was
2 wearing a bulletproof vest.

3 So we can't -- he tried to, but you can't deny the
4 fact that he did reach for a gun in a struggle with a police
5 officer after he had attempted to get away and couldn't. So
6 his mind frame was to get away -- his mind frame at that point
7 was to reach for a gun and to get away, to hurt the officer,
8 kill the officer with that many trigger pulls and that close of
9 a range and for it to have happened before the officer even
10 knew that there was a gun in the car.

11 Officer Powell testified that he didn't see a gun,
12 that he only thought that this was real because he had gotten
13 shot, and that he didn't go towards him because he thought he
14 was reaching for a gun. He was still trying to maintain
15 control over the Defendant and the vehicle, because, remember,
16 he had already put the car in place with the officer halfway in
17 and halfway out sort of in this vehicle, where his legs were
18 still not all the way in, the door was open, you know, it's
19 2:00 in the morning on a highway where there's medians on both
20 sides. This was a dangerous situation.

21 And the Defendant, the Government's position, still
22 intended to try to get away however he needed to, and at the
23 point that he made the decision and reached for the gun in an
24 attempt to kill the officer, maybe to even further get away,
25 was his decision, that was his mindset, and that's what he

1 intended to do, and that's why we're asking for the
2 cross-reference.

3 **THE COURT:** Do you all want to be heard on
4 obstruction -- I mean, reckless endangerment, too?

5 **MR. DUSENBURY:** Yes, sir. Your Honor, if I might
6 just say one quick point, I think maybe two sentences, on this
7 cross-reference issue, and, that is, I would assert that an
8 indicator and a fatal flaw of the insufficiency of the evidence
9 to support the cross-reference is the inability of the
10 Government to articulate anything more than Mr. Lynn reached --
11 fell in the back, acquired a gun, and Officer Powell ended up
12 getting shot. There -- because, that is, what happened in
13 terms of did Mr. Lynn turn and point the gun at Officer Powell?
14 How did he go from being facedown in the right rear passenger
15 compartment? Did he manipulate the gun in some fashion?

16 The point is the Government's position amounts to, I
17 would say, saying something terrible happened; therefore, the
18 Defendant must have intended -- it's really that presumption of
19 intending the reasonable and foreseeable consequences of one's
20 actions, which the Court in *Braxton* said is insufficient in
21 that case to support a finding of the element of malice much
22 less specific intent.

23 I think when you boil it down, when you distill it
24 right to its essence, the Government's position is that some
25 terrible things happened to this officer; therefore, the

1 Defendant must be accountable for the worst-case scenario out
2 of all of the charging options, and in the absence of something
3 more, there can be -- they cannot be said to have discharged
4 their duty to prove, even by a preponderance, specific intent
5 to kill.

6 As it relates to the obstruction, Judge, I would only
7 say this, and I'm thinking this is one of those times where I
8 say that I am going to be brief, and I actually follow through.

9 It's this, Judge: 3C1.2 speaks to the creation of a
10 substantial risk of death or serious bodily injury. I think
11 these facts establish some risk. It's 1:00 in the morning,
12 hardly any traffic on the road, car moving at a very slow rate
13 of speed. I meant to ask Officer Powell that question and
14 forgot to. There is some risk, not a substantial risk, of some
15 injury.

16 I don't think -- clearly this -- in my experience,
17 this adjustment applies. The scenario I am most familiar with
18 is the high-speed chase, which -- where it's obvious, not to
19 say -- certainly not to say that it's limited to that
20 situation, but the substantial nature of the risk and the
21 severity of the risk of injury -- or the severity of the injury
22 that is at risk in that high-speed-chase scenario is obvious.

23 Here, because of all of the totality of the
24 circumstances, there is some risk. Certainly, it would be
25 absurd to say that there's no risk. There is some risk, I

1 would contend not substantial, not substantial, because slow
2 speed, late at night, very little other traffic, of some
3 injury. The lack of velocity of the vehicle necessarily
4 mitigates the amount of damage that could be caused on impact.
5 That's why I contend that's not applicable.

6 **THE COURT:** Do you want to be heard any further?

7 **MS. DAVIS:** Just briefly, Your Honor. I just
8 respectfully disagree with Mr. Dusenbury in that the officer's
9 own testimony was that he was concerned about that median
10 because the door was still open, his body wasn't all the way
11 in, and he was, like, I don't want to hit this. I don't want
12 to hit this, and the implication is he didn't want to get
13 crushed by a moving car slamming into a median on the highway.
14 That would be considered substantial risk of injury, of bodily
15 injury, and he was clearly -- by his own testimony, Mr. Lynn
16 was driving to get away from police officers.

17 **THE COURT:** All right. Well, based on the facts set
18 forth in the presentence report and not objected to, as well as
19 the testimony presented here today, I will overrule these two
20 objections and find that both apply.

21 I do agree with Mr. Dusenbury in terms of the
22 reckless endangerment adjustment. We'll talk about that one
23 first. That one does require -- would require activity
24 separate and apart from the firearm incident that occurred
25 within the vehicle, but here it certainly wasn't high speed, I

1 think the presentence report makes clear, as well as the fact
2 that the testimony of 30 seconds to travel -- 30 seconds,
3 roughly speaking, to travel a quarter of a mile down the road,
4 it does sound like the car was not moving at a high rate of
5 speed.

