REPORT OF
THE TEXAS FORENSIC SCIENCE COMMISSION

BRANDON LEE MOON INVESTIGATION

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BRANDON LEE MOON REPORT

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I. BACKGROUND

A. History of the Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission ("FSC" or "Commission") by passing House Bill 1068 (the "Act"). The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the FSC. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. The Act took effect on September 1, 2005. *Id.* at § 23.

The Act provides that the FSC "shall investigate, in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility or entity." TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3).

The term "forensic analysis" is defined as a medical, chemical, toxicological, ballistic, or other examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. *Id.* at art. 38.35(4). The statute specifically excludes certain types of analyses from the "forensic analysis" definition, such as latent fingerprint examinations, a breath test specimen, and the portion of an autopsy conducted by a medical examiner or licensed physician.[1]

The FSC has nine members—four appointed by the Governor, three by the Lieutenant Governor and two by the Attorney General. *Id.* at art. 38.01 § 3.

[1] For list of statutory exclusions, *see* TEX. CODE CRIM. PROC. art. 38.35(a)(4)(A)-(F) & (f).

Seven of the nine commissioners are scientists and two are attorneys (one prosecutor and one criminal defense attorney). *Id.* The FSC's presiding officer is designated by the Governor. *Id.* at § 3(c).

The FSC's policies and procedures set forth the process by which it determines whether to accept a complaint, as well as the process used to conduct an investigation once a complaint is accepted. *See* FSC Policies & Procedures at § 3.0, 4.0. The ultimate result of an investigation is the issuance of a final report.

B. National Context

With the FSC's creation, Texas emerged as a leader among states seeking to advance the integrity and reliability of forensic science in criminal courts. Texas is one of only a handful of states to establish an independent agency for forensic oversight of accredited criminal forensic laboratories.

Current interest in improving forensic science at the national level was prompted in part by the release of a 2009 National Academy of Sciences report entitled *Strengthening Forensic Science in the United States: A Path Forward* (the "NAS Report").[2] The NAS Report contains thirteen recommendations designed to improve forensic science and establish consistency and predictability. The Commission incorporates observations from the NAS Report herein to the extent such information is relevant and useful.

C. Intersection of Science and the Law

As the United States Supreme Court noted in its landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) ". . . there

[2] For a copy of the NAS Report, *see* http://www.nap.edu/catalog.php?record_id=12589.

are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly." *Id.* at 596-97. Despite these differences, scientists, lawyers and judges must work together to fulfill their respective roles in the legal system. While judges and lawyers have some exposure to forensic science, they often lack the expertise necessary to thoroughly evaluate the reliability of forensic techniques. (NAS Report at 85.) This places tremendous pressure on the forensic science community to engage in continuous internal evaluation of forensic disciplines and to strive for consistent application of modern scientific principles in the courtroom. *Id.* at 110.

II. PENDING JURISDICTIONAL ISSUES

Since its creation in September 2005, the FSC has received numerous investigative requests involving various types of forensic analyses, some of which were conducted years or decades ago. Because the FSC's enabling statute provides limited detail regarding the scope of its jurisdiction, some interested parties have questioned the reach of the FSC's investigative authority. In light of these jurisdictional questions and the related risk of litigation, the Commission voted at its January 21, 2011 quarterly meeting to obtain an official legal opinion from the Texas Attorney General's Office. (*See* Exhibit 1 for copy of request.) **While the Attorney General opinion request is pending, the FSC will not issue any finding in response to allegations of misconduct or negligence by the Texas Department of Public Safety ("DPS").** Rather, the purpose of this

report is to set forth the FSC's observations regarding the analysis conducted and lessons learned from the case, and to issue recommendations that the Commission believes will help advance forensic science in Texas courts. The FSC anticipates that ambiguities and conflicts over jurisdictional issues will be addressed by the Attorney General's office in its response to the pending request, and may update this report accordingly.

