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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4120

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN SMITH,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:14-cr-00017-RJC-6)

Submitted: November 17, 2016 Decided: August 14, 2017

Before WILKINSON, KEENAN, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

James P. McLoughlin, Jr., MOORE & VAN ALLEN, PLLC, Charlotte, North Carolina, for Appellant. Jill Westmoreland Rose, United States Attorney, Elizabeth Greenough, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin Smith appeals his conviction and sentence for possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1) (2012). Finding no reversible error, we affirm.

I.

Smith first claims that the district court erred in admitting witness testimony that he had previously possessed a firearm matching the description of one of the firearms listed in the indictment. We review a district court's rulings as to the admissibility of evidence for abuse of discretion. *United States v. Williams*, 740 F.3d 308, 314 (4th Cir. 2014).

Evidence of other wrongful conduct cannot be used to establish a defendant's character; however, evidence of other wrongs may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b). Such evidence also "may be introduced if it concerns acts intrinsic to the alleged crime because evidence of such acts does not fall under Rule 404(b)'s limitations to begin with." *United States v. Otuya*, 720 F.3d 183, 188 (4th Cir. 2013) (alteration and internal quotation marks omitted). We have held that evidence of other bad acts is considered intrinsic if "it arose out of the same series of transactions as the charged offense, or if it is necessary to complete the story of the crime on trial." *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994) (alterations and internal quotation marks omitted). Evidence is also intrinsic if it "is necessary to provide context relevant to the criminal charges." *United States v. Basham*, 561 F.3d 302, 326 (4th Cir. 2009) (internal quotation marks omitted).

The district court admitted the witness testimony as intrinsic to the charged offenses or, in the alternative, pursuant to Rule 404(b). Upon review, we find the district court did not abuse its discretion in admitting the evidence that Smith possessed a firearm matching the description of one of the firearms found in his house. *See United States v. Brown*, 151 F. App'x 286, 287–88 (4th Cir. 2005) (finding district court did not err, under Rule 404(b), in admitting evidence that defendant was observed shooting the same firearm a week before the incident at issue in felon-in-possession conviction); *United States v. Holmes*, 376 F.3d 270, 273 n.1 (4th Cir. 2004) (finding no reversible error where district court admitted evidence that defendant had used a pistol in several past robberies, and district court found evidence was intrinsic to the charged offenses of being a felon in possession of a weapon and therefore did not fall under Rule 404(b)); *see also United States v. Brooks*, 715 F.3d 1069, 1076–77 (8th Cir. 2013) (finding that admission of cell phone photos and videos of defendant posing with firearm were admissible as evidence intrinsic to charges, including possession of a firearm by a convicted felon).

II.

Smith also claims that the evidence at trial was insufficient as a matter of law to support his conviction. We will uphold a jury's guilty verdict if it is supported by substantial evidence, defined as "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Louthian*, 756 F.3d 295, 303 (4th Cir. 2014) (internal quotation marks omitted). In making this determination, we view the evidence and draw all reasonable inferences in the light most favorable to the Government. *United States v.*

McNeal, 818 F.3d 141, 148 (4th Cir.), *cert. denied*, 137 S. Ct. 164 (2016). We defer to the jury's credibility determinations and resolutions of conflicting evidence, as those decisions "are within the sole province of the jury and are not susceptible to judicial review." *Louthian*, 756 F.3d at 303 (internal quotation marks omitted). We also must "consider the evidence in cumulative context rather than in a piecemeal fashion." *United States v. Strayhorn*, 743 F.3d 917, 922 (4th Cir. 2014) (internal quotation marks omitted). "Appellate reversal on grounds of insufficient evidence will be confined to cases where the prosecution's failure is clear." *United States v. Fuertes*, 805 F.3d 485, 502 (4th Cir. 2015) (alterations and internal quotation marks omitted), *cert. denied*, 136 S. Ct. 1220 (2016).

After viewing the evidence as a whole and in the light most favorable to the Government, we conclude that there was sufficient evidence to establish that Smith intentionally exercised dominion and control over the firearms in question. *See United States v. Moye*, 454 F.3d 390, 395 (4th Cir.2006) (setting forth elements for possession of a firearm by a convicted felon); *United States v. Al Sabahi*, 719 F.3d 305, 311 (4th Cir. 2013) (providing that the "government can prove constructive possession by showing that [the defendant] intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm" (internal quotation marks omitted)). Because the jury's verdict was supported by substantial evidence, we affirm Smith's conviction.

III.

Smith next challenges both 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e)(1) as unconstitutionally void for vagueness. Specifically, he claims that "constructive

possession is an abstraction as to which [§ 922(g)(1)] gives neither sufficient notice nor guidance." He further claims that the phrase "committed on occasions different from one another" in 18 U.S.C. § 924(e)(1) is void for vagueness. Because Smith failed to raise these challenges below, we review for plain error. *United States v. Moore*, 810 F.3d 932, 939 (4th Cir. 2016). "[W]e may reverse only on a finding that (1) there was error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alterations and internal quotation marks omitted).

"The void-for-vagueness doctrine requires that penal statutes define crimes so that ordinary people can understand the conduct prohibited and so that arbitrary and discriminatory enforcement is not encouraged." *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003) (internal quotation marks omitted). "[A] court considering a vagueness challenge must determine if the statutory prohibitions are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States v. Whorley*, 550 F.3d 326, 333 (4th Cir. 2008) (internal quotation marks omitted). "In evaluating whether a statute is vague, a court must consider both whether it provides notice to the public and whether it adequately curtails arbitrary enforcement." *Klecker*, 348 F.3d at 71; *accord United States v. Saunders*, 828 F.3d 198, 206 (4th Cir. 2016).

Upon review, we conclude that Smith has failed to establish plain error.[1] *See United States v. Michel*, 446 F.3d 1122, 1136 (10th Cir. 2006) (holding that the language of 18 U.S.C. § 924(e)(1) is "sufficiently definite to let a person of ordinary intelligence . . . know that if he committed . . . separate crimes on the same day against separate victims at separate locations, his sentence would be enhanced under the ACCA"); *United States v. Rogers*, 41 F.3d 25, 29 (1st Cir. 1994) (rejecting claim that 18 U.S.C. § 922(g) is void for vagueness and finding that the term "'possession' concretely describes the conduct proscribed by the statute").

IV.

Smith also contends that the district court erred in determining that his predicate convictions for robbery with a dangerous weapon were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

> We have come to rely on five factors [(the *Letterlough*[2] factors)] to determine whether predicate ACCA offenses were committed on different occasions: (1) whether the offenses arose in different geographic locations; (2) whether the nature of each offense was substantively different; (3) whether each offense involved different victims; (4) whether each offense involved different criminal objectives; and (5) whether the defendant had the opportunity after committing the first-in-time offense to make a conscious and knowing decision to engage in the next-in-time offense.

[1] Moreover, although Smith claims that these statutes are void for vagueness under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the holding in *Johnson* has no direct relevance to Smith's argument, as § 922(g)(1) and § 924(e)(1) do not contain a provision resembling the residual clause of the Armed Career Criminal Act (ACCA).

[2] *United States v. Letterlough*, 63 F.3d 332 (4th Cir. 1995).

United States v. Linney, 819 F.3d 747, 751 (4th Cir. 2016) (internal quotation marks omitted). "Importantly, these five factors may be considered together or independently and the strong presence of any one factor can dispositively segregate an extended criminal episode into a series of separate and distinct episodes." *Id.* (internal quotation marks omitted). "In undertaking this five-factor analysis, courts rely on *Shepard*-approved sources[,] . . . such as the indictment, judgment, any plea agreement, the plea transcript or other comparable record confirming the factual basis for the plea, and any document explicitly incorporated into one of the foregoing." *Id.* at 751–52 (internal quotation marks omitted); *see also Shepard v. United States*, 544 U.S. 13 (2005).

Smith does not contest that his January 3, 1997, robbery was committed on a different occasion than his other three robberies. Even if we assume that the two offenses that occurred on January 21, 1997, were part of a continuing offense, the indictment indicates that Smith proceeded to use a firearm to steal a car from Gerald Wayne McClamrock on January 22, 1997. This offense occurred on the following day, involved a different victim, had a different criminal objective, and occurred after Smith had an opportunity to rethink his previous criminal behavior. *See United States v. Carr*, 592 F.3d 636, 645 (4th Cir. 2010) (finding 13 prior convictions for breaking and entering 13 storage units housed in the same building on the same date were separate and distinct episodes, as the crimes had 10 different victims and, as he committed each crime, defendant "had the opportunity to make a conscious and knowing decision to cease and desist his criminal behavior or engage in yet another crime" (internal quotation marks omitted)). Thus,

applying the *Letterlough* factors, we find no error in the district court's conclusion that at least three of Smith's convictions occurred on different occasions.

V.

Smith also claims that the district court violated his due process rights in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005), in deciding that his predicate offenses were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). He contends that the application of this provision is a factual determination that should be submitted to a jury. Because Smith failed to raise this claim below, we review for plain error. *Moore*, 810 F.3d at 939.

We have rejected claims that the "'separateness' of the occasions" inquiry must be submitted to a jury. *See United States v. Thompson*, 421 F.3d 278, 285–86 (4th Cir. 2005) ("The line between facts that are inherent in a conviction and facts that are about a conviction is a common-sensical one, and there is no way that our conclusion as to the separateness of the occasions here can be seen to represent impermissible judicial factfinding."). Accordingly, we conclude that Smith fails to establish error, much less plain error, in this regard.

VI.

Finally, Smith argues that the district court erred in determining that his prior North Carolina convictions for robbery with a dangerous weapon are "crime[s] of violence for purposes of 18 U.S.C. § 924(e)." Smith's argument is squarely foreclosed by our recent decision in *United States v. Burns-Johnson*, __ F.3d __, 2017 WL 3027872 (4th Cir. July 18, 2017), in which we held that a North Carolina conviction for robbery with a dangerous

weapon categorically qualifies as a violent felony under the "force clause" of the ACCA. *See* 18 U.S.C. § 924(e)(2)(B)(i). Because Smith committed a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another," *see id.*, we likewise reject Smith's related argument that his convictions are not crimes of violence under the identical force clause set forth in *U.S. Sentencing Guidelines Manual* § 4B1.2(a)(1) (2014), as well as his objection to the inclusion of two additional criminal history points assigned to him pursuant to U.S.S.G. § 4A1.1(e).

Accordingly, we affirm Smith's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: August 14, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4120
(3:14-cr-00017-RJC-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KEVIN SMITH

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
Western District of North Carolina

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987)
V.	
Kevin Smith	Case Number: 3:14-cr-00017-RJC-6 USM Number: 29300-058 Renae Alt-Summers Defendant's Attorney

THE DEFENDANT:

☐ Pleaded guilty to count(s) 53.
☐ Pleaded nolo contendere to count(s) which was accepted by the court.
☒ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:922(g)(1) & 924(e)(1)	Possession of firearm by felon	8/15/13	53

The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

☐ The defendant has been found not guilty on count(s).
☒ Count(s) 1, 11-12, 50 & 52 (is)(are) 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 monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 2/12/2016

Signed: March 3, 2016

Robert J. Conrad, Jr.
United States District Judge

Defendant: Kevin Smith
Case Number: 3:14-cr-00017-RJC-6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHTY-EIGHT (188) MONTHS.

☒ The Court makes the following recommendations to the Bureau of Prisons:
- Participation in any available substance abuse treatment program and if eligible, receive benefits of 18:3621(e)(2).
- Defendant shall support all dependents from prison earnings.
- Participation in any available educational and vocational opportunities.
- Placed in a facility as close to Charlotte, NC as possible, consistent with the needs of BOP.

☒ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

☐ As notified by the United States Marshal.
☐ At _ on _.

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

☐ As notified by the United States Marshal.
☐ Before 2 p.m. on _.
☐ As notified by the Probation 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 Marshal

Defendant: Kevin Smith
Case Number: 3:14-cr-00017-RJC-6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the Court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively; The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or monitoring which is (are) required as a condition of supervision.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office, vehicle and/or any computer system including computer data storage media, or any electronic device capable of storing, retrieving, and/or accessing data to which they have access or control, to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.
24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.
25. The defendant shall participate in transitional support services under the guidance and supervision of the U.S. Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider and/or with the approval of the U.S. Probation Officer.

Defendant: Kevin Smith
Case Number: 3:14-cr-00017-RJC-6

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$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.

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay $0.00 towards court appointed fees.

Defendant: Kevin Smith
Case Number: 3:14-cr-00017-RJC-6

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $0.00 due immediately, balance due
☐ Not later than_____
☐ In accordance ☐ (C), ☐ (D) below; or

B ☒ Payment to begin immediately (may be combined with ☐ (C), ☐ (D) below); or

C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or

D ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

☒ The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Court Order (Doc. No. 735) entered 7/14/2015:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

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) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness

FILED
CHARLOTTE, NC

JAN 23 2014

US DISTRICT COURT
WESTERN DISTRICT OF NC

UNDER SEAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA	DOCKET NO. 3:14CR17-RJC
v.	**BILL OF INDICTMENT**
(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P"	Violations:
(2) JORDAN FOSTER a/k/a "2-3"	18 U.S.C. § 2
(3) STANLEY RUTLEDGE, JR.,	18 U.S.C. § 513
(4) PAMELA KERNS,	18 U.S.C. § 922(g)(1)
(5) OLWIN BROWN, a/k/a "JUICE" a/k/a "OJ"	18 U.S.C. § 924(l)
(6) KEVIN SMITH,	18 U.S.C. § 1028A
(7) RENARDO PERRY, a/k/a "S-DUB"	18 U.S.C. § 1344
(8) JERRY McDUFFIE, a/k/a "J"	18 U.S.C. § 1349
(9) CRAIG McINNIS,	18 U.S.C. § 1708
(10) ANTHONY WOODS, a/k/a "GEROD"	**UNDER SEAL**
(11) YARRAL WILSON,	
(12) KALIF WILSON, a/k/a "SCRAP"	
(13) TOMONTA SIMMONS, a/k/a "MONTAY"	
(14) JARRAL THOMPSON,	
(15) JAKARI RUTLEDGE,	
(16) ELIJAH GRANT, a/k/a "BOX"	
(17) MARTELL MACKEY, a/k/a "TELLY"	
(18) JADE BROWN,	
(19) CHRISTOPHER MOAT,	
(20) TRAVIS GABRIEL, a/k/a "GANGSTER"	
(21) TIERRA LOVE,	
(22) DEMARCUS SHANKLE,	
(23) CHRISTIAN ROBERTSON,	
(24) RASHAD JOHNSON,	
(25) QUILLIE SMITH,	
(26) KEOSHA MACK, and a/k/a "KIKI"	
(27) WALTER BOYD a/k/a "WEB"	

THE GRAND JURY CHARGES:

At the specified times and at all relevant times:

The Check Fraud Scheme

1. From in or about December 2007 to the present, a check fraud conspiracy was operating in and around Mecklenburg, Gaston, Iredell, Cabarrus Counties in North Carolina, and elsewhere.

2. The Check fraud conspiracy (hereafter, the "conspiracy") would deposit worthless checks into empty or near-empty bank accounts to trick the bank system into crediting the account with funds, and then steal as much cash as possible with ATM withdrawals before the banks realized what was happening and could do a proper accounting and reconciliation.

3. Specifically, the conspiracy generally operated in the following manner:

   a. One or more members of the conspiracy would obtain federally insured financial institution (hereinafter "bank") checks (hereinafter referred to as "worthless checks"). The worthless checks were usually linked to bank accounts with little or no money in them.

      i. Often, members of the conspiracy would purchase the worthless checks from the worthless check account holders.

      ii. Other times, members of the conspiracy would purchase stolen checks, or steal the checks themselves, usually from cars.

   b. Around the same time, members of the conspiracy would obtain Automated Teller Machine (hereinafter "ATM") card(s) from an account holder (hereinafter referred to as "straw account holder"). The conspiracy members would pay or promise to pay money to the straw account holder in exchange for use of the ATM card and connected bank account. The straw accounts usually had little or no money in them.

   c. One or more members of the conspiracy would often make the worthless check(s) payable to the name of the straw account holder. The conspiracy member(s) would fill in a dollar amount, and then endorse the check by forging the signature of the straw account holder.

   d. One or more members of the conspiracy would deposit or cause to be deposited the completed worthless check into the straw account, causing the balance on the straw account to be inflated by the amount of the worthless check. These deposits were usually made at the ATM after normal operating hours.

e. Alternatively, utilizing a straw ATM card and account, conspirators would fraudulently deposit an empty envelope into the ATM and claim that the empty envelope contained a check endorsed for an amount of money.

f. Usually within one day of the deposit into the straw account, one or more members of the conspiracy would then withdraw, or cause to be withdrawn, cash from the straw account, by use of an ATM, in any amount up to the authorized single cash withdrawal limit predetermined by the relevant bank's policies. Alternatively, one or more members of the conspiracy would direct the straw account holder to withdraw the cash from a bank teller immediately after it was deposited. The straw account holder would then promptly turn over some or all of the withdrawn cash to the conspiracy member(s).

g. After the full amount of the worthless check was posted by the bank to the straw account, one or members of the conspiracy would withdraw any remaining balance in the straw account utilizing one or both of the following methods: 1) purchasing money orders utilizing the straw ATM card; and 2) using the straw ATM card to purchase items, obtain services, and/or cash from businesses offering point of sale cash withdrawals commonly known as getting "cash back."

h. Usually, within five to seven days after the worthless check was deposited in the straw account, the bank in which the straw account was held would complete the reconciliation and check-clearing process. This process alerted the bank that the initial worthless check account had insufficient funds to cover the amount deposited and then withdrawn from the straw account.

i. By the time banks realized that there were insufficient funds to cover the withdrawals from the straw account, the conspiracy members had already completed their fraudulent activity with that straw account.

j. Ultimately, the bank in which the straw account was held incurred a financial loss as a result of the cash stolen through the fraud scheme.

4. The conspiracy, using this scheme to steal cash from banks, started in or about December 2007, and continues until the present.

5. The conspiracy victimized numerous financial institutions, including Bank of America (BoA), Branch Bank and Trust (BB&T), Carolinas Telco Federal Credit Union (Telco CU), Charlotte Metro Credit Union (Metro CU), Coastal Federal Credit Union (Coastal CU), Fifth Third Bank (Fifth Third), Founders (Founders), Navy Federal Credit Union (Navy Federal), PNC Bank (PNC), SunTrust Bank (Suntrust), TD Bank (TD), Truliant Federal Credit Union (Truliant), USAA Federal Savings Bank (USAA), State Employees Credit Union (SECU) Wells Fargo Banks (Wells Fargo) and Wells Fargo Bank f/k/a Wachovia Bank (Wells Fargo f/k/a Wachovia).

6. The conspirators stole approximately one million dollars ($1,000,000) from the banks as a result of the fraud scheme.

Victim Financial Institutions

7. BoA, BB&T, Fifth Third, PNC, Suntrust, TD, USAA, Wells Fargo, and Wells Fargo f/k/a Wachovia were financial institutions, the accounts and deposits of which were insured by the Federal Deposit Insurance Corporation ("FDIC").

8. Telco CU, Metro CU, Coastal CU, Founders, Navy Federal, SECU, and Truliant, were financial institutions, the accounts and deposits of which were federally insured by the National Credit Union Administration ("NCUA").

9. BoA, BB&T, Fifth Third, PNC, Suntrust, TD, USAA, Wells Fargo and Wells Fargo Bank f/k/a Wachovia Bank, Telco CU, Metro CU, Coastal CU, Founders, Navy Federal, SECU, Truliant, offered financial services to individuals, which services included the receipt of monies, funds, and credits into deposit accounts and the disbursement of monies, funds, and credits therefrom through withdrawal of deposited monies, funds, and credits of transfer of deposited monies, funds, and credits to other deposit accounts or to the accounts of merchants offering goods, services, or negotiable instruments.

COUNT ONE
18 U.S.C. § 1349
(Conspiracy to Commit Bank Fraud)

10. Paragraphs 1 through 9 of this indictment are re-alleged and incorporated by reference herein as though fully set forth.

11. From in or about December 2007 and continuing to the present, in Mecklenburg, Gaston, Iredell, Cabarrus Counties, within the Western District of North Carolina, and elsewhere, the defendants,

(1) PHILLIP GREGORY HARRIS, SR.,
a/k/a "CASH P"
(2) JORDAN FOSTER
a/k/a "2-3"
(3) STANLEY RUTLEDGE, JR.,
(4) PAMELA KERNS,
(5) OLWIN BROWN,
a/k/a "JUICE"
a/k/a "OJ"
(6) KEVIN SMITH,
(7) RENARDO PERRY,
a/k/a "S-DUB"
(8) JERRY McDUFFIE,
a/k/a "J"
(9) CRAIG McINNIS,
(10) ANTHONY WOODS,
a/k/a "GEROD"
(11) YARRAL WILSON,
(12) KALIF WILSON,
a/k/a "SCRAP"
(13) TOMONTA SIMMONS,
a/k/a "MONTAY"
(14) JARRAL THOMPSON,
(15) JAKARI RUTLEDGE,
(16) ELIJAH GRANT,
a/k/a "BOX"
(17) MARTELL MACKEY,
a/k/a "TELLY"
(18) JADE BROWN,
(19) CHRISTOPHER MOAT,
(20) TRAVIS GABRIEL,
a/k/a "GANGSTER"
(21) TIERRA LOVE,
(22) DEMARCUS SHANKLE,
(23) CHRISTIAN ROBERTSON,

(24) RASHAD JOHNSON,
(25) QUILLIE SMITH
(26) KEOSHA MACK, and
a/k/a "KIKI",
(27) WALTER BOYD
a/k/a "WEB"

did knowingly and intentionally combine, conspire, confederate, and agree with each other and others known and unknown to the Grand Jury, to commit bank fraud in violation of Title 18, United States Code , Section 1344.

Object of the Conspiracy

12. It was a part and object of the conspiracy that the defendants, and others known and unknown to the Grand Jury, would and did knowingly execute and attempt to execute schemes and artifices to defraud financial institutions, in violation of Title 18, United States Code, Sections 1344.

Manner and Means

11. The defendants and others known and unknown to the Grand Jury carried out the conspiracy in the manner and means described in paragraphs 1 through 6 of this Bill of Indictment, among others.

Overt Acts

12. In furtherance of the conspiracy, and to accomplish the objects thereof, the defendants and their co-conspirators committed one or more of the following overt acts in the Western District of North Carolina and elsewhere:

13. Theft from Wells Fargo between May 11-18, 2009.

a. At an undetermined time and date, JADE BROWN and PHILLIP GREGORY HARRIS, SR. obtained worthless checks from BoA account *2239 (checks #1002, #1004, #1005), and SunTrust account *2929 (checks #1034, #1035, #1048).

b. On or about May 11, 2009, JADE BROWN opened straw checking account *7574 at Wells Fargo in Charlotte, NC.

c. Between May 14, 2009 and May 18 2009, JADE BROWN deposited worthless checks (#1034, #1035, #1048, #1002) totaling $1,975 into her straw account *7574 and then withdrew $1,975 in cash from that same account.

d. On or about May 18, 2009, PHILLIP GREGORY HARRIS, deposited worthless checks (#1004, #1005) totaling $980 into JADE BROWN's straw account *7574, and then withdrew $240 in cash from that same account utilizing an ATM card connected to JADE BROWN's straw account *7574.

e. On May 13, 2009 and May 19, 2009, PAMELA KERNS, an employee of Wells Fargo Bank f/k/a Wachovia Bank, working at the behest of her coconspirators, conducted inquiries into the status and balance on JADE BROWN's straw account *7574 and provided information to PHILLIP GREGORY HARRIS SR. that the scheme had been successful because the worthless check had cleared, that the money was available, and that it was safe to withdraw the funds.

14. Theft from Wells Fargo between May 11-12, 2009.

a. At an undetermined time and date, PHILLIP GREGORY HARRIS, SR. obtained worthless checks for SunTrust account *2929 (checks #1024, #1025, #1026, #1028).

b. On or about December 12, 2006, a straw checking account *8121 was opened at Wells Fargo and issued to an individual hereafter referred to as "A.B."

c. On or about May 11, 2009, A.B. deposited worthless checks (#1024, #1025, #1026) totaling $4,300 into the straw account *8121 and then withdrew $4,300 in cash from that same account.

d. On or about May 11, 2009, PHILLIP GREGORY HARRIS, SR. deposited a worthless check (#1028) totaling $3,500 into straw account *8121 utilizing the account's ATM card.

e. On or about May 12, 2009, PHILLIP GREGORY HARRIS, SR., withdrew $400 and then $100 in cash from straw account *8121 utilizing the account's ATM card.

f. On May 11, 2009 and May 12, 2009, PAMELA KERNS, an employee of Wells Fargo f/k/a Wachovia, working at the behest of her coconspirators, conducted inquiries into the status and balance on straw account *8121, and provided that information to PHILLIP GREGORY HARRIS, SR. to assist HARRIS with the scheme to defraud the bank of cash.

g. On or about May 12, 2009, A.B. withdrew $2,500 from straw account *8121.

15. Theft from Wells Fargo between May 18-19, 2009.

a. At a undetermined time and date, JORDAN FOSTER, obtained worthless checks from PHILLIP GREGORY HARRIS, SR. belonging to BoA account *2239 (#1003) and SunTrust account *2929 (#1043, #1045).

b. On or about July 14, 2004, straw checking account *9909 was opened at Wells Fargo in Charlotte, NC, and issued to an individual hereafter referred to as "R.T."

c. On or about May 18, 2009, R.T. deposited worthless checks (#1043, #1045) totaling $2,950 into straw account *9909 and then immediately withdrew $2,950 in cash from that same straw account.

d. On or about May 18, 2009, JORDAN FOSTER, deposited a worthless check totaling $1,500 (check #1003) into straw account *9909 and then withdrew $100.00 in cash utilizing the account's ATM card.

e. On May 18, 2009 and May 19, 2009, PAMELA KERNS, an employee of Wells Fargo f/k/a Wachovia, at the behest of her conspirators, conducted inquiries into the status and balance on straw account *9909, and provided that information to PHILLIP GREGORY HARRIS, SR. to assist in the scheme to fraudulently obtain cash from the bank.

16. Theft from Wells Fargo between June 29-July 2, 2009.

a. At an undetermined time and date, JORDAN FOSTER and STANLEY RUTLEDGE, JR., obtained worthless checks from Metro CU account *3663 (#1504, #1505, #1508, #1510, #1511, #1512).

b. On or about April 1, 2005, straw checking account *4671 was opened at Wells Fargo and issued to an individual hereafter referred to as "S.S."

c. On or about June 29, 2009 and July 1, 2009, S.S. deposited worthless checks (#1504, #1505, #1508, #1510 and #1511) totaling $7,500 into straw account *4671, that were obtained from STANLEY RUTLEDGE, JR,. and then immediately withdrew $7,500 in cash from that same straw account.

d. On or about July 1, 2009, JORDAN FOSTER deposited a worthless check (#1512) totaling $1,500, that was obtained from STANLEY RUTELDGE, JR., into straw account *4671, and then withdrew $100.00 in cash from that same account utilizing the straw account's ATM card.

e. On or about July 2, 2009, JORDAN FOSTER conducted an empty envelope deposit utilizing the straw account *4671's ATM card, entered an amount of $500, and then immediately withdrew $100 in cash from the account utilizing the straw account's ATM card.

17. Theft from Wells Fargo between July 1-3, 2009.

a. On or about March 2, 2005, straw checking account *5624 was opened in the name of "The Pelzer Group" at Wells Fargo Bank f/k/a Wachovia Bank. An individual referred to herein as "N.P." was an authorized user of the ATM card connected to the straw account.

c. On or about July 1, 2009, WALTER BOYD deposited an empty envelope alleging to total $1,500 via an ATM into straw account (*5624), and then withdrew $500 and then $140 in cash utilizing the account's ATM card.

d. On or about July 2, 2009, WALTER BOYD, via ATM, deposited two empty envelopes alleging to contain a total of $3,000 ($1,500 and $1,500) in checks into straw account *5624, and then withdrew $500 from that same account utilizing the straw account's ATM card.

e. On or about July 2, 2009, an unidentified coconspirator conducted ATM cash withdrawals and point of sale transactions utilizing the straw account's ATM card totaling $2,030.45.

18. Theft from Wells Fargo between June 2-3, 2010.

a. At an undetermined date and time, JERRY MCDUFFIE obtained worthless checks from SECU account *5505 (check #4670) and Suntrust account *9049 (check #1167).

b. On or about December 28, 2006, straw checking account *5297 was opened at Wells Fargo and issued to an individual hereafter referred to as "C.B."

c. On or about June 2, 2010, a worthless check from SunTrust account *9049 (check #1167) totaling $1,650 was deposited by the straw account holder, C.B., into straw account *5297 and then the same amount was immediately withdrawn.

d. On or about June 3, 2010, JERRY MCDUFFIE deposited the aforementioned SECU worthless check (#4670) totaling $1,400 into straw account *5297 using the straw accounts ATM card and then withdrew $340 from the straw account.

19. Theft from Wells Fargo between March 14-15, 2011.

a. At an undetermined time and date, KEVIN SMITH obtained a worthless altered check from Fifth Third account *0963 (#30829).

b. On or about August 15, 2009, straw checking account *8449 was opened at Well Fargo Bank, f/k/a Wachovia Bank and issued to an individual identified herein as "D.B."

c. On or about March 14, 2011, KEVIN SMITH deposited the worthless altered check (#30829) totaling $6,659 into straw account *8449 utilizing the account's ATM card.

d. On or about March 15, 2011, "D.B." withdrew $8,000 in cash from straw account *8449.

20. Theft from Wells Fargo between August 13-16, 2011.

a. At an undetermined time and date, PHILLIP GREGORY HARRIS, SR. and TIERRA LOVE, obtained worthless checks from First Tennessee Bank account *6189 (#3643, #3646), Regions Bank account *0663 (#215), and First Federal Bank account *0661 (#1125).

b. On or about October 24, 2010, straw checking account *9569 was opened at Wells Fargo Bank f/k/a Wachovia Bank and issued to an individual hereafter referred to as "E.B."

c. Between August 13, 2011 and August 15, 2011, straw account holder E.B. deposited three worthless checks (#3643, #3646, #215) totaling $4,400 into straw account *9569, and then withdrew $4,400 in cash from that same straw account.

d. On or about August 16, 2011, TIERRA LOVE deposited a worthless check (#1125) totaling $2,500 into straw account *9569 using the account's ATM card, and then withdrew $100.00 in cash.

e. On or about August 16, 2011, PHILLIP GREGORY HARRIS, SR. utilized the straw account's ATM card to withdraw $200.00.

21. Theft from Suntrust between September 21-22, 2011.

a. At an undetermined time and date, RENARDO PERRY obtained worthless checks from Wells Fargo f/k/a Wachovia Bank account *3809 (#5027, #5028).

b. On or about September 15, 2011, straw checking account *1203 was opened at Suntrust and issued to an individual hereafter referred to as "S.G."

c. On or about September 21, 2011, straw account holder S.G. deposited two worthless checks (#5027, #5028) totaling $2,000 into straw account *1203.

d. On or about September 22, 2011, RENARDO PERRY withdrew $500 utilizing the straw account's ATM card.

e. On or about September 22, 2011, an unidentified coconspirator(s) utilized the straw account ATM card to make point of sale transactions at Wal-Mart stores totaling $1,486.80.

22. Theft from Wells Fargo between December 12-13, 2011.

a. At an undetermined time and date, ANTHONY WOODS obtained a worthless altered check from First National Bank account *1684 (#15618).

b. On or about March 16, 2011, straw checking account *7933 was opened at Wells Fargo Bank and issued to an individual hereafter referred to as "J.M."

c. On or about December 12, 2011, ANTHONY WOODS deposited the worthless altered check (#15618) totaling $8,600 into straw account *7933 utilizing the account's ATM card.

d. On or about December 13, 2011, "J.M." entered a Wells Fargo branch and withdrew $8,200 in cash from that same straw account.

23. Between May 2012 and August 2012, WALTER BOYD provided KEOSHA MACK with various straw account ATM cards bearing the account holder name "Preferred Customer" and instructed KEOSHA MACK to withdraw various amounts of cash from the accounts. KEOSHA MACK withdrew the cash as instructed.

24. Between May 2012 and August 2012, WALTER BOYD, and KEOSHA MACK used straw account ATM cards to rent vehicles from AVIS Rent-A-Car System, LLC.

25. Theft from Wells Fargo between August 29, 2012 and September 5, 2012.

a. At an undetermined date and time, QUILLIE SMITH obtained worthless checks from Consumer Credit Union account *8402 (#3772, #3774, #3775, #3776).

b. Between August 29, 2012 and August 31, 2012, the worthless checks (#3772, #3774, #3775, #3776), totaling $1,191, were deposited into straw account *3076 held with Wells Fargo and belonging to an individual hereafter referred to as "M.A."

c. On or about August 31, 2012, an unidentified coconspirator(s) withdrew $180 at a ATM utilizing the straw account's ATM card.

d. On about September 5, 2012, an unidentified coconspirator(s) purchased two money orders from Harris Teeter, totaling $981.98, utilizing the straw account's ATM card.

26. Theft from Wells Fargo between September 4-21, 2012.

a. At an undetermined time and date, KALIF WILSON obtained worthless checks from MCNB Bank and Trust Co. account *1467 (checks #1042, #1044, #1045, #1046, #1047, #1048, #1049).

b. On or about September 4, 2012, KALIF WILSON deposited the worthless checks (#1042, #1044, #1045, #1046, #1047, #1048, #1049), totaling $2,064, into a straw account *1145 held with Wells Fargo and belonging to an individual hereafter referred to as "J.P."

c. Between September 4, 2012 and September 7, 2012, an unidentified coconspirator(s) withdrew $2,044.98 from the straw account utilizing the straw account's ATM card to purchase money orders, make point of sale purchases, and withdraw cash from an ATM.

d. On or about September 21, 2012, YARRAL WILSON cashed a money order purchased utilizing the straw account's ATM card.

27. Theft from Wells Fargo, SECU, and Telco CU between September 12, 2012 and April 30, 2013.

a. On or about August 15, 2012, an unidentified coconspirator stole a blue Ford F250 (VIN *4063) from Town & Country Landscaping (herein "T&C") in Hickory, NC.

b. At an undetermined date and time, TRAVIS GABRIEL, STANLEY RUTLEDGE, JR., and CRAIG McINNIS obtained a business checkbook issued by Community One Bank account *7061 to "T&C", which had been inside the stolen blue Ford F250.

c. Between September 28, 2012 and October 1, 2012, TRAVIS GABRIEL deposited stolen and worthless checks (#1671, #1680, #1683, #1685, #1693), totaling $1,360.20, into straw account *7635 held with Wells Fargo and belonging to an individual hereafter referred to as "J.K."

d. Between September 28, 2012 and October 2, 2012, an unidentified coconspirator (s) withdrew $543 at various ATMs utilizing the straw account's ATM card.

e. On or about April 18, 2013, STANLEY RUTLEDGE, JR. deposited two of the stolen and worthless checks (#1706, #1707), totaling $1,200, into straw account *0234 held by SECU belonging to an individual hereafter referred to as "C.F."

f. Between April 18, 2013 and April 19, 2013, an unidentified coconspirator(s) withdrew $634.56 at Wal-Mart in Charlotte, NC, utilizing the straw account's ATM card.

g. On or about April 29, 2013, CRAIG McINNIS and STANLEY RUTLEDGE, JR. deposited stolen and worthless checks (#1725, #1726), totaling $2,800, into straw account *7061 held by Telco CU belonging to an individual hereafter referred to as "A.G."

h. On or about April 29, 2013, CRAIG McINNIS withdrew $1,203.99 in cash from various ATM locations, $1,008.84 through point of sale transactions at various Harris Teeter locations, and an additional $99.77 through additional point of sale transactions utilizing the ATM card attached to Telco CU straw account *7061.

28. Theft from Wells Fargo between December 19-20, 2012.

a. On or about December 19, 2012, an unidentified coconspirator broke into a white Chevrolet Avalanche (VIN *9488) and stole various items including a checkbook from Farmers and Merchants Bank account *2464, issued to CJ's Rentals LLC (herein referred to as "CJ's").

b. On or about December 19, 2012, RASHAD JOHNSON and an unidentified coconspirator obtained nine of the stolen and worthless Farmers and Merchants Bank checks (#1078, #1079, #1080, #1081, #1083, #1084, #1086, #1087, #1090) from an unindicted coconspirator.

c. On or about December 19, 2012, RASHAD JOHNSON and an unidentified coconspirator deposited four of the stolen and worthless checks (#1078, #1079, #1080, #1081) into straw account *6186 held with Wells Fargo belonging to an individual hereafter referred to as "D.F.". JOHNSON and the unindicted coconspirator also deposited five of the stolen and worthless checks (#1083, #1084, #1086, #1087, #1090) into straw account *6178 held with Wells Fargo belonging to an individual hereafter referred to as "K.M." The nine deposited checks, over the two Wells Fargo straw accounts, totaled $1,502.06.

d. On or about December 19, 2012, an unidentified coconspirator(s) withdrew $200 at ATMs utilizing straw account *6186 ATM card and $300 utilizing straw account *6178 ATM card.

29. Theft from Wells Fargo between January 20-24, 2013.

a. Between January 20, 2013 and January 21, 2013, an unidentified coconspirator broke into a blue Lexus RX350 (VIN *6815) and stole various items including a checkbook from BoA (account *5924) issued in the name of joint account holders identified herein as "J.H. and C.H."

b. At an undetermined date and time, ELIJAH GRANT, MARTELL MACKEY, and an unidentified coconspirator(s) obtained fourteen of the aforementioned stolen and worthless checks (# 9189, #9191, #9193, #9218, #9188, #9205, #9206, #9207, #9208, #9209, #9212, #9214, #9215, #9216).

c. On or about January 22, 2013, an unidentified coconspirator(s) deposited five of the stolen and worthless checks (#9188, #9189, #9191, #9193, #9218), totaling $1,403, into straw accounts *2224 and *3686 held with Wells Fargo Bank and belonging to an individual hereafter referred to as "T.G."

d. On or about January 23, 2013, KALIF WILSON purchased three money orders totaling $580 at multiple Harris Teeter locations in Charlotte, NC, utilizing the ATM card attached to the straw accounts *2224 and *3686.

e. On or about January 23, 2013, MARTELL MACKEY deposited four of the stolen checks (# 9212, # 9214, # 9215, # 9216), totaling $1,193, into straw account *2976 held with Wells Fargo belonging to an individual hereafter referred to as "R.F."

f. On or about January 23, 2013, an unidentified coconspirator withdrew $100.00 at an ATM utilizing straw account *2976 ATM card.

g. On or about January 24, 2013, ELIJAH GRANT deposited five of the stolen checks (#9205, #9206, #9207, #9208, #9209), totaling $3,750, into a straw account (*8542) held with Wells Fargo belonging to an individual hereafter referred to as "A.H."

h. On or about January 24, 2013, an unidentified coconspirator withdrew $100.00 at a Wells Fargo ATM utilizing straw account *8542 ATM card.

30. Theft from Suntrust between January 22-23, 2013.

a. On or about January 13, 2013, an unidentified coconspirator broke into a white Honda Odyssey (VIN *8074) and stole various items including a checkbook from Local Government Federal Credit Union account *2046 issued in the name of an individual account holder identified herein as "D.N."

b. At an undetermined time and date, YARRAL WILSON obtained two of the aforementioned stolen and worthless checks (#1053, #1054).

c. On or about January 22, 2013, YARRAL WILSON deposited the stolen and worthless checks (#1053, #1054), totaling $3,695, into straw account *4933 held with Suntrust belonging to an individual hereafter referred to as "M.N."

d. On or about January 23, 2013, YARRAL WILSON purchased four money orders totaling $2,000 at Wal-Mart in Charlotte, NC, utilizing straw account *4933's ATM card.

e. On or about January 24, 2013, QUILLIE SMITH cashed two of the money orders purchased by YARRAL WILSON with the straw account ATM card.

31. Theft from USAA between April 12, 2013 and June 14, 2013.

a. At an undetermined date and time, OLWIN BROWN, and unindicted coconspirators K.C., K.M., and A.R. obtained twenty-nine worthless checks from BoA account *2273 (#223) and BoA account *2481 (#91), Wells Fargo f/k/a Wachovia account *7087 (#1051, #1052, #1061, #1062, #1063, #1064, #1065, #1067, #1068), Wells Fargo account *2500 (#95, #99) and Wells Fargo account *9476 (#96), Woodforest National Bank account *8561 (#805, #808), Woodforest National Bank account *5716 (#806, #807), Woodforest National Bank account *7993 (#801, #804, #805), Woodforest National Bank account *8404 (#804), Woodforest National Bank account *7655 (#801, #802), Woodforest National Bank account *0642 (#805), Woodforest National Bank account *3502 (#1010, #1011), Woodforest National Bank account *3908 (#1001)

b. At an undetermined date and time, OLWIN BROWN, K.C., K.M., and A.R. obtained two straw USAA ATM cards, attached to bank accounts *5302 and *8699, and issued to individuals hereafter referred to as "J.A." and "J.W."

c. Between April 16, 2013 and June 14, 2013, OLWIN BROWN and K.C. deposited the twenty-nine aforementioned worthless checks into USAA straw accounts *5302 and *8699 totaling $43,337.75.

d. Between April 16, 2013 and May 21, 2013, OLWIN BROWN, K.C., K.M., A.R and other unidentified individuals used the previously obtained straw USAA ATM cards attached to bank accounts *5302 and *8699 to deplete the bank accounts of the previously deposited worthless check funds totaling $38, 942.97.

32. Theft from BB&T between April 29, 2013 and May 1, 2013.

a. On or about April 27, 2013, in Mecklenburg County, unidentified individual(s) broke into a red Saturn Vue (VIN *1454) and stole various items including checks from BB&T account *3174 issued in the name of an individual identified herein as "C.H."

b. At a undetermined time and date, JARRAL THOMPSON, and DEMARCUS SHANKLE, obtained the aforementioned BB&T stolen and worthless checks (#1159, #1160).

c. On or about April 30, 2013, JARRAL THOMPSON, DEMARCUS SHANKLE, and unindicted coconspirator B.C. drove together to a BB&T ATM located in Charlotte, NC.

d. Once at the ATM, JARRAL THOMPSON, utilizing straw account *3596 ATM card, deposited the two stolen and worthless checks (#1159, #1160), totaling $1,450, into straw BB&T account *3596 belonging to an individual identified herein as "B.L.C".

e. On May 1, 2013, an unidentified coconspirator, utilizing straw account *3596 ATM card, withdrew $200.00.