6 On the other hand, this was an instance where law
7 enforcement -- there's no dispute that law enforcement officers
8 had sufficient cause to initially stop the vehicle. Upon
9 stopping the vehicle, there does not appear to be any dispute
10 that law enforcement officers smelled the odor of marijuana,
11 providing probable cause to believe that a crime was being
12 committed; whereupon, the officers, it seems to me,
13 appropriately continued that investigation by detaining the
14 three individuals inside the car.

15 Mr. Lynn, after having been padded down and placed
16 against the guardrail in between the officer's car -- or an
17 officer's car and the car that had been stopped, then jumped
18 and ran around and jumped in the driver's side of the vehicle.
19 At that point Officer Powell, as he described it, dove in on
20 top of him. Somehow Mr. Lynn managed to and did put the car in
21 drive; whereupon, in looking at the video as well as the
22 information described, the car then crossed from the shoulder
23 into the two lanes of travel on that side of 421.

24 It seems to me at that point there is, as required, a
25 substantial risk of at least serious bodily injury created by,

1 A, oncoming traffic coming up from behind the vehicle as it
2 crosses the two lanes of traffic, and, B, with Officer Powell
3 hanging out of the car, there is substantial risk of the car
4 hitting the median, causing -- and thereby perhaps causing
5 serious bodily injury to Officer Powell, who at that point is
6 still hanging out of the car. The car then traveled back to
7 the other side -- back to the shoulder of the highway where,
8 after the struggle continued, Officer Powell was able to turn
9 the vehicle off.

10 And those are the facts upon which the Court -- from
11 which the Court finds and further finds that those facts
12 support a two-level adjustment under 3C1.2 for reckless
13 endangerment during flight; that is, the process of fleeing the
14 detention by putting the car in drive and attempting to operate
15 the vehicle while an officer was attempting to stop Mr. Lynn's
16 progress in a manner in which occurred here constitutes
17 reckless endangerment during flight, justifying the two-level
18 adjustment.

19 With respect to the cross-reference for attempted
20 murder, I think the parties have briefed this issue relatively
21 thoroughly, but 18 U.S.C. Section 1111 provides that "murder is
22 the unlawful killing of a human being with malice aforethought.
23 Every murder perpetuated by a poison, lying in wait," et
24 cetera, et cetera, that is, essentially involving
25 premeditation, "is murder in the first degree and any other

1 murder is murder in the second degree."

2 The presentence report has applied a cross-reference
3 to a base offense level of 27, which would be attempted murder
4 in the second degree. The *Ashford* case makes clear that
5 first-degree murder requires proof of premeditation while
6 second-degree murder simply requires proof of malice
7 aforethought, which may be established by evidence of conduct
8 which is reckless and wanton and a gross deviation from a
9 reasonable standard of care of such a nature that a jury is
10 warranted in inferring that the defendant was aware of a
11 serious risk of death or serious bodily harm.

12 With respect to the facts in this case, I do find the
13 testimony of Officer Powell to be credible, both in terms of
14 what he does recall and in terms of what he does not recall.
15 Specifically, as I mentioned during the argument, it seems to
16 me that the critical fact -- or a critical fact in this
17 analysis is the question of how Mr. Lynn came to be in
18 possession of the firearm and what his intention was, and it
19 seems to me that should the evidence support a finding that
20 Mr. Powell [sic] dove over the -- in between the two seats
21 toward the backseat to retrieve a firearm and continued his
22 escape from the lawful detention by law enforcement officers,
23 that that act, followed by a shooting in the chest of a law
24 enforcement officer before he saw a gun, is sufficient to
25 support a finding that that act, with respect to that --

1 particularly that one shot, the first shot fired, which Officer
2 Powell very clearly described, constitutes an attempted
3 second-degree murder.

4 On the facts, there is a disputed fact between
5 Officer Powell's testimony as to when he saw the gun and when
6 the struggle started. Officer Powell testified that he heard a
7 click and a shot and felt a bullet hit his chest, and it was at
8 that point he realized a gun had been introduced into the
9 fray -- or the struggle that was taking place in the front of
10 the vehicle. Mr. Lynn, on the other hand, contends that he was
11 forced to the backseat in an effort to escape Officer Powell's
12 advances, and while in the backseat, he saw the gun. The two
13 of them began struggling with the gun, both possessing the
14 firearm at the same time, and, ultimately, Mr. Lynn is not
15 aware of how the gun went off, but the inference can be drawn
16 from Mr. Lynn's testimony that the firearm went off
17 accidentally during the course of the struggle.

18 I do not find Mr. Lynn's testimony to be credible as
19 to this matter, and I do find Officer Powell's testimony to be
20 credible as to the question of how Mr. Lynn came into
21 possession of the firearm during the struggle that took place.

22 Specifically, it seems to me, Mr. Lynn, during the
23 course of his testimony, minimized both his possession of the
24 firearm in terms of pleading guilty to the 922(g)(1) offense
25 and further minimized his testimony when asked directly about

1 the facts of the prior robbery conviction. Ultimately, because
2 it appears to this Court that Mr. Lynn's intention, regardless
3 of any use of illegal drugs or anything else, was to escape the
4 lawful detention by law enforcement officers on this particular
5 date by the side of the highway, and each of these efforts, it
6 seems to me, that is, running to the vehicle, struggling to
7 drive the vehicle down the road while the officer, at least at
8 one point, has told him to stop, and then moving to the
9 backseat of the car and at some point coming into possession of
10 a firearm, were all directed at Mr. Lynn's intention to escape
11 law enforcement officers.

12 As a result, I find, based upon the facts as
13 testified to as well as reasonable inferences to be drawn from
14 those facts, that with respect to the first shot fired that hit
15 Officer Powell in the chest, that at that point Mr. Lynn
16 obtained possession of the firearm and turned and attempted to
17 shoot Officer Powell in the chest in an effort to further his
18 escape.

19 In light of the fact that I am overruling those
20 objections and finding that the cross-reference as well as the
21 reckless endangerment both apply in this case, I further find
22 that while -- certainly, all of Mr. Dusenbury's objections are
23 reasonable on the facts of this case, but, here, with respect
24 to the objections as to the common law robbery conviction and
25 whether that constitutes a crime of violence and the other

1 factors -- let me see -- well, specifically, with respect to
2 the common law robbery, it's ultimately moot, and then the
3 question of the four levels for victim sustained permanent or
4 life-threatening bodily harm, it seems that the firing of
5 the -- well, let me see, Mr. Dusenbury. I don't want to speak
6 too quickly. We understood your pleading, the change in the
7 levels was --

8 **MR. DUSENBURY:** Four versus two, I believe.

9 **THE COURT:** Yeah, but there was some -- I wasn't sure
10 I understood what you said. What was the objection on the four
11 versus two?

12 **MR. DUSENBURY:** I was asserting that -- I believe the
13 probation officer applied -- found life-threatening bodily
14 injuries, and I was contending that they were no more than
15 serious bodily injuries under the 2A2.1, Subsection (b) (1) (B).

16 **THE COURT:** Ms. Davis, in terms of the permanent or
17 life threatening -- I mean, there's no question shooting
18 someone in the chest was the intention that may be associated
19 with that based on the facts that I found here. It's not clear
20 to me in terms of the permanent or life-threatening injuries.
21 Do you want to be heard on that further?

22 **MS. DAVIS:** Yes, Your Honor. Just that that was one
23 of the shots, but our contention is that there were four bullet
24 shots, and that was -- the one that you found was --

25 **THE COURT:** What's the permanent injury from any of

1 those?

2 **MS. DAVIS:** The only permanent injury -- obviously,
3 there would be some scarring. I don't know that that would
4 necessarily count as the permanent injury, but the Government's
5 position is that being shot four times and where those shots
6 happened, one so close to the chest near armpit area, close to
7 the upper arm --

8 **THE COURT:** Right, I don't think there is any
9 question about shooting somebody three or four times is highly
10 dangerous, but it seems to me -- he was in the hospital two
11 days, I think? Went in on the 4th and got out on the 6th?

12 **MS. DAVIS:** I think it was a little bit longer.

13 **THE COURT:** Was it more than that? Maybe it was a
14 little bit longer than that.

15 **MS. DAVIS:** The other thing that Officer Powell --
16 while I'm looking for that, I thought --

17 **THE COURT:** He was bleeding pretty heavily.

18 **MS. DAVIS:** And that he testified that his bone was
19 shattered.

20 **THE COURT:** Yeah, the ulnar or something was broken.

21 **MS. DAVIS:** And it went through and through that and
22 obviously would have had some --

23 **THE COURT:** Still talking about life threatening.

24 Okay. So the facts -- other than the fact he was shot four
25 times, including the shot to the chest, three in the shoulder

1 and arms, we've got the fact that he was apparently bleeding
2 pretty heavily. There's blood in the video and obviously blood
3 spatter on his face. The response to his injuries really
4 doesn't suggest to me life-threatening injuries, as is required
5 for the plus-four. Certainly serious injuries, but not life
6 threatening. There is a lot of blood, but I don't see anything
7 to indicate there's arterial bleeding, or something like that
8 going on.

9 Second, the treatment -- I mean, the broken arm and
10 everything else, but I'm struggling to say -- certainly, these
11 were very serious injuries and perhaps the intention was to --
12 was death, not perhaps, was in my mind, but in terms of the
13 actual injuries themselves, I think -- I don't see at this
14 point the permanent or the life threatening, based on the
15 evidence presented.

16 **MS. DAVIS:** Your Honor, I'm just looking at the
17 commentary application notes on that issue, and I actually had
18 tabbed it probably expecting this question.

19 It also means injury involving a substantial risk of
20 death. So I think that's where my point comes from with saying
21 someone -- the risk of death of getting shot four times -- you
22 know, no one really questions, well, if I get shot four times,
23 what's my chances of living, especially in the areas where he
24 got shot.

25 **THE COURT:** Yeah, and I agree with you. I mean, the

1 act itself, the shooting the gun four times, is more than a
2 risk of death. Arguably, it's an intention to cause death.
3 It's not the act itself. As I read this adjustment, it's a
4 question of the actual injury sustained.