33. Theft from Metro CU between May 17-20, 2013.

a. On or about April 24, 2013, an unidentified coconspirator broke into a white Honda Accord (VIN *4760), in Charlotte, N.C., and stole various items including a checkbook from Wells Fargo Bank, f/k/a Wachovia account *8346 issued in the name of joint account holders identified herein as "M.G. and J.B."

b. At an undetermined time and date, CHRISTOPHER MOAT and unidentified coconspirator(s) obtained five of the aforementioned stolen and worthless checks (#1098, #1099, #1100, #1101, #1102) from OLWIN BROWN.

c. Between May 18, 2013 and May 19, 2013, CHRISTOPHER MOAT deposited two of the stolen and worthless checks (#1100, #1101) totaling $812.25 into a straw account *5665 held with Metro CU and belonging to an individual hereafter referred to as "D.T."

d. On or about May 20, 2013, CHRISTOPHER MOAT also deposited stolen and worthless check (#1118), totaling $289, into straw account *5566.

e. Between May 17, 2013 and May 19, 2013, unidentified coconspirator(s) deposited three of the stolen and worthless checks (#1098, #1099, #1102), totaling $1,865.49, into straw account *5566.

f. Between May 17, 2013 and May 20, 2013, unidentified coconspirator(s) utilized straw account *5665 ATM card to make point of sale purchases and ATM withdrawals totaling $608.84.

34. On or about July 9, 2013, STANLEY RUTLEDGE, JR. and CRAIG McINNIS discussed, via SMS text message, defrauding Fifth Third, BB&T, and Wells Fargo. During the text message conversation between the two, they discussed, in sum and substance, that CRAIG McINNIS was in the process of acquiring straw accounts for Fifth Third, BB&T, and Wells Fargo. STANLEY RUTLEDGE, JR. instructed CRAIG McINNIS on how to manipulate the straw accounts utilizing a mobile phone computer application. The coconspirators then agreed to solicit OLWIN BROWN to make the deposit of worthless checks into the straw account. RUTLEDGE then told McInnis that he had $1,000 worth of worthless checks to deposit into the straw account.

35. Theft from BoA between August 10-21, 2013.

a. On or about August 10, 2013, in Mecklenburg County, TOMONTA SIMMONS broke into a black Chevrolet Suburban (VIN *2263) and stole various items including a check book from Wells Fargo Bank account *8531 issued in the name of an individual account holder identified herein as "J.C."

b. Between August 19, 2013 and August 20, 2013, unidentified coconspirators deposited the aforementioned Wells Fargo stolen and worthless checks (#1351, 1352, 1353) totaling $3,500, into a straw BoA account *3226 held by an individual identified herein as "D.H.", utilizing the ATM card associated with that account.

c. Between August 19, 2013 and August 20, 2013, unidentified coconspirators, utilizing account *3226 ATM card, made point of sale purchases and ATM cash withdrawals totaling $498.75.

36. Theft from BoA between June 26, 2013 and July 1, 2013.

a. At an undetermined time and date, unidentified coconspirators obtained four worthless checks (#803, #804, #805, #808) from Woodforest National Bank account *0685, two worthless checks (#802, #808) from Woodforest National Bank account *3905, a worthless check (#1464) from Wells Fargo account *3558 and a worthless check (#1150) from Lincoln Bank account *8469.

b. Between June 27, 2013 and July 1, 2013, CHRISTIAN ROBERTSON and JORDAN FOSTER obtained both the initial and replacement ATM cards attached to straw BoA account *6613 belonging to an individual hereafter referred to as "K.M."

c. On or about June 26, 2013, an unidentified coconspirator(s) deposited a worthless check (#802), totaling $850.00, into the straw BoA account *6613, and then withdrew $700.00 in cash utilizing the straw account ATM card.

d. On or about June 27, 2013, unidentified coconspirator(s) deposited worthless checks (#803, #804, #808), totaling $1,345.00, into the straw BoA account *6613, and then withdrew $842.00 in cash from an ATM and $78.03 through various point of sale transactions utilizing the straw account ATM card.

e. On or about June 28, 2013, unidentified coconspirators deposited worthless checks (#805, #1464, #808), totaling $1,740.00, into the straw BoA account *6613, and then withdrew $800.00 in cash utilizing the straw account ATM card.

f. On or about July 1, 2013, unidentified coconspirator(s) deposited worthless check (#1150), totaling $620.00, into the straw BoA account *6613, and then withdrew $800.00 in cash from an ATM and $230.70 through a point of sale transaction utilizing the straw account ATM card.

37. Theft from BB&T on July 23, 2013.

a. At an undetermined time and date, STANLEY RUTLEDGE, JR. obtained two worthless checks (#2048, #2050) from Wells Fargo account *5557 and one worthless check (#1008) from Woodforest National Bank account *1677.

b. On or about July 23, 2013, STANLEY RUTLEDGE, JR. deposited a worthless check (#2050), totaling $300, and an empty envelope, totaling $900, into a straw checking account *7198 held with BB&T and belonging to an individual hereafter referred to as "C.N."

c. On or about July 23, 2013, STANLEY RUTLEDGE, JR. also deposited two worthless checks (#2050, #1008), totaling $1,200, into a straw savings account *6400 belonging

to C.N. STANLEY RUTLEDGE, JR. made the deposits while leaning out of the passenger's window of the vehicle associated with JAKARI RUTLEDGE.

d. On or about July 23, 2013, STANLEY RUTLEDGE, JR. and JAKARI RUTLEDGE utilized the ATM card associated with straw accounts *7198 and *6400 belonging to C.N. to make money order purchases and ATM withdrawals totaling $1,802.80.

All in violation of Title 18, United States Code, Section 1349.

COUNTS TWO – FORTY-SEVEN
(18 U.S.C. § 1344)
(Bank Fraud)

38. Paragraphs 1 through 7 and 12 through 36 of this indictment are re-alleged and incorporated by reference as though fully set forth herein.

39. On or about each of the dates reflected below for each of Counts Two through Forty-Seven, in Mecklenburg Gaston, Iredell, and Cabarrus Counties, within the Western District of North Carolina, and elsewhere, the defendants listed below, and others known and unknown to the Grand Jury, aiding and abetting one another, did knowingly execute and attempt to execute schemes and artifices to defraud, and to obtain by means of false and fraudulent pretenses, representations and promises, money, funds, and credit under the custody and control of a federally insured financial institution, to wit, falsely inflating the balance of a straw account with worthless and stolen checks, all or part of which balance was later withdrawn, each instance identified below being a separate violation of Title 18, United States Code, Sections 1344 and 2.

COUNT	DEFENDANT(S)	DATE	CHECK NUMBERS	BANK OF DEPOSIT	ACCOUNT NUMER	AMOUNT(S)
2	**(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P", (4) PAMELA KERNS**	May 11-12 2009	1024, 1025, 1026, 1028	Wells Fargo f/k/a Wachovia	*8121	$ 1,500, $500, $2,300, $3,500
3	**(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P", (4) PAMELA KERNS, (18) JADE BROWN**	May 11-18, 2009	1024, 1035, 1048, 1002, 1004, 1005	Wells Fargo f/k/a Wachovia	*7574	$500, $475, $500, $500, $500, $480
4	**(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P", (2) JORDAN FOSTER, a/k/a "2-3", (4) PAMELA KERNS**	May 18, 2009	1003, 1043, 1045	Wells Fargo f/k/a Wachovia	*9909	$1,500, $1,500, $1,500

COUNT	DEFENDANT(S)	DATE	CHECK NUMBERS	BANK OF DEPOSIT	ACCOUNT NUMBER	AMOUNT(S)
5	**(2) JORDAN FOSTER, a/k/a "2-3", (3) STANLEY RUTLEDGE, JR.**	June 29 – July 2, 2009	1504, 1505, 1508, 1510, 1511, 1512	Wells Fargo f/k/a Wachovia	*4671	$1500, $1500, $1500, $1500, $1500, $1500
6	**(27) WALTER BOYD, a/k/a "WEB"**	July 1-3, 2009	N/A –Empty ATM Envelopes	Wells Fargo f/k/a Wachovia	*5624	$1500, $1500, $1500, $1500
7	**(27) WALTER BOYD, a/k/a "WEB"**	August 3, 2009	N/A - Empty ATM Envelopes	Wells Fargo f/k/a Wachovia	*7844	$500, $500, $500, $500, $500, $500, $500, $500
8	**(2) JORDAN FOSTER, a/k/a "2-3", (3) STANLEY RUTLEDGE, JR., (8) JERRY MCDUFFFIE, a/k/a "J", (18) JADE BROWN**	September 16-20, 2009	1085, 1086, 1093, 1094, 1523,	Wells Fargo f/k/a Wachovia	*1589	$350, $350, $350, $350, $350
9	**(8) JERRY MCDUFFIE, a/k/a "J"**	June 02, 2010	1167, 4670	Wells Fargo f/k/a Wachovia	*5297	$1,650, $1,400
10	**(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P", (2) JORDAN FOSTER, a/k/a "2-3"**	September 01-03, 2010	227, 228, 234, 235, 1078, 1079	Wells Fargo f/k/a Wachovia	*2952	$1,450, $1,450, $1,500, $1,500, $1,500, $1,450
11	**(6) KEVIN SMITH**	March 4, 2011	3026	Wells Fargo	*3102	$4,800
12	**(6) KEVIN SMITH**	March 14, 2011	30829	Wells Fargo	*8449	$6,659

COUNT	DEFENDANT(S)	DATE	CHECK NUMBERS	BANK OF DEPOSIT	ACCOUNT NUMBER	AMOUNT(S)
13	**(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P", (21) TIERRA LOVE**	August 13-16, 2011	3643, 3646, 215, 1125	Wells Fargo f/k/a Wachovia	*9569	$1,500, $1,450, $1,450, $2,500
14	**(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P", (21) TIERRA LOVE**	August 15-16, 2011	205,216, 1123	Wells Fargo f/k/a Wachovia	*5989	$2,400, $1,400, $1,350
15	**(7) RENARDO PERRY, a/k/a "S-DUB"**	September 22, 2011	5027, 5028	SunTrust	*1203	$1,000, $1,000
16	**(10) ANTHONY WOODS, a/k/a "GEROD"**	December 13, 2011	117150	Wells Fargo	*7933	$8,600
17	**(10) ANTHONY WOODS, a/k/a "GEROD"**	January 4, 2012	27350	Wells Fargo	*1468	$8,800.67
18	**(11) YARRAL WILSON**	April 12-23, 2012	3746, 3745	SunTrust	*8000	$987, $969
19	**(12) KALIF WILSON, a/k/a "SCRAP"**	August 13-14, 2012	1327, 1328, 1329, 1330, 1335, 1336, 1337, 1338, 1339	Wells Fargo	*4352	$297, $298, $299, $295, $299, $295, $298, $295, $280
20	**(25) QUILLIE SMITH**	August 29-31, 2012	3772, 3773, 3774, 3775, 3776	Wells Fargo	*3076	$297, $299, $298, $297, $299
21	**(12) KALIF WILSON, a/k/a "SCRAP", (11) YARRAL WILSON**	September 4-21, 2012	1042, 1044, 1045, 1046, 1047, 1048, 1049	Wells Fargo	*1145	$298, $297, $295, $296, $280, $298, $299

COUNT	DEFENDANT(S)	DATE	CHECK NUMBERS	BANK OF DEPOSIT	ACCOUNT NUMBER	AMOUNT(S)
22	**(20) TRAVIS GABRIEL, a/k/a "GANGSTER"**	September 28- October 1, 2012	1671, 1680, 1683, 1685, 1693	Wells Fargo	*7635	$200, $290, $290, $290, $290.20
23	**(24) RASHAD JOHNSON**	December 19, 2012	1078, 1079, 1080, 1081	Wells Fargo	*6186	$140, $270, $201, $98
24	**(24) RASHAD JOHNSON**	December 19, 2012	1083, 1084, 1086, 1087, 1090	Wells Fargo	*6178	$202, $101, $96.06, $265, $129
25	**(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P"**	January 25- 28, 2013	390, 256	SunTrust	*2986	$1,900, $1,000
26	**(20) TRAVIS GABRIEL, a/k/a "GANGSTER"**	January 28, 2013	1131	SunTrust	*1156	$500
27	**(16) ELIJAH GRANT, a/k/a "BOX"**	March 15, 2013	1000, 1005	BB&T	*1584	$500, $500
28	**(17) MARTELL MACKEY, a/k/a "TELLY"**	March 15- 16, 2013	1003 (checking) 1002 (savings)	BB&T	*6834 (checking) *2628 (savings)	$500, $500
29	**(11) YARRAL WILSON, (25) QUILLIE SMITH**	March 15- 19, 2013	2322, 2329, 7225 (checking) 146, 7224, 2323 (savings)	Wells Fargo	*7831 (checking) *8987 (savings)	$1,498, $1,496, $1,495, $1,498, $1,495, $1,490
30	**(17) MARTELL MACKEY, a/k/a "TELLY"**	March 25- 26, 2013	1004 (checking) 1009 (savings)	BB&T	*3716 (checking) *0096 (savings)	$200, $200 (both keyed)
31	**(25) QUILLIE SMITH**	April 9, 2013	1083, 1084	BB&T	*0738	$500, $500

COUNT	DEFENDANT(S)	DATE	CHECK NUMBERS	BANK OF DEPOSIT	ACCOUNT NUMBER	AMOUNT(S)
32	**(14) JARRAL THOMPSON**	April 12, 2013	807, 95	SunTrust	*1289	$1,940, $1,950
33	**(9) CRAIG McINNIS, (3) STANLEY RUTLEDGE, JR.**	April 29, 2013	1725, 1726	Telco CU	*7061	$1,400, $1,400
34	**(14) JARRAL THOMPSON, (22) DEMARCUS SHANKLE**	April 30, 2013	1159, 1160	BB&T	*3596	$725, $725
35	**(15) JAKARI RUTLEDGE**	May 6-7, 2013	902, 901, 506	Wells Fargo	*1778	$1,500, $1,500, $1,500
36	**(19) CHRISTOPHER MOAT, (5) OLWIN BROWN, a/k/a "JUICE" a/k/a "OJ"**	May 17, 2013	1098, 1099	Metro CU	*5566	$765, $688.13
37	**(22) DEMARCUS SHANKLE**	June 28, 2013	806, 807	Wells Fargo	*1509	$750, $750
38	**(23) CHRISTIAN ROBERTSON**	June 27, 2013	807	Suntrust	*6966	$3,750
39	**(23) CHRISTIAN ROBERTSON, (2) JORDAN FOSTER a/k/a "2-3"**	June 28-July 1, 2013	805, 1150, 808, 802, 1464, 808, 804, 803	BoA	*6023	$290, $620, $740, $850, $700, $745, $300, $300
40	**(3) STANLEY RUTLEDGE, JR., and (15) JAKARI RUTLEDGE**	July 23, 2013	2050 2048, 1008	BB&T	*7198 (checking) *6400 (savings)	$300, $900 (empty envelope) $300, $900
41	**(22) DEMARCUS SHANKLE**	July 23, 2013	805, 804	Wells Fargo	*8213	$750, $750

COUNT	DEFENDANT(S)	DATE	CHECK NUMBERS	BANK OF DEPOSIT	ACCOUNT NUMBER	AMOUNT(S)
42	(5) OLWIN BROWN, a/k/a "JUICE" a/k/a "OJ"	September 26, 2013	3330 (checking) 808, 3329 (savings)	Wells Fargo	*5476 (checking) *8462 (savings)	$290 $290, $299
43	(5) OLWIN BROWN, a/k/a "JUICE" a/k/a "OJ"	October 9, 2013	802, 803, 807, 808	Wells Fargo	*4986	$299, $299, $290, $296
44	(26) KEOSHA MACK a/k/a "KIKI"	October 17, 2013	91	Wells Fargo	*3892	$3,000
45	(16) ELIJAH GRANT, a/k/a "BOX"	November 4-5, 2013	1013, 1014, 1015, 1019, 094, 095	BB&T	*1891	$500, $400, $500, $400, $298, $298
46	(26) KEOSHA MACK a/k/a "KIKI"	November 8, 2013	1046, 1045	Wells Fargo	*2785	$874, $1,400
47	(19) CHRISTOPHER MOAT	November 8, 2013	N/A	Wells Fargo	*2728	$40.97, $50.92
48	(9) CRAIG McINNIS	September 11, 2013	108	SunTrust	*5122	$1,600
49	(1) PHILLIP GREGORY HARRIS, SR., a/k/a "CASH P", (7) RENARDO PERRY, a/k/a "S-DUB"	June 6-7, 2011	1134	Wells Fargo f/k/a Wachovia	*9667	$2,400

COUNT FIFTY
(18 U.S.C. § 513)
(Possession of Counterfeit Securities)

40. Paragraphs 1 through 36 of this indictment are re-alleged and incorporated by reference herein as though fully set forth.

41. On or about August 15, 2013, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(6) KEVIN SMITH,

did knowingly make or possess, counterfeited securities of BB&T, an organization which operated in and the activities of which affected interstate and foreign commerce, to wit, a fake check, number 4536, with account number *7261, with the intent to deceive another person, organization or government, to wit a federally insured financial institution.

In violation of Title 18, United States Code, Section 513(a).

COUNT FIFTY-ONE
(18 U.S.C. § 1028A)
(Aggravated Identity Theft)

42. Paragraphs 1 through 36 of this indictment are re-alleged and incorporated by reference herein as though fully set forth.

43. On or about January 1, 2013, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(1) PHILLIP GREGORY HARRIS, SR.,
a/k/a "CASH P"

did knowingly use, without lawful authority, a means of identification of another person, to wit, the social security number of identity theft victim P.H., during and in relation to the commission of one or more federal felony violations, to wit, Conspiracy to Commit Bank Fraud (18 U.S.C. §1349) and Bank Fraud (18 U.S.C. §1344).

All in violation of Title 18, United States Code, Section 1028A (a)(1) and (b).

COUNT FIFTY-TWO
(18 U.S.C. §1708)
(Possession of Stolen Mail)

44. Paragraphs 1 through 36 of this indictment are re-alleged and incorporated by reference herein as though fully set forth.

45. Between July 19, 2013 and August 15, 2013, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(6) KEVIN SMITH,

did possess mail addressed to Dal Tile in Charlotte, NC 28273, which had been stolen, taken, embezzled and abstracted from a letter box or post office, mail receptacle, mail route or carrier, which was an authorized depository for mail matter, knowing the said letter to have been stolen, taken, embezzled and abstracted from an authorized depository for mail matter.

All in violation of Title 18, United States Code, Section 1708.

COUNT FIFTY-THREE
(18 U.S.C. § 922(g)(1))
(Possession of Firearms by a Convicted Felon)

46. On or about August 15, 2013, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(6) KEVIN SMITH,

having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year, did knowingly possess one or more firearms in and affecting commerce, that is, a Bryco Jennings Model T-380 semi-automatic pistol, a Ruger Blackhawk .357 revolver, a Benelli Super Vinci 12 Gauge Shotgun, and a Remington Arms Model 700 30-06 Rifle and ammunition.

In violation of Title 18, United States Code, Sections 922(g)(1).

COUNT FIFTY-FOUR
(18 U.S.C. § 924(l))
(Theft of Firearms)

47. On or about July 22, 2013, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

(13) TOMONTA SIMMONS,
a/k/a "MONTAY"

did knowingly and intentionally steal one or more firearms, to wit, a Smith and Wesson Bodyguard .380 semi-automatic pistol and ammunition, that had moved in interstate or foreign commerce.

In violation of Title 18, United States Code, Sections 924(l).

COUNT FIFTY-FIVE
(18 U.S.C. § 924(l))
(Theft of Firearms)

48. On or about August 14, 2013, in Gaston County, within the Western District of North Carolina, and elsewhere, the defendant,

(13) TOMONTA SIMMONS,
a/k/a "MONTAY"

did knowingly and intentionally steal one or more firearms, to wit, a Ruger SR40C .40 caliber pistol and ammunition, that had moved in interstate or foreign commerce.

In violation of Title 18, United States Code, Sections 924(l).

NOTICE OF FORFEITURE AND FINDING OF PROBABLE CAUSE

Notice is hereby given of 18 U.S.C. § 982, 18 U.S.C. § 924, and 28 U.S.C. § 2461(c). Under Section 2461(c), criminal forfeiture is applicable to any offenses for which forfeiture is authorized by any other statute, including but not limited to 18 U.S.C. § 981 and all specified unlawful activities listed or referenced in 18 U.S.C. § 1956(c)(7), which are incorporated as to proceeds by Section 981(a)(1)(C). The following property is subject to forfeiture in accordance with Section 982, 924, and/or 2461(c):

a. All property which constitutes or is derived from proceeds of the violations set forth in this bill of indictment;
b. All firearms or ammunition involved or used in the violations set forth in this bill of indictment; and
c. If, as set forth in 21 U.S.C. § 853(p), any property described in (a) or (b) cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty, all other property of the defendants to the extent of the value of the property described in (a) and (b).

The Grand Jury finds probable cause to believe that the following property is subject to forfeiture on one or more of the grounds stated above:

a. A forfeiture money judgment in the amount of at least $1,000,000, such amount constituting the proceeds of the violations set forth in this bill of indictment;

b. A Bryco Jennings Model T-380 semi-automatic pistol; a Ruger Blackhawk .357 revolver; a Benelli Super Vinci 12 Gauge Shotgun; a Remington Arms Model 700 30-06 Rifle; a Smith and Wesson Bodyguard .380 semi-automatic pistol; a Ruger SR40C .40 caliber pistol; and ammunition.

A TRUE BILL:

ANNE M. TOMPKINS
UNITED STATES ATTORNEY

KEVIN ZOLOT
ASSISTANT UNITED STATES ATTORNEY

Revised AO 45 (WDNC - 3/07)

"UNDER SEAL"

NEW CRIMINAL CASE COVER SHEET U. S. DISTRICT COURT

(To be used for all new Bills of Indictments and Bills of Information)

CASE SEALED: (•) YES ( ) NO **DOCKET NUMBER:** 3:14-cr- 17

If case is to be sealed, a Motion to Seal and proposed Order must be attached.)

CASE NAME :US vs PHILLIP GREGORY HARRIS, SR., et al

COUNTY OF OFFENSE : MECKLENBURG

RELATED CASE INFORMATION :

Magistrate Judge Case Number :

Search Warrant Case Number :

Miscellaneous Case Number :

Rule 20b :

SERVICE OF PROCESS : WARRANTS

U.S.C. CITATIONS *(Mark offense carrying greatest weight):* ( ) Petty ( ) Misdemeanor (•) Felony

18 U.S.C. 2;371; 513; 922(g)(1); 924(1); 1028A; 1344; 1349; 1708

JUVENILE: ( ) Yes (•) No

ASSISTANT U. S. ATTORNEY : KEVIN ZOLOT

VICTIM/WITNESS COORDINATORS:

INTERPRETER NEEDED :

LIST LANGUAGE AND/OR DIALECT:

REMARKS AND SPECIAL INSTRUCTIONS:

(Maintain form in the Case Opening Work Flow / Document Saving)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,	) DOCKET NO. 3:14-cr-17
vs.	)
KEVIN SMITH,	)
Defendant.	)

VOLUME I OF II

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. CONRAD, JR
UNITED STATES DISTRICT COURT JUDGE
JUNE 4, 2014

APPEARANCES:

On Behalf of the Government:

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LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

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JUNE 4, 2014; VOLUME I of II

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* * * * * *

E X H I B I T S

GOVERNMENT EXHIBITS:

NUMBER	ADMITTED
1	37
2	40
3	40
4	41
5	43
6	74
7	44
8	45
9	45
10	46
11	47
12	70
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20	52
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E X H I B I T S

DEFENDANT'S EXHIBITS:

NUMBER	ADMITTED
1	19

* * * * * *

P R O C E E D I N G S

WEDNESDAY, JUNE 4, 2014:

(Court called to order at 1:50.)

THE COURT: All right. We're here in the matter of United States V Kevin Smith. Prior to the jury being summoned, the only outstanding issue that I'm aware of is a motion by the defense for production of draft plea agreements which was filed, I guess, today. What's the Government's response?

MR. ZOLOT: Your Honor, two responses:

One, we don't believe they're relevant to any point. That's an executive function in our ability to offer pleas one way or the other.

But secondly, I've checked our system, and I don't believe there were any secondary pleas. There was one plea offered to each defendant. We don't fact bargain, as the Court knows. And the same plea was offered at the beginning and it was just accepted. So there is no --

THE COURT: So you object in principle and in fact?

MR. ZOLOT: Yes, Your Honor.

THE COURT: Mr. Burgess, I don't see a reason to question the factual version. I'd rather rest it there and agree to fight on the principle another day.

MR. BURGESS: Well, Your Honor --

THE COURT: The Government says they don't have it.

MR. BURGESS: Well, I believe -- he said he believes they don't have it.

THE COURT: Right, so --

MR. BURGESS: Your Honor, frankly, it's my experience in cases I've done there have been previous plea agreements proposed. And the reason I brought this up is because after I got them I noticed that they were very -- seem to have very small loss amounts agreed to in there and that's what got me thinking. And some of these people, for example, Olwin Brown has only pled guilty here, sort of toward the very end. And frankly --

THE COURT: I'll address the principle. What's the additional relevance to the draft as opposed to the actual agreement between witnesses and the Government?

MR. BURGESS: Well because, Your Honor, they were able to negotiate an even better agreement as trial approached, which could give rise to the inference that the witnesses have more bias to testify favorably because holding out gave them a better deal.

THE COURT: I -- I think any additional impeachment value is marginal, cumulative. I think the real impeachment value is that the witness has an agreement with the Government. The agreement provides for whatever it provides for in terms of benefit. I think that's the value. To the extent there's an additional value between something that was

negotiated over time and the resulting agreement, I think that would be marginally relevant, at best, in terms of impeachment. And under 403 it just seems to be very distracting a pursuit. And I don't know that I've ever ordered drafts of plea agreements before. I don't know that I've ever been asked to, really. Being asked for the first time, I just don't see any additional value; so I'm going to overrule that motion.

MR. BURGESS: Yes, Your Honor.

THE COURT: Anything else?

MR. ZOLOT: There are a few issues I want to bring to the Court's attention, if I may?

THE COURT: All right.

MR. ZOLOT: The first is, Your Honor, late yesterday we discovered some new evidence, I guess in the early afternoon yesterday. And I alerted Mr. Haycox to the possibility of that. And the issue really is that there's an additional witness that would need to be called, unless Mr. Burgess stipulated. And I did not read that witness out to the jury. Her name is Brenda Williams. She works for the Mecklenburg County jail. She's the custodian of the property. And we intend to introduce the defendant's sneakers because they are particular -- they match a lot of the size and style of sneakers in photographs in the house. And it's a particularly unique size. It's a small size foot.

THE COURT: Is there any stipulation as to this property custodian's testimony, or do you want to hear from the witness herself?

MR. BURGESS: Your Honor, I would like to have the witness here because there's other things I would like to ask her now that she's being brought in.

THE COURT: Okay. So we'll -- it doesn't appear to be a fact witness, to me. It's a chain of custody person and I'll inquire of the jury whether anybody's familiar with Brenda Williams, whose employment is as a property custodian at the Mecklenburg County Sheriff's Department?

MR. ZOLOT: Essentially, yes, Your Honor.

THE COURT: Okay. I'll ask that question.

MR. ZOLOT: Thank you, Your Honor.

Then, Your Honor, one of the other things is we wanted to ask the Court -- we're not asking for a ruling now. But we would just like to ask the Court to consider, down the road, as the evidence comes out, we have one other witness -- I don't think we explained to the Court -- we have a witness who's the relative of the defendant, who is not a co-conspirator or co-defendant in this case, who will testify that on one occasion during the relevant time period that the Court has set parameters on, he saw the firearm in question. We're not asking the Court to admit that testimony.

THE COURT: Is that the pistol?

MR. ZOLOT: The pistol, yes, Your Honor.

THE COURT: All right. And so you're not asking me for --

MR. ZOLOT: A ruling now. But I ask the Court, just as the evidence comes out -- we may ask the Court -- depending on how the evidence comes out -- to reconsider its ruling based on the fact that the witness is not one of the co-conspirators in this case. It's just a fact witness who had seen that weapon on a previous occasion. And I just wanted to bring that to the Court's attention. I don't know if we flushed that out and made our argument clear to the court.

THE COURT: My previous ruling on the number of --

MR. ZOLOT: Yes, sir.

THE COURT: I'll take that up at the appropriate time.

MR. ZOLOT: Thank you. Something else Mr. Burgess and I had discussed -- wanted to discuss with the Court -- is trying to stay within the Court's parameters of the ruling regarding the fraud argument. Mr. Burgess and I were discussing some particularly possibly door-opening questions Mr. Burgess may ask on cross regarding things that were found in the house.

I think Mr. Burgess and I have, perhaps -- we had a brief discussion. I don't know if you would call it a

disagreement. But I wanted to call it to the Court's attention because it will happen with the first witness as to what I believe might be questions that Mr. Burgess would ask that would open the door to bring in all the fraud evidence, and I perhaps want to talk about it now so that it does not happen, or that it happens in the correct way to stay within the Court's ruling.

THE COURT: All right. Let me hear the trigger for this dispute.

MR. ZOLOT: Well, Your Honor, when the -- of course when the police went into the house they found credit cards, checkbooks, fraudulent checks. And I'm trying to -- that's the basics of it -- all throughout the house, all mixed in with all the guns. Yeah, and they all had different people's names on them that were not the defendant's name, and they were not anybody else who we believe was living in the house.

There are several questions that could trigger, that Mr. Burgess and I were talking about, could trigger the opening the door to the fraud evidence. I'll let Mr. Burgess speak to the questions, because they were his questions.

MR. BURGESS: Your Honor, one of the questions we talked about was if I were to ask Detective Lail whether all of the evidence that he is going to present -- which I believe is going to be an ID card, and they're going to talk about some shoes, and maybe some other things -- if I can ask him is

that all the evidence that you found in there? That --

THE COURT: And the purpose would be to try to suggest to the jury that there's other occupants of the house who might be possessors of the weapons, not your client?

MR. BURGESS: Well, it's that, Your Honor, as well as it's our contention that it was not his residence. And the Government wants to introduce evidence to try to show that it was his residence; and among that would be an ID card and some shoes and some clothes.

THE COURT: It seems to me, that if you ask a question beyond a question related to the identity of some other known occupant of the house, that it does open the door to the Government coming back and saying -- trying to question about the significance of that evidence, and so --

MR. BURGESS: What I wouldn't be asking the Court, Your Honor -- and I may just stay away from this altogether. But what I wouldn't be asking for is names of other people, but rather, is this all that you found?

THE COURT: And the purpose of that questioning would be to suggest that, you know, there's some other people here who -- who might be the real possessors of the weapon. And if the Government has evidence that they're not real people, they're part of a fraud scheme, names used in a fraud scheme, it seems like it would be relevant to rebut the suggestion you're making.

So I do think there's a very real open door issue if the questioning suggests that there's identification in the form of other people.

MR. BURGESS: That may be that inference may be drawn, Your Honor. What I was trying to articulate -- let me see if I can. What I'm trying to say, well --

THE COURT: Well, keep talking, I'm --

MR. BURGESS: What I was trying to say -- I was going to say I was going to leave it alone. But that this was all found in there that was related to him. I'm not going to say that, you know, "You found a whole bunch of checks with other people's names on them and they weren't his name." Because that would be -- just bad faith and wrong.

THE COURT: But related to him. When the Government has evidence that suggests -- might suggest that there are other things related to him, tools and -- of the fraud scheme, you know. I think that does open the door. So you need to be aware of that.

MR. BURGESS: And one other thing, Your Honor. The report that Detective Lail has written that notes that he saw other people going in and out of there --

THE COURT: Yeah, I think that's relevant. I don't think it opens any door.

MR. BURGESS: Clearly that would not open a door.

And I also think that he would testify that there

were other people living there, Ms. Mia Matthews, for one. I would think that --

THE COURT: I think that is very relevant inquiry. And I don't see an open door issue with that.

MR. BURGESS: And it also go to ask him, "Well, do you have knowledge of anyone else living there other than Ms. Matthews?" And of course he's gonna -- his testimony would be that he believes that Mr. Smith was living there. I'll stay away from anything doing -- having to do with the -- what was found in the house.

THE COURT: Okay.

MR. BURGESS: It seems to me, though, that in closing I would be able to say, "Well, this is the evidence that they found in the house."

THE COURT: Right.

MR. BURGESS: And that's it. And that seems to me that would be acceptable. Are we in agreement on that?

THE COURT: It seems to be. Any argument in opposition?

MR. ZOLOT: No, Your Honor. If he's asking if there are other people in Detective Lail's knowledge of other people living there --

THE COURT: Right.

MR. ZOLOT: -- I think that's absolutely fine. It's the next question that might trigger the --

THE COURT: I think Mr. Burgess is aware of, you know, the Court's perspective on this evidence and the triggers for possible rebuttal questions.

MR. BURGESS: Yes. And just to be clear on the last point, Your Honor, it would be my argument that they found an ID, they saw some shoes they said were his. This is it. Therefore, he must not have lived there, because you would expect to find more items related to him -- such as photographs --

THE COURT: That's close, but I think it's fair -- fair argument.

MR. BURGESS: -- such as photographs and, you know, other things that you would normally find in someone's house.

THE COURT: Right.

MR. BURGESS: Personal items that they would use, you would expect them to have.

THE COURT: Yeah.

MR. ZOLOT: Your Honor, I just -- I want to point out to the Court -- I understand what Mr. Burgess is getting at and the Court's ruling. What I want to point out to the Court is that Mr -- Detective Lail knows that he was living there because his possessions were there. His possessions, he knows, are the fraud stuff. This was a fraud investigation, he would be investigating on fraud. The warrant was for fraud. So if Mr. Burgess wants to get into that, I'm just

trying to --

THE COURT: Right. And I think we've set up some parameters.

MR. ZOLOT: Okay.

THE COURT: And within those parameters I think there's the degree of flexibility for argument that Mr. Burgess has described.

MR. ZOLOT: Thank you.

MR. BURGESS: We are in agreement with everything else, Your Honor.

THE COURT: All right.

MR. BURGESS: Yes, Your Honor. Mr. Zolot has handed me some forms of records that he got from Piedmont Natural Gas. And just so the Court knows, I have subpoenaed -- and we've stipulated to the admissibility of these documents -- some Piedmont Natural Gas bills in the name of my client for another address. And Mr. Zolot got from Piedmont Gas some records of who's paid the bills and what records related to payments. He gave those to me this morning -- or this afternoon. But he gave them to me this afternoon. And on one date it shows that the bill -- this was January 13th, 2014, that the bill was paid with a card in my client's name.

I told Mr. Zolot that I would like to introduce that into evidence because it shows that my client did, on this occasion, pay the bills in his name at this other house.

Now the bill shows the account was prior to the date the guns were found, and then on into early 2014 before it was closed.

THE COURT: Do you have a stipulation as to those records?

MR. ZOLOT: Not to these, no, Your Honor.

THE COURT: What's the objection to --

MR. ZOLOT: These? Because they're not relevant. The payment records for the time period -- we have -- it goes through -- Piedmont gave me a long time period. The time period where the defendant -- we allege the defendant is living at the house -- which is before the search warrant -- there are no payment records. In other words, there were cash payments or whatever.

This is basically almost a year later it shows -- and the records show that there were payments that were made by someone else some time later, and then this is in 2014.

THE COURT: Your objection is not to the authenticity of the record, but its relevance.

MR. ZOLOT: It's relevance. Yes, sir, Your Honor. I don't understand how a year later, way after the search warrant, we're not alleging he lived there then, how this could be relevant.

THE COURT: Sounds like a good argument for cross-examination, one or the other. I don't think it's --

MR. ZOLOT: There's no witness --

THE COURT: I'm talking right now.

MR. ZOLOT: I apologize.

THE COURT: Seems like it's a fair thing to argue about or to cross-examine on. But it's some evidence that at some point in time Mr. Smith lived somewhere else. It tends to establish that fact. And subject to argument from you, that maybe so, but it's outside the timeframe. So if your argument is purely relevance, I'm going to overrule it.

MR. ZOLOT: I would, Your Honor, I would like just to be heard on one point. We are stipulating already to the bill that shows that he's the registered person at the time. So that's already coming in.

THE COURT: I understood that when you said that the first time.

MR. ZOLOT: I just wanted to be clear.

MR. BURGESS: Your Honor, and one more thing, as well. This may be out of order.

THE COURT: How many times are you going to get up and say "One more thing." You've won a bunch.

MR. BURGESS: I'm like Columbo, Your Honor. I promise this will be the last time. I just think of more stuff. I apologize.

We stipulated to some records, the bills from Piedmont, the bills from Duke Energy that he has. I was going

to ask the Court if we could just go ahead and get that out of the way and get those admitted into evidence.

THE COURT: Yes. Any objection? The records that are stipulated to, just stipulate at the beginning that they're admissible instead of defendant waiting for his case in chief. That seems like an efficient thing to do.

MR. BURGESS: That way we can just --

MR. ZOLOT: Then with the Court's permission, if I have rebuttal evidence for that, may I put it on in my rebuttal case? Because normally we'd wait for the defendant's case.

THE COURT: Sure. We're just talking about the admissibility of evidence. And oftentimes the Government agrees with defense attorney that exhibits 1 through 100 are admissible without any further evidence. So they all come in. We do this all the time.

MR. ZOLOT: Yes, sir.

THE COURT: It seems like an efficient thing to do.

MR. ZOLOT: Yes, sir.

MR. BURGESS: And to be clear, Your Honor, what I'm asking for is we consider them admitted --

THE COURT: Right.

MR. BURGESS: -- as of now. They don't have to be admitted later. Simply published to the jury.

THE COURT: But to the extent they're your --

normally they come in, in your case in chief. And so to the extent that they are defense exhibits and not prosecution exhibits, I would allow the Government to introduce rebuttal evidence today.

MR. BURGESS: I don't have to do anything else during evidence?

THE COURT: Right.

MR. BURGESS: Fine.

THE COURT: As to the stipulated documents, that's correct.

MR. BURGESS: And then I would also ask, since this has been stipulated to, as well --

THE COURT: "This" being what?

MR. BURGESS: This, pardon me, Your Honor. The payment records that we were just discussing, that this would be admitted as well.

THE COURT: Yes.

MR. BURGESS: And I can make this a part of what is Exhibit 1 for defense.

THE COURT: Yes.

MR. BURGESS: Thank you.

THE COURT: For our -- for purposes of capturing all these exhibits, we're going to need either to move admission by number at the very beginning, or at the very least the attorneys meet with Ms. Hankins and make sure that the

exhibits that are stipulated to are the exhibits we have received into evidence.

MR. BURGESS: There's only one, Your Honor. It's going to be No. 1 on my part.

THE COURT: Defense Exhibit 1.

(Defendant's Exhibit No. 1 was received into evidence.)

MR. ZOLOT: And there are Duke Power records from the same time period, Your Honor, that Mr. Burgess, I guess, will be stipulating to.

THE COURT: Well, let's all get that clear on the record is what I'm saying.

MR. ZOLOT: Yes, sir.

THE COURT: So you might want to -- I don't know, maybe before your first witness -- move all the stipulated to exhibits into evidence, and so then we're clear on the record.

MR. ZOLOT: Yes.

THE COURT: Are you in a position to articulate that? Do you know all the exhibits?

MR. ZOLOT: Yes, sir. For the Government's side.

THE COURT: Yeah.

MR. ZOLOT: Yes, sir.

THE COURT: And so, you know, at the very beginning, we -- if you would just indicate that the following records are stipulated as authentic without any further need for

witnesses, and then just list those exhibits.

MR. ZOLOT: Yes, sir.

THE COURT: All right. Anything else?

MR. ZOLOT: No, Your Honor.

MR. BURGESS: No, Your Honor.

THE COURT: Are we ready for the jury?

MR. ZOLOT: Yes, Your Honor.

THE COURT: Call the jury.

(The jury was returned to the courtroom at 2:08.)

THE COURT: Good afternoon, members of the jury.

Madam Clerk, would you impanel the jury at this time.

(Twelve jurors were selected and passed by the Government and the Defendant. One alternate juror was selected and passed by the Government and the Defendant. All thirteen jurors were duly impaneled.)

THE COURT: Members of the jury, now that you have been sworn and impaneled, I will give you some preliminary instructions to guide you in your participation in this trial.

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to the facts that you find, the law that the Court will give to you. Nothing that the Court may say or do during the course of this trial is intended to indicate in any way what your verdict should be.

The evidence from which you will find the facts will consist of the testimony of witnesses, the documents, and other things received into the record as exhibits, and anything that the lawyers agree to or stipulate to or that the Court may instruct you to find.

Certain things are not evidence. I want to go over some of those with you right up front.

Statements, arguments, and questions by lawyers are not evidence. Objections to questions are not evidence. You shouldn't be bothered by an objection. The lawyers have a duty to their clients to object to things they believe are not properly admitted under the rules of evidence. If the objection is overruled, you would treat the answer to the question like any other answer. If the objection is sustained, then you would ignore the question.

There may be times where you're instructed that certain evidence is received for a limited purpose and you should follow that instruction. If the Court instructs you that testimony should be excluded or disregarded, you would follow that instruction.

And of course, anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to be guided solely on the evidence offered here today.

Now we went over some rules in criminal cases. I

want to remind you of those. And the first one is the presumption of innocence.

There is a charge against the defendant brought by the Government by way of a Bill of Indictment, and that charge is merely an accusation. It is not evidence. It's not proof of guilt or lack of guilt. It just brings the defendant to trial before you.

The second principle is that the burden of proof is on the Government to prove each element of the offense beyond a reasonable doubt. The defendant has no burden to prove his innocence or to present evidence or to testify. Since he has a constitutional right to remain silent, you should not hold that against him if that is the election he makes.

And then third, the proof burden on the Government is beyond a reasonable doubt. I'll give you instructions later on that point. But bear in mind that in this respect, a criminal case is different from the burden in a civil case.

Now during jury selection I referred briefly to the nature of the charge being that the defendant is charged with being a felon in possession of a firearm. I will give you detailed instructions on the law with respect to that charge, and a copy of the indictment at the end of the case. And those instructions will control your deliberation and decision.

One of the things I want to talk to you about in the

beginning of the case is your role as the judges of the credibility of the witnesses, and the weight the testimony of the witnesses deserves.

There is no absolute or arbitrary factor to measure the truthfulness or untruthfulness of a witness, but there are some factors that may assist you in that determination. They include things like whether the witness has any motive or reason for being truthful or untruthful;

The witness's interest, if any, in the outcome of the case;

Whether there has appeared from the witness's attitude or conduct any bias, prejudice or feeling which may cause that person's testimony to be influenced;

Whether the testimony bears the earmarks of truthfulness;

To what extent it's corroborated by other testimony or by known or admitted facts.

You may also consider the intelligence and mental capacity of a witness, and the witness's opportunity to have accurate knowledge of the matters to which that person testifies.

I instruct you that you may believe all that a witness says, known of it, you might believe part and disbelieve part. It is entirely up to you.

Now a few words about your conduct as jurors.

First, I instruct you that during the trial you're not to discuss the case even among yourselves but also with anyone else, nor should you allow anyone to discuss it with you. Until you retire to the jury room at the end of the case you're simply not to talk about the case. If anyone should try to talk to you about it, you should bring it to the Court's attention promptly.

Second, do not read or listen to anything touching on the case in any way.

Importantly in this case you're not to do any independent research. You're to base your verdict on the evidence that you hear in this courtroom and the instructions that the Court gives you, nothing else.

And so even though in other aspects of our daily living we consult all sorts of devices and media for information, telephone, cellphone, smart phones, iPhones, Blackberrys, computer, the Internet; internet services, chat rooms, blogs, websites such as Facebook, My Space, LinkedIn, You Tube, or Twitter, those are all parts of our daily living, text and instant messaging services. But while you're performing your role as jurors, you're not to use any of those things to talk to anybody else about the case or to do any independent research. This is a very serious directive from the Court, and any failure to follow it could result in you being found in contempt of court; and certainly no one wants

that.

Finally, do not form any opinion until all the evidence is in. You should keep an open mind until you start your deliberation at the end of the case.

Now. I think some of you may have brought notebooks in, and you're free to take notes during the trial. But remember that your notes serve merely as an aid to your memory. It's not a substitute for your memory.

So the trial is about to begin. And the first phase of the trial will be the opening statements. Each attorney has an opportunity to make an opening statement. And an opening statement, as I said, is not evidence. It's merely a forecast of what that attorney believes the evidence will be.

After the opening statements the Government will present its witnesses, and defense counsel will have an opportunity to cross-examine those witnesses.

Following the Government's case the defendant may, if he wishes, present witnesses whom the Government may cross-examine. And after all the evidence is in I'll give you some general instructions, you'll listen to the closing arguments of the attorneys, and then I'll come back and give you specific instructions on the offenses charged in the indictment.

So that's the process that we're going to follow. The schedule we're going to follow from this point forward, is

that we'll start at 9:30 in the morning, and we'll finish at 6:00 at night. There's really no good reason to let jurors out at 5:00 in Charlotte traffic, and so we get a lot done in that last hour of the day. So we will be here until 6:00. We'll take a 15-minute break in the morning and afternoon, and a break at lunch around 1:00. And so every couple of hours we'll take some form of break from the courtroom testimony. Start at 9:30, finish up at 6:00. And so that's the schedule we'll follow.

So having told you about the process, told you about the schedule, we're now ready for the attorneys to make their opening statements.

Mr. Zolot, are you ready, Mr. Miller?

MR. MILLER: Yes, Your Honor. Thank you.

THE COURT: Thank you.

MR. MILLER: May it please the Court.

Ladies and gentlemen of the jury, the defendant Kevin Smith is a convicted felon. And because he's a convicted felon, it's against the law for him to have a gun. During the course of this trial the Government's going to prove to you, though, that that's exactly what he did. We are going to prove that the defendant had guns, and that he kept them all throughout the house where we lived.

Now you're going to hear during this trial that last summer officers obtained and executed a search warrant at the

defendant's house. Prior to executing the search warrant they did some surveillance at the house, and they saw the defendant there, and they saw his cars come and go.

Now on the day that they actually did the search, the defendant wasn't home. He wasn't there. But the evidence will show that what was there, were his guns. They were all throughout the house. There was a revolver under a living room -- under a couch in the living room. There was a rifle back in the washroom. There was a shotgun in the living room. And there was a silver and black pistol tucked right under the bed. It was right under the bed next to a nightstand where the defendant had placed his identification.

Now you're also going to hear from several witnesses during this trial who are going to tell you that they had seen the defendant with a gun that looked like one of the guns that the officers found during the search. Those witnesses are going to tell you that they saw the defendant with that silver and black pistol that was right there under the bed, or one that matches the description.

Now these witnesses, some of them have pled guilty to federal crimes. And I'm not going to ask you to like these witnesses. I'm not going to ask you to like what they did. But I will ask you to listen to them and to consider what they have to say, and decide for yourself whether or not that makes sense, and whether or not it fits with the rest of the

evidence.

And at the close of the evidence, after you've heard everything, we're going to have a chance to come back in front of you. And at that time Mr. Zolot's going to ask you to find the defendant guilty. He's going to ask you to find the defendant guilty of illegally possessing those guns that he kept all throughout this house. Thank you.

THE COURT: Mr. Burgess, when you're ready.

MR. BURGESS: Thank you, Your Honor.

First of all, I would like to thank you all for your time and your attention. In this case you're going to see what's going to break down into two categories of evidence: You're going to see documents, and then you're going to hear testimony. Much of it's going to be from people that have pled guilty, that have criminal records, that have plea agreements, pursuant to which they're testifying here today, and who will be shown to have bias; so they want to help themselves.

Now, but you're also going to hear from documents. The documents aren't going to have the bias like these witnesses have. What documents? Reports of scientific analysis. You're going to see DNA testing reports. You'll see fingerprint testing reports. DNA testing on all four of the guns which the Government is going to try to prove my client possessed. Fingerprint testing of the two handguns

found at the residence.

Now, there was DNA swabbed and collected from three locations on the shotgun. First of all, they swabbed the entire bolt of the shotgun. They swabbed the entire stock of the shotgun. They swabbed the underside receiver of the shotgun. They swabbed three different locations on the rifle, entire bolt, the entire stock, the textured area of the fore-stock. They tested the entire grip of the revolver. They swabbed the entire grip of the semi-automatic weapon, and they tested the base of the magazine. No DNA matching Kevin on the entire bolt of the shotgun. No DNA matching Kevin on the entire stock of the shotgun. No DNA matching Kevin on the underside receiver of the shotgun. No DNA on the entire bolt of the rifle. No DNA on the entire stock of the rifle. No DNA on the fore-stock of the rifle. No DNA on the entire grip of the revolver. No DNA on the entire grip of the semi-automatic weapon. And no DNA on the base of the magazine. Again, documents will tell you this; not witnesses who have reasons to lie to help themselves, but documents. In total, nine locations were swabbed. No DNA matching Kevin was found.

Secondly, fingerprints, fingerprint testing. Again, documents of scientific testing. They processed the magazine of the semi-automatic weapon for fingerprints; processed the revolver for fingerprints; processed the semi-automatic for

fingerprints.

No fingerprints matching Kevin on the magazine. No fingerprints matching Kevin on the revolver. And no fingerprints matching Kevin on the semi-automatic weapon.

In short, the scientific evidence in this case will not connect Kevin to those guns.

Another set of documents, again, unbiased documents. Bills from Piedmont Natural Gas for an account in Kevin's name at 5104 Snowdrop Drive, which is a different address from the address which those guns were found. That shows that Kevin did not live at the address were the guns were found.

Now, testimony -- and I'm going to ask you to look closely at this for the reasons I've stated. But, again, a lot of it will come from witnesses who have an awful lot to gain by getting on the stand and saying what they need to say to help themselves. And these witnesses you will hear have pled guilty, some of them in a fraud case which is based on deceptive conduct and lying. We'll go into that more.

Now testimony will also show that there were a lot of different people going in and out of that house where those guns were found.

The testimony will also show that although DNA testing was done on the guns, fingerprint testing was done on the guns, there was no DNA testing done on the clothes and the shoes.

As the Government's indicated, they're going to try to argue that because they found some man's clothes and some man's shoes in the residence, that it must have been his residence. Well, certainly I think we all know that DNA evidence would have been found on those clothes; had the Government tested that. Then they would be able to prove to you what it is they're going to try to claim to you based on a guess.

In short, the evidence will show that Kevin did not live in the house where the guns were found.

And importantly and finally, despite all the surveillance that they described as having been done, you will not see one photograph, you will not see one videotape of him going in and out of that house, despite all that time they spent out there watching. You'll see photographs of a lot of other stuff, but not that.

So when this is all over I'm going to come back to you and tell you -- or ask you to do what the evidence will tell you to do, which is to find my client not guilty.

I thank you for your time.

THE COURT: Call your first witness.

MR. ZOLOT: Thank you, Your Honor.

The Government calls Detective Derrick Lail.

DERRICK LAIL, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. ZOLOT:

MR. ZOLOT: May I inquire, Your Honor?

THE COURT: You may.

MR. ZOLOT: Thank you.

Q. Could you please introduce yourself to the jury?

A. Good afternoon. I'm Derrick Lail.

Q. Might be helpful if you step back from the mike. It's getting some feedback.

Spell your last name, please.

A. L-a-i-l.

Q. Thank you. Where do you work?

A. For the Charlotte-Mecklenburg Police Department.

Q. In what capacity?

A. I'm a detective.

Q. And how long have you worked for CMPD?

A. I've been there for eight years.

Q. And where do you work now? Your unit?

A. I'm currently assigned to a unit called the major crimes unit.

Q. How long have you been a detective?

A. I've been a detective since -- approximately four years.

Q. Were you the lead detective in the search of 4017 Carlyle? The house?

A. Yes.

Q. And I want to talk about that -- that search. I want to

direct your attention to August 15 of 2013. Did you obtain a lawfully authorized search warrant for 4017 Carlyle Drive?

A. I did.

Q. And could you describe what that location is?

A. It's a single story brick ranch style house. It has a couple of metal columns on the front porch, driveway to the left.

Q. What part of Charlotte is that?

A. It's on the west side.

Q. All right. And before executing -- obtaining and executing that search warrant, did you conduct surveillance on that residence -- and okay. I'm sorry.

A. I did. I conducted surveillance at that residence --

Q. Are you familiar with an individual by the name of Kevin Smith?

A. I am.

Q. Do you see him in the courtroom today?

A. I do.

Q. Can you please point him out and indicate something he's wearing?

A. Yes, sir. He's sitting right there wearing the white button-up shirt.

MR. ZOLOT: I would ask the record to reflect that the witness has identified the defendant, Your Honor.

THE COURT: It will.

MR. ZOLOT: Thank you.

Q. In addition to doing surveillance on the residence prior to execution of that search warrant, did you also do surveillance of Mr. Smith?

A. I did.

Q. All right. If you would tell the jury about your surveillance, both of Mr. Smith and that location for 4017 Carlyle?

A. My unit is a plain clothes unit. And so at any given day I'm dressed -- not like this -- and I would conduct what we call mobile surveillance. I would go to 4017 Carlyle. And I would drive past the residence multiple times. I would never stop in the front yard or I would never stop at the residence. But I would conduct mobile surveillance and any observations that I may see.

Q. Detective Lail --

A. Yes, sir.

Q. If we can get a timeframe for that. When was the search warrant executed?

A. The search warrant was on August 15. And my surveillance was from the middle of July 2013, leading up to the time period of the search warrant.

Q. Okay. So were you familiar with the car that Mr. Smith the defendant was driving at the time?

A. Yes, sir.

Q. Okay. Can you tell us what the car was and why you were familiar with that?
A. It was a charcoal color, newer model, Mercedes SUV. Forgive me. I don't remember the exact registration plate, but it was a Virginia tag.
Q. How did you tie that to the defendant?
A. I saw the defendant operating that vehicle on one occasion in early August at a gas station commonly known as The Bottom Store, or The L. It's a gas station attached to a barber shop on LaSalle Street.
Q. Okay. And what company runs that gas station?
A. A Marathon.
Q. And what did you observe the defendant doing when you saw him?
A. Parking the vehicle and exiting the vehicle.
Q. And did you observe that vehicle on other occasions?
A. I did. In the time period middle July 2013, leading up to the search warrant, I would probably go past the residence -- I probably went past the residence no less than 20 days within that time period. And I observed the charcoal Mercedes SUV with the Virginia plate parked in the driveway at 4017 Carlyle, in approximately 15 of those 20 days.
Q. And what times of day would you go by that you saw the vehicle?
A. I went by various times. I went by before lunch. I

would go by late afternoon, early evening. I would go by early in the morning at 4:00, 5:00 in the morning.
Q. All right. Did you also conduct surveillance to see if -- let me strike that. Did you ever see Mr. Smith at the residence 4017 Carlyle?
A. I did.
Q. Okay. Can you tell the jury about that?
A. On July 31, 2013, I was conducting surveillance and I actually observed Mr. Smith walk out of the front door of the residence, turn and check the mail. The mailbox is attached to the house right beside the front door. I watched him check the mail and then re-enter the house through the front door and close the door.
Q. Okay. I'm going to show you what's been marked as Government's Exhibit 1. Do you see that on your screen?
A. I do.
Q. Do you recognize what Government Exhibit 1 is?
A. I do. That's a photograph of 4017 Carlyle.
Q. Is that a fair and accurate representation of what the house looked like in the summer when you were doing surveillance and when you executed the search warrant?
A. It is.
MR. ZOLOT: Offer Government's Exhibit 1 into evidence.
THE COURT: Any objection?

MR. BURGESS: No objection to that, sir.

THE COURT: Let it be admitted.

MR. ZOLOT: May I publish?

THE COURT: You may.

(Government's Exhibit No. 1 was received into evidence.)

Q. While we have it up, you can draw on the screen. Do you have a pen in front of you there?

A. I do.

Q. If you would use the non-writing part of the pen.

A. Gotcha.

Q. If you can draw what you saw on July 31st when you saw Mr. Smith?

A. Yes, sir.

Q. Can you kind of explain what you saw him do?

A. Yes, sir. I saw him come out and -- maybe --

Q. Is it working?

THE COURT: Try with your finger.

THE WITNESS: I saw Mr. Smith exit this door here (indicating), and check the mail in the mail receptacle right there (indicating).

Q. Okay. Thank you.

So I wanted to now -- I wanted to direct your attention then to execution of a search warrant on August 15 of 2013. What time of day was it when the search warrant was executed?

A. Search warrant was executed around 4:30 in the afternoon.
Q. All right. And what was your role in the execution of the search warrant?
A. I was the lead investigator, and as such it was my role to collect the evidence and follow-up on the investigation afterwards.
Q. Okay. And how does it work when you're the evidence collector?
A. Once the search warrant is executed, then the team that actually makes entry into the residence will divide up and they'll search the different rooms in the house. And as the other officers come across what they believe to be items of evidentiary value, then they'll alert me to it. I will observe the items where they lay, if possible. They'll be photographed and then collected.
Q. All right. And was -- was the search warrant executed as you described?
A. It was.
Q. Okay. Could you describe -- did you enter the house at the time?
A. I did.
Q. Can you describe what the house generally looks like?
A. As you go through the front door that I highlighted earlier, you're walking into a small living room. There directly in front of you are two dark colored couches. There

was a flat screen television on the entertainment center against the left exterior wall. There was a small table with a lamp and a coffee table. Also in the living room was a closet, like a coat kind of closet. Proceed through the living room and you enter into a small kitchen/dining room. Off the back of the kitchen/dining room was a wash room. If you were to make a right down the hallway instead of going into the kitchen, there was a bathroom and three bedrooms.

Q. Was anyone home when you executed the search warrant?

A. No, sir.

Q. And did a search proceed?

A. Yes.

Q. And did you find items of an evidentiary nature?

A. I did. I collected four firearms.

Q. All right. Let me show you Government's Exhibit 2, please. Do you recognize what's pictured in Government's Exhibit 2?

A. I do.

Q. And what is that?

A. That's a photograph of the -- one of the corners of the living room.

Q. Is this how it looked when you first saw it when you entered the residence?

A. It is.

MR. ZOLOT: Offer 2 into evidence, Your Honor.

THE COURT: Any objection?

MR. BURGESS: No objection, Your Honor.

THE COURT: Let it be admitted, published.

MR. ZOLOT: Yes, sir, Your Honor.

(Government's Exhibit No. 2 was received into evidence and published.)

Q. And Detective, we can now go to Government's Exhibit 3, please. Do you recognize what that is?

A. I do.

Q. What is that?

A. That's one of the couches inside the residence in the living room.

Q. Is that how it looked on that day?

A. It is.

MR. ZOLOT: Offer 3, Your Honor, into evidence.

THE COURT: Any objection?

MR. BURGESS: No, Your Honor.

THE COURT: Let it be admitted.

MR. ZOLOT: May it be published?

THE COURT: You may.

(Government's Exhibit No. 3 was received into evidence and published.)

Q. And where was -- if you were using the entry door as the point of reference, where was this couch?

A. This couch would have been the one directly in front of

you as you enter the residence on the wall that leads to the kitchen/dining room.

Q. Thank you. If you would look at No. 4. Do you recognize what this is?

A. I do.

Q. What is it?

A. That was a revolver located underneath the couch that I just described.

Q. Is it a photograph?

A. I'm sorry. It's a photograph of the revolver that was located underneath the couch. Yes, sir.

Q. Is this the position in which it was found?

A. It is.

Q. And what we just saw as Government's Exhibit 3, what's the relationship between the couch and where this is?

A. This is -- this is what was underneath the couch that was shown in Government's Exhibit 3.

MR. ZOLOT: Offer into evidence Government's Exhibit 4, Your Honor.

THE COURT: Any objection?

MR. BURGESS: No objection, Your Honor.

THE COURT: Let it be admitted.

MR. ZOLOT: Thank you. May I publish, Your Honor?

THE COURT: You may.

(Government's Exhibit No. 4 was received into

evidence and published.)
Q. If we could talk about describing -- I see two boxes, a green and a white one.
A. Sir.
Q. Can you describe what those are?
A. Yes, sir. One is a box of .380 caliber ammunition, and one is a box of 30-06 rifle ammunition.
Q. Now, did that ammunition match that revolver?
A. No.
Q. Did it match other weapons that you subsequently found in the house?
A. It did.
Q. Okay. Like to show you Government's Exhibit 5. Do you recognize what's in 5?
A. I do.
Q. What is that?
A. This is a photograph of the smaller couch that was located in the living room you can see to the right of the exterior door -- the front door.
Q. Okay. And I see a door with kind of a hole in it?
A. Yes, sir.
Q. Why is that like that?
A. That's the door where the unit that I requested forced entry into the residence.
Q. Thank you. And behind that door to the right, is there

anything there?
A. Yes. The coat closet that I mentioned earlier is behind the front door.
MR. ZOLOT: Offer 5 into evidence, Your Honor.
THE COURT: Any objection?
MR. BURGESS: No objection, Your Honor.
THE COURT: Let it be admitted.
MR. ZOLOT: Publish, Your Honor?
THE COURT: Yes.
(Government's Exhibit No. 5 was received into evidence and published.)
Q. Go to Government's Exhibit -- excuse me, No. 7, skipping 6 for the moment. No. 7.
Now Detective Lail, do you see what's depicted in Government's Exhibit 7?
A. I do.
Q. And what is that?
A. That is a photograph of the master bedroom.
Q. Is that picture a fair and accurate representation of how the room looked before any search was conducted?
A. It is.
Q. In other words, the way you found it?
A. Yes, sir.
MR. ZOLOT: Offer 7 into evidence.
THE COURT: Any objection?

MR. BURGESS: No objection, Your Honor.

THE COURT: Let it be admitted.

MR. ZOLOT: Publish please.

THE COURT: Yes.

(Government's Exhibit No. 7 was received into evidence and published.)

Q. Detective Lail, if you could describe some of the items that we see in the picture -- if you could -- at the foot of the bed.

A. At the foot of the bed are numerous Nike tennis shoes.

Q. Appear to be men's or women's size?

A. They appear to be men's.

Q. What is sort of the left side of the picture beyond the fan?

A. There is a small entertainment center, a small TV stand with a flat screen television sitting on it.

Q. What appears in the -- to the far right on the floor by the bed?

A. There's a white ashtray.

Q. All right. Thank you.

Government's Exhibit 8. Do you recognize Government's Exhibit 8?

A. I do.

Q. What is it a photograph of?

A. It's a photograph of a .380 caliber pistol that was found

underneath the bed in the master bedroom.
Q. Is that where the gun was laying at the time which officers found it?
A. It is.
MR. ZOLOT: Offer 8 into evidence, Your Honor.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
MR. ZOLOT: Thank you. May we publish, Your Honor?
THE COURT: You may.
(Government's Exhibit No. 8 was received into evidence and published.)
MR. ZOLOT: If we can go to 9, please.
Q. And what is depicted in the photograph in Government's Exhibit 9?
A. It's a photograph -- close-up photograph of the pistol as it lay underneath the bed in the master bedroom.
Q. Is that -- is it depicted how it was laying at the time without being -- before police touched it?
A. Yes, sir.
MR. ZOLOT: Offer 9 into evidence.
THE COURT: It will be admitted.
MR. ZOLOT: Thank you, Your Honor. May we publish?
THE COURT: You may.
(Government's Exhibit No. 9 was received into

evidence and published.)
Q. And what is depicted in the photograph of Government's Exhibit 10, Detective Lail?
A. This is a photograph of -- in the master bedroom; from the angle from which you can see the TV stand and flat screen TV that we mentioned earlier.
Q. Okay. And did you -- well, strike that.
Is this in the same or similar condition before the police search?
A. It is.
MR. ZOLOT: Offer 10 into evidence, Your Honor.
THE COURT: Any objection?
MR. BURGESS: No objection, Your Honor.
THE COURT: Let it be admitted.
MR. ZOLOT: May we publish, Your Honor?
THE COURT: You may.
(Government's Exhibit No. 10 was received into evidence and published.)
Q. Detective, in this photograph there appear to be numerous items underneath the TV on the nightstand.
A. Yes.
Q. Did you review those items?
A. I did.
Q. Did you seize any of those items?
A. I did.

Q. Let's go to Government's Exhibit 11, please.

What is depicted in Government's Exhibit -- the photograph of Government's Exhibit 11?

A. It's a photograph of the North Carolina identification card for Mr. Smith.

Q. Okay. And where was this found?

A. On the TV stand, sitting on top of it, in front of the television.

Q. And what was next to it?

A. A brown Michael Kors watch.

MR. ZOLOT: Your Honor, I would offer --

Q. Is it in the same or similar condition as to when you found it --

A. Yes, sir.

Q. -- meaning the items depicted?

A. Yes, sir.

MR. ZOLOT: Offer 11 into evidence, Your Honor.

THE COURT: Objection?

MR. BURGESS: No objection, Your Honor.

THE COURT: Let it be admitted.

MR. ZOLOT: Publish?

THE COURT: Yes.

(Government's Exhibit No. 11 was received into evidence and published.)

MR. ZOLOT: Thank you, Your Honor.

Q. Detective, based on your knowledge, did that appear to be a men's or women's watch?
A. Men's.
MR. BURGESS: Your Honor, I object to his conclusion about that. He's not an expert in watches. Many women have big watches now.
THE COURT: Overruled.
Q. What do you see depicted in the photograph of Government's Exhibit 13?
A. That, again, is a TV stand. The flat screen TV and a stack of shoe boxes and shoes and a red ashtray on the TV stand.
Q. Detective, is this how it looked before the police started moving things, and moving things around and searching?
A. Yes, sir.
MR. ZOLOT: Offer 13 into evidence.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
MR. ZOLOT: May we publish?
THE COURT: You may.
(Government's Exhibit No. 13 was received into evidence and published.)
Q. All right. And Detective, I'm going to attempt to zoom in here and ask you some questions. Are you able to make out

the size of the shoes on this box?
A. Yes, sir.
Q. What size do you see there?
A. Eight and a half.
Q. Is that men's?
A. Yes, sir.
Q. Detective, a little bit further down in the picture is other shoe boxes. Can you make out the size of the shoe?
A. Yes, sir. There's also a men's eight and a half.
MR. ZOLOT: Your Honor, may I approach the witness?
THE COURT: You may.
Q. Detective, I'm showing you what's been marked as Government's Exhibit 15. I took it out of the plastic for you. Do you recognize that?
A. I do.
Q. What do you recognize that to be?
A. A North Carolina identification card for Kevin Smith.
Q. Okay. And what is the address on there?
A. 3829 Perennial Terrace Drive, Apartment K, Charlotte, North Carolina.
Q. When does it show that that state identification card was issued?
A. December 5, 2012.
Q. Do you see the person listed in that ID in this courtroom today?

A. I do.
Q. Who is that?
A. Mr. Smith.
MR. ZOLOT: Indicating the defendant, Your Honor?
THE COURT: The record will reflect that, yes.
MR. ZOLOT: Thank you. May I offer 15 into evidence now, Your Honor?
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
MR. ZOLOT: Thank you, Your Honor. May we publish?
THE COURT: You may.
(Government's Exhibit No. 15 was received into evidence and published.)
MR. ZOLOT: Your Honor, we have a digital copy of this that we're going to be using with the Court's permission.
THE COURT: Why don't we ask the witness to compare the hard document to the digital?
MR. ZOLOT: Yes.
Q. Take a look at the license, if you would, and compare it to the one on the screen.
THE COURT: When you say -- what exhibit number is that?
MR. ZOLOT: They're both the same, Your Honor.
THE COURT: 15?

MR. ZOLOT: Both 15.

THE WITNESS: Yes, sir. They appear to be the same.

MR. ZOLOT: Okay. Thank you.

May I publish the digital copy of this, Your Honor?

THE COURT: You may.

Q. Detective, we're going to put up what's already been admitted as Government's Exhibit 11. The identification you see here in 11, is it the same as the one I just showed you, Government's Exhibit 15?

A. It is.

Q. Was that -- did you seize that from the residence on that day?

A. I did.

MR. ZOLOT: Your Honor, I have a series of physical items to show the witness. May I approach?

THE COURT: You may approach; sure.

Q. Detective, did you find firearms on that day besides the two weapons that were seen in the photographs?

A. Yes.

Q. Okay. What other items?

A. I found a Benelli shotgun and also a rifle.

Q. Okay. We can start with the rifle. Where was the rifle found?

A. The rifle was in a washroom, the one I described through the kitchen/dining room. The washroom in the back.

Q. Okay. And who originally found those items?
A. The rifle was located by Officer Comer.
Q. Okay. And after Officer Comer found it, was it brought to your attention?
A. It was.
Q. What did you do with that item?
A. Ultimately I seized that item -- collected and seized it.
Q. Was it -- how was it packaged?
A. It was inside a black hard case commonly called a Pelican case with padding inside of it and other items.
Q. Okay. I'm going to show you what's been marked as Government's Exhibit 20. Do you recognize this?
A. I do.
Q. What do you recognize this to be?
A. That's the black case that the rifle was in when found --
Q. Is it in the same or similar condition?
A. Yes.

MR. ZOLOT: Offer 20 into evidence, Your Honor.

THE COURT: Any objection?

MR. BURGESS: No objection, Your Honor.

THE COURT: Let it be admitted.

MR. ZOLOT: Thank you. May I just publish it briefly, Your Honor?

THE COURT: You may.

(Government's Exhibit No. 20 was received into

evidence and published.)
Q. What was inside of this, Detective?
A. A rifle.
Q. Did you seize that rifle?
A. I did. Yes, sir.
Q. Could you describe it, please?
A. It was a wooden rifle, 30-06 bolt action. It had a large scope on top of it and a sling.
Q. Okay. And was there any ammunition found with the weapon?
A. Yes. Both loaded and additional in the case.
THE COURT: Show it to the marshal first.
MR. ZOLOT: Yes, sir.
Q. If you would please take a look at 19 -- Government's Exhibit 19.
A. Do you have the box?
Q. I have it.
A. Yes, sir.
Q. Do you recognize that?
A. I do.
Q. And what is that?
A. That's the rifle that I seized that was inside the black case.
Q. There's a package in here -- if you would -- with the rifle. If you would open that, please.

A. They're loose.
Q. You don't have to open all the way. Do you recognize what those are?
A. I do.
Q. What are those?
A. This is the additional ammunition that was inside the case.
Q. Okay. Put it down. Other than -- other than how it's packaged, are these items in the same or similar condition as when you found them?
A. They are.
MR. ZOLOT: I would offer 19 into evidence.
THE COURT: Any objection?
MR. BURGESS: No objection, Your Honor.
THE COURT: Let it be admitted.
MR. ZOLOT: May I publish, Your Honor?
THE COURT: You may.
(Government's Exhibit No. 19 was received into evidence and published.)
Q. Detective, how many -- approximately how many rounds are in here?
A. I don't recall.
Q. More than five?
A. Yes. Yes, sir.
Q. Now, did you also recover a shotgun?

A. I did.
Q. Where was the shotgun recovered from?
A. From the coat closet, just inside the front door in the living room.
Q. All right. I want to show you a photograph that's already been admitted into evidence, show you Government's Exhibit 6.

Apologies, Detective. No. 5 has already been admitted into evidence.

Can you describe where the closet is? Where the weapon was found, based on this picture?
A. Yes. If you're looking at the small couch and the front door with the hole in it, if you were to close the front door, the closet would be immediately behind there.
Q. And how was the shotgun packaged or closed up when you found it?
A. It was inside a nylon camouflage bag, similar to a rifle bag.

MR. ZOLOT: May I approach, Your Honor?

THE COURT: You may.

Q. I want to show you Government's Exhibit 22. Do you recognize this?
A. I do.
Q. Is that the nylon bag you just described that was in the closet?

A. It is.

MR. ZOLOT: Offer 22 into evidence, Your Honor.

THE COURT: Any objection?

MR. BURGESS: No objection.

THE COURT: Any objection?

MR. BURGESS: I'm sorry. No objection.

THE COURT: Let it be admitted.

MR. ZOLOT: Thanks. May I briefly publish, Your Honor?

THE COURT: You may.

(Government's Exhibit No. 22 was received into evidence and published.)

Q. And did you open up and find -- can you describe the weapon that was found inside the bag?

A. Yes, sir. Inside the nylon bag was a shotgun, long barrel, camouflage.

MR. ZOLOT: Your Honor, I'm going to approach, but to the marshals first.

THE COURT: Very well.

Q. Showing you Government's Exhibit 21. If you could please take a look at what's inside. Do you recognize that?

A. I do.

Q. What do you recognize that to be?

A. This is the shotgun that was inside the nylon bag in the closet.

Q. There's a little envelope with it. Can you please open that as well?
A. (Witness complies.)
Q. What's in there?
A. Two live shotgun shells.
Q. Do you recall where those were located?
A. Yes, sir. They were inside the firearm.
Q. In other words, was the firearm loaded?
A. Yes.
MR. ZOLOT: Okay. Your Honor, we offer 22 -- 21 into evidence and ask to publish.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted and published.
MR. ZOLOT: Thank you, Your Honor.
(Government's Exhibit No. 21 was received into evidence and published.)
MR. ZOLOT: For the record, I'm showing the shotgun shells now.
Q. Now, Detective, you previously testified about finding two other firearms. Did you recover a revolver?
A. Yes.
Q. And where was that revolver found?
A. The revolver was underneath the couch along the wall that's adjacent to the kitchen/dining room.

Q. Is this the photograph depicting what you just described?
A. It is.
THE COURT: This being Government's Exhibit --
MR. ZOLOT: Four, Your Honor.
THE COURT: -- four.
MR. ZOLOT: Your Honor, may I approach with --
THE COURT: You may.
Q. I'm approaching with Government's Exhibit 16 and 17. I'll show the marshal first.
Showing you Government's Exhibit 16 and 17, if you could take a look at those items. Do you recognize Government's Exhibit 16?
A. I do.
Q. What do you recognize it to be?
A. That is the revolver that was seized from underneath the couch in the living room.
MR. ZOLOT: Okay. Offer 16 into evidence, Your Honor.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
MR. ZOLOT: Thank you.
Q. And if you'll -- Government's Exhibit 17.
A. Yes.
Q. Can you, please?

A. Seventeen contains the two boxes of ammunition that were also underneath the couch with the rifle -- I'm sorry, with the revolver.
Q. Are they depicted in Government's Exhibit 4?
A. They are.
MR. ZOLOT: Thank you.
Offer those into evidence as Government's Exhibit 17, Your Honor.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
MR. ZOLOT: May we publish, Your Honor?
THE COURT: You may.
MR. ZOLOT: Thank you.
(Government's Exhibit No. 17 was received into evidence.)
Q. Now, Detective, the two boxes of ammunition -- I would like to talk about those, please. The box of Remington. I want to put it on the document camera. Try to zoom out a little. I'm going to open up -- what kind of ammunition is in this?
A. 30-06 rifle ammunition.
Q. Okay. And does this ammunition match another weapon in the house? In other words, would it fit another weapon?
A. Yes.

Q. Which weapon was that?
A. The rifle that was in the washroom.
Q. I'll show you the other box of ammunition. Do you know what kind of ammunition this was?
A. It was .380 caliber.
Q. Did this match any other -- did it match the revolver?
A. No.
Q. Did it match any other firearm in the house?
A. Yes.
Q. Which one?
A. The .380 pistol that was underneath the master bed.
Q. Thank you. I'm going to try to display the pistol using the document camera. Was there anything inscribed on the butt of the gun?
A. Yes.
Q. Do you remember?
A. Yes.
Q. Okay. What was that?
A. The word "Killer."
Q. Can you make that out?
A. Yes.
Q. Yes? Can you see that clearly on your screen?
A. I can.

MR. ZOLOT: Thank you.

May I approach again, Your Honor?

THE COURT: You may.

Q. Show you what's been marked as Government's Exhibit 18. Can you please take a look at 18. Do you recognize what's in 18?

A. I do.

Q. What do you recognize it to be?

A. The black and silver pistol that was located underneath the master bed.

Q. Was that gun loaded at the time?

A. It was.

Q. And if you'd take a look at what we've clipped together here in a small bag, please. What is in that small bag?

A. .380 caliber ammunition.

Q. And where was that ammunition at the time?

A. It was loaded in the weapon at the time it was seized.

MR. ZOLOT: Thank you. Offer 18 into evidence, Your Honor.

THE COURT: Any objection?

MR. BURGESS: No objection.

THE COURT: Let it be admitted.

MR. ZOLOT: Thank you.

May I publish at this time?

THE COURT: You may.

(Government's Exhibit No. 18 was received into evidence and published.)

Q. What was done with the items, the firearms after you seized them?
A. I turned the firearms into our property control at CMPD and then I requested lab analysis for each of the firearms.
Q. Okay. Thank you.
MR. ZOLOT: Your Honor, may I have one moment?
THE COURT: You may.
MR. ZOLOT: Your Honor, we have no further questions. Tender the witness.
THE COURT: Any cross?
MR. BURGESS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BURGESS:
Q. Detective Lail, good afternoon.
A. Good afternoon.
Q. Do you know that my client is sometimes known as "Cam"?
A. Yes.
Q. Okay. Any other nicknames?
A. Kev, Kevin, Cam.
Q. Now, in your experience, you learned that people sometimes have street names or nicknames?
A. Yes.
Q. Such as "Killer"?
A. Yes.
Q. Now, the guns that we saw that were brought out, those

were the ones that were tested for DNA, right?
A. They were.
Q. They were also the ones that were tested for fingerprints?
A. Yes, sir.
Q. Now, do you know who BM Matthews is?
A. I do.
Q. She lived at the Carlyle address, didn't she?
A. She did.
Q. She was -- at the time you were doing the surveillance and at the time the house was entered for the search, she was pregnant at the time, wasn't she?
A. Yes, sir.
Q. Yes. And it was Kevin's child?
A. Yes, sir.
Q. Kevin often took her to the doctor -- or at least sometimes took her to the doctor?
A. I'm not sure.
Q. Are you aware that on the day that the search was done, that they were at the hospital?
A. I know Mia was, yes, sir.
Q. Just to be clear, the Exhibit 8, which was when we could see the gun -- the semi-automatic gun under the bed -- clearly see it the photograph?
A. Say again, I'm sorry?

Q. Could you bring Exhibit 8 up?

Just to be clear, this is after all that bedding was removed, correct?

A. The -- I think it's called a bed skirt. After the bed skirt was raised, yes, sir. That's as the gun lay.

Q. In the picture that we saw before, I don't know which exhibit it was. Can you bring that one up? The one with the bedding still on it.

This is the bed in Exhibit 7 that we also see in what was the last exhibit, Exhibit 8?

A. Correct. Seen that.

Q. This is the view one would have before the bedding was moved and the skirt was moved?

A. That's correct.

Q. To be clear, there was no one in the house at all when you went in and did the search?

A. That's correct.

Q. Okay. Including Kevin?

A. That's correct.

Q. And then to be clear, the address on the ID that you found is not for the Carlyle address?

A. That's correct.

(Bench conference as follows:)

MR. BURGESS: I want to make sure I'm not going outside the Court's parameters with a couple of additional

questions. In addition to asking "Did you see other people going in and out? Did he see any other cars at the house?"

THE COURT: I can't say that's outside the parameters.

MR. BURGESS: Did he see other men going in and out of there; and did he ever see anyone else driving that car --

THE COURT: Mercedes?

MR. BURGESS: Yes.

THE COURT: Those are all appropriate questions. I mean, those are all questions that don't trigger an open door issue.

MR. BURGESS: Okay. And that, of course, is in addition to "He saw other people going in and out of the home?"

THE COURT: Correct.

(Bench conference was concluded.)

Q. Detective Lail, I don't want to take up too much of your time.

A. Here all day.

Q. Just a few more questions.

You saw other people going in and out of the house?

A. Yes, sir.

Q. At the time you had it under surveillance?

A. Yes, I saw females and some children.

Q. You saw other -- other cars in the driveway?

A. Yes, sir.
Q. Okay. And did you see other men going in and out of there?
A. I don't recall another man going in or out. No, sir.
Q. Now, you were in and out of there. You said you went passed there about 15 times in 20 days?
A. About 15 days.
Q. Fifteen days?
A. Yes, sir.
Q. I was mistaken.

MR. BURGESS: Thank you. No more questions.

THE COURT: Any redirect?

MR. ZOLOT: Just to clarify that last point.

REDIRECT EXAMINATION

BY MR. ZOLOT:
Q. What was the gender of the people you saw coming in and out of the house?
A. Females and some children. I don't remember the gender of the children.
Q. How many times did you see that?
A. Only on one day.
Q. Did you see any men at any other time?
A. No, sir.

MR. ZOLOT: Thank you. No further questions.

MR. BURGESS: Just one more, Your Honor.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. BURGESS:

Q. Did you only see other people going in and out on one day, is that what you said?

A. Yes, sir.

THE COURT: You may step down.

Call your next witness.

MR. MILLER: The Government calls Officer Brian Comer.

BRIAN COMER, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MILLER:

Q. I'll begin by asking you to please state your name and spell your last name, please.

A. Brian Comer, C-o-m-e-r.

Q. And Mr. Comer, what do you do for a living?

A. I work for the Charlotte-Mecklenburg Police Department.

Q. How long have you worked for the Charlotte-Mecklenburg Police Department or CMPD?

A. Since March 17, 1999.

Q. And Officer Comer, what unit are you currently assigned to?

A. I work with the TRAP unit, it's a plain clothes unit with the Charlotte-Mecklenburg Police Department.

Q. Can you explain just briefly what the TRAP unit does?
A. Basically, it is a plain clothes surveillance unit. We basically work a lot of property crimes that go into different aspects of robberies, B&Es, property crimes, basically. We assisted in other areas just as needed -- surveillance.
Q. Now, Officer Comer, as part of your work with the TRAP unit, were you asked to participate in a search on August 15, 2013?
A. Yes, sir. I was.
Q. Where did that search take place?
A. 4017 Carlyle.
Q. And had you been involved in the investigation that led up to that search?
A. As a totality of it. I haven't been, like, key, in it. I was asked to help with the search warrant that particular day.
Q. And what was your role in the search?
A. Basically, I was with other TRAP members, and the Freedom FMT unit. These are another set of officers with the Charlotte-Mecklenburg Police Department. Basically, a search warrant was issued for 4017 Carlyle. I was the fifth one in the stack. Basically, what we did was executed a search warrant on the house.
Q. And explain to the jury what you mean when you say "the stack."

A. A "stack" is how officers line up. We have a doorman, a pointman, and other officers, basically, that line up in a stack. When we go towards a residence and we have a breacher, if the door is locked or it's barricaded, we have somebody that can open the door. Then we enter into the residence like water. We flow through the house to contain the house. And if there's any individuals, to put them in custody and take control of the house, basically, is what we do.

Q. Did you ultimately enter the house on August 15?

A. Yes, sir. Around 5:00 p.m., 17:00 hours.

Q. And once you entered the house, where did you go?

A. I went straight through the living room and back towards the -- straight back towards the left, just a little bit into a kitchen area.

Q. And what happened next?

A. Basically -- I didn't come across any persons. A command was given for a secondary search. Basically, what that means is, we look closely, make sure there's no guns, drugs, any small places that things could be hidden in. Like, people -- we've -- we've had people hide in refrigerators before, things like that. After that I went outside. There's a back door, and went right outside. There's, like, a small utility closet, like, a washroom.

Q. And did you ultimately find any evidence?

A. Yes, sir, I did.

Q. What did you find?
A. When I went outside to the washroom, I opened the door checking for persons, people. There was a washing machine, like I said, a washroom, a water heater, and there was a large black rifle case.
Q. I'm going to show you what's been previously marked as Government's Exhibit 12 up on your screen there. Do you recognize that picture?
A. Yes, sir.
Q. What is that a picture of?
A. Inside the washroom closet that I entered.
Q. And does that picture, Government's Exhibit 12, fairly and accurately reflect what you saw on August 15 during the search?
A. Yes, sir, it does.
MR. MILLER: Your Honor, the Government offers Government's Exhibit 12 into evidence.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
MR. MILLER: And would ask to publish.
THE COURT: You may.
(Government's Exhibit No. 12 was received into evidence and published.)
Q. Can you explain to the jury what it is we're looking at?