5 **MS. DAVIS:** I understand. And the other thing
6 that -- I don't know that -- I didn't get this from Officer
7 Powell, and I probably should have, is that the -- and I just
8 know this, that when they had to do the surgery to repair, they
9 had to put a plate and some things in his arm to make it
10 functional again, and I don't know if that would come under
11 that umbrella --

12 **THE COURT:** Permanent and the plates and everything
13 could ultimately -- to the extent it results in some kind of
14 reduced abilities, could result -- could certainly support a
15 finding of permanent injury, but I -- in observing Officer
16 Powell, it looks like he's made a full return to duty. He
17 still appears to be carrying a firearm and back on patrol by
18 virtue of what I saw.

19 So it seems to me, ultimately, that, A, no permanent
20 injury and, B, just gauging on the evidence presented, the
21 level of the response to the injuries -- I know that they could
22 get him to the hospital quickly in the back of a police car,
23 but no immediate aid is rendered. I'm not sure that there were
24 life-threatening injuries within the meaning of the statute
25 involved. They were intended, but not necessarily inflicted.

1 **MS. DAVIS:** And I don't want to belabor the point,
2 but the uniform that he was wearing, he -- I don't think
3 anybody could see the injuries. They could see the blood
4 because obviously it was pouring out. You saw it in the video.
5 In looking at the hospital pictures from where his arm was, you
6 see the sheets are soaked in blood underneath there, and
7 probably adrenaline played a role in his --

8 **THE COURT:** I don't think there is any question.

9 Both Mr. Lynn and Officer Powell had pretty -- had the
10 adrenaline flowing pretty heavily while this was going on.

11 At the end of the day, I am going to -- what's the
12 next level down? I think it's plus-two for serious injury.
13 What's that guideline?

14 **MS. DAVIS:** 2A2.1(b).

15 **THE COURT:** I thought there was a three level in
16 there.

17 **MS. DAVIS:** There is. It's Subsection 3: "If the
18 degree of injury is between that specified in Subsections (a)
19 and (b), increase by three levels."

20 **THE COURT:** Well, I will find -- let me make sure.
21 Those of you who are here for the 1:00 session, as you can see,
22 we are running behind, and I am going to need a little break.
23 So we probably won't get started at least until 1:30, if that
24 helps you plan a little bit.

25 All right. Serious bodily injury means injury

1 involving extreme physical pain or the protracted impairment of
2 a bodily member, organ, or mental faculty requiring medical
3 intervention, such as surgery, hospitalization, or physical
4 rehabilitation. I am going -- I am going -- I think the
5 plus-two clearly applies. I am going to apply the plus-two on
6 the circumstances of this case. So we'll have a slight
7 adjustment.

8 Does that make any change ultimately to the 120-month
9 guideline range?

10 **THE PROBATION OFFICER:** Yes, Your Honor.

11 **THE COURT:** Okay. So we will stay -- instead of a 27
12 plus 4, it'll be a 27 plus 2 for the serious bodily injury, and
13 then plus 2 for the reckless endangerment during flight. So
14 that will put us at 31 minus 3 for acceptance. We'll be at a
15 28. Is that what you have?

16 **THE PROBATION OFFICER:** Yes, Your Honor.

17 **THE COURT:** And let me get my -- so that will put us
18 at a 28 and a 3. What's the revised guideline range then?
19 Ninety-seven to one-twenty-one?

20 **THE PROBATION OFFICER:** The revised guideline range
21 would be 97 to 121 months.

22 **THE COURT:** Which then becomes 97 to 120. One to
23 three years. Does the fine range change at all?

24 **THE PROBATION OFFICER:** Yes, Your Honor, the fine
25 range would be 25,000 to 250,000.

1 **THE COURT:** All right. So I will adopt the
2 presentence investigation report as modified. The offense of
3 conviction does not carry a mandatory minimum sentence. The
4 resulting advisory guideline calculation is as follows:

5 A total offense level of 28, a criminal history
6 category of III, a guideline imprisonment range of 97 to 121
7 months, which becomes 120 months by operation of the statutory
8 maximum, a supervised release range of 1 to 3 years, a fine
9 range of 25,000 to \$250,000, and a special assessment of \$100
10 is mandatory.

11 Will there be any additional evidence, Mr. Dusenbury?

12 **MR. DUSENBURY:** Your Honor, we did hand up, I think,
13 three letters.

14 **THE COURT:** I read those letters from his sister and
15 his mother and father.

16 **MR. DUSENBURY:** All three of whom are here. We have
17 no further evidence.

18 **THE COURT:** Then I will hear from you at this time as
19 to what constitutes a sentence that is sufficient but not
20 greater than necessary, taking into consideration the advisory
21 guideline calculation as well as all other factors set forth
22 under 18 U.S.C. Section 3553.

23 **MR. DUSENBURY:** Thank you, Your Honor.

24 Your Honor, I would probably incorporate much of what
25 I said with respect to the cross-reference argument under the

1 3553 subsection pertaining to the nature and circumstances of
2 the case, in other words. I would contend -- there are a
3 couple of other factors that I think are particularly
4 pertinent.

5 **THE COURT:** And let me say this to both parties. I
6 made my finding with respect to the first shot that was fired
7 into the chest of Officer Powell while the struggle took place.
8 It is clear that the struggle continued, and, what, three more
9 shots were fired, ended up all over the car. Mr. Lynn was
10 shot. Officer Powell was shot additional times.