A. Basically, I'm inside a small room, like, a washroom. There's a washing machine that's straight ahead, a water heater towards the right, and there's a rifle case that is at an angle in between the washing machine and the water heater.
Q. Okay. And what did you ultimately do, if anything, with that case?
A. I, basically, removed the case, brought it into the kitchen area. Once the house was clear and secured I opened up the case on the kitchen table, and basically ran the serial numbers, discovered a rifle -- a Remington 700.
MR. MILLER: If I may approach, Your Honor?
THE COURT: You may.
Q. I'm going to show you what's been previously admitted into evidence as Government's Exhibit 19. Do you recognize that?
A. Yes, sir.
Q. And what is that?
A. That's a Remington 700 with a scope that I saw that day and time in this black case.
Q. And is it in -- other than having been made secure, is it in the same condition as when you saw it?
A. Yes, sir.
Q. Now that I've cleaned up my mess.
A. Yes, sir.
Q. So this rifle that we saw, Government's Exhibit 19, is

that the rifle you found there in the gun case?
A. Yes, sir.
MR. MILLER: No further questions at this time, Your Honor.
THE COURT: Any cross?
MR. BURGESS: I have no questions for this witness.
THE COURT: You may step down.
THE WITNESS: Thank you, sir.
THE COURT: Call your next witness.
MR. MILLER: Your Honor the Government calls Officer Ashley McAlister.

ASHLEY McALISTER, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MILLER:
Q. Please state your name and spell last name.
A. Ashley McAlister. M-c-A-l-i-s-t-e-r.
Q. Ms. McAlister, what do you do for a living?
A. I'm a police officer for Charlotte-Mecklenburg.
Q. How long have you worked for the Charlotte-Mecklenburg Police Department?
A. Three years.
Q. What unit are you currently assigned to?
A. I'm with the post TRAP unit.
Q. As part of your work with that unit, were you asked to participate in a search on August 15, 2013?

A. Yes.
Q. Do you recall where that search took place?
A. Carlyle.
Q. And what is it that you were searching that day?
A. A residence.
Q. And had you been involved in the investigation that led up to that search?
A. No.
Q. As part of the search, did you ultimately enter the house?
A. Yes.
Q. And what did you do once you entered the house?
A. Once we entered the house, I then searched the closet to the right that was also in the living room and located evidence in the closet.
Q. I'm sorry, I couldn't hear the last part.
A. And located evidence in the closet.
Q. And what did you find in that closet?
A. There was a soft material rifle case.
Q. I'm going to show you what's been previously marked as Government's Exhibit 6 on your screen there. What's depicted in this picture?
A. The soft rifle case that I located.
Q. And does this picture fairly and accurately reflect what you saw on August 15?

A. Yes.

MR. MILLER: Your Honor, at this time the Government offers Exhibit 6.

THE COURT: Any objection?

MR. BURGESS: No objection.

THE COURT: Let it be admitted.

MR. MILLER: And would ask to publish.

THE COURT: You may.

(Government's Exhibit No. 6 was received into evidence and published.)

Q. If you could just point out for the jury -- or explain where the soft rifle case is that you were describing in this picture?

A. It's in the right corner of the closet.

Q. What color is it there?

A. Looks like black.

Q. Did you ultimately see the contents of that bag?

A. Yes.

Q. And what was in the bag?

A. There was a camouflaged shotgun.

MR. MILLER: All right. May I approach, Your Honor?

THE COURT: You may.

Q. Show you what's been previously entered into evidence as Government's Exhibit 21. Do you recognize this?

A. Yes.

Q. What is this?
A. This is the shotgun inside the soft rifle case.
MR. MILLER: Thank you.
Your Honor, those are all the questions I have for this witness.
THE COURT: Any cross?
MR. BURGESS: No, Your Honor. Thank you.
THE COURT: You may step down.
Call your next witness.
MR. ZOLOT: The Government calls Stanley Rutledge.
STANLEY RUTLEDGE, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. ZOLOT:
Q. Good afternoon. Could you please introduce yourself.
A. Stanley Eugene Rutledge, Jr.
Q. Okay. Mr. Rutledge, the mike has some feedback. If you would push it away from you a little bit just so we can hear you.
Can you spell your last name, sir?
A. Yes. R-u-t-l-e-d-g-e.
Q. How old are you, sir?
A. 28.
Q. What's the highest grade you completed?
A. Twelfth, graduated.
Q. Sir, did you plead guilty to a federal crime?

A. Yes.
Q. What was that crime?
A. Conspiracy to commit bank fraud.
Q. And as part of that plea did you make an agreement -- enter a plea agreement with the government?
A. Yes.
Q. Okay. And as part of that, the plea agreement, was one of those terms -- did you agree to cooperate with the Government?
A. Yes.
Q. And what do you understand to be the basic terms of your cooperation?
A. Basically, don't lie.
Q. Okay.
A. And part of my plea was that I might have to testify.
Q. Okay. What is your understanding if you were to lie? What would happen, based on your agreement?
A. Plea could be no -- plea could be terminated and new charge can be -- come up.
Q. Okay. Now, did there come a time before you were charged with the bank fraud that you were working with the police as a confidential informant?
A. Yes.
Q. How long had you been working with different law enforcement agencies?

A. Since 2008.
Q. During the time of your cooperation did you commit bank fraud?
A. Yes.
Q. And did you tell Detective Lail about this conduct?
A. No.
Q. And why not?
A. I didn't want to get in any more trouble.
Q. Okay. Do you know a person by the name of Kevin Smith?
A. Yes.
Q. Do you see him in this courtroom?
A. Yes.
Q. Can you point him out and tell me something he's wearing, please?
A. White shirt, button-up.
MR. ZOLOT: Your Honor, I would ask the record to reflect that the witness has identified Kevin Smith.
THE COURT: It will.
MR. ZOLOT: Thank you.
Q. When did you first meet Mr. Smith?
A. I met him around 2011, Silver Fox Nightclub, through this cousin Simona Jones.
Q. Okay. And what kind of nightclub is the Silver Fox or was the Silver Fox?
A. Strip club, adult strip club.

Q. Is it around anymore?
A. No.
Q. Okay. And did you -- was this the first time you met Mr. Smith?
A. Yes.
Q. After this first meeting, did you become friends?
A. Yes.
Q. After that time, how often would you see him?
A. Some. Like, four times a month -- every Wednesday at the club.
Q. Okay. Why do you remember every Wednesday at the club?
A. It was free and everybody was there.
Q. Okay. Did you ever see Mr. Smith outside the club at other locations?
A. Yes.
Q. All right. Did you ever take a trip with Mr. Smith out of town?
A. Yes.
Q. Where did you go?
A. We went to Atlanta, Georgia. TI birthday bash.
Q. Who is TI?
A. A rapper.
Q. When was this, approximately?
A. May of 2013.
Q. How did you guys travel down there?

A. We all were in separate cars. I went in my green Chevy Tahoe. He was in a gray Infiniti truck.
Q. Who else went with you besides Mr. Smith?
A. Myself, Olwin Brown, Karem, Chris Moat, a couple other guys. I don't know their name.
Q. Okay. Do you know where Mr. Smith -- Kevin Smith was living in the spring and summer of 2013?
A. Yes.
Q. Where was that?
A. Carlyle; off Freedom and Ashley Road.
Q. All right. I want to show you what's been admitted into evidence as Government's -- already admitted as Government's Exhibit 1.
Do you recognize what's depicted in Government's Exhibit 1? Can you see it?
A. Yes.
Q. Okay. And what is that a picture of?
A. That's Kevin Smith's home.
Q. Okay. Now what was the first time you went to that house, do you remember?
A. No, I don't remember.
Q. Do you remember the first time you ever went to Carlyle Street?
A. Oh, yeah. I dropped him off.
Q. Who?

A. Kevin Smith.
Q. Okay. And did you have a conversation about the house when you dropped him off?
A. Yeah, I asked him, "Who lived there?" He said he did. 'Cause he asked me to take him home. He said he lived there "with me and my girlfriend Mia."
Q. Okay. Now, does anyone you know live across the street from this house?
A. Yes, my brother Jacari Rutledge.
Q. When did your brother live there?
A. He lived there in the summer of 2013.
Q. Now, did you visit your brother?
A. Yes.
Q. Okay. Did you ever visit Mr. Smith at the -- across the street at Carlyle?
A. Yes.
Q. Approximately how many times do you remember going there?
A. Seven, eight times.
Q. All right. Most of the times, did you go in the house or --
A. No, in the driveway.
Q. What would you do?
A. We just sit around and talk. He'll be sitting in the car or something, and I'll be standing up speaking to him.
Q. Okay. Now let me show you this picture back to you.

When you talk about the driveway, what part of the driveway usually were you hanging out in?
A. Towards the end by the sidewalk.
Q. With your finger, if you can kind of indicate where.
A. Right here. The sidewalk right there.
Q. Okay. Thank you. Did you ever actually -- did you see the inside of the house?
A. Yes.
Q. How many times, do you remember?
A. Twice.
Q. And what -- do you remember what the house looked like inside?
A. Yeah. The living room area, little box area. A couple of dark colored couches in there. Flat screen TV against the wall. A little table in the middle.
Q. Okay. How long do you think you were in there when you were in that living room area?
A. No longer than five minutes.
Q. Okay. And did you ever go beyond that into the other rooms?
A. No, I didn't.
Q. Now, have you ever seen Mr. Smith with a gun?
A. Yes.
Q. All right. I want to direct your attention to May of 2013, before you left on that trip to Atlanta.

A. Yes.
Q. Did you guys meet up somewhere before you went -- caravaned out there?
A. Yeah. We met at a gas station, BP gas station on Freedom and Ashley Road, close by his house.
Q. How close is it to the Carlyle address?
A. No longer than one minute.
Q. Okay. And what were you doing at the gas station?
A. We was just meeting there because it was close to his house. And we can get straight on the highway, go to Atlanta. It was close to 85.
Q. Did you see a gun at that time?
A. Yes.
Q. Could you tell the jury what happened at that time that allowed you to see the gun?
A. He said his cousin -- he called his cousin. I don't know his name. But he sent his cousin to his house to get his gun.
Q. Why?
A. Because he didn't want to ride all the way to Atlanta with no gun.
Q. Did he say this?
A. Yes.
Q. Okay. And did you see what happened next?
A. He sent his cousin. His cousin returned, approximately -- about two minutes; came back; handed him a chrome and black

automatic handgun. Kevin Smith stuck it in a glove compartment and put it under the seat because he said he didn't know which way he wanted to ride with it.

Q. Okay. And describe what you remember the gun looking like. I heard it briefly.

A. It was chrome, automatic, black handle.

Q. Okay. And what kind of car was Mr. Smith driving?

A. A gray Infiniti truck.

Q. Can you describe what he did with it in the truck?

A. He went from the glove box to under the seat.

Q. Okay. Where did he ultimately leave it?

A. Under the seat.

Q. Okay. Did you have occasion to see Mr. Smith with a gun on another occasion?

A. Yeah.

Q. At a Shell gas station on Statesville Road?

A. Yes.

Q. Okay. Approximately -- in relation to the trip to Atlanta -- when was it; before or after?

A. This was before.

Q. Before?

A. Yes.

Q. How much before?

A. Maybe two months.

Q. Okay. So -- and what was the occasion? What were you --

did you meet Mr. Smith at the gas station?
A. Yes.
Q. And how did you have occasion to see the gun in?
A. I went to -- he was sitting in the car. I walked up to the car. And he was in a white Chrysler 300. Black -- or chrome and black automatic handgun was between the armrest and the center console.
Q. Okay. Did you get a good look at it?
A. Yes.
Q. Okay. Could you describe for the -- first of all, again, what kind of car was he driving?
A. White Chrysler 300.
Q. Okay. And describe where you saw the firearm?
A. Right in where you put your armrest, like, you put CDs and stuff, it was sticking out. The butt of it was sticking up.
Q. Okay.
A. It was black and chrome.
Q. Okay. And did you -- how long did you see it there? How long were you there?
A. It was there the whole time we were there. I went in the gas station no longer than five minutes.
Q. I'm sorry.
A. No longer than five minutes.
Q. Okay. Was anyone else in the car?

A. No.

MR. ZOLOT: May I have a moment, Your Honor?

THE COURT: You may.

MR. ZOLOT: Your Honor, no further questions. We tender the witness.

THE COURT: Any cross?

MR. BURGESS: Thank you, Your Honor. Yes.

CROSS-EXAMINATION

BY MR. BURGESS:

Q. Mr. Rutledge, when you first got charged in this case you pled guilty in, you knew you were guilty, didn't you?

A. Yes.

Q. Now, but when you first went to court on January 29 -- when you went to court on January 29, you pled not guilty, didn't you -- entered a plea of not guilty?

A. Yes.

Q. That wasn't true, was it?

A. No.

Q. Okay. You did that in court, didn't you?

A. Yes.

Q. In front of a judge?

A. Yes.

Q. Kind of like you're doing here today?

A. Yes.

Q. But again, that was a lie?

MR. ZOLOT: Objection, Your Honor.

THE COURT: I'll sustain the objection to that.

Q. That was not true?

MR. ZOLOT: Objection.

THE COURT: I'll sustain the objection to that. I'll see counsel at sidebar.

(Bench conference as follows:)

THE COURT: Every criminal defendant pleads not guilty at the beginning of a case. And I have concerns with that line of questions.

MR. BURGESS: Yes, Your Honor.

THE COURT: Implies more than the procedure would suggest, and so --

MR. BURGESS: I understand.

THE COURT: -- instruct you to stay away.

MR. ZOLOT: Your Honor, would the Court consider a brief curative instruction?

THE COURT: I'll consider it. I'll think about it.

MR. ZOLOT: Okay.

(Bench conference was concluded.)

Q. Later on in the case, you had said previously, you entered into a plea agreement?

A. Correct.

Q. Is that correct?

And as a part of that plea agreement you had four -- let

me ask you. You were charged in that case with conspiracy to commit bank fraud, correct?
A. Yes.
Q. And then you were also charged with four other counts of bank fraud, correct?
A. Correct.
Q. Okay. Now, as a part of your plea agreement you plead guilty only to one of those five?
A. Correct.
Q. And the one you're pleading guilty to is a conspiracy to commit bank fraud?
A. Yes.
Q. But the other four all being dismissed as part of the plea agreement?
A. Yes.
Q. And as part of the plea agreement, do you agree to come to court to testify if asked to do so?
A. Yes.
Q. All right. Now, so in exchange for agreeing to come testify, you're having four of these counts dismissed?
A. Yes.
Q. And are you aware of what the maximum penalties are for each of those counts?
A. Yes.
Q. How much?

A. Thirty years.
Q. Thirty year max. And then also in the plea agreement you, as part of your agreement to testify, have the opportunity to receive a reduced sentence; is that correct?
A. Yes.
Q. Now in the fraud case that you're pleading guilty to, that's essentially based on untruthfulness, is it not?
A. Yes.
MR. ZOLOT: Objection.
THE COURT: Overruled.
Q. And what you did in that case was to get money?
A. Yes.
Q. The untruthful acts were for purposes of obtaining money?
A. Yes.
Q. Okay. Now let me ask you this: What do you value more, money or your freedom?
A. Freedom.
Q. Okay. So if you would make false statements to get some freedom, wouldn't you also make false statements -- I'm sorry. If you would make false statements to get money, wouldn't you also make false statements to get freedom?
A. No.
Q. You would not?
A. No.
Q. Even though it's more important to you than money?

A. Yes, I would not.
Q. Even though you did lie to get money?
A. Yes.
Q. Now when you cooperated with the police before, you received payment for that, didn't you?
A. Yes.
Q. Okay. And you cooperated with Alcohol, Tobacco and Firearms?
A. Yes.
Q. Now, you received money if the information that you provided actually led to someone being charged? Is that how it worked?
A. No, not necessarily.
Q. Well, did you sometimes get money if people got charged?
A. Yes.
Q. Okay. So would it be fair to say you were sort of getting a commission of sorts?
A. No.
Q. Well, you were being paid for producing something, were you not?
A. Yes.
Q. And did that work out pretty good for you?
A. Yes.
Q. You were able to get money?
A. Yes.

Q. And would it be fair to say that you would like to see the people that paid you that money remain happy with what you do for them?
A. Yes.
Q. Okay. So as a part of your testimony here today, you're hoping that they will be happy with what you say?
A. No, just telling the truth.
Q. Right. But you still want what you're saying to continue to keep the people that paid you money previously, happy?
MR. ZOLOT: Objection.
THE WITNESS: No.
THE COURT: Overruled.
Q. You want them to be sad?
A. I'm just telling the truth.
Q. Okay. Now, when you were cooperating with the police before, you said on direct that you were actually committing the bank fraud or -- that you pled guilty to --
A. Yes.
Q. -- correct? But yet you didn't tell them that you were doing that?
A. Not at that time, but I eventually did.
Q. Right. And you said you lied about it because you didn't want to get in trouble?
A. Any more trouble, yes.
Q. But you lied about it because you wanted to have a

benefit of lying, and that benefit was, you didn't get in trouble?
A. Yes.
Q. Okay. Now, again, that's an instance where you told lies to help yourself?
A. Yes.
Q. Now you were interviewed on how many occasions by the police in connection with the case that you pled guilty on?
A. I can't remember.
Q. More than once?
A. Yeah, more than once.
Q. More than three?
A. More than three.
Q. Okay. And when was it that you told them about the testimony that you're giving today about having seen -- allegedly seen my client with a gun?
A. I don't remember.
Q. That's been here recently, hasn't it?
A. Yes.
Q. Okay. And so you -- all the times you've spoke to them before, which is stretched back over a year and a half, hasn't it?
A. Yes.
Q. Correct?
A. In connection with fraud, yes.

Q. During that year and a half period of time you never said anything about my client allegedly having a gun, did you?
A. Yes, I have.
Q. You said you said it recently?
A. Yes.
Q. Okay. Only recently you said about the gun?
A. Yes.
Q. Okay. Not in all that -- not in the -- year and a half back?
A. I can't remember. But it have been -- it's not been no year and a half, but it's been within the past year.
Q. Okay. But recently you told about the gun?
A. Yes.
Q. Within about the last, what, two weeks?
A. No, it's been within a year.
Q. Okay. Let me ask this way: What do you think the word "recently" means?
A. You said, "Within the last two weeks." That's recent.
Q. Okay. And you recently told about it?
A. I mean, that, and within this year. This last year I have.
Q. Okay. Well, two weeks is within a year, clearly.
Now -- now one other thing I want to ask you about. You have had experience with other people that you know getting charged in federal court, have you not?

A. Yes.
Q. Okay. And pleaded guilty?
A. Yes.
Q. And making plea agreements?
MR. ZOLOT: Objection. Relevance.
MR. BURGESS: I'm getting there, Your Honor.
THE COURT: All right. I'll give you some latitude.
Q. You are aware, are you not, that in exchange for testifying people get reductions in their sentences?
A. Yes.
Q. And you're expecting to get a reduction in your sentence?
A. Yes.
Q. And you're expecting that based on -- you seen other people get it?
A. No, just telling the truth as part of my plea.
Q. But you just did say that you know other people have gotten them?
A. Yes.
Q. Okay. Now you spoke to the prosecutors prior to testifying here today, didn't you?
A. Yes.
Q. In preparation for your testimony?
A. Yes.
Q. On how many different occasions?
A. Three.

Q. Three? And for how long each time?
A. No longer than an hour.
Q. Okay. At least an hour. So three hours total?
A. Correct.
Q. All right. And during that time what did you talk about?
A. Telling the truth. What I saw.
Q. Okay. Well, are you saying that it took three hours to tell you to tell the truth?
A. No, I'm just telling what I saw. What I witnessed.
Q. All right. So -- but the testimony that you've given here today has taken nowhere near three hours, has it?
A. No.
MR. ZOLOT: Your Honor, objection. Approach.
THE COURT: You don't have to approach. I'll sustain the objection.
Q. How was it the topic of guns came up when you were talking to the prosecutor?
A. When I got interviewed?
Q. Yes.
A. As I say, I was working with the ATF. So I was trying to get some guns.
Q. I'm talking about with the testimony you gave that my client allegedly possessed the guns. How did that come up?
A. They asked me who I went to Atlanta. They already knew about the trip.

Q. Okay.
A. So they said, "Who all had handguns?"
Q. So you were asked, "Did he have a handgun?"
A. Yes.
Q. You didn't just offer that he had a handgun?
A. No.
Q. You were asked, "Does he have a handgun?" You said, "Yes."
A. Yes.
Q. Okay. So you didn't bring it up, right?
A. Correct.
Q. Now, you asked if he had a silver handgun with a black handle?
A. Yes. That's what I saw. So that's what I told.
Q. But you were asked -- that was the question to you, "Did you see him with a black-handled silver gun?"
A. No. No.
Q. That's not what you just said?
A. No.
Q. Have you ever used any drugs before?
A. No.
Q. When was the last time that you went over to the Carlyle address?
A. I don't remember.
Q. Well, when is the last time you remember going over

there?
A. It was in the summer of 2013.
Q. Sometime in 2013?
A. Yeah, it was the summer.
Q. June?
A. End of July. My brother stayed across the street. So I know -- I think he moved or something. I helped him -- I helped him do something, but I don't remember.
Q. Now what were the cars that you said you saw Kevin in?
A. Gray Infiniti truck and a white Chrysler 300.
Q. Not a Mercedes. Those are the only ones.
A. Yeah.
Q. Now did you exchange text messages with any of the detectives during the time you were working with them?
A. Yes.
Q. Who was that? Which detective?
A. Like, Detective Lail.
Q. Detective Lail. Do you know if anybody else did that?
A. No, I do not.
Q. Pardon me?
A. No, I do not.
Q. You don't know that?
A. No.
MR. BURGESS: May I have just a moment, Your Honor?
THE COURT: You may.

Q. Do you have any belief as to what will happen to you, as far as your sentence reduction, if Kevin's not found guilty?

MR. ZOLOT: Objection.

THE WITNESS: No.

THE COURT: Overruled. What was your answer?

THE WITNESS: No, I do not.

Q. You don't have any -- you don't think that will not help your chances?

A. Repeat the question.

Q. Yeah. If he's not found guilty, that will, in your mind, make you think you're not going to get the same reduction that you would otherwise get?

A. I don't know. I'm just telling what I witnessed.

Q. But I'm asking you -- can you try to answer that one?

THE COURT: He's answered it once.

MR. BURGESS: Okay. Thank you, sir. I have further questions. Thank you for your indulgence.

THE COURT: Any redirect?

MR. ZOLOT: Yes. Thank you.

REDIRECT EXAMINATION

BY MR. ZOLOT:

Q. Mr. Rutledge, do you recall providing information back in summer of 2013, to Detective Lail about the defendant and guns?

A. Yes.

Q. Okay. I want to clarify that. Now, did you also then speak to me independently, recently, about guns?
A. Yes.
Q. Okay. Mr. Burgess asked you some questions about -- about lying and your plea agreement?
A. Yes.
Q. Okay. What do you understand to be the written -- in your written plea agreement, what happens to you if you lie on that witness stand?
A. A new charge and plea no good.
Q. What do you mean by "plea no good"? What do you understand to happen?
A. You plead -- you're pleading, no deal, whatever was in the agreement.
Q. Okay. Now, have I or anyone else, police officers, you know, other prosecutors, made any promises to you about what kind of sentence you're going to get?
A. No.
Q. And what is your understanding of whose decision it is about what your sentence is?
A. The judge.
Q. Now Mr. Burgess also asked you about the meeting with me, do you remember that?
A. Yes.
Q. Did I or any other person from the Government ever

suggest to you what the color of the gun was?
A. No.
Q. Did we ever tell you what to say?
A. No.
Q. What was it that -- my instructions to you?
A. Tell the truth.
Q. Now, as far as cars, I think there was some confusion. Have you seen Mr. Smith, not on occasions he had a gun, but on other occasions in other cars?
A. Yes.
Q. How many cars do you think you've seen him in?
A. About four or five.
Q. Okay.
A. Rental cars.
Q. I'm sorry?
A. Rental cars.
Q. Okay. Could you tell us, do you remember these rental cars?
A. Yes.
Q. Who procured these rental cars for Mr. Smith?
A. Olwin Brown.
Q. And what kind of cars do you remember seeing Mr. Smith in?
A. Gray Infiniti truck, gray Mercedes Benz truck, white Chrysler 300, yellow Camaro. About all I remember at the

time.
Q. And when you say a truck, what do you mean by a truck?
A. A jeep, Infiniti jeep.
Q. Is that like a SUV?
A. Yeah. SUV -- big SUV.
MR. ZOLOT: No further questions, Your Honor.
THE COURT: Any recross?
MR. BURGESS: Yes, Your Honor. Briefly.

RECROSS-EXAMINATION

BY MR. BURGESS:
Q. Isn't it true that you could say that you saw my client with a gun, and no one would know whether you were lying, because no one else was there to see when you saw the gun, correct?
A. Correct.
MR. ZOLOT: Objection.
THE COURT: Sustain the objection to the argumentative form of the question.
MR. BURGESS: Yes, sir.
Q. How would anyone know that you were lying about saying my client had a gun?
MR. ZOLOT: Objection.
THE COURT: I'll sustain the objection to that.
THE WITNESS: Can you repeat that again?
THE COURT: No.

Q. Was there anyone else there, other than you and my client?
A. At the BP gas station, before we went to Atlanta.
Q. But other than my client, there was no one there to confirm or deny whether you saw a gun?
A. No, it was other people at the gas station.
Q. In the car?
A. Not in the car. They were just around the area cause we were getting ready to go on the trip.
Q. So there was no one else in the car to confirm or deny whether you saw a gun?
A. His cousin.
Q. Now -- and you do understand that in your plea agreement the Government can make a motion to reduce your sentence, right?
A. Yes.
Q. So they can ask the Court to reduce your sentence?
A. Yes.
Q. Again, to be clear, without regard to that motion, you are getting four counts dismissed?
A. Yes.
Q. Each carrying 30-year maximum?
A. Yes.

MR. BURGESS: No more questions, Your Honor.

THE COURT: You may step down.

Any objection to this witness being excused?

MR. BURGESS: No, Your Honor.

MR. ZOLOT: No, Your Honor.

THE COURT: You may step down; be excused.

Members of the jury, we're going to take our afternoon break at this time. We're going to take a break for approximately 15 minutes. During that break I would direct you not to talk about the case with each other; keep an open mind, you haven't heard all the evidence, you haven't heard the instructions of the Court. And so with those instructions we'll take a 15-minute break at this time.

(The jury was escorted from the courtroom.)

(Recess at 3:57 until 4:15.)

THE COURT: We ready for the jury?

MR. ZOLOT: Yes, Your Honor.

THE COURT: Call the jury.

(The jury was returned to the courtroom.)

THE COURT: All right. Call your next witness.

MR. ZOLOT: Your Honor, the Government calls Special Agent Gerod King.

GEROD KING, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MILLER:

Q. Please introduce yourself to the jury.

A. I'm Special Agent Gerod King, Bureau of Alcohol, Tobacco,

Firearms and Explosives.
Q. And Special Agent King, how long have you worked for ATF?
A. Twenty-four years.
Q. What are your current duties with ATF?
A. I am a special agent who works organized and violent crime.
Q. And does part of your duties involve the analysis of firearms?
A. Yes, it does. As an interstate nexus expert.
Q. And could you explain what an interstate nexus examination involves?
A. Yes. It is individuals who work at the ATF who will examine firearms to determine the origin of the firearms where they were manufactured.
Q. How do you make that type of determination?
A. We will physically examine the firearm to look at the manufacture, make, model, serial number, to make sure it is on the firearm. We will also -- after we do that, we will check our ATF database. We also use reference manuals, and a few other things to make sure that when we look at it and we see a firearm has been manufactured in a specific state, that it actually was manufactured there.
Q. Have you received any kind of specialized training in that type of analysis?
A. Yes. I attended the ATF interstate nexus school in

Wheeling, West Virginia.
Q. Does your analysis also include determining whether an object actually is a firearm?
A. Yes, that's correct.
Q. This may sound like an odd question: What is a firearm?
A. The definition of a firearm is a firearm, frame, receiver, to include a starter pistol, that is designed to, or can be readily converted to expel a projectile by means of an explosive action.
Q. So a gun?
A. That's a gun.
Q. During your career, approximately how many firearms would you estimate you examined?
A. I stopped counting -- 10,000 or more.
Q. Have you been qualified as an expert in the study of firearms and identification, as well as the place of manufacture in federal court before?
A. Yes, I have.
Q. Approximately how many times?
A. At least five.
MR. MILLER: Your Honor, at this time the Government offers Special Agent King as an expert in interstate nexus and firearms analysis.
MR. BURGESS: No objection.
THE COURT: Agent King will be allowed to offer

opinion in that area.
Q. Now, Agent King, were you asked to make a determination whether certain firearms involved in the case of United States versus Kevin Smith traveled from one state to another state?
A. Yes, I was.
Q. And do you recall what firearms you examined?
A. Yes, I do.
Q. What firearms did you examine?
A. It would have been a Bryco Arms, a Remington -- Bryco Arms, Remington, Ruger, and a Benelli.
Q. Is it your regular practice to generate a report of your findings when you do this analysis?
A. That's correct.
Q. Did you make a report in this case?
A. Yes, I did.
Q. Did you write that report at or near the time you did the analysis?
A. Yes.
Q. I'll show you there what's been briefly marked as Government's Exhibit 25. Do you recognize this document?
A. Yes, I do.
Q. Are you able to read it? I know it might be small on the screen there.
A. Yes, I can.
Q. All right. And what is this document?

A. This is ATF Report of Investigation, referred to as an RI. This is a report that I generate after I examine the firearms and make a determination as to the manufacture, as to the origin of the firearm, and also the definition of a firearm.
Q. And is this the report that you generated in this case?
A. That is correct.
MR. MILLER: Your Honor, at this time the Government offers Exhibit 25.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
MR. MILLER: And I would ask to be able to publish at this time.
THE COURT: You may.
(Government's Exhibit No. 25 was received into evidence and published.)
Q. All right. So moving through your analysis here. What was the first gun here that you analyzed?
A. Would have been the Bryco Arms.
Q. I'll show you what's previously been entered into evidence.
May I approach, Your Honor?
THE COURT: You may.
Q. This is previously been entered into evidence as

Government's Exhibit 18. Do you recognize this?
A. Yes, I do.
Q. What is that?
A. This is the Bryco Arms that I examined.
Q. How can you tell?
A. The serial number matches the serial number that I have in the report.
Q. Thank you. Based on your analysis, were you able to determine where that pistol was manufactured?
A. Yes, I could.
Q. And where was that?
A. It was manufactured in the State of California.
Q. And did you also determine whether or not that was -- did you do a physical examination of that as well?
A. Yes, I did.
Q. And did you determine whether or not it met that definition of firearm?
A. It does meet the definition of firearm.
Q. All right. What was the second item of evidence that you examined?
A. It would have been the Ruger.
Q. I will show you what's been previously marked as Exhibit 16.
If I may approach, Your Honor?
THE COURT: You may.

Q. Now Agent King, do you recognize this?
A. Yes, I do.
Q. And what is that?
A. This is a Ruger revolver.
Q. And is this the Ruger revolver that you analyzed for this case?
A. Yes, it is.
Q. How can you tell?
A. Serial number.
Q. Thank you. Now during your analysis, were you able to determine where this gun was manufactured?
A. Yes, I did.
Q. Where was that?
A. This was manufactured in the State of Connecticut.
Q. And did you also examine this gun that was manufactured in Connecticut for operability -- or to determine whether or not it was in fact a firearm?
A. Yes, it is a firearm.
Q. And were you able to form an opinion in that regard?
A. Yes.
Q. What was -- what did you --
A. That it is a firearm that traveled in interstate commerce.
Q. Did you also determine whether or not it was in fact a firearm?

A. Yes.
Q. And was it?
A. It is a firearm.
Q. All right. Moving to the third item that you analyzed here. What was that?
A. A Benelli.
MR. MILLER: All right. May I approach, Your Honor?
THE COURT: You may.
Q. All right. I'm showing you now what's previously been marked and entered into evidence as Government's Exhibit 21.
A. Okay.
Q. Do you recognize that?
A. Yes, I do.
Q. What is that?
A. This is a Benelli shotgun.
Q. And is this the Benelli shotgun that you examined in this case?
A. Yes, it is.
Q. And how can you tell?
A. Serial number.
Q. Thank you. In the interest of time I'll go ahead and show you -- what was the fourth gun that you analyzed?
A. It was a Remington rifle.
MR. MILLER: All right. May I approach?
THE COURT: You may.

Q. This has been previously entered as Government's Exhibit 19.
A. Um-hmm.
Q. Do you recognize this?
A. Yes, I do.
Q. And what is this?
A. This is the Remington rifle.
Q. And how can you -- is this the Remington rifle that you examined in this case?
A. Yes, it is.
Q. How can you tell?
A. By the serial number.
Q. Thank you. All right. Agent King, I have the same questions for you with respect to these guns. The first gun you saw the Benelli shotgun, were you able to determine where that was manufactured?
A. Yes. The Benelli shotgun was manufactured in the country of Italy.
Q. Did you also confirm that what you examined was a firearm?
A. It is a firearm.
Q. And with respect to the rifle, the Remington, were you able to determine where that was manufactured?
A. It was manufactured, State of New York.
Q. And did you also determine whether or not it was a

firearm?
A. It did meet the definition of firearm.
Q. And so all -- what was your determination as to where -- were all of these weapons manufactured in a state other than North Carolina?
A. All of these weapons were manufactured outside the state of North Carolina, which subsequently means if they were possessed here, they would have traveled in and affected interstate commerce.

MR. MILLER: No further questions, Your Honor.

THE COURT: Any cross?

MR. BURGESS: No, Your Honor.

THE COURT: You may step down; be excused.

Call your next witness.

MR. MILLER: The Government calls William Trantham.

WILLIAM TRANTHAM, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MILLER:
Q. Could you please introduce yourself to the jury and spell your last name, please.
A. My name is William Dwayne Trantham. Last name spelling T-r-a-n-t-h-a-m.
Q. Mr. Trantham, where do you work?
A. I am a latent fingerprint examiner for the Charlotte-Mecklenburg Police Department.

Q. How long have you been in that role with CMPD?
A. I started work for the Charlotte-Mecklenburg Police Department on July 1st of 2013.
Q. Where did you work before that?
A. For 15 years prior to that I was a fingerprint examiner for the Mecklenburg County Sheriff's Office.
Q. In addition to your work with the CMPD and Sheriff's Office, have you received any training in fingerprint analysis?
A. Yes. I have received training from the State Bureau of Investigations. I went through their science of fingerprint school in 1997, and was certified as a state fingerprint examiner.
Q. As a result of that training, what certifications did you obtain?
A. I'm certified by the State of North Carolina as a fingerprint examiner.
Q. During the course of your career, have you had the occasion to examine firearms for the presence of fingerprints?
A. Yes, with the Charlotte-Mecklenburg Police Department.
Q. And approximately how many times have you analyzed guns for fingerprints?
A. Approximately 300.
MR. MILLER: Your Honor, at this time we would offer Mr. Trantham as a person qualified to give an opinion in

latent fingerprint analysis.

MR. BURGESS: No objection, Your Honor.

THE COURT: He'll be allowed to offer an opinion in that area.

MR. ZOLOT: Thank you, Your Honor.

MR. MILLER: Thank you, Your Honor.

Q. Mr. Trantham, could you explain to the jury, what is a fingerprint?

A. A fingerprint is a -- well, there's two types of fingerprint. There's a known fingerprint, which is what we call a 10-print, which is a rolled impression that is taken from a known donor. And there's also a latent fingerprint. Latent means hidden. And a latent fingerprint is a unknown print that is usually left from -- what mostly we deal with -- from a crime scene, that requires some type of chemical or physical process in order to be seen.

Q. And what is a latent fingerprint comprised of?

A. 99 percent of a latent fingerprint is comprised of perspiration or sweat. The other 1 percent are various oils, amino acids, salts.

Q. As part of the CMPD lab, how are you able to use latent fingerprints for investigative purposes?

A. Can you repeat that question, please?

Q. What is it about fingerprints that makes them useful to you for law enforcement purposes?

A. For law enforcement purposes, fingerprints are two things: They are both permanent and unique. They're permanent in the sense that before you're born, up until death and decomposition, the fingerprint remains the same. They're unique in that no two people share the same fingerprint.
Q. And how does someone leave latent fingerprints?
A. Through touch. An item first has to be touched in order to leave a latent fingerprint. There's actually three -- there are three criteria that have to be met in order for a latent fingerprint to be left.

Number one, as stated earlier, an item has to be touched. Number two, the surface has to -- the surface that is being touched has to be able to receive the print. And number three, the environmental factors come into play. Has the item been out in the weather? Could it have been between a box spring and a mattress? Fingerprints are very fragile. They can be rubbed off very easily.
Q. The second factor you mentioned was the surface, if I'm not mistaken. What is it about the surface that would affect whether or not a fingerprint would be left?
A. The ideal surface for a fingerprint to be retained is a smooth, clean surface. If you think about the surface of, say, a cellphone or a glass. Those are very excellent surfaces for a fingerprint to be recorded on.
Q. What would be an example of a bad surface for a

fingerprint?
A. Anything that's textured. Firearms are a fairly hard surface to pull a latent fingerprint off, anything with a texture to it.
Q. This may seem like an obvious question after everything you said, but does someone leave a latent fingerprint every time they touch something?
A. No. You can make a touch and not leave a latent fingerprint.
Q. Are there things a person can do to avoid leaving a fingerprint?
A. You can wear gloves. You can wipe the item after you've touched it. In the winter time people tend not to perspire as much as normal. You have to have that perspiration present in order to leave a fingerprint.
Q. And you mentioned environmental factors earlier. What are some of those environmental factors that would affect whether or not you left a fingerprint?
A. If the item has been left out in the rain; of course water is going to wash away a majority of that print. If it's in extreme temperatures, extremely hot, extremely humid; the fingerprint can dissipate or be -- fluid can evaporate before development can visualize it.
Q. All right. Mr. Trantham, were you asked to analyze evidence in the case of United States versus Smith?

A. Yes.
Q. And generally speaking, what was the -- what type of evidence were you asked to review?
A. Memory serves me correctly, it was firearms and associated cartridges and shotgun shells.
Q. Do you ordinarily prepare a report when you review the evidence?
A. Yes.
Q. Did you prepare a report in this case?
A. Yes.
Q. Was that report prepared at or near the time of your analysis?
A. Yes.

MR. MILLER: May I approach the witness, Your Honor?

THE COURT: You may.

Q. Mr. Trantham, take a minute and look at that document and tell me if you recognize it.

THE COURT: When you said "that document" do you have a number?

MR. MILLER: Excuse me. Government's Exhibit 23 has been previously marked as Government's Exhibit No. 23.

THE COURT: Thank you.

Q. What is that?
A. This is a report I prepared after I had processed the items in question for latent fingerprints.

Q. In this case?
A. In this case.
MR. MILLER: Thank you, Your Honor. At this time the Government offers Exhibit 23 into evidence.
THE COURT: Any objection?
MR. BURGESS: No objection.
THE COURT: Let it be admitted.
(Government's Exhibit No. 23 was received into evidence.)
Q. All right. So specifically now, what items of evidence were you asked to review in this case?
A. There was one magazine, one Ruger Model Blackhawk .357 caliber revolver, one Bryco Jennings Model T-380 -- .380 caliber semi-automatic handgun, seven 30 -- .380 caliber bullets, one Benelli Model Super-Vinci 12-gauge semi-automatic shotgun, and two 12-gauge shotgun shells, and one Remington Model 700 30-06 caliber bolt action rifle, and 22 30-06 caliber bullets, along with a black ammunition tray, and one Tasco branded riflescope.
Q. And just generally speaking, give the jury an overview of your testing process.
A. Well, the first thing that we do is we'll bring the item into the lab. It comes up from a section at the CMPD or the Charlotte-Mecklenburg Police Department called "Property Control." They control all of the evidence that gets booked

in.

It would come up. I would open the sealed carton that the item was in. I would look at it, do an inventory of it. Write down the serial number, the make, model. After that I would look at it with white light to see if I could detect any visible prints. A visible print is known as a patent print.

If I did not notice any patent prints on the item, then I would use an alternate light source which would be a laser, and I would look there to see if I could see any prints that way.

If I did not see any prints, then I would move on to a process we call cyanoacrylate fuming, which that's a fancy word for superglue. We would take superglue, put it into a fuming chamber and heat the superglue. And the superglue releases fumes that rise up into the air inside the chamber, and then they fall down onto the item in question. And they would adhere to any of the perspiration or any of the oils or what not that would be able to allow the fingerprint to be visualized.

Once it comes out of the fuming chamber, then it is squirted down with a chemical dye solution that will fluoresce under a laser. And we'll look back at it under a laser to see if we can detect any latent prints.

Q. Did you perform that process for the items in this case?

A. Yes. I performed that process for all the items in this

case.
Q. And after going through that process, were you able to find any latent fingerprints on any of the items?
A. No, I did not.
Q. And based on your training and experience, is it common to find fingerprints on guns?
A. It's fairly uncommon. The lab -- what I processed, I'm running at about 5 to 8 percent of success rate on getting fingerprints off of guns.
Q. You mentioned -- so of the hundreds of guns you analyzed, how often have you found latent fingerprints?
A. Out of the 300 -- out of around the 300 that I've done, I've gotten latent fingerprints off of about 15.

MR. MILLER: No further questions at this time.

THE COURT: Any cross?

MR. BURGESS: Yes, Your Honor.

Can I approach the witness, Your Honor?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. BURGESS:
Q. Pardon me. I just want to look at this.
You examined more than just the guns, didn't you? You looked at some bullets, as well.
A. Yes.
Q. Okay. And I think it -- pardon me. I don't have a copy

back here, so that's why I'm staying up here.

Over here you examined seven .380 caliber bullets?