11 How all that happened is -- remains a mystery to me
12 to some degree. It seems to me it's most likely that the
13 struggle continued. Officer Powell somehow managed to get some
14 control over the firearm at some point in time during the
15 course of the struggle and whether it was ricochets or what
16 occurred -- I am not able to say from the evidence presented
17 that Mr. Lynn fired all four shots in an attempt to murder
18 Officer Powell. I'm not sure that makes much difference, but
19 it really gets hazy in terms of what was going on after the
20 first shot was fired.

21 **MR. DUSENBURY:** Yes, sir. Judge, in addition to that
22 discussion, a couple of other things. In fact, I'll begin with
23 where I am going to end. I'm going to ask the Court to impose
24 a sentence at the low end of the newly calculated recommended
25 range. A sentence of 97 months for Mr. Lynn in these

1 circumstances and, in fact, a downward variance from that I
2 think would be appropriate, given -- if you give credence to
3 this, Your Honor, in addition to all of the bizarre nature of
4 what unfolded out there on 421, if you also credit the idea
5 that Mr. Lynn started that evening with the specific intent, if
6 you will, to do a good deed for a friend, to drive illegally
7 without a license from Raleigh to Winston-Salem to pick up a
8 friend to take him back to Raleigh so the friend could go to
9 court the next day, if you give credence to that and view that
10 as the starting point of this -- the episode that ends here,
11 this was a -- I don't know that I know the words, but just an
12 extraordinary run of -- I'm reluctant to say bad luck, but just
13 a very unfortunate sequence of events for all concerned,
14 certainly Officer Powell, because if -- because what that
15 narrative contains, Your Honor, it contains much to corroborate
16 what his family says about him, about, you know, that part of
17 the presentence report that you just can't see. It's that part
18 of the iceberg under the surface, how much of a giving person
19 he is, notwithstanding problems he's had. He is a loving,
20 giving person, and that's reflected in the -- his motives for
21 starting the process that led here.

22 And if you also give credence to the notion that he
23 found out about the gun -- that the gun was put there by
24 somebody else and he found out about it, then, again, it
25 further extenuates, it further distinguishes this case from

1 anything remotely resembling the heartland situation of gun
2 felony possession cases that end up with officers or other
3 people injured from a discharge. It makes it very atypical.

4 That 97 to 121 range is the Sentencing Commission's
5 statement about what is reasonable in the vast majority of
6 situations where a person's history and the facts of the case
7 land them at level, what did we say, 28/3. This is an atypical
8 28/3 scenario for all of those reasons and when you also add in
9 the fact that he has the one felony, the common law robbery, if
10 all of his other prior encounters have been misdemeanors.

11 He also has an atypically extensive work history --
12 Your Honor, I realize some of it couldn't be corroborated --
13 especially given the limited education. So if you -- if he is,
14 in fact, the kind, giving person who is still struggling in a
15 lot of areas of his life but he has a good heart, which caused
16 him to be in this situation in the first place, I think it's
17 fair to say that but for his intent to help the Diyancy Ladsen
18 that night, he wouldn't be here.

19 Nevertheless, he made the choices that he made, and
20 the Court -- and those choices put him in a position where
21 someone like Your Honor will make a decision about the next
22 several years of his life; but because these factors come
23 together in such an atypical way, a sentence, I would say,
24 within the recommended guideline range would be excessive. It
25 would be sufficient but more than necessary to vindicate the

1 principles that 3553 identifies. So I would ask the Court to
2 vary below the low end of the range.

3 **THE COURT:** All right. Ms. Davis?

4 **MS. DAVIS:** Your Honor, it's probably no surprise
5 that the Government is asking for 120 months in this case, and
6 the reason we're asking for that is that the Defendant -- I
7 mean, his actions that entire night, but, more importantly, and
8 I've already said several times, but the fact that he did reach
9 for a firearm in an attempt to kill a police officer; and when
10 you reach for a firearm with an intent to kill anybody, it
11 should not be any surprise that the Government is going to ask
12 that you get the mandatory amount that you can get because when
13 you make that decision and you make those actions, you are a
14 danger to society. You are --

15 **THE COURT:** There is no question about the
16 seriousness of the offense? Here's what troubling -- and this
17 is not the first 922(g)(1) offense that has been before me that
18 involved the shooting of a law enforcement officer while
19 conducting the discharge of duties, and you can make an
20 argument that 120 months is too low, given the seriousness of
21 that offense.

22 What troubles me, and I really wrestle with this, is
23 when an individual pleads guilty in a timely fashion, I
24 struggle to say that that's -- that results in a case where the
25 statutory maximum sentence should be imposed because there is

1 something -- a benefit to the Court system. Now, I'm not
2 saying that two levels down from 120 and 97 is appropriate.
3 Sometimes when the evidence is so clear, the plea of guilty
4 perhaps isn't quite the same as in other cases, but -- so maybe
5 this is a case where 30 days is sufficient recognition -- one
6 month is sufficient recognition.

7 So in terms of the -- I think both sides understand
8 in terms of the seriousness of the offense, giving the facts
9 that the Court has found, that this is as serious as it gets
10 with a felon in possession of a firearm. On the other hand, I
11 do have that statutory cap. There is a guilty plea, and I
12 struggle to hit that cap in the absence of a trial on a plea of
13 not guilty.

14 Any thoughts about that?

15 **MS. DAVIS:** Yeah, the Government also thought about
16 that, like what benefit was there for him to plead guilty if
17 we're going to ask for 120 months, and, you know, I did
18 struggle with that, what would I be asking the Court; but what
19 surprised me today in court was his minimization of the entire
20 event, and that struck a chord and whether or not he fully
21 understands or appreciates what happened that night. This
22 wasn't -- and the way he described it, the evidence is not
23 supporting what he described happened that night.

24 The other thing that the Government found troubling
25 was that he decided to stop in Durham and use some pretty

1 significant amount of drugs and then drive to Winston-Salem,
2 which isn't -- you know, it's not 2 miles. It's quite a
3 distance, and then to try to escape and then to use that
4 firearm, he clearly is a danger; and he still has not
5 appreciated or fully recognized that those actions were wrong,
6 and he minimized his criminal history, he minimized -- his just
7 whole demeanor: Well, I'm not used to being in situations like
8 that. Well, we all know, looking at the PSR, that that's just
9 simply not true. He's had contact with law enforcement before.
10 He's been around people who, quote, are bad people or bad
11 influences in his life, and to the extent that he still wants
12 to minimize that to Your Honor, to the Court, is troubling and
13 did strike a chord with me when questioning him on
14 cross-examination.

15 Does he fully appreciate what he pled guilty to, the
16 consequences of his actions, or does he still think I didn't
17 really do it, and that's where I am going to be?

18 Had maybe his testimony went different, we would be
19 in a different position, but that's not what happened today in
20 court. He did minimize several things in his testimony, and
21 because of that, you know, my thought process is he doesn't
22 appreciate it, and I am going to ask for 120 months.

23 Another issue that I've spoken with with counsel is
24 the pending state charges. My understanding is those are going
25 to trial in April, and I'm not a part of that process. I'm

1 divulged of that case as long as it's in state court, and I
2 recognize that 5G1.3(c) says something in regards to if it's
3 relevant conduct and there is an anticipated state sentence,
4 that they shall run concurrent. You know, I would like to be
5 heard on whether or not this sentence, this federal sentence,
6 should run concurrent or consecutive with any state sentence
7 that may or may not --

8 **THE COURT:** Both of you can address that, if you want
9 to. I will say that there will be some overlap if Mr. Lynn is
10 convicted in state court of an offense, but I find it terribly
11 difficult to do a calculation that reflects what portion of the
12 sentence should be run concurrently with a future sentence to
13 be imposed.

14 I guess it was five or six years ago or maybe longer
15 when the law became clear that we do have authority to announce
16 concurrent versus consecutive with respect to sentences that
17 may be imposed in the future, but I don't know what that
18 sentence might be, and I personally -- perhaps Mr. Dusenbury
19 can convince me otherwise, but I'm reluctant to make a finding
20 on consecutive versus concurrent when this Court is imposing
21 the initial sentence for the federal offense, the 922(g)(1). I
22 think that either the state court can take this sentence into
23 account in fashioning a sentence, and then, ultimately, the
24 Bureau of Prisons has the authority to come back in and handle
25 it through one of those retroactive designations.

1 I don't know what -- I mean, certainly his guideline
2 range has been significantly enhanced by an attempted
3 second-degree murder, but I don't know what facts or factors
4 may lead to his conviction and the imposition of a sentence in
5 state court ultimately.

6 For example, let's say that a state court jury finds
7 beyond a reasonable doubt, as Mr. Dusenbury has argued, that
8 there was a struggle and this constitutes some kind of
9 aggravated assault. I'm not sure I would want this sentence to
10 be imposed to run concurrently based on the facts that I found.

11 On the other hand, if there's an attempted
12 second-degree murder conviction and some 288-month sentence is
13 imposed, then I think, in fairness, the circumstances might
14 merit some overlapping consideration, but I just don't know at
15 this point.

16 **MS. DAVIS:** Your Honor, my thought process is instead
17 of giving him less than 120 months as somewhat of a concession
18 as a result of the plea, because we just don't know what's
19 going to happen in state court, maybe as -- like to do some
20 type of overlap as in recognition of his plea early on in the
21 process because we just don't know what he will get. Assuming
22 that he will get something, that consideration of some portion
23 of it being concurrent could be in lieu of giving him less than
24 120 months. That's all I wish to be heard on.

25 **THE COURT:** Mr. Dusenbury, you want to be heard on

1 either one of those?

2 **MR. DUSENBURY:** Yes, sir. Your Honor, this is one of
3 the things that -- I struggle with this situation as well. My
4 understanding from talking with Paul James, who represents
5 Mr. Lynn in state court, the -- apparently, one plea offer has
6 been proposed. That's been rejected. The case by default now
7 is scheduled for trial, but it's his anticipation that there
8 will be subsequent plea negotiations.