A. Yes.

Q. Now bullets have a smooth clean surface on them, don't they?

A. Yes.

Q. So that would be something that would be capable of -- more capable of a textured surface of picking up --

A. Yes.

Q. -- a fingerprint?

And then also you examined, I believe, 22 30-06 caliber bullets?

A. Yes.

Q. Those would be bullets also that have smooth clean surfaces on them; thus more likely to pick a fingerprint up than a textured handgun?

A. Yes.

Q. And then how about a magazine, doesn't the magazine have a smooth --

A. Some magazines do. Some are textured.

Q. Okay. Do you remember one -- in case -- in question here? Do we need to maybe have a look at it?

A. I can't remember the specific one in this one.

MR. BURGESS: Okay. Do you have the magazine?

May I approach the witness, Your Honor?

THE COURT: You may.

MR. BURGESS: Here it is. Can you have a look at it?

THE COURT: Before you show it to him, what is the exhibit number for the magazine being shown.

MR. MILLER: This is part of Exhibit Number 18, Your Honor.

THE COURT: Number 18?

MR. MILLER: Yes.

MR. BURGESS: Thank you, Your Honor.

Q. How would you characterize the cleanliness of the surface on that?

A. It's smooth with a slight amount of rust on it.

Q. Okay. You said a smooth surface would be more likely to pick up a fingerprint.

A. Yes, a smooth, clean surface.

Q. In the instances when you have detected fingerprints on a gun, has it been on the -- on the magazine or on the gun itself, can you remember?

A. I have had some come off magazines, some come off the slide area right above the trigger.

Q. Okay. And then how -- you talked about the frequency of picking up fingerprints on the gun itself, what about the bullets?

A. I didn't run the numbers on the bullets. I just did,

specifically, the guns.
Q. Would it be fair to say that it would be more frequently on bullets since they have that smooth clean surface?
A. Logically speaking, yes, it would.
Q. Okay. And then just one more question. You, through your analysis, were not able to determine that my client had ever touched any of those bullets or those guns?
A. I tested everything for the presence of latent fingerprints and there were no detected.
Q. Okay.

MR. BURGESS: Thank you, sir.

THE COURT: Any redirect?

MR. MILLER: One question, Your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:
Q. Just because you didn't find a latent fingerprint on an item, does that mean someone didn't touch it?
A. No, it does not.
Q. Why not?
A. Because you can touch something without leaving a fingerprint. If your hands are extremely dry, or for the -- what we -- what I had mentioned earlier -- if the item could have been rubbed or it could have been outside. It could have been in a dry environment.

MR. MILLER: No further questions.

THE COURT: Any objection to this witness being excused?

MR. BURGESS: None, Your Honor.

THE COURT: You may step down; be excused.

Call your next witness.

MR. ZOLOT: The United States calls Jakari Rutledge.

JAKARI RUTLEDGE, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. ZOLOT:

Q. Good afternoon. Could you please tell us your name.

A. Jakari Rutledge. Jakari Rutledge.

Q. Thank you. Yeah, the mike is a little sensitive. So if you could adjust it appropriately.

Could you spell your first name, please, for the court reporter?

A. J-a-k-a-r-i.

Q. Thank you. And how old are you, sir?

A. 25.

Q. What's the highest grade you completed in school?

A. Tenth grade.

Q. All right. And sir, did you plead guilty to a federal crime?

A. Yes.

Q. Okay. And what was that crime?

A. Conspiracy to commit bank fraud.

Q. And as part of that plea, did you enter what's called a "plea agreement" with the United States?
A. Yes.
Q. And as part of that plea agreement, did you agree to cooperate and testify truthfully?
A. Yes.
Q. And what do you understand are the terms of that cooperation?
A. Tell the truth.
Q. And what happens if you don't?
A. Then I could be prosecuted. My plea could be rejected.
Q. Okay. Sir, do you have prior felony convictions, three of them, for breaking and entering?
A. Yes.
Q. Are you related to Stanley Rutledge?
A. Yes.
Q. What's the relationship?
A. That's my brother.
Q. Okay. Where were you living in the summer of 2013?
A. 4018 Carlyle Drive.
Q. And approximately when did you move in there?
A. Around April or May.
Q. Of what year?
A. Around 2013.
Q. And who did you live there with?

A. Me and my girlfriend Chartesel.
Q. Anyone else?
A. And our kids.
Q. Okay. I want to show you, are you familiar with a house across the street at 4017 --
A. Yes.
Q. -- Carlyle?
A. Yes.
Q. I would like to show you what's been admitted into evidence as Government's Exhibit 1. Do you recognize that house?
A. Yes.
Q. What do you recognize that house to be?
A. Right across the street from where I stayed.
Q. Okay. Is that -- and who did you know to live in that house?
A. Kevin.
Q. Kevin who?
A. Kevin Smith.
Q. Okay. Do you see him in the courtroom today?
A. Yes.
Q. Okay. Could you point him out. Tell us what he's wearing, please?
A. Right here with the white collared shirt on.
MR. ZOLOT: I ask the record to reflect the witness

has identified the defendant.

THE COURT: It will.

MR. ZOLOT: Thank you, Your Honor.

Q. Do you remember the first time you saw Mr. Smith there?

A. Yes.

Q. Around --

A. Yes. Around the first time we -- when we first moved there.

Q. Okay. And would you -- how often would you see him at Carlyle?

A. About two to three times a day.

Q. How many days a week?

A. Like twice.

Q. Okay. And what times of day would you see him?

A. Like, all -- all during the day time.

Q. Okay. Do you know what kind of cars he drove?

A. Various amount, different kinds.

Q. But were you aware of the cars he drove?

A. Some of them.

Q. Did you ever see those cars parked there?

A. Yes.

Q. What times of day and night?

A. All throughout the day and night -- different times.

Q. Okay. Did you know where Mr. Smith slept at night?

A. Yes.

Q. Where was that?
A. Right across the street at -- on Carlyle.
Q. How did you know he actually slept there?
A. Because he would be there when I go to sleep and when I wake up.
Q. Okay. Mr. Rutledge, you lived across the street. Why did you have occasion to see him so often?
A. Because at the time, my girl, she had just had a baby and I was unemployed so I was always at the house.
Q. Okay. But if you're at the house, why does that mean you would be across -- looking across the street?
A. 'Cause I'm standing in the door, you know, looking outside.
Q. Okay. Did you spend a lot of time -- do you have a porch area at your house?
A. Yeah.
Q. Did you spend time there?
A. Sometime.
Q. Did you ever see Mr. Smith taking care of the house?
A. Like sweeping the porch, stuff like that.
Q. Okay. Were you friends with Mr. Smith?
A. No, sir.
Q. Did you have a lot of interaction with him?
A. No, sir.
Q. Did you have any?

A. No, sir.
Q. Well, did you ever say "Hello" to each other?
A. Sometime.
Q. Okay. And how would that go?
A. I mean, I just seen him. I might say "What's up?" or we might not say nothing at all to each other.
Q. Okay. Did there come a time when you discovered that Mr. Smith was no longer living at the house on Carlyle?
A. Yes.
Q. Okay. Do you remember when that was?
A. Around -- I don't know what month it was. But I know, like, after the police had raided the house it was a little after -- it was basically after that time.
Q. Okay. And did you have a -- did something happen to Mr. Smith's house after the police did execute the search warrant?
A. Yeah. Somebody -- some kids from the neighborhood had broke into the house.
Q. Okay. Did you have occasion to talk to Mr. Smith about that?
A. Yeah. I didn't talk to him about it. He had pulled up on us and asked did we see anyone around his house.
Q. And how did he refer to 4017 Carlyle?
A. "Did you see anyone around my house?"
Q. Okay. Did he actually use those words "my house"?

A. Yes.

MR. ZOLOT: No further questions. We tender the witness.

THE COURT: Any cross?

MR. BURGESS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BURGESS:

Q. You were previously asked, I believe, what you've been convicted of in the last 10 years that you could do a year or more for. Do you remember that?

A. Sir?

Q. Let me ask you this way: What have you been convicted of in the last 10 years that you could do one year or more for in prison?

A. I don't understand the question.

Q. What felonies have you been convicted of?

A. Breaking and entering.

Q. Okay. And what else?

A. And this last charge right here, conspiracy to commit bank fraud.

Q. Are you saying, that's it; just one breaking and entering?

A. No. I have three prior convictions of breaking and entering.

Q. Okay. You had a breaking and entering and also a larceny

after breaking and entering, didn't you?
A. Yes. But I was only charged with the breaking and entering.
Q. Are you saying you did not plead guilty to larceny after breaking and entering?
A. I pled guilty to breaking and entering. They dropped the larceny charge.
MR. BURGESS: Okay. May I approach the witness, Your Honor?
THE COURT: I think you might want to ask some foundational questions before you do that. Are you using a document to refresh his recollection?
MR. BURGESS: Yes, Your Honor.
THE COURT: Go ahead.
Q. Let me ask you, if I showed you a copy of a judgment that was entered against you in criminal court, would that refresh your recollection as to whether you had, in fact, been convicted of larceny after breaking and entering on September 6, 2009? Would that refresh your recollection? Would it help you remember?
A. If you showed me the papers?
Q. Yes, sir.
A. Yeah.
MR. BURGESS: May I approach the witness, Your Honor?

THE COURT: You may.

MR. BURGESS: This has been marked for purposes of identification as Defendant's Exhibit 15.

Have a look at that, sir.

Q. Okay. Does that refresh your recollection that you, in fact, were convicted of larceny after breaking and entering on September 3, 2009?

A. Yes.

Q. Okay. And sir, do you recall being convicted of possession of stolen property?

A. No, sir.

Q. Back on February 7, of 2007?

A. No, sir.

Q. You don't recall that?

A. No, sir. I recall being convicted of a breaking and entering back in 2007, not possession of stolen goods.

Q. Okay. If I showed you a copy of a judgment like I just did a minute ago, would that help you remember?

A. Yes.

MR. BURGESS: Okay. May I approach the witness, Your Honor?

THE COURT: You may.

MR. BURGESS: This has been marked for purposes of identification as Defendant's Exhibit 17.

MR. ZOLOT: Your Honor, may we approach?

THE COURT: You may.

MR. BURGESS: I'll withdraw.

THE COURT: He's withdrawing it.

MR. ZOLOT: Okay.

MR. BURGESS: I'll get back to it.

Yes, Your Honor, I think we do need to approach.

THE COURT: Very well.

(Bench conference as follows:)

THE COURT: Okay.

MR. BURGESS: He's raised an issue which I frankly need to look at and see whether it's a Class H felony.

MR. MILLER: H-1.

THE COURT: What's the criminal record?

MR. MILLER: Prior record level I, I believe.

THE COURT: Less than --

MR. MILLER: I think has to be H -- 3 or higher.

MR. BURGESS: H-3.

MR. MILLER: Prior record level III, a combination.

THE COURT: H-1 won't do it.

MR. MILLER: H-1 won't do it.

MR. BURGESS: *Simmons* analysis as well.

THE COURT: Yeah, at least I applied it last trial.

MR. MILLER: I have some familiarity.

MR. BURGESS: Okay.

THE COURT: *Simmons* is affecting many different

areas of law. The last trial we had this week the Government had three felony priors -- previously would have been three felony convictions, but I ruled it was *Simmons* prohibited; so H-1 would not get you where you need to go in terms of the felony for the last 10 years.

MR. BURGESS: Thank you.

MR. ZOLOT: Your Honor, could you possibly instruct the jury to disregard --

THE COURT: No, we're going to go from there.

(Bench conference was concluded.)

Q. Then do you also recall being convicted of breaking and entering in 2011?

A. Yes, sir.

Q. Mr. Rutledge, have you, in the past, used any drugs or alcohol?

A. No, sir.

Q. No alcohol?

A. No, sir.

Q. No drugs?

A. No, sir.

Q. If I were to show you a transcript of plea on which you indicated that you had used such a substance at a time prior to having pled guilty, would that refresh your recollection?

A. Sir?

Q. If I showed you a document that said that you had -- that

you admitted that you had, would that refresh your recollection? Would that help you remember?

A. I don't remember using anything.

Q. If I can show you something in which you said you did, would that help you remember?

A. Yeah.

MR. BURGESS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. This has been marked for identification as Defendant's Exhibit 15 -- no, pardon me, Your Honor, Defendant's Exhibit 16. Defendant's Exhibit 16 for identification.

MR. ZOLOT: Your Honor, I would object. Based on what Mr. Burgess has tendered.

THE COURT: Well, he's just refreshing his recollection.

MR. ZOLOT: But the question was improperly stated.

THE COURT: So ask the question again.

Q. If I show you a document in which you were asked, "Are you under the influence of alcohol, drugs, narcotics, pills or other substances?" And "When you last used or consumed any such substance?" And you said, "Six months ago." Would that help refresh your recollection -- help you remember whether you have, at some point in your life, either drank alcohol or used drugs?

A. Yes.

MR. BURGESS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. First of all let me ask you: Do you recognize what that is, a transcript of plea?

Tell you what, can you turn over to the third page? Is that your signature?

A. Yeah.

Q. Okay. So you signed this?

A. Yeah.

Q. Right.

A. In 2009.

Q. Right. And this was something that you signed -- you were in court pleading guilty. And you were asked a series of questions, correct?

A. Yes.

Q. And one of those questions was "Are you now under the influence of alcohol, drugs, narcotics, pills, or other substances?" And you said, "No."

A. Yes, that's correct.

Q. You understand they were asking that because they wanted to make sure you knew what you were doing.

A. Yes.

Q. Okay. So you weren't drunk or high or something like

that.
A. Okay.
Q. Then they asked you, "When was the last time you used or consumed any such substance?" And you said, "About six months ago."
A. Yeah.
Q. Correct. So you in fact have used alcohol or drugs previously?
A. Yes. This was in 2009.
Q. Right. Okay. Well, so you understood my question to be "Had you ever used alcohol or drugs in your life?" That's what I asked you, remember?
A. Yeah.
Q. And you gave a false answer.
A. It sounded like to me that you had asked was I under the influence now of anything?
Q. You think that's what I asked you?
A. Yeah.
Q. Are you?
A. No.
Q. But when you answered the question I asked you, which was, "Have you used alcohol before?" You said, "No," correct?
A. Correct.
Q. I asked you, "Have you used drugs before?" You said, "No," correct?

A. Correct.
Q. But that's not true because you admitted in here that you had.
A. That was in 2009.
Q. Yes. Now you also remember pleading guilty and completing a transcript of plea back on July 19, 2011. Do you remember that?
A. You said -- can you say the question again?
Q. Do you recall completing another transcript of plea in connection with pleading guilty on July 19, 2011?
A. No.
Q. You don't remember that?
A. No, I don't.
Q. If I show you a copy of that transcript of plea with your signature on it, would that help you remember?
A. Yes.

MR. BURGESS: May I approach the witness, Your Honor?

THE COURT: You may.

MR. ZOLOT: Your Honor, I'm going to object as to relevance.

THE COURT: Overruled.

Q. This is going to be the same form as I gave you before, at least you can look at it and make sure that's right. Look at that and let me -- let's flip over and confirm that that's

your signature on there. Is that your signature?
A. Yes.
Q. Okay. Let's go back to page 1, please. You see there the question the same --
THE COURT: The question before him is whether it refreshes --
MR. BURGESS: Yes. Does this --
THE COURT: -- his recollection as to the plea transcript on July 19, 2011.
MR. BURGESS: Yes. Pardon me, Your Honor. Thank you for that.
Q. Does this refresh your recollection of this plea agreement?
A. Yes.
Q. Okay. Now, can you have a look at question four that we went over before. And you see that's the one --
A. "Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, any other substance? No."
Q. And then it asked, "When did you last use any such substance?" It says, "July 17, 2011."
A. Okay.
Q. Okay. All right. Thank you. That was true when you said that, right?
A. Yes.
Q. Because you were sworn under oath when you answered all

these questions. You remember that, don't you?
A. Yes.
Q. Okay. When you were unemployed hanging out over there on Carlyle Drive, were you drinking and doing drugs then too?
A. No, sir. I was on probation for eight years so I wasn't able to smoke or drink.
Q. Okay. That would be something that would cause your probation to be revoked, wouldn't it?
A. Yes.
Q. You would get a report saying you violated probation?
A. Yes.
Q. You want to tell us anything about that?
A. No, sir. I'm just here to tell the truth.
THE COURT: Hang on a second. I'll sustain as to the form of the question.
Q. You've had violation reports for violating probation before, haven't you?
A. Yes.
Q. Okay. And on occasion, that was for use of drugs, wasn't it?
A. No, sir. It was actually for not paying my money on time.
Q. Okay. That's your testimony, it was from not paying your money, that's it?
A. Missing a couple of office visits, that's it.

Q. Now, I want to ask you some questions about the plea agreement that you entered into. That's the one under which you agreed to come to court to testify if the Government asked you to do it, correct?
A. Yes.
Q. Okay. And you pled guilty to one count of conspiracy to commit bank fraud, right?
A. Yes.
Q. Okay. Now how many other counts were you charged with?
A. I think that's the only one.
Q. You don't recall being charged with two additional counts of actual bank fraud itself?
A. No, sir.

MR. BURGESS: May I have a moment, Your Honor?

THE COURT: You may.

MR. ZOLOT: Your Honor, if it may please the Court, to speed things along, the Government is willing to stipulate.

THE COURT: Well, he's got him on cross right now. Give Mr. Burgess a moment.

MR. ZOLOT: Yes.

Q. Does that help you remember?
A. Sir?
Q. Does that help you remember whether in fact you were charged with more than just conspiracy to commit bank fraud?
A. I don't understand the question.

Q. All right. Well, just let me have a moment, Your Honor. I apologize.

If I were to show you a copy of the indictment in which you were charged, would that help refresh your recollection as to what all you were charged with?

A. Yes, sir.

Q. I'm sorry. Yes, sir?

A. Yes, sir.

MR. BURGESS: May I approach the witness, Your Honor?

THE COURT: Yes. And get right to the portion of the indictment --

MR. BURGESS: Yes, I got it right here.

THE COURT: -- that you want to direct his attention to.

MR. BURGESS: Absolutely.

Q. Do you see right there in what's Count 40?

A. Yes.

Q. Where it says "Jakari Rutledge"?

A. Um-hmm.

Q. That's you, right?

A. Yes.

Q. And that's -- see up here where it says "Bank fraud" in this table here. And that's you down there at number 40 -- that's Count 40, see that?

A. Yes.
Q. So you have, in fact, been charged with more than what you testified to originally -- than just the conspiracy; charged with bank fraud as well, correct? Is that right?
A. Yes.
Q. Okay. And as a part of your plea agreement -- by the way, do you know what the maximum penalty is for bank fraud?
A. No, sir.
Q. Thirty years. Does that sound familiar to you?
A. Yes.
Q. So it's 30 years, to your knowledge?
A. Yes.
Q. Okay. And in exchange for your plea in which you agreed to come to court to testify, you're pleading guilty only to the conspiracy, right? And this other one is being dismissed?
A. I didn't -- I didn't know -- like, my knowledge -- I didn't know anything was being dismissed. I just know I pled guilty to commit conspiracy to commit bank fraud.
Q. Right. So the other bank fraud's getting dismissed?
A. I don't know.
Q. And also another potential benefit of this -- and, again, you get this dismissal just for signing the agreement and coming to testify.
THE COURT: I think the testimony was he didn't know anything was dismissed.

MR. BURGESS: Thank you, Your Honor.

Q. And then also you have an opportunity to -- let me withdraw that.

Do you know any other people that have -- friends of yours or relatives or anyone that's pled guilty in a federal case?

A. No, sir.

Q. You don't know anybody?

A. My brother.

Q. Okay. And you're familiar with the possibility of getting a reduction in the sentence for testifying, correct?

A. Yes.

Q. You know other people that have gotten that?

MR. ZOLOT: Objection.

THE WITNESS: No, sir.

MR. BURGESS: You do not?

THE COURT: Overruled.

Q. But you're familiar with it?

A. I'm familiar with it, but I don't know nobody who --

Q. Okay. And, I mean, the truth be told, you are hoping that that's what you get here?

A. Yes, sir.

Q. Is it your expectation -- well, I'll withdraw that question.

And also is it your understanding that anything that you

have to disclose in connection with the plea agreement, that you're protected from being prosecuted for other crimes unless they involve violence or something you do after the date of the plea agreement or for making false statement, perjury or obstruction of justice?

MR. ZOLOT: Objection. Mischaracterization of the plea agreement.

THE COURT: Overruled.

Q. Do you know that?

A. I don't understand the question, sir.

Q. You're getting these other benefits as well, correct?

A. What other benefits?

Q. The ones I just read to you.

A. I mean, you said a whole lot. I don't understand. Can you rephrase that question?

MR. BURGESS: May I approach the witness, Your Honor?

THE COURT: Ask him about what his understanding is of the benefits he's receiving.

Q. Okay. What is your understanding of the benefits you're receiving under this plea agreement?

A. I still don't understand what you're saying.

Q. You don't understand what I mean when I -- I'm sorry. Let me ask again.

What is your understanding of the benefits you're going

to receive for the plea agreement?
A. I don't understand. I still don't understand what you're saying.
Q. Okay. I'll withdraw the question.
Now for all -- the bank fraud that you pled guilty to, that is based on conduct where you make false representations to get money, isn't it?
A. Sir, repeat the question.
Q. The fraud that you -- the bankrupt -- I'm sorry. The conspiracy to commit bank fraud which you have pled guilty to, that is an offense where you make false statements, false representations to get money, correct?
A. Yes.
Q. Okay. Now, so it's essentially telling lies to get money; am I right?
A. Are you asking a question?
Q. Yes.
A. Can you repeat it?
Q. It's telling lies to get money, isn't it?
A. Yeah, I guess. Yeah, that's what you want to call it.
Q. And what means more to you, your freedom or just some money?
A. My freedom.
Q. If you're willing to tell lies for money, aren't you willing to tell lies for freedom?

A. I'm here to tell the truth.
Q. All right.
A. So --
Q. Well, but are you willing to tell lies for freedom?
A. No, I'm here to tell the truth.
Q. Like you told the truth when I asked you about the alcohol or drugs?
A. Like I said, sir, I'm just here to tell the truth, that's all.
Q. Just -- here's my question to you though: The truth that you're intending to tell, is that the same truth you told when I asked you whether you used alcohol or drugs in the past?
A. Can you repeat the question?
THE COURT: I'll sustain an objection. That's an argumentative question.
MR. BURGESS: May I have a moment, Your Honor?
THE COURT: You may.
MR. BURGESS: Thank you so much, Mr. Rutledge. I don't have any more questions.
THE COURT: Any redirect?
MR. ZOLOT: Just a few questions.

REDIRECT EXAMINATION

BY MR. ZOLOT:
Q. Mr. Rutledge, just to clarify. When you were living at Carlyle, were you using drugs and alcohol?

A. No.
Q. Okay. And Mr. Burgess asked you a bunch of questions about your plea agreement. Do you remember that?
A. Yes.
Q. And about the indictment?
A. Yes.
Q. Are you aware that the count -- the conspiracy count you pled guilty to carries a 30-year maximum term of imprisonment?
A. Yes.
Q. Mr. Rutledge, did you see Kevin Smith when you were living at Carlyle?
A. Yes.
MR. BURGESS: Objection. That's beyond the scope of my cross.
THE COURT: And it's not covering anything new. I'll sustain the objection.
MR. ZOLOT: No further questions, Your Honor.
THE COURT: Any objection to this witness being excused?
MR. BURGESS: Yes, Your Honor. Actually, I may have to recall him.
THE COURT: All right. You may step down but you're still under subpoena.
Call your next witness.
MR. ZOLOT: Yes, Your Honor. The Government calls

Brenda Williams.

THE COURT: Members of the jury, I don't believe that this witness was mentioned to you during jury selection. And so, Brenda Williams, I believe, is an employee of the Mecklenburg County Sheriff's Office. Is that name familiar to any of the jurors?

THE JURY: (Shaking head negatively.)

THE COURT: I see all the heads shaking no. If it's familiar, would you raise your hand.

THE JURY: (No jurors raising their hand.)

THE COURT: Thank you.

MR. ZOLOT: Your Honor, may I call the witness?

THE COURT: I thought you did.

MR. ZOLOT: Okay.

BRENDA WILLIAMS, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. ZOLOT:

Q. Good afternoon. If you would please tell us your name.

A. Brenda Williams.

Q. And where do you work, Ms. Williams?

A. The Mecklenburg County Sheriff's Office.

Q. And what do you do currently at the --

A. I'm a supervisor for the inmate finance -- Inmate Property division.

Q. Okay. And what does that mean?

A. Well, it means we take possession of all the inmate's money, and all their personal property when they come in; their clothes, their personal belongings, and all their financial things. They could have checks and cash, and we just take possession of all of it to secure it.
Q. All right. Are you the custodian of records for the property department --
A. Yes, I am.
Q. Okay. And do you make accurate records -- does the Mecklenburg County sheriff make records on or at the time that you -- say a new person comes into the jail and you need to take their stuff?
A. Oh, yes. The records are made from spot, to spot, to spot. And there are direct procedures. And there's cameras everywhere. And we follow him through the system. And when he's brought to us by a deputy to be dressed out, if it's determined he's not getting out when they're dressed out -- that's being incarcerated -- then we have him standing before the property person and we are inventorying all his clothes, and what property that may have been taken when he was searched when he first came in too. We match it up and he signs a receipt showing that this is his property.
Q. Okay. And are those records made on or at the time of the transaction it purports to reflect?
A. Are they made --

Q. At the time of the transaction that it reflects?
A. Oh, it's accurate, yes. And it's timestamped. Everything's time sensitive and it's put into a computer as the moment that it occurs.
Q. Are they stored in the regular course of your business?
A. Yes, sir.
Q. And are the items of, you know, clothing and stuff that are taken off the person, are they stored in the regular course of your business?
A. Yes, sir.
MR. ZOLOT: Okay. Your Honor, let me withdraw that.
Q. Ms. Williams, when someone comes in to be part of the Mecklenburg County jail, even for a temporary period of time, are they allowed to remain in their civilian clothes?
A. They stay until they come to dress out.
Q. But when dress out happens, what do you do with their clothing?
A. We put them in a property bag. As we -- as they undress, we give them an orange jumpsuit and we verify who he is with his arm band. He has an arm band that has a PID number. That PID number stands for positive identification -- he's been fingerprinted. And that number never changes your entire life. If you're ever arrested, it's yours. So that account becomes yours. Every piece of paperwork has a sticker with that number on it. Every item is tagged with that and the

inmate verifies it's his.
Q. Okay. Thank you.
MR. ZOLOT: Your Honor, might I approach the witness?
THE COURT: You may.
Q. I'm going to just put on the table Government's Exhibit 14 and 14A.
A. Okay.
Q. I would just like to talk to you about 14A for the moment. Do you recognize that?
A. Yes, I do.
Q. And what is that?
A. This top sheet is an inventory form that we created when the inmate was being dressed out.
Q. Who is the person?
A. The person is Kevin Smith.
Q. Okay.
A. And he signed it.
Q. Okay. And is that a fair and accurate copy of the records that you have and --
A. Yes.
Q. -- that you're testifying to?
A. Yes, it is. It's accurate.
Q. Is that from your system?
A. Yes, it is. This is from the computer as it was

generated. And it's timestamped at the time he came in at 9:58 p.m.

Q. Can you tell us the date, actually, that the items were taken?

A. January 24, 2014.

Q. Okay. Thank you. Was this record made on or at the time that it reports to reflect?

A. Yes.

Q. Okay. And was this kept in the ordinary course of the Mecklenburg County sheriff's business?

A. Yes, it is.

MR. ZOLOT: Your Honor, I would offer Government's Exhibit 14 into evidence -- 14A, excuse me, into evidence.

THE COURT: Any objection?

MR. BURGESS: No objection.

THE COURT: Let it be admitted.

MR. ZOLOT: Thank you. May I publish, Your Honor?

THE COURT: You may.

MR. ZOLOT: Thank you.

(Government's Exhibit No. 14A was received into evidence and published.)

Q. Can you see that on your screen?

A. I do.

Q. Do you see a signature there?

A. Yes, I do.

Q. Can you read it?
A. Yes.
Q. Whose signature is that?
A. Kevin Smith.
Q. Okay. Thank you. Does this paperwork correspond to what I already have left on your stand as Government's Exhibit 14?
A. Yes, sir.
Q. Okay. And did you pull that property after reviewing this sheet?
A. Yes, sir.
Q. Okay. And if you would look inside the bag of Government's Exhibit 14. If you could describe -- if you look and see if you recognize the items.
A. Okay. Yes. This item -- you want me to take it out?
Q. If it will be helpful to you.
A. Yes. This item has part of his property here. This is his shoes that's listed.
Q. Okay. All right.
A. And his shoestrings.
Q. And are those in the same or similar condition, as custodian of record, as you understand from when they were taken from Mr. Smith?
A. Yes. We just removed the shoestrings. They were removed by they deputy before he comes to us.
Q. Is that kept in the ordinary course of your business in

the property room after it was taken from Mr. Smith?
A. Yes, sir.
MR. ZOLOT: Offer 14 into evidence, Your Honor.
THE COURT: Any objection?
MR. BURGESS: No objection, Your Honor.
THE COURT: Let it be admitted.
(Government's Exhibit No. 14 was received into evidence and published.)
Q. If you would take out both shoes and if we can maybe put them up here. And we can leave the shoestrings in the bag --
A. Okay.
Q. -- for the moment.
I think -- if you could turn them towards the jury so perhaps they could see them while we talk about it.
A. Okay.
Q. Thank you. Can you tell what size those shoes are?
A. What size?
Q. Yeah. Well, first of all, what type of shoes are those?
A. They're a Nike high top sneaker/tennis shoe.
Q. And can you tell the size on them?
A. Yeah, these are eight and a half.
Q. Okay. Is that men's?
A. Yes, they are.
MR. ZOLOT: Your Honor, may I just briefly walk by the jury?

THE COURT: You may.

Q. Do you see the eight and a half there on the screen?

A. I do.

MR. ZOLOT: Thank you. No further questions.

THE COURT: Any cross?

MR. BURGESS: Just briefly.

CROSS-EXAMINATION

BY MR. BURGESS:

Q. You didn't find any house keys? No house keys in his property?

A. No, sir. He came in with no house keys.

Q. Okay. Do you pay attention to the size shoes when they come through?

A. We do pay attention to it. We usually talk with the inmate as they come in to ask them -- because we have to give them another pair of shoes. We give them what's known as "shower shoes."

Q. Okay.

A. So when we inventory that size into -- we won't put eight and a half 'cause we don't sell that. We don't have eight and a half sizes. We have small, medium, large, extra large, and triple extra large. So we would give him a size comparable to an eight and a half shoe to switch out so he'll have something to put on his feet.

MR. BURGESS: Thank you, ma'am.

That's all I have.

THE COURT: Okay. Any objection to this witness being excused?

MR. BURGESS: No, Your Honor.

THE COURT: You may step down; be excused.

Call your next witness.

THE WITNESS: Thank you.

MR. MILLER: The Government calls Rachael Scott.

RACHAEL SCOTT, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MILLER:

Q. Please introduce yourself to the jury.

A. My name is Rachael Scott.

Q. And, Ms. Scott, what do you do for a living?

A. I work for the Charlotte-Mecklenburg Police Department in the crime laboratory as a DNA analyst.

Q. How long have you worked at the CMPD lab?

A. Approximately five and a half years.

Q. Where did you work prior to that?

A. I worked for the Florida Department of Law Enforcement in Tampa, Florida, in their crime laboratory as a DNA analyst.

Q. And as a DNA analyst, what are your day-to-day responsibilities?

A. I examine items of evidence. I perform DNA testing to generate DNA profiles that can be used for comparison. I

issue reports on my findings, and when necessary, testify in court.

Q. And, Ms. Scott, what is your educational background?

A. I have a Bachelor of Science in biology from Eckerd College. And I have completed a year-long training course that's specific to forensic DNA testing through the Florida Department of Law Enforcement.

Q. Have you received any specialized training in the analysis of DNA?

A. While working at the Florida Department of Law Enforcement, I underwent several training programs with them. And then as part of my continuing education each year, I'm required to complete eight hours of training, as well.

Q. Have you testified before today as an expert in court?

A. Yes, I have.

Q. In what areas have you testified as an expert?

A. I have testified in both civil and federal court, in the fields of serology and DNA.

Q. How many times and in what courts?

A. Approximately 40 times.

MR. MILLER: Your Honor, at this time the Government offers Ms. Scott as an expert in DNA testing analysis and comparison.

THE COURT: Objection.

MR. BURGESS: No objection.

THE COURT: She'll be allowed to offer opinions in that area.

MR. MILLER: Thank you, Your Honor.

Q. Now starting with the basics, can you just -- generally, what is DNA?

A. DNA stands for deoxyribonucleic acid. It's a large information molecule that's found in the cells of your body that contains generic information that's passed on from generation to generation. You get half of your DNA from your mother and half of your DNA from your father. And no two individuals have the same DNA -- except identical twins.

Q. Now how would DNA -- a person's DNA get onto a particular item?

A. There are several ways DNA could get on an item; either through direct contact such as touching an item, or a body fluid being deposited on an item, or an item being placed in a biological sample.

Q. And what factors affect whether or not a person's DNA may transfer to a particular object?

A. It depends. Each person sheds skin cells at different rates. So one individual may hold an item and transfer a lot of their DNA to it. Someone may hold an item and not transfer as much DNA. If an individual is handling an item where they're wearing gloves, I wouldn't expect their DNA to be transferred to it. If the item is cleaned regularly with

certain chemicals, it could also remove any DNA that is on that item.

Q. Now is the CMPD lab you work for, is that an accredited lab?

A. Yes, it is.

Q. By whom?

A. We are accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board under their international program.

Q. Do you have standard policies and procedures that you follow at the CMPD lab?

A. Yes, we do.

Q. And in your experience, would a particular lab's policies vary from lab to lab?

A. Yes, they would.

Q. And why is that?

A. The policies that we have in place are lab specific. The instruments that we use, the type of testing kits that we use, we have internally validated them. Which means that we've performed a series of tests and studies to see how these instruments, and how these specific kits work specific to our instruments. So each laboratory is required to do that for their specific laboratory.

Q. And what is the purpose of the type of DNA analysis that you do at the CMPD lab?

A. The purpose of my DNA testing is to obtain DNA profiles from evidence samples, and then make comparisons with known DNA profiles.
Q. And when you do that type of analysis, does the CMPD lab standard policies and procedures require some sort of peer review or quality assurance?
A. Yes, they do.
Q. Could you explain that, briefly?
A. Once I have completed all of my testing and have made my conclusions on my evidence samples, my entire case file is then given to another DNA analyst who is trained and they will check to make sure I followed all of our standard operating procedures. And they'll also make sure that they agree with all of the conclusions that I've made. If there is any disagreement, the report is not issued.
Q. Were you asked to perform an analysis comparing evidence samples to a known sample in the case of United States versus Kevin Smith?
A. Yes, I was.
Q. And do you know Kevin Smith?
A. No, I do not.
Q. Generally speaking, what evidence were you asked to review?
A. I was asked to review swabs from four different firearms.
Q. And were you also provided with what -- I think you

referred to earlier as "a known sample"?
A. Yes, I was.
Q. And what was the -- what was the -- how was the known sample described to you?
A. May I reference my notes?
Q. Did you prepare a report in this case?
A. Yes, I did.
Q. And is it your ordinary practice to prepare a report?
A. Yes, it is.
Q. I will actually show you what's been previously marked as Government's Exhibit 24. Do you recognize this document?
A. Yes, I do.
Q. How do you recognize it?
A. It has the CMPD complaint number. It has the general format of what our reports look like. I believe on the next page would have my signature.
MR. MILLER: To make things easier -- may I, approach Your Honor?
THE COURT: You may.
Q. I'm handing you a physical copy of what's been previously marked as Government's Exhibit 24. Does that contain the remainder of the pages of your report?
A. Yes, it does.
MR. MILLER: All right. Your Honor, at this time the Government would offer Exhibit 24 into evidence.

THE COURT: Any objection?

MR. BURGESS: No, Your Honor.

THE COURT: Let it be admitted.

MR. MILLER: And -- excuse me.

(Government's Exhibit No. 24 was received into evidence.)

Q. And in reviewing that report, does that refresh your recollection as to how the known sample was described to you in this case?

A. Yes, it does.

Q. All right. And you mentioned earlier that you were to compare that known sample to swabs taken from, I believe you said "four firearms." Explain to the jury what you mean when you say "swabs"?

A. When dealing with firearms -- and to perform my DNA testing, the areas on the firearm that a person would come in most contact with and holding them, such as the grip area of the gun, is swabbed using a Q-tip that has been moistened with sterile water. And the surface is swabbed to pick up or remove any skin cells that could be left on the item.

Q. All right. When you do this type of testing, are you always able to make it to the step where you compare the swabs from the evidence to the known sample?

A. No, I am not.

Q. And what are certain situations where you wouldn't make

it to that step?
A. Sometimes I do not obtain a DNA profile at all. Other times I obtain a complex mixture. Which a mixture just means that there's more than one person's DNA present.
If I call it a complex mixture, that means that there's typically more than two -- three or four individuals present. And once I have that many individuals present in the sample, I am not confident with any scientific certainty that I would be able to make an accurate comparison. So I do not use that sample. And I also could have a minimal profile, which means I don't have a complete profile or enough information to make any conclusions on.
Q. And in your analysis of the evidence in this case, the swabs from the guns, were you able to find any useable samples?
A. No, I was not.
Q. All right. I would like to go through, in a little more detail, the evidence that you reviewed in this case.
What was the first item listed in your -- what was the first piece of evidence that swabs were taken from that's described in your report?
A. There were three areas on a shotgun that were swabbed.
Q. All right. And what areas of the shotgun were swabbed?
A. The entire bolt of the shotgun, the entire stock of the shotgun, and the underside of the lower receiver of the

shotgun.
Q. What did your analysis of the swabs from those three areas reveal?
A. The swabs from the entire bolt of the shotgun did not give me any indication that DNA was present at all on that sample. So I did not complete DNA testing on that sample.
The swabs of the entire stock of the shotgun gave me a minimal profile where there wasn't enough information to make a conclusion.
And the DNA profile obtained from the swabs from the underside of the lower receiver of the shotgun, was considered a complex mixture that I couldn't make any conclusions on.
Q. And remind the jury what you mean by "complex mixture."
A. "Complex mixture" means that there are more than two or three or four individuals present. Which I do not feel confident in making a conclusion based on that sample.
Q. So in light of those determinations, did you compare any of the swabs taken from the shotgun against the control sample -- or the swab that you described as being from Kevin Smith?
A. No, I did not.
Q. All right. What was the second -- what was the second item of evidence that you reviewed swabs from?
A. There were three areas of a rifle that were swabbed.
Q. All right. And what were those areas?

A. The entire bolt of the rifle, the entire stock of the rifle, and the textured area of the fore-stock of the rifle.
Q. Were you able to find any useable samples from those swabs?
A. No, I was not.
Q. What did you find?
A. The DNA profile obtained from the swabs from the entire bolt of the rifle was a minimal profile that I could not make comparisons on.

The swabs from the entire stock of the rifle was also a minimal profile that I couldn't make comparisons on.

And the swabs from the textured area of the fore-stock of the rifle was a complex mixture which I could not make comparisons to.

Q. So any useable samples from the rifle?
A. No, there was not.
Q. What was the next item of evidence you reviewed?
A. The next item was a pistol and the magazine.
Q. And where did the swabs come from on the pistol and the magazine?
A. The swabs were collected from the base of the magazine. And swabs were collected from the entire grip area of the pistol.
Q. Were you able to find any useable samples from those swabs?

A. No, I was not.
Q. So did you -- did you compare any of those swabs against the control sample in the Kevin Smith swab?
A. No, I did not.
Q. All right. What was the next item of evidence you reviewed swabs from?
A. Last, there were swabs from the grip area of the revolver.
Q. And were you able to find any useable samples from those swabs?
A. No, I was not.
Q. All right. So after you analyzed these swabs and determined that you didn't have any useable samples, was that the end of your analysis?
A. Yes, it was.
Q. Were you able to determine, one way or another, whether the defendant's DNA -- or excuse me -- whether any of those DNA swabs matched the control sample or Kevin Smith's?
A. No. It's my expert opinion that the DNA profiles I obtained from the swabs from these firearms, would not be used to make any comparisons with any scientific certainty.
Q. So why didn't you compare those evidentiary samples to the known samples?
A. I deemed that those samples weren't adequate to make any comparisons to.

MR. MILLER: No further questions.

THE COURT: Any cross?

MR. BURGESS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. BURGESS:

Q. That you found a complex mixture on some of these swabs shows that more than one person had handled these guns, correct?

A. That is correct.

Q. And when you say that "You did not make a comparison." What do you mean exactly by, "making a comparison"? I don't understand that.

A. When I say I'm making a comparison, it means that I have DNA profile from an evidence sample and I deemed that it is complete or has enough information that it can be used for comparison. So then I would look at the DNA profile obtained from the known standard and see if they're the same, if they match, or if they're different.

Q. Okay. So you didn't -- so you're saying you didn't even try to see if they matched?

A. That is correct.

Q. Okay. When you do this, are there other papers that go along with these reports?

A. I have a case file that contains all of my notes that are taken during my testing.

Q. Are there some papers that have, at least on some occasions, little graphs that have lines going up and so forth?
A. Yes, there are.
Q. Okay. And those graphs, sometimes you see them laid out on a piece of paper one, two, three, something like that, one on top of the other?
A. That is correct.
Q. Okay. What is that depicting? Is that depicting a comparison?
A. That is depicting a DNA profile.
Q. Okay. And when they're put next to one another in that manner, is that because you're comparing them? Is that what that's --
A. No. The samples that I analyze are put in an instrument that separates the DNA based on size. I look at 15 different areas on the DNA molecule. So the DNA profile is represented to me as peaks on a graph in each of those 15 areas. Each of those peaks is designated a number. In order to make my comparison, I would compare the number that each peak is given at each area.
Q. What would -- could you describe what the -- maybe what the paperwork would look like if you had made a comparison?
A. The paperwork would look the same. I would just have conclusions made. And in this folder I had reported that

there were no conclusions made. So my paperwork wouldn't change. But my interpretations in the report would be different if I had made a comparison.

Q. Let me make sure I understand. Some instances you would make a comparison and you would draw conclusions from that?

A. That is correct.

Q. And then in some cases you would not make a comparison. Which you didn't do in this case, you said.

A. That is correct.

Q. Therefore, you would not draw any conclusions.

A. That is correct.

Q. When you don't make a comparison, do you write on the report somewhere on some of the other documents that would be attached to it, "I did not make a comparison"?

A. On each of the pieces of paper that represents each sample, I will make a note of -- if I think it is a complex mixture, I will say that it's a complex mixture and why I believe it is. If it is a minimal profile, I will document on that paper "minimal profile". And that shows myself and my reviewer that I'm not using that sample for comparison.

Q. And when you did this, you would have generated some documents that had some of those graphs on them with them?

A. Yes, I do.

Q. And then some tables with things written in them?

A. That is correct.

Q. About how many more pieces of paper do you think you have?

A. My case file is complete how it is. I performed the DNA testing the same way. Because I don't determine if I can use a sample until after I've completed my DNA testing.

So all of the paperwork is included in my folder, whether or not I use it for comparison.

Q. Okay. I guess what I'm trying to figure out, how many -- how much more paperwork would you have other than these pages that you --

A. There won't be any additional paperwork. There would be conclusions in my report that stated different conclusions than the conclusions I got if I had made a comparison.

Q. What I'm trying -- I guess what I'm trying to be clear about, are you saying that what you already -- that the document that's been entered into evidence is everything that you had?

A. The document entered into evidence is my report which is the summary of my conclusions. I have a case file that stays with the laboratory that documents each step of the process that I have taken. That, I don't believe, is issued as an exhibit.

Q. Okay. But just to be clear from my part because it's confusing, complicated stuff. On that other paperwork that you refer to, it would say on there, "No comparison made"

somewhere. Would those words be written on there?
A. The file that I have with my case notes does have a copy of my report that does say that. The only thing that you would find in the file that would show I didn't make a comparison is my note that said -- I called a complex mixture or a minimal profile. And that is in my case notes.
Q. Okay. So if you say, "I found a complex mixture," that means you didn't make a comparison?
A. Correct.
Q. So is it never possible to make a comparison when you have a complex mixture?
A. Correct. We never make comparisons with complex mixtures or minimal profiles.
Q. You say you don't do that. But are there other labs that can do that?
A. No, they do not.
Q. Now let me ask you a question about the probability of picking up DNA off of clothing. How would you characterize that?
A. It's possible to pick DNA up off of clothing.
Q. Let's say comparing guns to clothing -- would it be more likely to find it on clothing, wouldn't it, than guns?
A. Not necessarily.
Q. I mean, clothing that people are wearing. Like, for example, my shirt. If you were to come swab in here, you

would probably find some DNA from me, wouldn't you?
A. It depends how much the individual sheds skin cells, who's wearing the item. Some people you would find a lot of DNA on their collars; some people you wouldn't find very much at all.
Q. Okay. Now would you believe it would be more likely to find it on clothes than on a gun?
A. I think it would be equally likely for either item to contain DNA.
Q. So you're as likely to find DNA on guns as you would be on anything else?
A. Yes.
Q. And let me delve a little bit into the process that you used to do the test. As I understand it there's a kit that you have -- a test tube -- and put some liquid in there and put the swab in there. And it's able to take what little DNA you may have and amplify it so that you have a bigger sample to test from.
A. There is a process within the DNA testing that does make millions of copies of the specific regions of the DNA molecule that I'm looking at.
Q. So what you're doing is, like, for example, my collar. You're getting a small amount of DNA but you can amplify that to get a larger population.
A. Yes. I'm amplifying it or making millions of copies;

that would be similar of making Xerox copies on a copy machine. It's not changing the DNA in any way. It's just making it so I have enough that I can detect it with my instruments.

Q. Okay. And you did that in this case?

A. Yes, I did.

Q. But the bottom line here would be, you didn't find any DNA from my client on any of these items?

A. I found no DNA that I could make comparisons with on any of the firearms that I tested.

Q. So it would be, yes, you did not find any?

A. I did not make any comparisons to the DNA profiles I obtained.

Q. Did any of the analysis that you did, indicate my client had guns?

A. I never compared your client's DNA to the DNA profiles I obtained from the swabs from the firearms.

MR. BURGESS: I have no more questions for this witness.

THE COURT: Any redirect?

MR. MILLER: One question, Your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:

Q. Because you didn't find any usable samples, can you say one way or the other whether Kevin Smith's DNA was on the

guns?
A. No, I cannot.
MR. MILLER: That's all I have of this witness.
THE COURT: Any objection to this witness being excused?
MR. BURGESS: Your Honor, I might need to recall her; so yes.
THE COURT: Oh, okay. So you may step down, but you're still subject to subpoena.
Got a 10-minute witness?
MR. ZOLOT: No, Your Honor.
THE COURT: Members of the jury, we'll take our evening break at this time. As we said earlier, we'll start again at 9:30 in the morning. Between now and then people may be interested in talking to you about your experience today. But it's very important that you not talk about the case with anybody. And so even if when you go about your business and go home, family or friends ask you about your day, you just can't talk about the case.
Also keep an open mind. Because although you've heard from a number of witnesses, you haven't heard from all the witnesses. You haven't heard the instructions of the court. So keep an open mind until the end of the case. Don't talk about the case with yourselves or anyone else until you begin your deliberations.

With those instructions we'll call it a night and ask that you be back in the jury deliberation room sometime around 9:25, ready to come into court at 9:30. With that I'll say good night; see you in the morning.

(The jury was escorted from the courtroom at 5:53 p.m.)

THE COURT: Go ahead and have a seat.

We had a number of witnesses today, and I think what I want to do is have a charge conference in the morning before the jury comes in at 9:30. And so we haven't done it already, we'll give out proposed instructions tonight and schedule a charge conference -- if you all could come to my chambers -- the attorneys could come to my chambers at 8:45 in the morning. We'll have a charge conference at that time, either in our conference room or possibly across the hall in the grand jury room.

So 8:45 in the morning, charge conference. We should be able to do that and be ready to go at 9:30 with the continued presentation of evidence.

Anything from either side at this time?

MR. ZOLOT: Not from the Government.

MR. BURGESS: No, Your Honor.

THE COURT: All right. We'll see you all at 8:45 in the morning.

(Court is in recess for the day at 5:55.)

Charlotte-Mecklenburg Police Department Crime Laboratory

Complaint No: 20130815172800

Date of Report: 11/21/2013

Type of Case: Controlled Substances

Remarks: Processing - Negative.

Official Report

CONFIDENTIAL: This is an official report of the Charlotte-Mecklenburg Police Laboratory and is to be issued in connection with an official criminal investigation. Do not make public or reveal the contents thereof to any unauthorized person.
The form for this report is found to be in compliance with NCGS 90-95(g) and is hereby approved by the Attorney General.

Victims

Suspects

1 Kevin Smith

Control # 201326081

Item # 1

Description One magazine. Items received on 10/17/2013.

Processing request received from the Biology Section on 10/17/2013 and originated from D. Lail/3909 on 10/11/2013.

Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

Item # 2

Description One Ruger, Model Blackhawk, .357 caliber revolver. Serial number 31-28157.

Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

Item # 3

Description One Bryco Jennings, Model T380, .380 caliber semi-automatic handgun. Serial number 1433130.

GOVERNMENT EXHIBIT 44

KS_00001474

Charlotte-Mecklenburg Police Department Crime Laboratory

Complaint No: 20130815172800

Date of Report: 11/21/2013

Type of Case: Controlled Substances

Remarks: Processing - Negative.

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Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

Item # 4

Description Seven .380 caliber bullets.

Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

This report contains opinions, interpretations and conclusions. Detailed methodology on the process used to reach these results can be found in the CMPD Latent Fingerprint Unit Standard Operating Procedures and SWGFAST standards. Technical notes and data supporting the findings in this report are maintained within the laboratory case record.

Identified indicates that the fingerprint has been individualized to a specific source and contributor.
Dissimilar indicates that the listed individual has been eliminated as the contributor of the latent fingerprint impression.
Inconclusive indicates that no conclusion has been reached due to factors such as poor quality, clarity, or insufficient or missing information present within the latent print or known standards.
Received indicates the latent print is in our possession and no analysis has been performed.
AFIS Not Identified indicates the impression was searched through AFIS with no contributing candidate returned.

Authority Rodney D. Monroe
Chief Of Police

I certify this to be the results of the tests performed on these items.

Trantham, William D.

Latent Examiner

End of Official Report

Charlotte-Mecklenburg Police Department Crime Laboratory

Complaint No: 20130815172800

Date of Report: 11/21/2013

Type of Case: Controlled Substances

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Official Report

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Victims

Suspects

1 Kevin Smith

Control # 201325986

Item # 1

Description One Benelli, Model Super Vinci, 12 gauge semi-automatic shotgun. Serial number BH004525E. Items received on 10/17/2013.

Processing request received from the Biology Section on 10/17/2013 and originated from D. Lail/3909 on 10/11/2013.

Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

Item # 2

Description Two 12 gauge shotgun shells.

Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

Item # 3

Description One Remington, Model 700, 30-06 caliber bolt action rifle. Serial number B6454444.

Charlotte-Mecklenburg Police Department Crime Laboratory

Complaint No: 20130815172800

Date of Report: 11/21/2013

Type of Case: Controlled Substances

Remarks: Processing - Negative.

Official Report

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The form for this report is found to be in compliance with NCGS90-95(g) and is hereby approved by the Attorney General.

Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

Item # 4

Description Twenty-two 30-06 caliber bullets.

Also, one black ammunition tray and one Tasco branded rifle scope.

Results and Conclusions

Processed in sequence for latent prints with negative results. No latent prints of value developed.

This report contains opinions, interpretations and conclusions. Detailed methodology on the process used to reach these results can be found in the CMPD Latent Fingerprint Unit Standard Operating Procedures and SWGFAST standards. Technical notes and data supporting the findings in this report are maintained within the laboratory case record.

Identified indicates that the fingerprint has been individualized to a specific source and contributor.
Dissimilar indicates that the listed individual has been eliminated as the contributor of the latent fingerprint impression.
Inconclusive indicates that no conclusion has been reached due to factors such as poor quality, clarity, or insufficient or missing information present within the latent print or known standards.
Received indicates the latent print is in our possession and no analysis has been performed.
AFIS Not Identified indicates the impression was searched through AFIS with no contributing candidate returned.

Authority Rodney D. Monroe
Chief Of Police

I certify this to be the results of the tests performed on these items.

Trantham, William D.

Latent Examiner

End of Official Report

Charlotte-Mecklenburg Police Department Crime Laboratory

Complaint No: 20130815172800

Date of Report: 10/23/2013

Type of Case: Firearm by Felon

Remarks:

Official Report

CONFIDENTIAL: This is an official report of the Charlotte-Mecklenburg Police Laboratory and is to be issued in connection with an official criminal investigation. Do not make public or reveal the contents thereof to any unauthorized person.
The form for this report is found to be in compliance with NCGS 90-95(g) and is hereby approved by the Attorney General.

Items Received

The following item was retrieved from the General Biology Cage on 10/16/2013:

Control # 2013-32997
1. Buccal standard from Kevin Smith

The following items were retrieved from General Biology Storage on 10/17/2013:

Control # 2013-25986
100-1A. Swab from entire bolt of shotgun
100-1B. Swabs from entire stock of shotgun
100-1C. Swabs from the underside of lower receiver of shotgun
102-3A. Swab from entire bolt of rifle
102-3B. Swabs from entire stock of rifle
102-3C. Swabs from textured area of forestock of rifle

Control # 2013-26081
100-1. Swabs from base of magazine
100-3. Swabs from entire grip area of pistol
102. Swabs from entire grip area of pistol

Results and Conclusions

DNA was extracted, quantified, and when appropriate, amplified by the STR polymerase chain reaction (PCR) using the AmpFlSTR Identifiler Kit.

Control # 2013-32997
1. A DNA profile was obtained from the buccal standard from Kevin Smith.

Control # 2013-25986
100-1A. Due to an insufficient detection of human DNA for PCR analysis, the swab from the entire bolt of the shotgun was not profiled. The swab was consumed in analysis.

100-1B. Due to the limited value of the results obtained from the swabs from the entire stock of the shotgun, this data is not interpretable.

GOVERNMENT EXHIBIT 45

Charlotte-Mecklenburg Police Department Crime Laboratory

Complaint No: 20130815172800

Date of Report: 10/23/2013

Type of Case: Firearm by Felon

Remarks:

Official Report

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100-1C. The DNA profile obtained from the swabs from the underside of the lower receiver of the shotgun is a complex mixture and cannot be used for comparison purposes.

102-3A. Due to the limited value of the results obtained from the swab from the entire bolt of the rifle, this data is not interpretable. The swab was consumed in analysis.

102-3B. Due to the limited value of the results obtained from the swabs from the entire stock of the rifle, this data is not interpretable.

102-3C. The DNA profile obtained from the swabs from the textured area of the forestock of the rifle is a complex mixture and cannot be used for comparison purposes.

Control # 2013-26081
100-1. Due to the limited value of the results obtained from the swabs from the base of the magazine, this data is not interpretable.

100-3. Due to the limited value of the results obtained from the swabs from the entire grip area of the pistol, this data is not interpretable.

102. The DNA profile obtained from the swabs from the entire grip area of the pistol is a complex mixture and cannot be used for comparison purposes.

Comments

Control # 2013-32997 was transferred to the General Biology Cage to be returned to Property Control following examination.

Any remaining material from Control #'s 2013-25986 and 2013-26081, all DNA extracts, and any remaining extraction material associated with this case will be maintained in the laboratory and transferred to General Biology Storage.

Charlotte-Mecklenburg Police Department Crime Laboratory

Complaint No: 20130815172800

Date of Report: 10/23/2013

Type of Case: Firearm by Felon

Remarks:

Official Report

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The form for this report is found to be in compliance with NCGS 90-95(g) and is hereby approved by the Attorney General.

Authority Rodney D. Monroe
Chief Of Police

I certify this to be results of the tests performed on these items.

Rachael Scott

Scott, Rachael

Criminalist II

End of Official Report

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,	) DOCKET NO. 3:14-cr-17-6
vs.	)
KEVIN SMITH,	)
Defendant.	)

VOLUME II OF II

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. CONRAD, JR
UNITED STATES DISTRICT COURT JUDGE
JUNE 5, 2014

APPEARANCES:

On Behalf of the Government:

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Charlotte, North Carolina 28202

LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

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P R O C E E D I N G S

THURSDAY, JUNE 5, 2014:

(In chambers, charge conference. Defendant not present. Commenced at 8:45.)

THE COURT: Before we get started on the instructions -- I've been wrestling -- David, on cross you brought up that not guilty thing. It instinctively bothered me. I was trying to think why it did. And I've come to the conclusion that it's a false question. Because it's literally true when he pleads not guilty. He's pleading the truth. Because the burden is on the government to prove the case beyond a reasonable doubt. He's presumed innocent. At the moment he enters a not guilty plea, he's stating the truth. He's not lying at all. And so that -- it instinctively bothered me. But I couldn't put it into words. And that's the conclusion I've come to.

Now I don't think I'm going to do anything about it. If either side wants to argue it, they're free to do that. But I'm just going to let it alone. But I was thinking, you know, Well, does that mean if somebody pleads not guilty, then a jury later finds them to be guilty, that I should, in every case where a jury reaches a verdict -- or in every case where there's a plea or a verdict, find obstruction of justice because early on in the case someone lied, said they were not guilty? That -- that's obviously wrong.

And then it occurred to me that far from telling a falsity, he's actually stating a fact by pleading not guilty. So -- so I don't think I'm going to do anything with it. But certainly not going to allow that kind of questioning going forward. I wish I would have --

MR. BURGESS: Yeah, I won't forget it.

THE COURT: I wish I would have thought of it more quickly than I did. But, in any event, let's get into the instructions. Has everybody had a chance to read them?

MR. BURGESS: Yes, Your Honor.

MR. MILLER: Yes, Your Honor.

THE COURT: I have some tabs about where we have some questions about what we want to do. You all have been through this with me before. I'm going to give general instructions and offense specific instructions after you argue. So the first 20 -- 25, 27 pages will go before you guys. Some of these probably aren't consistent with the evidence and we'll strike them; others might be redundant and the less I talk the better. So some of these I'll only give if either side wants them. First page seem to be a little -- at least on my copy -- a little out of place. So we'll correct that. So as we walk through this, if everybody has any suggestions or changes --

MR. BURGESS: The caption I was looking down here --

THE COURT: The first major revision that I'm

contemplating is on page 9, which is the 404(b) instruction.

Let me hand out copies of a revised instruction that -- let me tell you, the normal 404(b) instruction says you can consider other act evidence for only 404(b) purposes. But I understand the offer of proof to be that the Government believes it's the same weapon possessed on a different occasion. And if not, it's intrinsic to the crime charged. If the jury believes it's a -- if the jury believes the weapon was possessed but it was a different weapon than that charged in the indictment, than the 404(b) kicks in. So that's what my revised instruction tries to do.

MR. BURGESS: Your Honor, one thing, if I may. But my understanding was, if it were not the same weapon but a different weapon, it would be offered for purposes of proving intent. Is that what was discussed?

THE COURT: Yeah. So intent, absence of mistake.

MR. BURGESS: I was wondering if given that we might parse out a reference to motive or opportunity, because that's not what they're claiming, and also, according to a plan or preparation. Because I think that's -- this is a difficult concept to comprehend for lawyers, I think.

THE COURT: I don't believe you just recited all of the purposes in the rule. It has to be offered for specific purposes. So what is the Government offering that for under 404(b)?

MR. MILLER: We're fine with Mr. Burgess's suggestion striking motive.

THE COURT: Taking out motive?

MR. MILLER: Also plan or preparation, and leaving it with state of mind or intent.

THE COURT: Absence of mistake?

MR. MILLER: Absence of mistake.

THE COURT: Very well. So as redrafted, are you all okay with it?

MR. ZOLOT: Yes, sir.

MR. MILLER: Yes, Your Honor.

THE COURT: Then the next change I have is on page 12. I don't think there were any recordings or transcripts.

MR. MILLER: No, sir.

THE COURT: Taking that out. On page 13.

MR. MILLER: Same thing.

THE COURT: Out. Page 17, I don't think that's called for, David, because it seems like -- at least so far as the only evidence of use of alcohol or addictive drugs was a time period before that, which the witness testified about.

MR. BURGESS: Yes, Your Honor. I agree with that.

THE COURT: So I'll take that out.

And then I don't know if the defendant intends to testify or not. And I'm not asking you to --

MR. BURGESS: No.

THE COURT: -- commit. You don't think he will?

MR. BURGESS: No.

THE COURT: So I'll tentatively go with the first paragraph on 23. And if that changes, we'll just readapt to the change. And so 24 will come out.

And then I don't have to do 25, 26 or 27 unless one of you -- either side wants it.

MR. BURGESS: Well, about the notes. Do they get to take them back here? I can't remember.

THE COURT: Yes. I told them in the beginning they're just an aid to their memory. I can rely on that or told them what I told them before.

MR. BURGESS: I think leave it in.

THE COURT: Page 25 or 26, in or out?

MR. ZOLOT: Page 26, I would ask to keep in, Your Honor.

THE COURT: All right. So then we go to the indictment. And the only real stylistic change is that I'm going to take out all references to Count 53 because it just --

MR. MILLER: One count, felon in possession charge.

THE COURT: You wonder what effect that will have on the jury in terms of what are we doing with the other 52 counts. So everywhere where it says Count 53, it will either be deleted or limited to Bill of Indictment.

MR. ZOLOT: Your Honor, I just want to point out the instructions we already went through. On page 4 it does say "53."

THE COURT: Oh, great. Yes. So we'll take that sentence out. Those two sentences. And so on page 4 it will read, "You are here to decide whether the Government's proved beyond a reasonable doubt the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense, not alleged in the indictment." Good catch.

So going to substantive instructions. Page 1 it will read: "I will now read the count -- I will now read the Bill of Indictment" in the first paragraph. Then the heading "53" comes out.

MR. ZOLOT: Your Honor, are you going to provide them with a redacted count?

THE COURT: We'll redact.

MR. ZOLOT: Will it say, "Count One" on the top? Will you edit over or just no count?

THE COURT: I think we'll just -- I may not even provide them with the indictment. I mean, there's no -- it's a one count. I'm going to provide them with the substantive instructions. I don't think they need the indictment.

MR. BURGESS: I would ask that you not do that, because it would be obvious --

THE COURT: Yeah, we'll keep it out.

MR. ZOLOT: Yes, sir.

THE COURT: All right. So take 53 out of the elements on page 5. That's the only change I have.

Are there changes from either side with respect to the substantive instructions?

MR. MILLER: No, Your Honor.

THE COURT: Any additional instructions from either side?

MR. MILLER: I have one, Your Honor, that I shared with Mr. Burgess here for the general instructions I've pulled, and I don't think Mr. Burgess has any objections to it.

THE COURT: Where in the general do you want that to come in?

MR. MILLER: Toward the end when we're talking about --

MR. ZOLOT: Expert testimony, perhaps.

MR. MILLER: Or after number of witnesses.

THE COURT: All right. So --

MR. MILLER: Between 20 and 21.

THE COURT: Okay. Any objection?

MR. BURGESS: No objection, Your Honor.

THE COURT: How about right after "Failure to cross-examine." Stick that in there.

All right. How long do you all think you need for

argument?

MR. BURGESS: Fifteen to 20 minutes -- 15 to 30.

THE COURT: I was thinking 15 or 20.

MR. BURGESS: Probably more like that -- maybe 15. I don't have much to say.

MR. MILLER: May we have 20?

THE COURT: I'll give each side 20. You don't have to use it all.

MR. BURGESS: All right.

THE COURT: So I think we're done unless anybody else has another instruction.

MR. BURGESS: One other thing, Your Honor, on the verdict sheet --

THE COURT: Yes.

MR. BURGESS: -- as to the Bill of Indictment charging --

THE COURT: Excellent catch too. So we'll change the verdict sheet. We do need to make sure that the exhibits that the Court has admitted, you all are in agreement that those are the exhibits that have come in, and if there's any issue we need to talk about it. So after we meet here, if you all would meet with Susan and run through those.

How much -- what are you forecasting how much more time in your case in chief?

MR. ZOLOT: Probably just one more witness, Your

Honor.

THE COURT: A long one?

MR. ZOLOT: No. I think no longer than the longest one we've had so far.

THE COURT: On direct. And not holding you to it, but just for scheduling purposes. Are you planning on putting up evidence?

MR. BURGESS: I may have a witness, Your Honor. I need to make an inquiry.

THE COURT: All right. So we're likely to be done this morning and arguing before lunch.

All right. Well, if you all would -- I'll get Susan to meet you all in the courtroom and run through the exhibits and be ready to go at 9:30.

Charge conference Concluded at 8:53.)

COURT CALLED TO ORDER AT 10:06:

(Defendant present with counsel.)

THE COURT: Good morning, everyone.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: All right. Apparently we had some traffic issues. But I understand that we're ready to go -- both sides?

MR. ZOLOT: Yes, Your Honor.

MR. BURGESS: Yes, Your Honor.

And I wanted to ask the Court, Your Honor -- I would

ask the Court, kindly, to allow me to voir dire this witness to see what he's going to say. I do not believe that he will offer testimony that he saw a silver and black handgun. Rather his testimony would be inconsistent with a silver and black handgun. Therefore it won't be within the parameters of the Court's ruling, but the jury will have already heard it.

THE COURT: What's the proffer from the government as to the testimony?

MR. MILLER: Certainly not that it's inconsistent with the silver and black handgun. This defendant -- my understanding is he'll testify that he only saw the handle, and that the handle of that gun was black. And our contention would be that it's up to the jury to decide whether or not that's the same handgun. And that the Court's instruction --

THE COURT: That's consistent with your proffer to me when we made this ruling.

Mr. Burgess, I'm admitting this. I limited the number of witnesses, but I'm admitting the evidence of recent gun possession on either of two theories.

One is, that it's intrinsic to the crime. That is, that it's the same gun and therefore it is a continuous possession.

And in the alternative, I'm admitting it as 404(b) evidence, that it's evidence of an earlier act offered to prove absence of mistake and intent concerning the charged

crime.

And so I believe that this evidence fits within the Court's earlier ruling based upon the proffer.

Whether the jury believes it's the same gun or a different gun, they can consider it for one or the other purposes and I will instruct them accordingly.

MR. BURGESS: Yes, Your Honor. Just so I can make my -- I looked at it, Your Honor. I didn't fully understand the parameters. But when I looked at the gun, the handle of it's black on the side but it's silver and chrome all around. So the handle itself is black and silver on that one. But the one he's going to talk about, apparently, is totally black. So that's why I say that.

THE COURT: All right. I note your objection and you have it, but I'm going to permit the testimony.

MR. ZOLOT: Your Honor, if I may, just one other brief request.

THE COURT: Very briefly. We have this jury --

MR. ZOLOT: Yes, sir. I know, I know. Your Honor. I apologize.

Your Honor, we intend, on rebuttal -- we've agreed to -- Mr. Burgess and I -- to introduce some redacted documents that came from the defendant's house. And they're heavily redacted because they have a lot of prejudicial information because they're court documents. One's a bond

paper and one's, like, a little court document.

I would ask the Court's permission to refer to them as -- to explain them to the jury -- either the Court give an instruction or that I be allowed to just explain --

THE COURT: That looks really redacted.

MR. ZOLOT: It is, Your Honor. It's heavily redacted. It's going to be strange in the current form without maybe some explanation to the jury that the Court has ordered that there's irrelevant information in it.

THE COURT: I can do that or you can put the agent up that discovered it and describe the documents without the prejudicial stuff.

MR. ZOLOT: Yes, sir. I would like the actual documents in because --

THE COURT: All right. So you have a proposed limiting instruction?

MR. ZOLOT: I would ask the Court to just instruct the jury that you have ordered the parties to redact this document because it contained irrelevant information that the jury should not consider, and that's why the documents have been blacked out in certain ways.

THE COURT: What says the defense?

MR. BURGESS: Your Honor, would you say "irrelevant personal information"?

THE COURT: Sure. All right.

MR. ZOLOT: Thank you.

THE COURT: Thank you. Call the jury.

(The jury was returned to the courtroom at 10:10.)

THE COURT: Good morning, members of the jury.

THE JURY: Good morning.

THE COURT: I do want to start out by apologizing to you for the late start. I can tell you that the Court and the attorneys were here early working on matters that would make the rest of the trial proceed efficiently. And so I hope that the total use of your time is more efficient than it would have been, but for the work we did this morning. But I told you we would start at 9:30, and we didn't. And I want to apologize to you. We're ready to go now. And I thank all of you for your conscientious attention yesterday, and your promptness at showing up this morning. And without further ado, we'll start back into the evidence.

The Government call their next witness.

MR. MILLER: The Government will call Olwin Brown.

OLWIN BROWN, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MILLER:

Q. Good morning.

A. Good morning.

Q. Please start off by stating your name and spelling it for the record.

A. Olwin Brown. O-l-w-i-n. Brown, B-r-o-w-n.
Q. And Mr. Brown, there's a microphone there but I'm going to need for you to speak up, please, so that we can all hear you.
Mr. Brown, how old are you?
A. 22.
Q. And where do you live?
A. In Greensboro.
Q. Was there ever a time that you lived in Charlotte?
A. Yes.
Q. And when was that?
A. 2011/2012.
Q. And do you currently have a job?
A. Yes.
Q. Where is that?
A. A cleaning service.
Q. And where do you work?
A. In Concord.
Q. Now, Mr. Brown, have you pled guilty in a federal case?
A. Yes.
Q. And what is it that you pled guilty to?
A. Bank fraud.
Q. And, Mr. Brown, are you here testifying today based on an agreement that you entered into in connection with that plea?
A. What do you mean?

Q. Are you here testifying today consistent with the plea agreement?
A. Yes.
Q. And what is your understanding of the terms of that plea agreement?
A. That I testify truthfully and lawfully.
Q. And what happens if you don't tell the truth?
A. Then my plea can get revoked. Then I can do more time.
Q. And I'm going to ask you just to make sure you keep your voice up for us.
A. Okay.
Q. Do you know someone named Kevin Smith?
A. Yes.
Q. Do you see that person in the courtroom today?
A. Yes.
Q. Can you point him out for me and indicate something that he's wearing?
A. (Indicating.) He's right there (indicating) with the white shirt.

MR. MILLER: Will the record reflect that the witness has identified the defendant?

THE COURT: It will.

Q. Now, Mr. Brown, when did you first meet Kevin Smith?
A. Like, beginning of the summer.
Q. And what summer was that?

A. 2012.
Q. Summer of 2012?
A. Yeah.
Q. And I'm still having a little trouble hearing you.
A. Yes.
Q. All right. Thank you.
How often would you typically see Kevin Smith?
A. About three to four times a week, probably.
Q. Fair to say you guys were friends?
A. Yes.
Q. And on these times when you would periodically see Mr. Smith, where was it that you would see him?
A. His house or the gas station.
Q. And explain to the jury why you would see Kevin Smith at the gas station. What was going on?
A. We were just meeting up.
Q. Do you also know the defendant's girlfriend?
A. Yes.
Q. And what is her name?
A. Mia.
Q. Now during the time that you've known Mia, was she pregnant?
A. Yes.
Q. And would you say that you're also friends with Mia?
A. Yes.

Q. Now in the time that you've known Kevin Smith, have you been to his house?
A. Yeah.
Q. And how many times would you say you've been to Mr. Smith's house?
A. Like 10 times.
Q. And where does Kevin Smith live?
A. Off of Carlyle, I think. Carlyle.
Q. And where is that in Charlotte?
A. Off of Freedom.
Q. How do you know that Mr. Smith lived on Carlyle?
A. Well, I would meet him there sometimes.
Q. Did he refer to that as his house?
A. Yes.
Q. And describe for the jury what type of house it is.
A. The one level house, brick house.
Q. I'm going to show you what's already been entered into evidence as Government's Exhibit 1. It will come up there on your monitor. I want you to take a look at that.
What do you see there in that picture, Mr. Brown?
A. The house.
Q. And when you say "the house," whose house?
A. Kevin's house.
Q. All right. Now, Mr. Brown, have you also been inside Kevin Smith's house?

A. Yes.
Q. And what part of the house were you in when you went inside Kevin's house?
A. Just the front. I've never been into anything else.
Q. And again, I'm sorry to keep asking you --
A. Just the front.
Q. Thank you.
A. I've never been anywhere else.
Q. And describe -- describe his house for me.
A. It's two couches and a TV.
Q. And what color are these couches?
A. Like, a brown.
Q. A dark color?
A. Dark. Yeah, dark brown.
Q. Does anyone else live at the defendant's house, to your knowledge?
A. Mia and the kids, that's it.
Q. Whose kids are those?
A. Mia's.
Q. All right. I now like to ask you if you've ever seen the defendant Kevin Smith with a gun?
A. Yes.
Q. And on how many occasions have you seen Mr. Smith with a gun?
A. Only three times.

Q. All right. I'm really --
A. Three times.
Q. I'm really having trouble hearing you.
A. Three times.
Q. And maybe you could lower that screen down for me too. Thank you.
So beginning with the first time you saw Kevin Smith with a gun. Where were you?
A. At the house.
Q. At the house on Carlyle?
A. Yes.
Q. And explain where you were and where the defendant was when you, during --
A. We were just meeting up and it was sitting there, like, on his -- by his leg; kind of tucked by his leg.
Q. All right. So where -- where was Kevin Smith?
A. Sitting down.
Q. On one of the couches?
A. Yes.
Q. And where were you?
A. Sitting down.
Q. And where, in relation to Mr. Smith, was the gun that you saw?
A. Excuse me?
Q. Where was -- where was the gun in relation to Mr. Smith?

A. Right by his leg -- right leg.
Q. And what part of the gun were you able to see at this time?
A. Just the handle.
Q. What color was the handle of the gun?
A. Black. I think, black.
Q. And could you tell what type of gun this was?
A. No, from my knowledge a 9 or --
Q. All right. Moving to the second time that you saw the defendant Kevin Smith with a gun. Where were you then?
A. We just meet up at the gas station.
Q. And where was it that you -- which gas station was it if you remember?
A. I think the BP.
Q. And where was that BP in Charlotte?
A. Off of Freedom.
Q. Is that near to the defendant's house?
A. Yeah, in the area.
Q. And where was the defendant at that gas station when you saw him?
A. In the car.
Q. Do you remember what kind of car he was driving?
A. A truck.
Q. And where were you?
A. Just standing out -- standing right outside the truck.

Q. And explain to the jury what it is that you saw?
A. Just the handle of the gun, once again, with -- and it was black.
Q. And where was the gun in the car?
A. Right by the leg by the console and the chair.
Q. And did this appear to be the same gun that you'd seen the defendant with in his house?
A. Yes.
Q. All right. Let's move to the -- did you say -- I couldn't hear your answer before.
A. Yes.
Q. Move to the third incident when you saw the defendant with a gun. Where was that?
A. The gas station.
Q. Was this the same BP gas station?
A. No.
Q. What gas station was this?
A. Marathon.
Q. And does that Marathon gas station have another name people refer to it by?
A. Yeah, the L.
Q. All right. Now where were you when you saw the gun this time?
A. Outside.
Q. And where was the defendant?

A. In the car.
Q. And explain to the jury what it is that you saw.
A. Same as last time, it was in the same spot on the right -- right by his leg and the console.
Q. And did you see this as the same gun that you'd seen on the other two occasions?
A. Yes.
Q. All right. Now in addition to those three occasions when you've seen the defendant with a gun, did there also come a time when you talked to him about a different gun?
A. Yes.
Q. And explain to the jury where did that conversation take place?
A. Outside the house.
Q. And is this, again, the house on Carlyle?
A. Yes.
Q. And explain to the jury how that conversation occurred.
A. We were just having a talk about -- it's a lot of wires around there. So we was talking about the distance. And it was squirrels running around. And he explained to me about a gun that had a scope that he could go from a distance with it, right. And that's about it.
Q. And did he identify the type of that gun?
A. Well, not quite, just the scope he used.
Q. And what happened next?

A. He then got the scope and we looked at it and looked through it.
Q. Where did he get that -- get the scope from?
A. The house.
Q. All right. I'm going to show you, at this time, what's previously been entered into evidence as Government's Exhibit 19. And for the record I'm actually going to just refer to a part of this exhibit that I've identified as 19A for the record.

MR. MILLER: May I approach the witness, Your Honor?

THE COURT: You may.

Q. Now I'm showing you here what we've marked as 19A for identification. Do you recognize this?
A. Yes.
Q. What is this?
A. The scope.
Q. Is this the scope that you discussed with the defendant that he retrieved --
A. Yes.
Q. -- from the house?

And as part of that conversation, what were you talking about with the squirrels and the scope? What were you -- what was the defendant suggesting that scope would allow you to do?
A. Just see from a far distance.
Q. All right. Did there ever come a time that you went on a

trip to Atlanta with the defendant?
A. Yes.
Q. And when was that, approximately?
A. I think around spring time, going on the end -- fall -- spring.
Q. And was that last year?
A. 2000 -- 2012 -- 2013.
Q. 2013?
A. Yes.
Q. So last --
A. Last.
Q. -- spring?
A. Yes.
Q. All right. Who else went on that trip to Atlanta?
A. Me, Kareem, his cousin, a boy named Stanley, two other guys, and a guy named Chris.
Q. And what were you guys going to do on that trip?
A. We was going for -- it was supposed to be at the GZ bash that time, all right. So that was the reason we was going.
Q. And --
A. It's a birthday event.
Q. Whose birthday event was it, do you remember?
A. GZ.
Q. Did you ultimately end up going to any kind of concert or club?

A. No, we didn't. It wasn't what we expected, so we left.
Q. And when you left -- did you all drive back in the same car or --
A. No, we've always had different cars.
Q. And who were you riding with?
A. Kareem.
Q. Do you remember who was riding with the defendant or anyone or how he was driving?
A. Yeah, his cousin.
Q. And you all were in separate cars. But did you drive in a caravan or as a group?
A. Well, we all drove together but in separate cars.
Q. All right. Now on the return trip when you were driving in his caravan, did the group have an encounter with law enforcement?
A. At one point I recall we did. We was coming down the highway and a cop started following on the highway too.
Q. All right. And what happened next?
A. Kevin pulled over and we got off the next exit.
Q. Do you remember what kind of car he was driving at the time?
A. Not quite sure.
Q. Okay.
A. I know it was an SUV.
Q. All right. And you said that you pulled off at the next

exit. Did you ever have a conversation with the defendant at that point?

A. Yeah. Well, he was just saying that he got off because he had a 9 and didn't want to get into any trouble.

Q. Again, I'm really having trouble hearing you.

What was it that the defendant said when you pulled off at the next exit?

A. That he had his 9. He didn't want to get into any trouble.

Q. And what did you take that to mean?

A. That he had his gun on him.

MR. MILLER: No further questions at this time.

THE COURT: Any cross?

MR. BURGESS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. BURGESS:

Q. So you're saying it was a 9-millimeter that you claim you saw -- that you claim that he mentioned to you, correct? Not a .380?

A. Yes.

Q. And that the handle on it was black?

A. Yes.

Q. And by the handle you mean the part that you hold?

A. Yes.

Q. The part that your fingers are touching?

A. Yes.

MR. BURGESS: Okay. May I approach the witness, Your Honor?

THE COURT: You may.

MR. BURGESS: It's going to be Exhibit 18.

Q. It's not that one, is it? Well, let me ask you this: The handle on that is not black.

A. Right.

Q. So it wasn't this gun that you saw him with?

A. No.

Q. Okay. This is not a 9-millimeter either, is it?

A. I'm really not sure, because I don't know a lot about guns.

Q. And just to be clear, the gun that you claim you saw him with, it was the same one every time? So on no occasion --

MR. ZOLOT: Objection.

MR. BURGESS: -- would it have been that gun?

THE COURT: Overruled.

THE WITNESS: Yes.

Q. All right. Now you just pled guilty -- what was it, yesterday -- went to court and pled guilty yesterday?

A. Yes.

Q. Now let me ask you: When were you originally charged?

A. Twenty-fourth of January.

Q. Okay. And your case was getting ready to go to trial,

wasn't it?
A. No.
Q. Wasn't it on the trial calendar for June 2?
A. That's the original date that everybody got.
MR. BURGESS: Okay. Well -- may I have a moment, Your Honor?
THE COURT: You may.
Q. Now if I were to show you a copy of a docket report showing that the last time your case was continued, it was continued until June 2 of 2014.
A. Right.
Q. Would that refresh your recollection that your case was, in fact, set for trial on June 2, 2014?
A. It was continued. But it was continued because they changed the date. They changed the date to about -- it was more than just my name that was on there. So it was not -- it wasn't a personal date change. It had about six people's names on there that was -- that was on the new date.
Q. Okay. But just to be clear, when you said "the new date," the new date was June 2? I'm not talking about who else, just you. Everybody's date would have been June 2, including yours?
A. Right.
Q. So you were supposed to go to trial -- perhaps there was some other people as well, though, on June 2?

A. Right.
Q. And you entered into a plea agreement -- okay. So -- and you entered into a plea agreement on -- at least it was filed on May 23, correct?
A. Yes.
Q. Okay. And do you remember when you signed that?
A. The next day.
Q. Pardon me?
A. The next -- my trial for my signing was yesterday. But I've been -- signed my plea.
Q. But I'm saying the plea agreement was filed with the Court -- if I show you a copy of the docket report showing you that the plea agreement was filed on May 23, would that refresh your recollection?
A. Right.
Q. So you do remember that your agreement was filed on 23 of May?
A. Right.
Q. Then you came to court and pled guilty on -- well, yesterday.
A. Right.
Q. Right? And you were aware that your case was unlikely to get continued again, weren't you?
A. Yes.
Q. In other words, you were up to the end. You held out to

the very end.

MR. MILLER: Objection, Your Honor.

THE WITNESS: Due to my lawyer.

THE COURT: Overruled.

Q. Well, but your lawyer did what you wanted him to do, didn't he -- or her?

MR. MILLER: Objection.

THE COURT: Sustained.

Q. Well, let me ask you: Your lawyer's acting on your behalf?

A. Right.

Q. So when I say -- so when you say your lawyer did it, that's just like you doing it?

A. No. My lawyer was looking for my best interest.

Q. Okay. How many times would you say you were interviewed by the police or prosecution in connection with the case that you have, that you pled guilty to?

A. Twice.

Q. Twice? And when was the first time?

A. May.

Q. May of this year?

A. Yes.

Q. Oh, you're talking about with regard to your testimony today or about your case?

A. My case.

Q. About the facts of your case?
A. Yes.
Q. Okay. And then when was the second time?
A. About two days after.
Q. Okay. All right. How was it that -- well, let me ask you: During any of those meetings, was there any discussion about what you testified to today -- talked about?
A. No.
Q. Okay. All right. So it was after that, that you spoke with someone about what you've been saying here today, correct?
A. No.
Q. It was before that?
A. You mean, oh -- after my -- yes.
Q. I'm sorry. Was it -- when did you talk to him about what you're testifying about today?
A. After my -- after me.
Q. After what?
A. After I spoke about me.
Q. Okay. So that would have been quite recently then?
A. Yes.
Q. Okay. Now, are you sure you didn't talk to the police, like, right shortly after you got arrested in this fraud case you pled guilty in?
A. No.

Q. You never gave any statements at all, never spoke to anybody?
A. No.
Q. They never came and asked you any question about what they wanted to know your involvement in the case was?
A. No, that's why I have a lawyer.
Q. Now the case that you -- well, let me go back one thing. You said you pled guilty to bank fraud.
A. Yes.
Q. Isn't it correct that you actually pled guilty to conspiracy to commit bank fraud?
A. Yes, that's what -- I agree.
Q. And how many other things were you indicted for in that case, other than the conspiracy?
A. The amount of money. The amount of money.
Q. Pardon me?
A. The amount of money.
Q. Yeah. You were also convicted, were you not, of -- I'm sorry, not convicted -- but charged, rather, of three additional counts, each of bank fraud?
A. Right.
Q. Each of those carrying a 30-year maximum sentence?
A. Right.
Q. And as a part of your plea agreement in which you agreed to testify in court if asked to do so, you are having those

additional three charges dismissed, correct?
A. Correct.
Q. Okay. And then you also have the added possibility of having the government come to court and ask the judge to give you a reduced sentence in exchange for your testimony today?
A. Correct.
Q. Right. And then would you also have the opportunity -- well, let me ask you: Do you know what a Rule 35 is?
A. No, I don't.
Q. Okay. Do you understand a Rule 35 means you may have an opportunity --
MR. MILLER: Objection.
THE COURT: Sustained.
Q. Any other benefits that you expect to get out of this plea agreement from your testimony?
A. No.
Q. Now, in what you pled guilty to, the fraud -- the fraud is essentially making false statements to get money, isn't it?
A. Yes.
Q. Basically, so just lying for money?
A. No, not like that.
Q. Well, is it making false -- you said it's making false misrepresentations?
A. No.
Q. You're saying "This is my check --"

MR. MILLER: Objection.