9 I understand the Court's problem, and I don't know
10 that I can shed any light on it, Your Honor, because the
11 variables, as I understand them, are clearly what charges --
12 assuming a plea is reached, then what charges would he be
13 allowed to plead to, because he has, in addition to the
14 homicide charge -- or attempted homicide charge, the felon in
15 possession charges, I think assault with a deadly weapon with
16 intent, and from what I recall of Mr. James -- my conversation
17 with him, depending on what mix of charges he's facing and
18 depending on factors like whether the judge sentences him
19 within the mitigated range and all of those things, the
20 best-case scenario, I think, is somewhere around 100 -- maybe
21 less than 10 years but more than 100 months. Worst-case, after
22 trial, probably double that. I understand the variables that
23 the Court has alluded to that you have to take into
24 consideration.

25 Would it -- I don't know if this addresses it or not,

1 Judge, but -- I mean, if the Court were to impose this sentence
2 to begin at some date certain in the future -- because you made
3 reference to how the Bureau of Prisons somehow backdates -- I
4 have never --

5 **THE COURT:** When an individual does finally arrive at
6 the Bureau of Prisons, there is an administrative process where
7 they can apply and ask for that overlap -- the overlapping
8 sentences to be taken into consideration and the Bureau of
9 Prisons backdate the start of the federal sentence to some date
10 during the state sentence that's been served. I usually get a
11 letter that asks for my position on that, and if it is truly a
12 circumstance where there was overlapping conduct that enhanced
13 both sentences, I usually tell that to the Bureau of Prisons,
14 but I don't know what they do with that once I've made my
15 comment.

16 **MR. DUSENBURY:** Judge, all I can say is that I think
17 this is a scenario -- save for one element, this is precisely
18 the scenario contemplated by 5G1.3. I mean, this is relevant
19 conduct, i.e., the cross-reference. He won't get credit. He's
20 here on a writ. The only thing is that that sentence is not
21 undischarged. It hasn't been imposed yet, but in every other
22 respect, the values that 5G1.3 is trying to address are
23 present. So I would ask the Court to impose it to run -- to
24 begin -- to commence at a date certain in the future.

25 **THE COURT:** All right. Mr. Lynn, you are not

1 required to say anything. If you choose to remain silent, your
2 silence will not be held against you in any way whatsoever, but
3 you do have the right to address the Court before any sentence
4 is imposed. If you wish to address the Court, now is the
5 appropriate time.

6 **THE DEFENDANT:** Yes, sir. I would just like to
7 apologize to the Court and to the officer. I would like to
8 take full responsibility for what I did. It was a big mistake,
9 maybe the worst of my life, but I just want the Court to also
10 know that I'm a good person, and I don't just go around trying
11 to harm people, or due to my background, I never had resisted
12 arrest or got into it with an officer before, and I'm just -- I
13 just want to take responsibility for my actions and that I'm
14 sorry.

15 **THE COURT:** All right. You can have a seat. Let me
16 see probation up here.

17 (Off-the-record discussion.)

18 **THE COURT:** All right. In Mr. Lynn's case, taking
19 into consideration the advisory guideline calculation as well
20 as the factors set forth under 18 U.S.C. Section 3553, I find
21 that a sentence of 120 months followed by 3 years of supervised
22 release is sufficient but not greater than necessary.

23 In Mr. Lynn's case, with respect to the history and
24 characteristics of the Defendant, while it is true, in terms of
25 Mr. Lynn's criminal history, that there are not -- I think

1 there's only the one prior felony conviction, the common law
2 robbery offense described in the presentence report, and the
3 rest of the convictions I think are various misdemeanor
4 convictions relating to the possession of marijuana, and there
5 are substance abuse issues, and the letters submitted by
6 Mr. Lynn's family are very moving in many respects.
7 Ultimately, the seriousness of the offense, that is, the nature
8 and circumstances of the offense, suggest to this Court that
9 this is, in fact, one of the most, if not the most, serious
10 forms of a 922(g)(1) offense. The only thing more serious is a
11 shooting in which an individual is actually killed.

12 And as a result then, taking into consideration the
13 3553(a) factors, specifically the need to protect the public
14 from further crimes of the Defendant and the need for the
15 sentence imposed to reflect the seriousness of the offense, all
16 suggest to this Court that a sentence at the high end of the
17 otherwise advisory guideline calculation is necessary in order
18 to fully accomplish the objectives required under 18 U.S.C.
19 Section 3553.

20 I have considered -- and it does certainly trouble me
21 to impose a sentence at the statutory maximum when an
22 individual has entered a guilty plea. However, having heard
23 Mr. Lynn's testimony and as the Court found previously, the
24 Court rejected that testimony as not credible based, at least
25 in part, on what appeared to the Court to be Mr. Lynn's

1 minimizing of his offense conduct both in this case as well as
2 the other prior conviction, based on all the facts and
3 circumstances; and as a result, while I think in many cases
4 this Court would be inclined to at least go down a month or two
5 in recognition of acceptance of responsibility, here, it seems
6 to me, Mr. Lynn's minimization of his responsibility with
7 respect to the seriousness of the conduct suggests to this
8 Court that the statutory maximum sentence should be imposed.