MR. BURGESS: -- on an account which really is not, correct?

THE COURT: Overruled.

THE WITNESS: No.

Q. So -- what is it then?

A. It's a -- if you're saying that I'm saying that "This is my check," how would you know if it's not my check?

So at the time it's not a false representation. Because at the time it's my check and I am putting it there.

So you wouldn't say it's false until after the fact, which then would make it fraud.

So at the time of being done, it's not fraud until after the fact.

Q. So are you saying that you were taking checks that actually were your checks and putting them into the bank?

A. No.

Q. They were stolen checks?

A. No.

MR. MILLER: Object to this line of questioning, Your Honor.

THE COURT: Overruled.

Q. They weren't stolen?

A. No.

Q. Well, whose checks were they?

A. Peoples.
Q. Okay. Well, what people?
A. Anybody.
Q. Like, anybody that was stolen from?
A. No, that would give them to me.
Q. Excuse me?
A. That would give them to me.
Q. But they had stole them?
A. No, it was their's.
Q. So people gave you checks?
A. Like I said, nothing is fraud until after the fact. So, yes, it was given to me. But after the fact, then it becomes fraud. As of the time it was not.
Q. So you're saying it's only a lie if you get caught?
A. No.
Q. Now tell me this: Tell me about what narcotics you used in the past -- drugs.
A. Marijuana.
Q. Okay. And fair to say you were smoking marijuana when you went down to this party?
A. No, I wasn't.
Q. Okay. At no time when you left from here in Charlotte, all the way down to Atlanta, the entire time you were down there and all the way back, you didn't smoke any marijuana at one point in time?

A. No.
Q. When would you -- would it be fair to say people sometimes smoke marijuana when they go to parties and concerts and things?
A. We never went.
Q. Had you gone to the concert, would you have smoked marijuana?
MR. MILLER: Objection to the relevance.
THE COURT: Sustained.
THE WITNESS: No.
THE COURT: No. When I sustain, you don't answer. Jury disregard the answer.
Q. When would have been the last time you used marijuana?
A. It's been a while now.
Q. Okay. How long is that?
A. About six months.
Q. Did you ever smoke marijuana at the L -- BP gas station?
A. Yes.
Q. Okay. And on some occasions when you said you observed my client there, you were smoking marijuana?
A. No.
Q. Do you believe your perception of things around you is as clear when you're smoking marijuana as it is when you're not?
A. Yes.
Q. It's just as clear?

A. Not as clear.
Q. Okay. But you feel it makes it -- is it -- does it make you any less likely to perceive things accurately?
A. You mean, does it -- marijuana is not a hallucination drug. So it cannot make you see differently. So it's not going to make me hallucinate or see something different from what I can see if I wasn't on marijuana.
Q. How -- would you say it affects your ability to recall events?
A. No.
Q. You can remember stuff just as well if you're high as when you're not high?
A. Yes.
Q. Now, did you say there was no table in that house when you went in there?
A. No, there was a table.
Q. Now, did anybody show you any pictures of the inside of that house?
A. No.
Q. You've never seen any photos at all of it?
A. No.
Q. Other than the one that you were shown in court today of the front of it?
A. That was outside.
Q. When did you first see that?

A. Just now.
Q. Do you have any experience with anybody else that's ever pled guilty in federal court, any family, friends, rumors you've heard of?
A. No.
Q. Now -- but in the interest to make clear, that gun that I showed you, that's not the gun that you saw there?
A. The silver one?
Q. Yeah.
A. No.

MR. BURGESS: No more questions.

THE COURT: Any redirect?

MR. MILLER: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:
Q. Mr. Brown, why did you plead guilty so late in this case?
A. Because of my lawyer.
Q. And when you pled guilty, did you plead guilty because you are in fact guilty of bank fraud?
A. Yes.
Q. And as part of that plea, did you accept responsibility for what you've done?
A. I have.
Q. All right. Now, have I or anyone else in the government made any promises to you about your sentence?

A. No.
Q. And to your understanding, whose decision is it, what your sentence will ultimately be?
A. The judge.
Q. And have I or anyone else in the government suggested to you what your testimony should be here today?
A. No.
MR. MILLER: No further questions, Your Honor.
THE COURT: Any recross?

RECROSS-EXAMINATION

BY MR. BURGESS:
Q. You understand that the judge will ultimately determine your sentence. But you also understand, do you not, that the Government has the ability to go in and file what's called a 5K motion --
MR. MILLER: Objection.
THE COURT: Overruled.
Q. -- and say, "This is what we think the sentence should be"?
A. No, I did not. No, I don't.
Q. Well, you need to talk to your lawyer about that.
MR. MILLER: Objection.
THE COURT: Sustained.
Any objection to this witness being excused?
MR. MILLER: No, Your Honor.

MR. BURGESS: No, Your Honor.

THE COURT: You may step down; be excused.

Call your next witness.

MR. ZOLOT: Your Honor, at this time we would ask to read the stipulation.

THE COURT: Very well.

MR. ZOLOT: "United States versus Kevin Smith. The parties agree and stipulate that prior to 2012, the defendant Kevin Smith had been convicted in a court in North Carolina of a crime for which the maximum term of imprisonment exceeded one year, and that he has not been pardoned or had his civil rights restored."

And that is a stipulation by the parties, Your Honor.

THE COURT: Very well. Next witness.

MR. ZOLOT: Your Honor, excuse me one second.

Your Honor, the Government rests.

THE COURT: Very well. May I see the attorneys at sidebar.

(Bench conference as follows:)

THE COURT: I was actually going to see if we can do the Rule 29 at sidebar, but I think we probably should do it -- send the jury back and hear from you all. So that's what we'll do.

MR. BURGESS: It will be short.

THE COURT: You want to do it here?

MR. BURGESS: No, I want him to know about it.

THE COURT: We'll excuse the jury for motions.

MR. ZOLOT: Thank you, Your Honor.

THE COURT: Hang on a second. Are you planning on putting up evidence --

MR. BURGESS: No, Your Honor. Other than --

THE COURT: -- if --

MR. BURGESS: -- what gets admitted --

THE COURT: -- Rule 29 is --

MR. BURGESS: Yeah, I'm kind of -- no.

THE COURT: All right.

MR. BURGESS: Other than those documents.

(Bench conference was concluded.)

THE COURT: Members of the jury, there are a couple of matters that we have to take up outside your presence, and so we're going to have a short morning recess at the close of the Government's case.

Keep an open mind. Don't talk to each other about the case. And we'll see you in a few minutes. Thank you.

(The jury was escorted from the courtroom at 10:47.)

MR. ZOLOT: Your Honor --

THE COURT: Mr. Burgess, any motions?

MR. BURGESS: Yes, Your Honor. We have a Rule 29 motion, Your Honor. Based on the circumstantial -- Rule 29

motion, Your Honor, the evidence is circumstantial, unreliable. We would ask the Court to enter a judgment of acquittal.

THE COURT: I think taking the evidence in the light most favorable to the Government, as I'm required to do at this stage, it does seem to me that there's been sufficient evidence showing where a reasonable jury could conclude that Mr. Smith was in constructive possession of firearms in the house that he lived in. The jury doesn't have to come to that conclusion, but I think there is evidence sufficient for them to come to that conclusion, if they so choose.

I do want to ask the Government whether there was any evidence of interstate nexus with respect to the ammunition charged in the --

MR. ZOLOT: There was not, Your Honor.

THE COURT: So I'm going to grant a Rule 29 with respect to the ammunition; allow the case to go forward on the firearms charged in Count 53.

Anything further from either side?

MR. ZOLOT: No, Your Honor.

MR. BURGESS: No, Your Honor.

THE COURT: Any dispute between the parties as to the admission of exhibits in the defendant's case in chief?

MR. ZOLOT: No.

THE COURT: All right. So I'll call back the --

you've already rested in the presence of the jury. I'll call the jury back and ask the defense if they have any evidence they wish to put on at this time.

MR. BURGESS: Then we'll just --

THE COURT: Just --

MR. BURGESS: -- tell them we have exhibits, right?

THE COURT: Just move admission -- or I guess those exhibits are already --

MR. BURGESS: They're already admitted, but I guess we need to let them know --

THE COURT: Yeah. All right. So call the jury.

MR. ZOLOT: Your Honor.

THE COURT: I'm sorry.

MR. ZOLOT: I apologize, Your Honor. Does the Court inquire of the defendant?

THE COURT: I'm glad you raised that. I would like to do that.

Mr. Burgess, if you consent, I would like to ask Mr. Smith about his options concerning testifying or not testifying, and whether he's aware of those.

MR. BURGESS: Yes, Your Honor.

THE COURT: Mr. Smith, would you please stand up?

THE DEFENDANT: Yes, sir.

THE COURT: I want to talk to you just to make sure that you understand your options with respect to either

testifying or not testifying. I think you've heard me tell the jury that you have a constitutional right not to testify. You don't have a burden in this case. And if you choose not to testify they can't hold that against you. But whether you testify or not is a personal choice of yours. You can choose to testify if you wish. You can choose not to testify. And if you made that choice I would again instruct the jury they can't hold that against you. But that's your choice to make.

I know you've talked to your attorney about that choice, but I want to make sure that you understand you can choose one or the other. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And have you made that choice?

THE DEFENDANT: Yes. I will not testify.

THE COURT: You don't want to testify?

THE DEFENDANT: No, sir.

THE COURT: I will instruct the jury at the end of the case that that is your constitutional right.

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you. Anything further?

MR. BURGESS: No, Your Honor.

MR. ZOLOT: Your Honor, I just want to also put on the record that we had extended plea offers to the defendant in the past. Based on recent case law, I just wanted to make

sure that the Court was aware that those offers had been rejected prior to the trial today.

THE COURT: And I guess I would make inquiry to Mr. Burgess as an officer of the court as to whether you presented any offers from the Government to your client?

MR. BURGESS: Yes, I did, Your Honor.

THE COURT: All right. Thank you. All right. Let's call the jury.

(The jury was returned to the courtroom at 10:51.)

THE COURT: Members of the jury, before we took a morning break, the government had rested its case.

Mr. Burgess, does the defense have any evidence at this time?

MR. BURGESS: Your Honor, we have the Defendant's Exhibit No. 1, Your Honor, which has been previously admitted. It is a collection of bills in Mr. Smith's name at a residence of 5104 Snowdrop Drive, Piedmont Natural Gas dated between March of 2013, until -- I believe it's April of 2014, Your Honor.

THE COURT: Very well.

MR. BURGESS: That will be it.

THE COURT: Defense rests?

MR. BURGESS: We rest, Your Honor.

THE COURT: Any rebuttal from the government?

MR. ZOLOT: Yes, Your Honor. We would ask to call

Detective Derrick Lail back to the stand.

THE COURT: Very well. Detective Lail, I'll remind you that you're under oath.

THE WITNESS: Yes, sir.

DERRICK LAIL, GOVERNMENT WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. ZOLOT:

Q. Detective Lail, I want to talk to you about a few additional matters.

A. Yes, sir. Can you hear me okay?

Q. Mr -- Mr. Burgess just introduced some records for a address on Snowdrop Trail.

A. Yes, sir.

Q. Are you familiar with those records that Mr. Burgess introduced?

A. I am.

Q. And I want to show you --

MR. ZOLOT: May I approach, Your Honor?

THE COURT: You may.

Q. -- show you what's been marked as Government's G. Are you familiar with those records?

A. I am.

Q. And did you obtain those records from Duke Power?

A. I did.

Q. And they -- as far as you understand it, to be fair and

accurate records?
A. Yes, sir.
Q. And what address are those records for?
A. 5104 Snowdrop Drive, Charlotte, North Carolina.
Q. Would it be fair to say that that's the same address as Mr. Burgess's records that he introduced?
A. The Piedmont Natural Gas? Yes, sir.
MR. ZOLOT: I would offer G into evidence and ask to publish, Your Honor.
THE COURT: G?
MR. ZOLOT: G.
THE COURT: Any objection?
MR. BURGESS: No, Your Honor.
THE COURT: Let them be admitted. You may publish.
(Government's Exhibit No. G was received into evidence and published.)
Q. Detective Lail, the jury's just seeing them for the first time, so...
Are these the records I just handed you? Is this a digital copy of the records?
A. Yes, it is.
Q. Okay. I want to go to the second page because it makes everything clear. We're going to turn that to the screen.
Who is the person listed as the -- listed for Duke Energy for this address?

A. The account is in the name of Wakeisha D. Ferguson.
Q. And again, the address? Just if you could read it for the record.
A. 5104 Snowdrop Drive, Charlotte, North Carolina 28215.
Q. Thanks. And if you could just look at the records and tell the jury, what time period are these records for that Ms. Ferguson is the only person listed as the person living at that address?
A. I'm holding June 2013, July 2013, August 2013, September 2013.
Q. Okay. And are those subsequent bills for that address?
A. Yes.
Q. Okay. Now, Detective, when you conducted the search of Carlyle Drive -- 4017, on August 15, did you find any documents with Mr. Smith's name on them in the house?
A. I did.
Q. I want to show you -- I want to show you on your screen, Government's double A -- AA. I know this -- do you recognize the document?
A. I do.
Q. Okay. Have you seen the original of this document?
A. I have.
Q. And is this document in a redacted form?
A. It is.
Q. Okay. Do you recognize the -- this to be -- do you

recognize the original of this?
A. I do.
Q. And where was this document found?
A. This document was on the shelf of the coffee table in the living room at 4017 Carlyle Drive.
Q. Okay. And is it the -- what was the date you did the search again?
A. August 15, 2013.
Q. And other than the redactions, is this document in the same or similar condition?
A. It is.

MR. ZOLOT: I'd offer AA into evidence, Your Honor.

THE COURT: Any objection?

MR. BURGESS: No objection, Your Honor. Pardon me.

THE COURT: Let it be admitted. And I'm going to -- are you offering to publish it as well?

MR. ZOLOT: I would like to, Your Honor.

THE COURT: Ladies and gentlemen of the jury, Government's Exhibit AA is a heavily redacted document. The information that is blacked out was deemed by the Court to be irrelevant personal information of the defendant. And so that information has been blacked out. And I wanted to instruct you to that effect. You should not consider the blackout in any way. It is just court ordered redaction of irrelevant personal information.

MR. ZOLOT: May I publish, Your Honor?

THE COURT: You may.

(Government's Exhibit AA was received into evidence and published.)

Q. Now, if you would, can you see it on your screen, Detective?

A. I can.

Q. If you would, just read for the jury -- what is the name and address listed?

A. Kevin Bernard Smith, 1314 Fordham Road, Charlotte, North Carolina 28208.

Q. Okay. The date on this?

A. The date is August 1, 2013.

Q. I'll show you what's already introduced, Government's Exhibit 2, which is -- you've already seen. Can you take a look at that. Could you tell the jury, using this photograph, where this paper was found and the next item I'm about to show you?

A. Yes. The coffee table here (indicating), is the coffee table I was referring to. The documents were on this lower shelf. This -- yeah, this lower shelf in front of the couch (indicating).

Q. Okay. Thank you. And to be clear, what is this a picture of?

A. This is the living room at 4017 Carlyle.

Q. Thank you. Now, if I could also show you what's been marked as Government's BB. Do you see that up on your screen?
A. I do.
Q. Do you recognize this?
A. Yes, sir.
Q. What do you recognize this to be?
A. An additional document that I located and seized from 4017 Carlyle.
Q. Where was this document located at?
A. This document was also at the coffee table.
Q. Other than the redactions, is it in the same or similar condition as you found it?
A. It is.

MR. ZOLOT: Offer BB into evidence, Your Honor.

THE COURT: Any objection?

MR. BURGESS: No objection, Your Honor.

THE COURT: Let it be admitted.

MR. ZOLOT: May we publish, Your Honor?

THE COURT: Publish it. Again, the same instruction with respect to the redaction.

MR. ZOLOT: Thank you.

(Government's Exhibit BB was received into evidence and published.)

Q. And who does this appear to be in the name of?
A. Kevin Bernard Smith.

Q. And what address is listed for Mr. Smith in this document?
A. 3829 Perennial Terrace Drive, Charlotte, North Carolina.
Q. And how long is it -- in this document -- it claim that Mr. Smith is living at this address -- had been living at this address?
A. For one year.
Q. Okay. If we can go to the bottom of the document. Who does it appear signed this document?
A. Kevin Smith.
Q. What appears to be the date of signature?
A. The eighth day of the sixth month of 2013; so June 8, 2013.
Q. Thank you. One other thing, Detective Lail; at what time did you execute the search warrant at Carlyle?
A. Approximately 4:30 in the afternoon -- 4:30 p.m.
Q. Had you been by that house in the morning?
A. Yes, sir.
Q. What time --

MR. BURGESS: Objection, Your Honor. It's beyond the scope.

THE COURT: Overruled.

Q. What time had you been there?
A. I went by the residence approximately 5:00 a.m., 5:30 a.m.

Q. And did you see anything -- notice anything?
A. I did. I observed the Mercedes SUV, that I described yesterday, parked in the driveway at the residence.
Q. When you executed the search warrant in the afternoon, was the vehicle still there?
A. No, sir.

MR. ZOLOT: No further questions, Your Honor.

THE COURT: Any cross?

MR. BURGESS: Briefly, Your Honor.

CROSS-EXAMINATION

BY MR. BURGESS:
Q. So to be clear, every paper that you found -- or you found no papers in the house that had Kevin's name with the address of Carlyle on it?
A. That's correct.
Q. You're not saying -- the bills that you looked at, those are for Duke Energy, right?
A. Yes, sir.
Q. Totally different from Piedmont Natural Gas.
A. Yes, sir.
Q. You're not saying there's something incorrect about these Piedmont Natural Gas?
A. I'm drawing no conclusions about those.
Q. And do you know whether the person listed on the bill on the Duke Energy lived in the Snowdrop address?

A. Yes, I believe I do.
Q. And how do you know that?
A. Through jail calls that I've listened to as part of this investigation.
MR. BURGESS: All right. Thank you.
MR. ZOLOT: May I ask a follow-up, Your Honor, based on --
THE COURT: Are you done? Mr. Burgess, are you done?
MR. BURGESS: Yes, I'm done. Pardon me.
THE COURT: Any redirect?
MR. ZOLOT: Yes, sir.

REDIRECT EXAMINATION

BY MR. ZOLOT:
Q. Who is the person that lived at Snowdrop?
A. To my understanding, Wakeisha Ferguson is the defendant's sister.
MR. ZOLOT: Thank you. No further questions.
THE COURT: Any recross?
MR. BURGESS: No, Your Honor.
THE COURT: You may step down.
Any further evidence from the government?
MR. ZOLOT: No, Your Honor.
THE COURT: Members of the jury, now you've heard the evidence in the case and you're about to hear the

arguments of the attorneys, their closing arguments. And before they do that, I wanted to give you some general instructions to guide your deliberations.

As I told you in the beginning, it is your duty and your responsibility to find what the facts are in this case. You may find those facts only from the evidence which has been presented during the trial. And the evidence consisted of the testimony of the witnesses, the exhibits which were admitted into evidence, and any stipulations by the attorneys.

Now in reaching your decision as to the facts, it is your sworn duty to file the follow the law as the Court instructs. You will apply the law given to you by the Court to the facts that you find to reach your verdict.

Counsel may refer to some of these governing rules in their closing arguments. If there is any difference between what counsel states and the law as given to you by the Court in these instructions, you should, of course, follow the instructions of the Court.

Now you're not to single out any one instruction alone as stating the law, but must consider all of the instructions as a whole.

You may not substitute or follow your own personal or private notion or opinion as to what the law is or ought to be.

You are required to perform these duties without

bias, prejudice, or sympathy for any party. The law does not permit jurors to decide any case based on bias, prejudice, sympathy, or on any basis other than solely upon the facts and the law arising in the particular case.

This case involves one charge, by Bill of Indictment, of possessing a firearm after being convicted of a felony, brought against the defendant, Kevin Smith.

You are instructed that an indictment is but a formal method of accusing the defendant of a crime. Its purpose is to inform the defendant of the charge against him and to bring him to trial. It is not evidence of any kind against the defendant, nor does it permit any presumption or inference of guilt. In other words, an indictment is not consistent either with guilt or lack of guilt. It simply puts that question at issue for your decision.

It is up to you, the jury, to decide whether the government has proved each element of the crime alleged in the Bill of Indictment beyond a reasonable doubt.

Now you are here to decide that question; whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case.

Now every defendant in a criminal case is presumed to be innocent, and this presumption continues throughout the course of the trial. This presumption will end only if you reach the jury room and arrive unanimously at the conclusion, if you do, that the government has shown to your satisfaction that the defendant is guilty beyond a reasonable doubt. This burden on the government does not change at any time during the course of the trial. The presumption of innocence in favor of a defendant is not a mere formality to be disregarded by the jury at its pleasure. It is a substantive part of our criminal law. Accordingly, the government must prove each of the elements of the crime charged in the indictment beyond a reasonable doubt before there can be a conviction.

The term "reasonable doubt" means what it says. It is a doubt based upon reason and common sense. Its meaning is no doubt self-evident and understood by you, and the Court will not attempt to define the term further.

Now there are two types of evidence which a jury may properly assess in determining whether the government has met its burden. One is direct evidence, such as the testimony of an eyewitness. The other is circumstantial evidence, which is evidence of facts or circumstances from which the existence or nonexistence of other facts in controversy may be inferred. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before

convicting a defendant, the jury must be satisfied of the guilt of such defendant beyond a reasonable doubt from all of the evidence in the case.

Now while you should only consider evidence presented during the trial of this case, you are permitted to draw such reasonable inferences from the testimony and exhibits and stipulation as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony in evidence in the case.

Now you heard evidence that the defendant allegedly possessed a firearm, alleged to be similar to a firearm or firearms charged in the indictment on dates other than that charged in the indictment. If you believe from the evidence that it is the same firearm, you may consider that evidence in determining whether the defendant possessed it on the date charged in the indictment.

If you believe from the evidence that the defendant possessed a different weapon at the earlier date, you may consider that evidence only for a more limited purpose. You must not consider it in deciding if the defendant possessed the weapons charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other

evidence in the case that the defendant did possess the weapons as charged in the indictment, then you may consider evidence of prior possession of a different weapon allegedly committed on other occasions to determine:

Whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment; or

Whether the defendant acted out of mistake or accident.

These are the limited purposes for which evidence of possession of other weapons may be considered. Remember, the defendant is on trial only for the crime charged in the indictment. You may consider the evidence of prior acts only for the limited purposes which I've just stated.

Now while we were hearing evidence you were told that the parties had agreed to or stipulated to certain facts. That means simply that they all accept those particular facts as true. The stipulation was:

That prior to the date charged in the indictment, the defendant, Kevin Smith, had been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, a felony. Moreover, the defendant's prior conviction had not been expunged or set aside, and the defendant had not been pardoned or had his civil rights restored.

There was no disagreement over these facts, so there

was no need for evidence beyond the stipulation itself by any party on these points. You must accept the stipulation as fact, even if nothing more was said about them one way or the other.

Now during the trial I instructed you to exclude from your consideration certain statements made from the witness stand or to limit your consideration of these statements in a certain way. I remind you that it is your duty to follow the instructions, consider only the evidence which was duly allowed from the witnesses presented to you for the limited purposes for which they were admitted.

You are not required to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness's bearing and demeanor, or because of the inherent improbability of his or her testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

Now the testimony of a witness may be discredited or impeached by showing that he or she previously made oral or written statements which are inconsistent with his or her present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely during any material matter, you have a right to distrust such witness's testimony in other particulars: You may reject all the testimony of that witness or give it such credibility as you think it deserves.

Now the testimony of a person -- the testimony of a person who provides evidence against a defendant with the hope of receiving a reduced sentence must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness's testimony has been affected by the circumstance of entering a plea agreement with the government, by the witness's interest in the outcome of the case, by prejudice against the defendant, or hope of receiving a reduced sentence. You should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict any defendant upon the unsupported testimony of such a witness unless you believe the testimony beyond a reasonable doubt.

You've heard the testimony of a witness who has been convicted of a felony, a crime for which a person may receive a prison sentence of more than a year. Prior conviction of a crime that is a felony is one of the circumstances that you may consider in determining the credibility of a witness.

While the testimony of a witness may be discredited or impeached by evidence showing that the witness has been convicted of a felony, it is the sole and exclusive right of the jury to determine the weight to be given to the testimony of anyone who has previously been convicted of a felony.

Now during the trial, you heard testimony from witnesses who were allowed to give opinion testimony in certain fields. These witnesses were permitted to testify even though they may not have actually witnessed any of the events involved in the trial.

A person's training and experience may give him or her specialized knowledge in a technical field. The law allows that person to state an opinion here about matters in that particular field. Merely because a witness has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe his or her testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness's background, training and experience is sufficient to give the opinion that you heard. You must also decide whether the opinions were based on sound reasons, judgment, and information.

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and

circumstances in evidence to determine which of the witnesses you choose to believe or not believe.

Now the law does not require either the defendant or the government to cross-examine any witness. You may not draw any inference from the fact that the government and the defendant -- or the defendant did not cross-examine a witness.

It is proper for an attorney to interview any witness in preparation for trial.

Now the defendant elected not to testify in this case. The Court instructs you that he has a constitutional right not to take the stand and testify and not to speak at all; the burden of proof being entirely upon the government. You must draw no adverse inferences of any kind from his exercise of his privilege not to testify. This right is a fundamental one in America's criminal law and one which cannot be disregarded by the jury at its pleasure.

Let me emphasize that a lawyer's question is not evidence. At times a lawyer may have incorporated into a question a statement that assumed certain facts to be true and asked the witness if the statement was true. If the witness does not answer or denies the truth of the statement and if there's no evidence in the record proving that the assumed fact is true, then you may not consider the fact to be true simply because it was contained in the lawyer's question. On the other hand, the witness adopts or agrees to the assumed

facts in his answer, then the witness may be considered to have testified to the facts assumed in the question and his testimony is evidence of those facts.

I told you once before that you could take notes. But I instruct you now as I did then, that the notes are only a tool to aid your own individual memory, and should not be substituted for your memory. Moreover, you should not compare your notes with other jurors' notes in determining the content of testimony or in evaluating the importance of any evidence. Remember, your notes are not evidence.

If you chose not to take notes, remember it was your own individual responsibility to listen carefully to the evidence. You cannot give this responsibility to someone who took notes. We depend on the judgment of all members of the jury; you must all remember the evidence in this case.

The last general instruction is a reminder to you that punishment provided by law for the offense charged in the indictment, should there be a verdict of guilty on any -- on the offense, is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or lack of guilt of the accused.

Those are the general instructions that I wanted to give to you before you heard from the attorneys. It is now time for them to make closing arguments.

Mr. Zolot, Mr. Miller, are you ready to proceed?

MR. ZOLOT: Thank you, Your Honor.

May it please the Court, Your Honor, ladies and gentlemen of the jury.

Defendant Kevin Smith is a convicted felon. And the law says felons can't possess weapons. But Mr. Smith decided to possess weapons, multiple weapons.

Now I want to talk to you a little bit about the law that you're going to hear. The Judge is going to instruct you on the second part after the case. I want to talk to you about the charge in the case, felon in possession.

Well, there are several elements to this, but the really -- the only one in dispute -- there's no dispute he's a convicted felon.

The really only issue in dispute is whether Mr. Smith knowingly possessed those firearms -- those four firearms in his house that you've seen.

Now the Judge is going to instruct you later but, you know, the government is not contending that Mr. Smith had those guns, obviously, at the time. He wasn't in the house. But we are saying that he constructively possessed those weapons.

In other words, they were his weapons. He left them there, but he was somewhere else. He could still possess them even if he's not actually holding them -- that's really what

constructive possession means.

And there's another point that the Judge is going to instruct you on: Possession can be sole or joint. That's a fancy way of saying, essentially, he doesn't have to be the only one that can exercise what they call, "dominion and control" over those weapons.

In other words, you can find that Mia Matthews has access to those weapons, his girlfriend, could have touched those weapons. But if you believe he also touched those weapons, accessed those weapons, possessed those weapons, he could be found guilty of that as well. That's just an example.

Now I'd like to turn to the evidence. I have a short amount of time, so please excuse me if I talk fast.

The evidence should prove to you that Kevin Smith possessed those weapons. Let's talk about first, whether he lived at Carlyle. Obviously the defense is contending that Mr. Smith did not live at Carlyle. But your common sense and the evidence tell you that of course he lived at Carlyle.

Well, first, let's talk about Detective Lail. Now keep in mind, ladies and gentlemen, we're talking about August 2013, where he was living then. 'Cause that's when -- August 15 when the guns were found.

Detective Lail -- what did he tell you? I'd seen Kevin Smith on July 31 coming out of that residence and

checking the mailbox. Who goes out of a house and checks the mailbox if you're not the resident? Right? That's not just the only thing we have.

We have Kevin Smith. The car he drove regularly -- that Mercedes you heard about -- staying at that house all times of the day and night. Detective Lail went by in the early morning hours and the car was there. You can deduce from that using your common sense, Mr. Smith slept there. That was his house. He stayed there with his girlfriend; his pregnant girlfriend.

You also heard from Jakari Rutledge who lived across the street.

Now ladies and gentlemen, Mr. Miller told you on opening -- we didn't ask you to like these people. We told you they did some bad things in their lives. But what we asked you to do is listen to their testimony and see if it was consistent with the other testimony and made sense to you.

What did Jakari Rutledge say? He said he lived across the street and he saw the defendant there. That was it. What else did he tell you? That the defendant had his house broken into right after the police raided it. And the defendant was angry because some kids had broken into it. And he came looking around trying to see if anyone saw anything. And he said, "Who broke into my house?" Defendant's own words, "my house." You don't say that if that's not your

house.

Mr. Rutledge -- Stanley Rutledge, also told you, Yeah, he been over the house many times to see the defendant. He'd hang out in the yard. He went into the house a couple times.

And he described to you, ladies and gentlemen, what the inside of that house looked like, if you remember. And it was exactly what Detective Lail testified to and you saw the pictures of. And you heard the evidence. We didn't coach the witnesses. This is not something we told them. This is what they knew, them telling the truth about what they saw.

Mr. Brown said the exact same thing. The two dark couches, the coffee table.

Do you remember when Mr. Burgess said, "There wasn't any coffee table there." He said, "No, no, no. Yes, there was." I mean, that's the confidence of a witness who's actually been in there. Who's seen the items. Who knows that house.

Now that's the testimony. How do we know he lived there? His ID was there; his state ID. His valid state ID was there. Okay. That's his proof of identification for everything. Why would you leave that there if that's not your house?

What else? His shoes. Now I understand this is a minor point, ladies and gentlemen, but something interesting

and, I think, worth noting. The defendant has an unusual size foot for a man. No disrespect. But he has a small foot -- eight and a half -- unusual size for a grown man. And what did you see the evidence of the shoe boxes that were found in that house? Eight and a half; ties him directly. And you saw in the pictures, ladies and gentlemen, shoes everywhere. Right? Nike shoes. Just like the ones I showed you that were taken from the defendant.

What else? The paper we just showed you, ladies and gentlemen, this stuff with his name on it in the coffee table. Why was it stuffed in the coffee table if he didn't live there, right? Why would this stuff with his name on it, his signature on it, addressed to him -- why would this be there if he didn't live there? These are personal documents. This is not stuff you leave lying around. Stuff with his signature on it.

Now we've shown you that it was his house. From the testimony of the witnesses, Detective Lail seeing him there, the other evidence, physical evidence. But I know what you're asking, were these his guns? Well, ladies and gentlemen it's his house. You've heard testimony -- you've only heard undisputed testimony, the only people in that house were Mia Matthews his girlfriend, the defendant, and two children.

How do you know they were his guns? Well, ladies and gentlemen, several ways you know. First of all, what the

witnesses told you -- Stanley Rutledge -- he told you very specifically. Did he not describe this gun? Chrome and silver gun with a black handle. This was his description of this weapon -- consistent with the evidence, ladies and gentlemen, hallmarks of truthfulness. Okay.

There's no evidence that he saw this weapon. That we fed this to him. This is based on his own recollection of what this weapon looked like in 2013 when he saw him with this weapon; dark handle chrome.

Also the trip to Atlanta. Okay. I'd ask you to recall the evidence on this 'cause several witnesses testified about this. Mr. Rutledge said that they met up at the gas station. And that's another important fact we'll get back to -- the gas stations. But they met up at the gas station. And Mr. Smith forgot his gun. Because they're going down to see the concerts in Atlanta. He forgot his gun. And he felt uncomfortable going down to Atlanta without his gun. We're talking about that gun -- the chrome gun.

So what did he do? He sent his cousin back to get the gun. And he finally got the gun, put it in his car and they went on.

Well, I understand Mr. Burgess is going to come up to you and say you can't believe anything he says. But what's consistent with that exact evidence? What you just heard from Olwin Brown. What did Olwin Brown tell you?

Now he didn't make up some fancy story and tell you, "Oh, I saw the gun" or this, that, and the other. No. What he told you on the way back from Atlanta, after they went down overnight. They're coming back, a cop pulls up and Mr. Smith gets scared and he jumps off the exit -- pulls off the road and jumps off the exit. And what does he say? "I had my 9 on me" or "my gun on me."

Now let's get this out of the way right now, ladies and gentlemen. You heard Mr. Brown say he doesn't know the difference between the .380 and the 9. But your common sense knows that people in the street -- people commonly refer to any automatic weapon as a 9 -- 9-millimeter; it's common culture. You hear it on TV.

Why would the defendant swerve off the road and say that? Well, it matches perfectly what Mr. Rutledge said.

You also heard both Mr. Rutledge and Mr. Brown say that they met up with him at gas stations. Mr. Smith frequents gas stations. Hangs out there. It's a hang out spot. Where is the gun? They all say the same thing. They saw the butt of the gun between the seat and the console right there. Right?

Now, okay, most importantly, ladies and gentlemen, Mr. Brown told you about another gun. Do you remember what he said? His friend and him were outside one day. It was a nice day. And they're looking at the squirrels running across the

power lines going across the street. And Mr. Smith said, "I have a gun with a scope, and the scope is great." Right? And he brought out this scope.

As easily as we took it off the rifle, what it was attached to at the time of the search warrant that Detective Lail found, he found this. It's a pretty big scope -- pretty recognizable -- attached to that weapon when Detective Lail found it. Direct evidence of Mr. Smith having this rifle, being his.

Ladies and gentlemen -- could we pull up Exhibit 8 for them to look at?

Something else, ladies and gentlemen. How do we know -- if you look at your screen for a second, something else in the pictures I want you to get a look at. The gun that was found under the -- this gun right here. Do you notice what's right near it? An ashtray in the master bedroom. Remember what Mr. Burgess asked and what Detective Lail brought out? Mia Matthews was pregnant. She's not smoking. But there's an ashtray there. Who's smoking? Who's the other person in that room sharing it? Kevin Smith. Look how close that ashtray is to that gun. That's Mr. Smith's gun. He put it right under the bed.

There's also been the suggestion that he was off because Mia Matthews was at a doctor's appointment. Well, okay. That makes perfect sense. Are you bringing your gun to

the doctor? No, you're leaving that there. You can't bring a gun into a hospital; makes perfect sense. His car was there that morning, ladies and gentlemen, that morning.

Ladies and gentlemen, I'm just going to ask you to refer to the evidence. Look at everyone's testimony, see if it's consistent; whether it makes sense to you. Because I think at the end of the day your common sense matters most. And that using your common sense you know that the defendant has possessed these weapons. We're going to ask you to find him guilty.

THE COURT: When you're ready, Mr. Burgess.

MR. BURGESS: If we want to know whether Mia Matthews smoked or not, we could of had her in here -- the Government could have brought her in here as a witness and tell you that she didn't. That didn't happen. Instead what they are going to do is point to an ashtray on the floor and ask you to reach the conclusion that there's no woman who's ever been pregnant that's ever smoked. I think we all know that's not true. You probably shouldn't smoke if you're pregnant. But certainly there are women that do.

Now we don't have a burden to prove anything. So I'm not required to anticipate that in closing someone's going to point to an ashtray next to a bed and come up with the idea that they can say that that means beyond a reasonable doubt that my client was smoking cigarettes in there because his

pregnant girlfriend would not have smoked. So we're not required to go anticipate that and go out and find that witness and bring her in here to do that.

Instead, if the Government wants you to believe that that was not Ms. Matthews' ashtray and that she was not the one smoking in there, they could easily have done that by having her come down here and testify. That didn't happen.

Now, as far as the bills are concerned for the 5104 Snowdrop Drive. They can't have it both ways. If they're going to come in here and take those bills from Duke Energy to prove that his sister lived there. Well, the bills that we put into evidence proved that he lived there as well. You don't have people -- necessarily always one person living in a house. And why would there be bills in his name there if he didn't live there? If she's -- if there are bills in her name and it proves she was a resident, then the bills in his name prove he's a resident too. What's good for the goose is good for the gander.

And if you look on those bills you'll see too, toward the end, there's some records of payment. And most of them appear to be cash payments because there's no indication of who paid what. But if you get close to the end, about maybe the third page from the end of them, you'll see that there's a credit card used on one occasion that's in Mr. Smith's name. And then if you look on another one -- and

has his name on there.

And if you look at another one of those pages, you'll see that that very same credit card number is listed on that as well. You don't see the name, but you see the credit card that was listed next to the name. So you can see there's two instances on there where he paid the bill over there.

So consider this: Why would someone have a gas account at a residence be paying the bill but not live there? Now we're not saying that Mr. Smith never went over to the Carlyle address. As been testified, his girlfriend lived there and she was pregnant with his child. And, yes, he did go back and forth over there. But just because you go and visit someone, a girlfriend for example, that doesn't mean that's your true residence.

Let's think about this: What are the kinds of things that you would expect to find at someone's residence? And when you look at the things that were found there, and what we've heard about so far is an ID card, two pieces of paper with his name on them. So we've got three things with his name on them found at the house. None of them have the address for the house on them. They all have other addresses, excuse me. Pardon me everyone. They all have other addresses on them.

Now, as far as personal papers are concerned, if you're going to somebody's house you would imagine that you

would find more than just that. You would find some mail there in their name. You would find some photographs of them. You would find -- with a man, you would go in there and you would find -- in the bathroom you would find probably some shaving equipment. You would find some cologne. You would find some man's deodorant. You would find some aftershave. We didn't hear any evidence of any things such as that found in that house. Those are the kinds of things that you would expect to find. Those are the kinds of things that prove that you live at a particular place.

Now if you go and stay somewhere from time to time, you probably wouldn't have those kind of things in there because you would be taking them back and forth. Say you go and visit a friend. You go and visit a girlfriend. You go and visit a relative. You're not going to leave all those types of things over there. You're not going to have those things there. But you may leave behind a few things. Because I don't think it would be uncommon to see that from time to time people go to friends and relatives houses and they leave things behind. Things get forgotten. You go over and show somebody a paper that you have and you then set it on the coffee table or the couch or somewhere and you leave it. And the person who lives there -- and they take it and they go and put it somewhere so the next time you come over they can give it back to you.

So that's not -- that's just not enough -- it's not enough for the kinds of things you would expect to find in a house if that's where somebody lived; not just three particular items.

Now I know there's some shoes that were pointed to. But as I said before, you're left having to guess as to whose shoes those were, because you don't know. One way to have known would have been to do the same thing that was done with the guns, which is to swab them for DNA and check. Then we wouldn't be sitting here having to draw an inference to try to determine whether those are or are not his shoes.

So if you look at the fact that he had these bills at another address that he was paying for that, and that those bills show the same thing that the Government says their bills shows -- which is that the person who's on the bills is a resident there.

Now, another part of the case here is that the government is trying to prove that my client possessed the firearms in that house by showing that on another occasion he possessed the weapon that looked similar to one of the weapons in the house. And the witness to that is Mr. Stanley Rutledge.

Now Mr. Rutledge has worked in the past for the government providing information on people. And he's been paid for that. You heard him testify to that. And I would

say that really what he was doing is, he's getting sort of a commission of sorts for providing information about people and that's worked quite well for him.

And then in this instance, he's once again trying to provide information on people in order to help themselves out again.

In this case he's been charged with bank fraud. He admits that essentially what that is it's lying to get money. And in exchange for his willingness to testify he entered into a plea agreement under which he's going to testify -- or did testify. He's having charges that carry a 30-year maximum dismissed. He's getting the possibility of a reduced sentence if things go well for him. And he's expecting to get that reduced sentence just like other people he's known got reduced sentences. He's looking for this to work out for him, just like it worked out for him when he was providing information for money.

Now, he says he's here just to tell the truth, or he was here just to tell the truth. But I think that common sense will tell you that whether he was or was not telling the truth, the only people that knows that is him and whoever else was there, and God. There's no way for anybody to know for sure whether what he's saying is the truth because none of us were there.

And also, when he was working with government

officials -- with the police -- he was still involved in bank fraud and he didn't tell them that. So at that same time that he's working with them, he's also lying to them about whether or not he's going out and committing other conduct. And it wasn't until he got caught doing it that he admitted that he was doing it. Well, because he didn't have any choice. He got caught.

If he would lie for money, he would lie for freedom. Now that's just common sense. If somebody's willing to tell you a lie to get some money, they're certainly willing to tell you a lie to stay out of prison or at least reduce the amount of time that they're going to be in prison.

Now he said that he wouldn't do that, but I would submit to you that the evidence shows that that was just another lie he told.

And then Jakari Rutledge -- in short, you really can't believe a word he says. Would it be based on common sense and reason to doubt whether Mr. Rutledge was telling the truth? Which Mr. Rutledge -- Stanley Rutledge was telling the truth about seeing my client with a similar gun? Of course it would. Because your common sense and reason tells you that when somebody lies to you, you can't believe anything else they say. You can't be sure of that. You don't know. Once you deal with someone, you find them to be untruthful. Then you can't believe anything they say after that.

Now even if you believe everything that Olwin Brown said, which I submit you cannot. Because like these other defendants who testified in here, they're all looking to get something out of this. They're not in here to do this just for their civic duty. They're doing it because they agreed to do it under a plea agreement that's going to provide them with benefits.

But even if you believe him, what he said was that the gun that he saw -- allegedly saw, was not that gun over there. And it's -- you heard what the Judge said earlier, which is that, evidence that he possessed a gun other than the gun that he allegedly possessed in this case, can only be considered if you find beyond a reasonable doubt based on the other evidence, that he's guilty in the first place for one of the very limited purposes that the Judge laid out for you.

In other words, you can only believe his -- you can only look to his testimony to find my client guilty if you find the other evidence about the other guns beyond a reasonable doubt shows he possessed the guns in that house. I know that's a little bit complicated, but you'll get the instructions and you'll have an opportunity to look at that again.

Now, I mentioned the burden of proof here which is beyond a reasonable doubt burden. But I would like to sort of go back to something the Judge talked about before which is

the difference between the civil burden, which is preponderance of the evidence, and the burden in a criminal case which is beyond a reasonable doubt. And the reason there's a difference there is because what is at stake in a civil case is typically money. But what is at stake here is someone's liberty, and their freedom, and their life. So --

MR. ZOLOT: Objection.

MR. BURGESS: I don't mean --

THE COURT: No --

MR. BURGESS: -- death. Pardon me.

THE COURT: Well, no, the thing I've instructed the jury a couple times is that punishment is not a consideration for them.

MR. BURGESS: And I'm sorry.

Well, the reason for the difference in the burden is because of the different types of -- different types of courts, and beyond a reasonable doubt is a higher burden. A civil burden is preponderance of the evidence just 49/50 -- 41/59 burden -- 49/51. Pardon me. I'm having a senior moment. Whereas here it's a much higher burden. And so you need to look closely at the Government's evidence to see if they met this higher burden. And I would submit to you it's more than suspicious. You may be suspicious. You may be even highly suspicious, but that is not beyond a reasonable doubt.

Now, what did the DNA testing tell us about these

guns? Well, what they told us is that multiple people have handled the guns. But the prosecution wants you to conclude beyond a reasonable doubt that among all those people that handled those guns, it was my client Kevin Smith was one of the ones that handled it.

Now what it didn't show us was, it didn't show us that he, in fact, did touch any of those guns. Now I understand the witness's testimony about how they didn't have enough DNA on there to find -- to be able to test at all, I think is what the conclusion was. They didn't have enough to test at all.

But if he had handled those guns as often as it was said he had handled them, it would be common sense to believe that there would have been some DNA on there, and they would have been able to test that. And they would have been able to conclude that it was his. But that didn't happen here.

Now Mr. Rutledge, Mr. Jakari Rutledge who lived across the street. He's been convicted of multiple felonies. And I'm not going to stand here and, you know, go over all the things that he told you weren't true on the stand. But one of them was, he lied about being convicted of breaking and entering until I had to go up there and show him the judgment in which he was, in fact, convicted of breaking and entering. Then he admitted to it because he got caught.

And then he lied about using drugs too. And it

wasn't until I went up there and showed him that transcript of plea on which he had previously admitted in court under oath that he had used drugs on two prior occasions, that he came forward and said, "Okay, well, I wasn't telling the truth about that either."

And again, just like his brother Stanley -- if he would lie to get money, do you think he would lie to get his freedom? Well, of course he would. And I would submit to you that he did. And I would ask you to disregard all of his testimony. Because I think it's going to be reasonable to conclude that he definitely did tell some falsehoods from the stand. And if he told some, then how do you know what other stuff he said was true or not true. Because the only way that I was able to ever get him to admit that he was not telling the truth about something, was by going up there and showing him a piece of paper and catching him, and then getting him to admit it.

And Mr. Olwin Brown, according to him it's not fraud until you get caught. It's not a lie until you get caught. I would suggest to you that someone who has that view of how things work, is not someone you can trust; is not someone your common sense and reason would lead you to conclude that person is telling the truth about something as important as what it was he was up there testifying to.

You also may have noticed that some of the witnesses

were evading questions that I was asking them and -- or saying they don't understand the question. Well, you would -- just ask yourself why it was that those people were apparently avoiding or trying to avoid answering the questions that I was trying to ask to them.

In short, I would say that your common sense and reason will tell you that you can't believe a word that the Rutledge brothers said, or that Mr. Olwin Brown said.

And then, if those four guns were his, well why didn't anybody else see him with -- allegedly see him with any other than the one that these three witnesses -- or these two witnesses claim they saw him with?

And then another question: These witnesses say he's carrying it around with him all the time, right? Well, then why didn't he have it with him when he got arrested? He's carrying it all the time -- like they say -- why didn't he have it with him when he was arrested?

And then another point was, on the bottom of the gun it had the word "Killer" scratched into there. I asked Detective Lail, sometimes people have street names or nicknames that they use. Kevin Smith does not have the nickname "Killer". Someone else did, and I would submit to you that shows that it was someone else's gun.

And Detective Lail testified that he went by there for about 15 days over a 20-day period preceding August 15,

and that he saw him there once -- only once during all that time. And that he saw a silver Mercedes there several times that he had seen Mr. Smith in at a gas station once.

Now my recollection from these other witnesses, Jakari Rutledge, and Stanley Rutledge, they saw him in an awful lot of cars. But I don't recall them saying anything about a Mercedes. They mentioned a whole other list of cars, none of which were ever seen at the Carlyle address. So he saw him there once, saw him in a car once, and then he saw that car there several times. But at the same time all these other witnesses say that Mr. Smith was always in another car. At least that was my recollection of what they said.

And then one question I had -- or one might have is if a house is being watched for that period of time, and it's going to be important that the person live there, it's part of the case, why would there not be some types of video or pictures? You would think that that would be something that would be done. But we don't have any video or picture or anything showing Mr. Smith going in and out, anything about him, you know, being out on the front porch sweeping the porch, those sorts of things. Instead we need to rely upon -- for the sweeping of the porch and other things -- Mr. Jakari Rutledge for that. And again, you can't believe what he says.

THE COURT: One more minute, Counsel.

MR. BURGESS: Again, and one other thing. No -- not

one piece of paper in that house with 41 -- with the Carlyle address on it. They didn't find him with a house key. All they found in there was the ID, those few papers -- none of which had the address on him. No photographs, nothing -- no mail with his name on it. No bills addressed to him. No lease in his name. No cologne, aftershave, razors. None of the types of things that you would find in a house that someone lived in full time as a true resident of the house.

So I want to thank you for your time, and thank you for hearing me. And given that the government has failed to prove this case beyond a reasonable doubt, I would ask you to find my client not guilty. Thank you.

MR. ZOLOT: Your Honor.

THE COURT: When you're ready.

MR. ZOLOT: Thank you. I want to address some of the things Mr. Burgess said.

First all, Mr. Burgess asked you, "Why didn't he have the guns when he was arrested?" Well, I don't know if he's trying to trick you with that question, ladies and gentlemen, but he didn't have the guns when he was arrested because they were taken already. He was arrested, if you remember, from Brenda Williams in 2014, in January. This was August of 2013. That's why he didn't have the guns on him. The Government took them. The police took them.

There are other things I really question that Mr.

Burgess just told you. He said a lot of things to you. He talked to you about addresses. He said his documents prove that his client was paying the bills at the Snowdrop address. Let's turn on the document camera. He didn't show you the documents, did he? No. He just told you about them. Let's actually look at the documents, his documents. Now these are in evidence, ladies and gentlemen. You can look at them anytime you want. But, first of all, I want you to note something. Is it focused right?

THE JURY: No.

MR. ZOLOT: Your Honor, if I may have a moment. It's not focusing. Look at these, ladies and gentlemen. Yeah, it says Kevin Smith's name there. But whose email address is there? That's not Kevin Smith. Why -- ask yourself. Why do you have something in your name but someone else's email address? Well, because the email address is where bills get sent and correspondence gets sent. Who is this Renee Gadson? Who is this woman? Why would you do that? Use your common sense.

Another thing Mr. Burgess said, that Mr. Smith had a credit card that said he paid the bill at the Snowdrop. That appears to be true, ladies and gentlemen. But look at the date of that. Can you see that on there? Mr. Smith -- someone using Mr. Smith's credit card, whether it be him or not. When is that? 2014. This is August 15, 2013. Who

cares who paid the bills at another address after the fact, after the guns were taken? I mean, use your common sense. If the police know you're living here and they just took guns out of your house; well, you're not going to go back and live at that address. Of course you're going to live somewhere else.

But let's not end there. We can look at the document. Look on your screen, ladies and gentlemen. The many addresses of Kevin Smith. And ladies and gentlemen, we haven't really parsed these documents, but I'm just going to summarize for you.

These are all the different addresses you've seen Mr. Smith living at, at the same time. Okay. This 3829 Perennial Terrace Drive. I showed you paperwork that was found in the house in the living room. It said -- now that was dated June 8, 2013. And it claims he'd been living there a year before that. Well, it's a coincidence. At the same time Mr. Burgess wants you to believe he's living at 5104 Snowdrop Drive where that gas bill is; same time period.

But wait, there's more. You saw a document that was dated August 1, 2013, that was heavily redacted that was found in the coffee table. August 1, 2013, different address. But you heard testimony from independent witnesses, from Defendant Lail, telling you, "No, I saw him at Carlyle."

Now, let me ask you -- using your common sense -- who does this? Who claims they're living at basically three

or four different places at the same time? Let me help you answer that. Someone who doesn't want the police to know where he's living. Someone who's breaking the law who doesn't want to know where he's going to get his guns. That's who does that. Do you do that? No. The only people that I know that have four addresses living at, at the same time, are you know, Donald Trump. That's not this case. The man who knows he's breaking the law. He wants to hide. Because if the police come looking for him, they're going to go to the utility addresses, not to the place where nothing's in his name. That's the smart place to put your guns.

Now Mr. Burgess told you on his opening statement: Documents aren't biased. Documents don't lie. Well, what do we see here, ladies and gentlemen? Documents may not lie, but the person who filled out the documents may.

Now Mr. Burgess made a lot of the credibility, the truthfulness of the people who testified for you. I want you to ask one question when you're going through the evidence: Was it consistent with the other evidence? Did it make sense to you? Was it consistent? Was it consistent?

Everything that those cooperators said was corroborated. There was a lot of it was corroborated. But what Detective Lail said, that adds truthfulness to what they said.

But even more, ladies and gentlemen, if they were

making things up, if they were just lying about this and making up stuff about guns, don't you think they would have come up with better stories? Let's take Jakari Rutledge. Like I said, right? Not the best witness. I agree. But did you hear him say one time, I saw Mr. Smith with a gun? No.

If he was really lying he would have come up there and said, "Of course I saw him with guns. I was the next door neighbor. I lived across the street. Of course I talked to him all the time. I've been to his house." That's what you do if you're lying, right? If you want the deal from the government. But is that what he told you? No. He said that he saw him a couple times, you know, a few times. That he lived there. Never really talked to him. Is that the mastermind lie? No. That's someone who's telling you the truth, not making it up. Telling you what they saw and what they know; right?

How about Olwin Brown. Ladies and gentlemen, if he was lying to you, wouldn't he have told you he saw the gun? Why would he just say he saw a sight; a scope for a gun. If he's this big liar, right? He can't be believed? He would have told you he saw the gun. He was telling you the truth about what he saw -- no more, no less.

Now look, ladies and gentlemen, these people pled guilty to crimes. There's no going away from that. But it's what they said, not who they are that matters.

And something else, ladies and gentlemen; did you notice that Mr. Burgess basically didn't ask one question of any of the three cooperating defendants about what they actually saw?

Mr. Burgess didn't ask Jakari Rutledge one question about that. All he kept harping on is, "Do you use drugs? Did you plead guilty? Do you have felony convictions?" But he didn't ask him one question about, "Did Mr. Smith live across the street?" Ask yourself why didn't he ask any questions about that? That's the heart of the case. The facts are the case. He's not on trial. He is. The facts are important. He didn't ask one question about that.

Stanley Rutledge. Didn't ask him one question about all the times he seen him with guns. The trip to Atlanta. He didn't ask him anything about that. Why didn't he? If you're interested in getting to the bottom of things of getting, you know, liars out. Why don't you ask about the facts?

Finally, ladies and gentlemen, about this DNA. Mr. Burgess told you on opening statement, and mentioned again, that defendant's DNA is not on any of those weapons. But what he failed to tell you is that no one's DNA can be taken from those weapons. Yes, some of them had a mixture. A bunch of people touched them.

But that's not all that Ms. Scott said -- some had one person's DNA. She just couldn't figure out whose it was.

Look, I wish that the science as it is today, is like it is on TV, like on CSI. That would be great. But unfortunately we don't have that. We have to rely on what we have.

What I suggest to you is that the DNA, the fingerprints that weren't found, that's a neutral fact. We have to go to the other facts to see what the evidence is. And ladies and gentlemen, the evidence is strong and clear in this case.

The defendant -- those witnesses we saw that Mr. Burgess wants you not to believe -- we didn't choose those witnesses. They weren't the Government. These are the people that Mr. Smith chose to hang out with -- his friends. We didn't choose them. He did. They saw him with guns because they were around him. He chose to have weapons after being a convicted felon, four of them. He chose to live at Carlyle, but throw everyone off the trail by having -- consistently at three different addresses at the same time. It's his choices, ladies and gentlemen, that brought him here today. And we're going to ask you now to hold him responsible for those choices. Thank you.

THE COURT: Members of the jury, I now want to read to you the indictment, then I'm going to read the statute that is alleged to have been violated. And then I want to talk to you about the elements of the offense.

Now keep in mind as I do this that the indictment is not evidence.

But it reads that on or about August 15, 2013, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant Kevin Smith, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess one or more firearms in and affecting commerce.

That is a Bryco Jennings Model T-380 semi-automatic pistol, a Ruger Blackhawk .357 revolver, Benelli Super Vinci 12-gauge shotgun, and a Remington Arms Model 700 30-06 rifle. In violation of Title 18, United States Code, Section 922(g)(1).

You will note that the indictment charges the offense was committed on or about a certain date. Proof need not establish with certainty the exact date of the alleged offense. It is sufficient the evidence in the case establishes beyond a reasonable doubt that the offense in question was committed on a date reasonably near the date alleged.

The statute charged, 18, United States Code, Section 922(g)(1) reads in pertinent part: That it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, to possess in or affecting commerce, any firearm, or to receive

any firearm which has been shipped or transported in interstate or foreign commerce.

Now for you to find the defendant guilty of the offense charged, the government must prove the following essential elements beyond a reasonable doubt:

That on or about the date alleged, within the Western District of North Carolina.

1: That the defendant had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

2: That after this conviction, the defendant knowingly possessed a firearm described in the Bill of Indictment; and

3: That the defendant's possession of the firearm was in or affecting interstate or foreign commerce.

Now I want to define some of these terms, and you are to use those definitions as you consider the evidence. If I do not define a term, you should assign it ordinary every day meaning.

"Crime punishable by imprisonment for a term exceeding one year." The parties have stipulated that at the time described in the indictment, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year, as that phrase is used in these instructions.

Now the word "possess" means to own or exert control over.

The word "possession" can take on several different but related meanings. The law recognizes two kinds of possession; actual possession and constructive possession.

A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person, who although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole.

If two or more persons share actual or constructive possession of a thing, then possession is joint.

You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

A "firearm" means any weapon which will or is designed to, or may readily be converted to expel a projectile by the action of an explosion, and includes any handgun shotgun, or rifle.

The phrase "in or affect interstate or foreign commerce" includes movement of a firearm between any place in a state or country, and any place outside that state or country.

Thus, if you find beyond a reasonable doubt that the firearm in question was manufactured outside of North Carolina, and that the defendant possessed the firearm in North Carolina, then you may find that this element has been satisfied.

I remind you that the burden of proof beyond a reasonable doubt remains on the government as to each and every element of the offense charged, including the requirement that the government show beyond a reasonable doubt that the defendant possessed the firearm knowingly. This is the mental element of this offense.

The word "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

The government is not required to prove that the defendant specifically intended to violate the statute charged, or that he knew the firearm had traveled in interstate commerce.

Now ordinarily there's no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, did, how he acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

You may also consider the natural and probable result of any acts that the defendant knowingly did, and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

You'll note that the indictment alleges that the defendant possessed several firearms. A conviction is possible if you find beyond a reasonable doubt that he possessed any of those items. However, you must be unanimous in your finding as to which, if any, was possessed.

Now, members of the jury, you've heard the evidence and the arguments of the attorneys. It is your duty to remember the evidence whether it has been called to your attention or not, and if your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection of the evidence in your deliberations.

You as jurors must decide the case based solely on the evidence presented here within the four walls of this courtroom. That means that during your deliberations you must not conduct any independent research about the case, matters

in the case, individuals, or groups involved, or legal concepts.

Your duty to follow this instruction is a serious responsibility, and the failure to follow it may result in being found in contempt of court.

During your deliberations you must not communicate with, or provide any information to anyone by any means about this case. And so, for example, you cannot use any electronic device media such as telephone, cellphone, smart phone, iPhone, Blackberry, or computer; the Internet, any internet service, or any text or instant messaging service, or any internet chat room, blog, or website, such as Facebook, My Space, LinkedIn, You Tube, or Twitter, to communicate any information about the case, or to conduct any research about the case while you are serving as jurors.

Now I have not reviewed the contentions of the parties, but it is your duty not only to consider all the evidence, but also consider the arguments, contentions, the positions urged by the attorneys, and any other contention that arises from the evidence, and to weigh them all in the light of your common sense, and as best you can to determine the truth of this matter.

The law as indeed it should requires the presiding judge to be impartial. Therefore, do not assume from anything I may have done or said during the trial that I have any

opinion concerning any of the issues in the case.

I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote, or any other voting mechanism aside from a unanimous verdict of twelve.

The Court suggests as soon as you reach the jury room and before you begin your deliberations, you select one of your members to serve as foreperson. That individual has the same vote as the rest of the jurors, but simply serves to preside over the discussion.

Once you begin deliberating, if you need to communicate with me, the foreperson will send a written message to me by knocking on the door and handing it to the marshal.

However, you're not to tell me how you stand numerically as to your verdict. For instance, should you be split in your voting at any particular time, do not tell me the specific numbers of division in your note.

We use a verdict sheet that is the written notice of your decision in the case. And as soon as you have reached a verdict, your foreperson will record it on the verdict sheet, date, and sign it. And when you return to the courtroom, the foreperson will, on request, hand the verdict sheet to the clerk.

Now during the trial several items were received into evidence as exhibits. You will not be taking the firearms back with you, but the other exhibits have been recorded electronically and you will have electronic access to all those exhibits.

It may take us a few minutes after you begin -- after you go to the deliberation room to make them available to you, but there is a system in the deliberation room for you to have electronic access to the exhibits, and these substantive jury instructions.

Now if you need a break during deliberations you can do that in the jury room. And if you need a break outside the room, the marshal can escort you for that purpose. But if you're taking a break and all twelve of you are not together, then stop deliberating on the case until all twelve get back together.

Now you have been on the Court's schedule throughout the jury selection and the trial, now we are on your schedule. We will stay as long as we need to for you to properly deliberate on the case. You decide how long the deliberation takes, whether you break for lunch or go through lunch. Just communicate with us by the note process what your intentions are for example, if you're going to take a lunch break. But we're on your schedule now. You will -- you are now asked by the Court to take the case and to begin your deliberations.

I will mention to Ms. Riley that you were the alternate. Seems to me that all twelve jurors are ready to begin deliberations, and so your service will come to an end. So if you have anything of a personal nature in the deliberation room, if you would get those things and come back into the courtroom.

And the rest of the members of the jury, if you would retire and begin your deliberations at this time.

(The jury was escorted from the courtroom to begin deliberations at 12:12.)

THE COURT: So Ms. Riley, I just wanted to thank you for your service. It can be frustrating to sit during the presentation of evidence and not deliberate. But your presence gave us the confidence to go forward in case something happened to another juror. The case before, that's what happened. And Mr. Stowe was available to sit as a deliberating juror and we didn't have to start over.

Though you didn't make it to the point of deliberation, I want to let you know your service was very valuable to us and you're free to go.

So before we recess, we need to make sure that the later received exhibits are recorded so we can send them back for the deliberation. So if the attorneys would meet with Ms. Hankins to make sure that we've got that.

(The court stood at ease at 12:14 waiting for a

response from the jury.)

(The defendant is not present.)

(The jury knocks at 1:50.)

(The defendant is present with counsel.)

THE COURT: The jury has a question. I'm not sure we need the defendant here for this. The question is, one of the jurors says that they would like to call their doctor.

I guess we have scared them so much about what they can -- their use of a cellphone.

Any objection from either side?

MR. BURGESS: No objection from me, Your Honor.

MR. ZOLOT: No.

THE COURT: And then, any sense that you need Mr. Smith here?

MR. BURGESS: I don't think so for that. It's not substantive to the case.

THE COURT: Yeah. So I'm going to ask Susan to let the juror know that they can call their doctor, unless there's any objection from either side. I should say, I'm going to ask the deputy clerk to do that.

We'll stand in recess. Apparently it's a missed appointment and she's just calling to do that. All right. We'll stand in recess until further notice. .

(The court stood at ease waiting for a response from the jury at 1:53.)

(The jury knocks at 2:19.)

THE COURT: The jury's indicated they've reached a verdict, so call the jury.

(The jury was returned to the courtroom at 2:27.)

THE COURT: Members of the jury, have you elected a foreperson?

THE JURY: Yes.

THE COURT: Ms. Venters, is that you?

MS. VENTERS: Yes, Your Honor.

THE COURT: Has the jury reached a verdict?

MS. VENTERS: Yes, Your Honor.

THE COURT: Did you record that verdict on the verdict form?

MS. VENTERS: Yes, Your Honor.

THE COURT: At this time, would you hand that verdict form to the deputy clerk.

I've inspected the verdict form, and I'm shortly going to ask the deputy clerk to publish it in open court. I would ask each juror to listen carefully to the publishing of the verdict in open court, either side may wish to have you polled to make sure it's your own individual verdict.

Madam Clerk, would you publish the verdict?

COURT CLERK: United States of America versus Kevin Smith. Case 3:14-cr-17 Jury Verdict. As to the count charging the defendant Kevin Smith with being a felon in

possession of a firearm: We the jury unanimously find the defendant guilty.

THE COURT: Does either side wish to have the jury polled?

MR. BURGESS: No, Your Honor.

THE COURT: Very well.

MR. ZOLOT: No, Your Honor.

THE COURT: Members of the jury, I want to thank you for your participation as jurors. As I said at the beginning, our criminal justice system couldn't function without citizens being willing to serve as jurors, and you've served conscientiously.

I especially want to thank Ms. Venters and Mr. Stowe. You've sat on two cases this term so the Court appreciates that service, as well as each member of the jury.

There's very little we can do for you. At times when you came -- every time you came into the court or out of the court, we stood, recognizing your role in these proceedings as the judges of the facts. And so that was our small token of respect for you, and we also will leave you with a small token of thanks for your participation.

The good news is your jury service for this term is over and you're free to go about your business, but you go with the court's thanks.

(The jury was escorted from the courtroom at 2:31.)

THE COURT: Mr. Smith, in light of that verdict I want to explain to you what you can expect from this time forward.

Your case will be referred to the Federal Probation Department for the purpose of preparing a presentence report. You will be interviewed for that report, and you have a right to have your counsel present during that interview.

But once a presentence report is completed, it will be sent out to the parties for any objections, for review, and filing of any objections that they might have. And once that time period for objecting to the presentence report is completed, I will calendar this case for a sentencing hearing.

So the next time you're before this court, it is likely to be that sentencing hearing after the completion of the presentence report.

And we do have the matter of the severed counts dealing with the bank fraud. And we have another jury coming in on Monday afternoon, and the Court is prepared to begin that trial on Monday.

Does either side have any comment to that proposed plan?

MR. ZOLOT: Yes, Your Honor. Given -- given the recent verdict, the Government would move to dismiss the other counts without prejudice. We could do so formally in writing, or we can do so on the record, whatever the Court --

THE COURT: I don't know that there's any requirement of written motion to dismiss. Is there any objection from the defendant?

MR. BURGESS: No, Your Honor.

THE COURT: And I'll grant the motion to dismiss the other counts without prejudice.

MR. ZOLOT: Thank you, Your Honor.

THE COURT: All right. So anything further from either side?

MR. ZOLOT: No, Your Honor.

MR. BURGESS: No, Your Honor.

THE COURT: Then this matter is concluded, and Mr. Smith is remanded into the custody of the marshals at this time.

(The matter is concluded at 2:33.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF OFFICIAL REPORTER

I, Laura Andersen, Federal Official Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this the 14th day of May, 2016.

S/Laura Andersen
Laura Andersen, RMR
Federal Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,	) DOCKET NO. 3:14-CR-17-6
vs.	)
KEVIN SMITH,	)
Defendant.	)

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE ROBERT J. CONRAD, JR
UNITED STATES DISTRICT COURT JUDGE
JULY 14, 2015

APPEARANCES:

On Behalf of the Government:

KEVIN ZOLOT, ESQ.,
Assistant United States Attorney
227 West Trade Street, Suite 1700
Charlotte, North Carolina 28202

On Behalf of the Defendant:

RENAE ALT-SUMMERS, ESQ.,
P.O. Box 1758
Lexington, South Carolina
29072

LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

P R O C E E D I N G S

TUESDAY, JULY 14, 2015:

(Court called to order at 11:46.)

THE COURT: We're here in the matter of United States v Kevin Smith for sentencing. Mr. Smith was found guilty by a jury on June 5, 2014.

Mr. Smith, if you would please stand. I have a few questions to ask you about the presentence report.

Have you had a chance to read the presentence report?

THE DEFENDANT: Just the first part where David -- Mr. David Burgess -- other than that, no, sir.

THE COURT: Do you believe you understand it?

THE DEFENDANT: That was the reason why I wrote you the letter, because he didn't -- he didn't give me no understanding of it.

THE COURT: Right. I read your letter. I'm just asking you if now, standing before me today, you've had a chance to read the presentence report and whether you understand it?

MS. SUMMERS: I think the problem is, Your Honor, is that he does not agree with a lot that's in the Presentence Investigation Report.

THE COURT: That's not my question to --

MS. SUMMERS: I know.

THE COURT: -- you, Mr. Smith. My question is not whether you agree with it, but whether you understand it?

THE DEFENDANT: No, sir.

THE COURT: Let me ask you this: Have you had enough time to go over the presentence report with your attorney?

THE DEFENDANT: I mean, I seen her when she first -- they first hired her to it; other than that, like I said, when me and my other lawyer, Mr. Burgess, was supposed to go over it --

THE COURT: Yeah, so Mr. Burgess is no longer in this picture.

THE DEFENDANT: Yeah.

THE COURT: And so the question to you today is whether you've had enough time to go over the presentence report with Ms. Alt-Summers? Have you been able to do that?

THE DEFENDANT: Not to fully understand it.

THE COURT: Very well. We're going to continue this hearing to another date.

And Ms. Alt-Summers, I'm going to ask you to meet with Mr. Smith and go over the presentence report so that the next time we're here he's able to answer these questions in a way that lets us go forward. So we'll continue this matter at this time.

MS. SUMMERS: Thank you, Your Honor.

(The matter is concluded at 11:48.)

* * * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF OFFICIAL REPORTER

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Dated this the 9th day of May, 2016.

S/Laura Andersen
Laura Andersen, RMR
Federal Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,	) DOCKET NO. 3:14-cr-17-6
vs.	)
KEVIN SMITH,	)
Defendant.	)

TRANSCRIPT OF CONTINUATION OF SENTENCING HEARING
BEFORE THE HONORABLE ROBERT J. CONRAD, JR
UNITED STATES DISTRICT COURT JUDGE
FEBRUARY 12, 2016

APPEARANCES:

On Behalf of the Government:

WILLIAM MICHAEL MILLER, ESQ.,
Assistant United States Attorney
227 West Trade Street, Suite 1700
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On Behalf of the Defendant:

RENAE ALT-SUMMERS, ESQ.,
P.O. Box 1758
Lexington, South Carolina
29072

LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

P R O C E E D I N G S

FRIDAY, FEBRUARY 12, 2016:

(Court called to order 9:40.)

THE COURT: Good morning, everyone.

ALL COUNSEL: Good morning.

THE COURT: We are here in the matter of United States v Kevin Smith. This was originally scheduled for sentencing last summer, and when we got to this point Mr. Smith indicated he had not had enough time to go over the presentence report with his attorney.

Mr. Smith, if you would please stand up. I would like to ask you those questions that we stopped at last time with respect to the presentence report.

Have you had a chance to read the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: And do you believe you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: Have you now had enough time to go over the presentence report with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You may sit down at this time.

Ms. Summers, I'll be glad to hear from you on any objections to the presentence report.

MS. ALT-SUMMERS: Thank you, Your Honor.

Your Honor, the defense has one remaining objection to the Presentence Investigation Report, and that is to whether or not my client is characterized as an armed career criminal under the ACCA. I filed a sentencing memorandum yesterday. And I apologize to Your Honor, I've been kind of up against it. This is my third sentencing in two weeks, and I apologize for the late hour.

THE COURT: It's my 13th in two days.

MS. ALT-SUMMERS: I know, Your Honor. I knew you'd have no sympathy, Your Honor. However, I wanted to let the Court know that I wasn't purposefully waiting until the last minute to fire that off.

However, I would say that I have argued our objection in that sentencing memorandum and I will stand on that, Your Honor.

THE COURT: Very well. It appears to me that there were -- does the Government -- you also responded to the objections. Do you wish to be heard?

MR. MILLER: No, Your Honor. I just wanted to make clear that we do include the *Shepard* documents as part of the record with our sentencing memorandum. And I think that those *Shepard* documents gives the Court what it needs to make the requisite finding.

THE COURT: It appears to be two issues presented in

the objections:

One, is whether the predicate offenses for the Armed Career Criminal Act were committed on occasions different from one another.

It appears that there are three Cabarrus County convictions and one, I believe, Union County conviction for activity that occurred in 1997.

The convictions that are in play are four robbery with a dangerous weapon convictions. One of which appears to have occurred on January 21 involving a handgun for a robbery committed at the Sun and Jung at J's Mini Mart.

There's another conviction that appears to have occurred on January 22 involving a handgun used to attempted carjacking.

There's a third conviction for January 21 involving a firearm to steal currency and jewelry from an individual.

And then there's a fourth conviction in a different county on a different day, January 3 of 1997.

And the question is whether the offenses that occurred on January 21 and 22 occurred on occasions different from one another. It appears that the parties have analyzed the appropriate factors, just come out with different results.

I note that the test that appears to be used in the Fourth Circuit is whether offenses arose in different geographic locations; whether the nature of the offenses were

substantially different; whether there were different victims, different criminal objectives; and after the commission of the first offense, whether the defendant had an opportunity to make a conscious and knowing decision to engage in the next-in-time offense.

When I look at these factors, Ms. Alt-Summers, it appears to me that the offenses committed on January 21 and 22 were committed on occasions different from one another and not as a single criminal impulse.

For one, it does appear that the robbery in the store occurred in a geographically different place than the carjacking. It does appear to me that those offenses are two and separate distinct criminal episodes.

The gun used to commit a robbery in the store. There was a gun used to attempt to steal a Corvette in some other geographic location. Not only is the geographic location different, it seems like the crimes themselves are different and distinct. Certainly there are two different victims, which cuts against finding a single criminal episode.

The fourth factor seems to cut in favor of distinct episodes, as well, in the sense that the crimes had different objectives.

And then finally, it does appear that there was time for the defendant to cease and desist from criminal activity or to consciously decide to commit another crime; which it

appears to the Court that he did.

And therefore the objection based upon whether or not the offenses occurred on occasions different from one another is overruled.

The second objection is with respect to the *Johnson* case which held that the "residual clause" in the Armed Career Criminal statute was void for vagueness, violated due process. And if these predicate convictions are convictions under the "residual clause," otherwise involves conduct that presents a serious potential risk of physical injury to another, in light of the *Johnson* case they would be disqualified.

I've read the briefing on it. It does appear to the Court that robbery with a dangerous weapon qualifies, not under the "residual clause" but under the "force clause." That is, it "has an element the use, attempted use, or threatened use of physical force against a person of another."

The government, in its memorandum, has set forth the elements of robbery with a dangerous weapon under North Carolina law. They are: That it was an "unlawful taking or an attempt to take personal property from persons or presence -- or in the presence of another; by use or threatened use of a firearm or other dangerous weapon; whereby the life of a person is endangered or threatened."

It appears that those elements are clearly elements indicating the "use of force or threatened use of force" under

the "force clause" not the "residual clause." And therefore I will find that the *Johnson* case is not a bar to the applicability of the Armed Career Criminal Act.

For all of those reasons I find that the objection is to be overruled. That the presentence report finding that Mr. Smith qualifies for armed career criminal status is applicable.

Are there any other objections to the presentence report from either side?

MS. ALT-SUMMERS: No, Your Honor. We would just ask that you note the defendant's objections to your adverse ruling.

THE COURT: Certainly. You have that for the record.

Having made those findings, it appears to the Court that the correct offense level is a 33, a criminal history category IV, with a resulting advisory guideline range of 188 to 235 months; with a mandatory minimum applicable in the case of 15 years. Those are the advisory guidelines that I'll consult.

Ms. Alt-Summers, I'll be glad to hear from you on behalf of Mr. Smith at this time.

MS. ALT-SUMMERS: Thank you, Your Honor.

Your Honor, we would ask that he be given the mandatory minimum sentence of 15 years. Certainly Your Honor

knows enough about this case, with the guideline range, I don't think that the government would object. I believe it's about eight months off from the bottom of that guideline range.

We would also ask Your Honor to direct the BOP or recommend that the BOP keep my client close to home in his placement. The reason for that is as you can see he has family support. They are here today. They were here the last time, I think. His mother, in particular, has a severe degenerative bone disease, and it is hard for her to travel. It is hard for her to get around. So we would ask that he be kept as close to home as possible. Thank you.

THE COURT: Thank you.

Mr. Smith, you do not have to say anything, but if there is anything you wish to tell me I'll be glad to hear from you.

THE DEFENDANT: No, sir.

THE COURT: Mr. Miller.

MR. MILLER: Thank you, Your Honor.

The Government's going to ask for a sentence of 204 months or 17 years, Your Honor. And that's based on a lack of acceptance of responsibility, a lack of respect for the law. I'm sure the Court remembers the trial in this case. I was one of the trial attorneys as well. And the witnesses that testified about the defendant's gun possession, talked about

him having a gun while he was traveling to Atlanta, seeking to avoid encounters with law enforcement because he knew he had a gun, which shows the consciousness of his guilt. Keeping a gun tucked into his sofa at his house and beside his leg in a car as he was traveling about and conducting business with these folks, who ended up being his co-defendants in the federal case.

And so it's not just a single instance of gun possession that got us here today, Your Honor, it's several of these instances where the defendant is out and about with the gun which presents a danger given his criminal history.

Moving to that criminal history: The reason that the Government's not asking for more than the 204 months is essentially because the primary violent convictions in the defendant's criminal history are from 1997. And so the Government's recommendation takes into account that there has been a lapse of time between those violent convictions and the present conviction.

That being said, the defendant did serve a lengthy period of time as a result of those convictions, and was -- by my reading of the presentence report released in sometime around 2009 -- and so a lot of that period where there weren't additional offenses were spent in jail.

And given that that lengthy sentence, Your Honor, didn't get the defendant's attention and lead him to reform

his conduct, that's another reason that the Government is not recommending the low end in this case, but instead recommending a guideline sentence in the middle of the range.

And so to promote respect for the law, to recognize the seriousness of the offense, and to account for the defendant's history and characteristics, the Government's recommending 204 months imprisonment.

THE COURT: Thank you.

MS. ALT-SUMMERS: Your Honor, if I may, briefly?

THE COURT: You may.

MS. ALT-SUMMERS: Thank you.

And I apologize, I was not here for the trial. As Your Honor knows, my client had another attorney who was representing him at that time.

But I do know that Your Honor was -- it's important that my client wants it noted that originally there was a fraud charge. And that the prosecution stated, apparently in open court prior to trial or at the beginning of the trial, that he was not -- the prosecution agreed that he was not using his handguns to protect anything or to threaten anyone. Because of that, Your Honor, we feel that a bottom of the guideline sentence or a mandatory minimum sentence is appropriate.

THE COURT: Mr. Smith, if you would please stand.

I've consulted the advisory Guidelines, I've

reviewed the information in the presentence report. I remember the trial of this case vividly. I've listened to the arguments of the attorneys. I've made the statutory and guideline rulings that I have, and I'm prepared to state a sentence.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant Kevin Smith is hereby committed to the custody of the Bureau of Prisons to be in prison for a term of 188 months.

A sentence of 188 months is sufficient but not greater than necessary to accomplish the sentencing objectives of Section 3553(a), including the need for the imposed sentence to reflect the seriousness of the offense, promote respect for the law, just punishment, adequate deterrence, and importantly, to protect the public from further crimes of the defendant.

It takes into account the history and characteristics of Mr. Smith, including his very serious criminal history with four different robbery with a dangerous weapon convictions dating back to the late '90s.

It appears that he spent a substantial amount of time in prison. He got out of prison in approximately 2009, got involved with a group that brought us -- brought him before this court. He has a conviction for fleeing to elude in 2013. And then this search warrant which found four

weapons in different areas of his home, after having been previously convicted of all these felonies, indicates somebody who does not have respect for the law; who needs to be deterred from criminal conduct.

And importantly, there's a strong need in this case to protect the public from further crimes of the defendant.

Congress has set the mandatory minimum sentence of 15 years up to life in prison. The Court will impose a sentence of 188 months as the sufficient but not greater than necessary sentence to accomplish these purposes of sentencing.

The Court calls to the attention of the custodial authorities that Mr. Smith has a history of substance abuse and recommends that he be allowed to participate in any substance abuse treatment program while incarcerated.

And if eligible, receive the benefits of 18, United States Code, Section 3621(e)(2).

The Court orders that Mr. Smith support his dependents from prison earnings; recommends that he be allowed to participate in any educational or vocational programs while incarcerated; will recommend to the Bureau of Prisons that he be designated to a facility as close to Charlotte as possible, consistent with the needs of the Federal Bureau of Prisons.

Upon release from imprisonment, Mr. Smith shall be placed on supervised release for a term of two years.

Within 72 hours of release from the custody of the

Bureau of Prisons, the defendant shall report in person to the probation office in the district to which he is released.

While on supervised release, he shall not commit another federal, state, or local crime.

And shall comply with the standard conditions that have been adopted by the Court in the Western District of North Carolina.

Further ordered that he pay to the United States a special assessment of $100 due and payable immediately.

The Court finds that he does not have the ability to pay a fine or interest, will waive payment of a fine and interest in this case.

Other than what we've already discussed, is there any legal reason why the sentence should not be imposed as stated?

MS. ALT-SUMMERS: No, Your Honor.

MR. MILLER: No, Your Honor.

THE COURT: Let it be imposed.

Mr. Miller, have you previously dismissed the fraud counts?

MR. MILLER: I don't believe so, Your Honor. I would like to do so at this time. That's Counts 1, 11, 12, 50 and 52. I would also note for the Court that there's an order of forfeiture -- that's document 735 -- that we would just ask that the Court orally pronounce that is part of the judgment

in this case.

THE COURT: What's the document number on that?

MR. MILLER: That's 735.

THE COURT: I will make that order part of the judgment.

MR. MILLER: Thank you, Your Honor.

THE COURT: I will grant the motion to dismiss Counts 1, 11, 12, 50 and 52.

MR. MILLER: Yes, Your Honor.

THE COURT: Very well.

Mr. Smith, you can appeal your conviction if you believe that your guilty plea is somehow unlawful or involuntary, or if there's some other defect in these proceedings that was not waived by your -- strike that.

You can appeal your conviction if you believe there's some defect in these proceedings. You can also appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law.

Any notice of appeal must be filed within 14 days from the entry of judgment. And if you are unable to pay the cost of an appeal, you may apply for leave to appeal with no cost to you. And if you request, the Clerk of Court will prepare and file a notice of appeal on your behalf.

The Court recommends that you talk to your attorney about these appeal rights, but do you understand these rights

as I've just explained them to you?

THE DEFENDANT: Yes, sir.

THE COURT: Anything further from either side?

MR. MILLER: No, Your Honor. Thank you.

MS. ALT-SUMMERS: No, Your Honor. Thank you.

THE COURT: This matter is concluded.

Mr. Smith is remanded into the custody of the marshals at this time.

(The matter is concluded at 9:59.)

* * * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF OFFICIAL REPORTER

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Dated this the 10th day of May, 2016.

S/Laura Andersen
Laura Andersen, RMR
Federal Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,
Plaintiff.

v. Docket No. 3:14-CR-00017

KEVIN SMITH,
Defendant.

NOTICE OF APPEAL

KEVIN SMITH, by and through undersigned counsel, hereby gives notice pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, of his intent to appeal the conviction and sentence entered by the Honorable Robert J. Conrad, Jr., and filed on March 4, 2016 to the United States Court of Appeals for the Fourth Circuit. The defendant respectfully requests the appointment of an attorney other than his trial counsel pursuant to the Criminal Justice Act due to the potential grounds for appeal.

Respectfully submitted,

/s/Renae Alt-Summers
Renae Alt-Summers
Attorney for the Defendant
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(828)243-5253
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Dated: March 4, 2016

CERTIFICATE OF SERVICE

I, Renae Alt-Summers, attorney for the defendant, hereby certify that a true and correct copy of the above NOTICE OF APPEAL was duly served upon William M. Miller, William.Miller@usdoj.gov , Assistant United States Attorney, 227 West Trade Street, Suite 1650, Charlotte, NC 28202, by ECF filing this the 4th day of March, 2016.

/s/Renae Alt-Summers
Renae Alt-Summers
raltsummers@gmail.com