9 I just -- I am not able to make a determination as to
10 how much of this sentence should be imposed to run concurrently
11 with the state court prosecution that is now pending.
12 Certainly, to the extent Mr. Lynn was ultimately either found
13 guilty or pled guilty to an attempted second-degree murder,
14 there would be significant overlap between these two sentences
15 that are imposed in this case, but, ultimately, I just -- I
16 don't know -- should Mr. Lynn ultimately only be convicted
17 of -- I realize that it may not be likely, but should Mr. Lynn
18 ultimately be convicted of a 922(g)(1) offense or some other
19 offense, I would not be inclined to run any of this sentence
20 concurrent to the sentence that may be imposed in state court.
21 Therefore, at this time I will decline to make a finding with
22 respect to running any part of this sentence concurrently to
23 any sentence imposed in the state court.

24 Three years of supervised release. That will be on
25 terms and conditions set forth in the presentence report.

1 Mr. Dusenbury, anything you want to address on those
2 supervised release terms?

3 **MR. DUSENBURY:** No, sir, thank you.

4 **THE COURT:** Mr. Lynn, if you will stand, please, sir.

5 In Case Number 1:16CR287-1, United States versus Gary
6 Giovon Lynn, as to Count One, it is hereby ordered that the
7 Defendant is committed to the custody of the Bureau of Prisons
8 for a term of 120 months followed by 3 years of supervised
9 release. A special assessment of \$100 is mandatory, is hereby
10 imposed, and is due and payable immediately. A fine is waived
11 because of the Defendant's inability to pay, and restitution is
12 not imposed in this case.

13 I do recommend to the Bureau of Prisons that the
14 Defendant be designated to a facility where he may participate
15 in intensive substance abuse treatment and to a facility as
16 close to his home as possible.

17 During the period of supervised release, it is
18 ordered that the Defendant shall abide by the mandatory and
19 standard conditions of supervised release. In addition to the
20 standard terms and conditions, the following special conditions
21 are imposed:

22 One, the Defendant shall cooperatively participate in
23 a mental health treatment program, which may include inpatient
24 treatment, and pay for those treatment services as directed by
25 the probation officer.

1 Two, the Defendant shall submit to substance abuse
2 testing at any time as directed by the probation officer. The
3 Defendant shall cooperatively participate in a substance abuse
4 treatment program, which may include drug testing and inpatient
5 or residential treatment, and to pay for those treatment
6 services as directed by the probation officer. During the
7 course of any treatment, the Defendant shall abstain from the
8 use of any alcoholic beverage.

9 Three, the Defendant shall not associate with or be
10 in the company of any gang member or security threat group
11 member, including, but not limited to, the United Blood Nation.
12 The Defendant shall not frequent any locations where gangs or
13 security threat groups congregate or meet. The Defendant shall
14 not wear, display, use, or possess any clothing or accessories
15 which have any gang or security threat group significance.

16 And, four, the Defendant shall submit his person,
17 residence, office, vehicle, or any other property under his
18 control to a warrantless search. Such a search shall be
19 conducted by a United States probation officer at a reasonable
20 time and in a reasonable manner based upon reasonable suspicion
21 of contraband or evidence of a violation of a condition of
22 release. Failure to submit to such a search may be grounds for
23 revocation. Mr. Lynn shall warn any residents that his
24 premises may be subject to such searches.

25 Mr. Lynn, you do have the right to appeal the

1 sentence that I have imposed in this case. If you choose to
2 appeal, notice of appeal must be filed within 14 days of the
3 entry of the judgment. If you wish to appeal and cannot afford
4 the services of counsel, counsel will be appointed to represent
5 you. Mr. Dusenbury will be responsible for advising you with
6 respect to your right to appeal and will file a notice of
7 appeal if you instruct him to do so.

8 I think I made this clear when I was making my
9 findings, and to the extent I didn't, I will add this and that
10 is that the attempted murder of a law enforcement officer while
11 that officer is in the course of discharging his duties with
12 respect to his office is an offense of particular seriousness
13 in the Court's mind. All human life is valuable, and I don't
14 mean to suggest that Officer Powell's life is more significant
15 than anyone else's. On the other hand, when an individual
16 attacks and attempts to kill another individual simply because
17 of the office and the duties that individual has undertaken, at
18 least in the Court's mind, that presents a serious -- an
19 unusual seriousness with respect to the danger to the community
20 posed by a particular individual.

21 Mr. Dusenbury, anything further in this case?

22 **MR. DUSENBURY:** Your Honor, I wonder if the Court
23 would consider, in addition to the Bureau of Prisons'
24 recommendation, to the extent it doesn't conflict with those,
25 recommending mental health evaluation and treatment.

1 **THE COURT:** I think that's a good point. I will
2 recommend that the Defendant be designated to a facility where
3 he may receive psychological evaluation and any recommended
4 mental health treatment while in the custody of the Bureau of
5 Prisons.

6 **MR. DUSENBURY:** Thank you, sir.

7 **THE COURT:** Anything further?

8 **MS. DAVIS:** No, Your Honor, thank you.

9 **THE COURT:** We are going to have a take about a
10 15-minute recess, and then we'll start and come back with the
11 1:00 cases.

12 (END OF PROCEEDINGS AT 1:37 P.M.)

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1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

4

5

6 I, Briana L. Bell, Official Court Reporter, certify
7 that the foregoing transcript is a true and correct transcript
8 of the proceedings in the above-entitled matter.

9

10 Dated this 22nd day of March 2017.

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Briana L. Bell

13 Briana L. Bell, RPR
14 Official Court Reporter

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