III. LIMITATIONS OF THIS REPORT

No finding contained herein constitutes a comment upon the guilt or innocence of any individual. A final report by the FSC is not prima facie evidence of the information or findings contained in the report. TEX. CODE CRIM. PROC. art. 38.01 § 4 (e); FSC Policies and Procedures § 4.0 (d). The Commission does not currently have enforcement or rulemaking authority under its statute. The information it receives during the course of any investigation is largely dependent upon the willingness of concerned parties to submit relevant documents and respond to questions posed. The information gathered has not been subjected to the standards for admission of evidence in a courtroom. For example, no individual testified under oath, was limited by either the Texas or Federal Rules of Evidence (*e.g.,* against the admission of hearsay) or was subjected to formal cross-examination under the supervision of a judge. Therefore, this report does not serve as a document necessarily admissible in court for any civil or criminal purpose. Rather, it seeks to encourage the development of forensic science in Texas.

IV. SUMMARY OF KEY FACTS AND COMPLAINT

On January 14, 1988, Brandon Lee Moon was convicted by a jury in El Paso, Texas of three counts of sexual assault arising from an April 1987 rape in El Paso. Moon was sentenced to 75 years in prison. He remained in prison until December 2004, when the Honorable Sam M. Paxon ordered that he be released based on the results of DNA testing. (*See* Exhibit 2.) In April 2005, Moon was exonerated by the Texas Court of Criminal Appeals based on grounds of actual innocence. Ex parte Brandon Lee Moon, No. 75,131-32 (Tex. Crim. App. 2005).

Key testimony at trial included the victim's identification of Moon and collaborative eyewitness identification testimony from another woman who had been sexually assaulted in a similar manner. Department of Public Safety ("DPS") Criminalist Glen David Adams also testified regarding the serology analysis conducted in the case. Mr. Adams testified that the perpetrator's semen was found: (1) on a bathrobe that the victim used to cover herself after the rape; and (2) on a comforter on the bed where the rape occurred. (*See* Trial Transcript at 233.) Mr. Adams also told the jury that the semen on both pieces of evidence came from a "non-secretor" (*i.e.,* someone whose blood type is not detectable in other bodily fluids). (*See* Exhibit 3.) He testified that approximately 15% of the

population consists of non-secretors, and that Moon was a non-secretor while the victim and the only two males in her household (her son and husband) were all "secretors" (*i.e.,* their blood type is detectable in other bodily fluids). (*See* Exhibit 4.)

On August 13, 2008, the Innocence Project ("IP") filed a formal complaint ("Complaint") with the FSC alleging professional negligence and/or misconduct in: (1) DPS's hiring, training and supervision of Mr. Adams; (2) the analysis, interpretation and testimony of Mr. Adams; (3) DPS's failure to conduct a DNA test on a new sample of Moon's blood after DPS analyst Donna Stanley determined in 1996 that the serology testing in the case was flawed; and (4) DPS's failure to take subsequent, necessary steps to complete further DNA testing as set forth in its report dated April 24, 2003, which conclusively excluded Moon as the source of seminal fluid found on the victim's comforter and robe. (*See* Exhibit 5.)

V. HISTORY OF CONVICTION, DNA TESTING AND APPEALS

While the Commission relied upon documents from various phases of litigation in this case, the Commission does not comment on or evaluate the appropriateness of the litigation. The procedural history is provided here simply to give context to how the case came before the Commission.

Conviction (1988). After a jury trial in the District Court of El Paso County, Brandon Moon was convicted and sentenced to 75 years in prison on January 14, 1988 for three counts of aggravated sexual assault. (*See* Exhibit 6.)

Lifecodes Testing (1989). In 1989, Moon requested and was granted

access to the evidence in his case for DNA testing. (*See* Exhibit 7.) Testing was conducted by Lifecodes Corporation, which released its results in February 1990. (*See Id.*, and also *See* Exhibit 8.) Using an early form of DNA technology available at the time, the lab obtained a DNA profile from the comforter only. The results excluded Moon as the contributor of the semen on the comforter. However, the profile was not compared to the profiles of the victim, her husband or her son.

DPS Testing (1996). From 1994-1996, Moon filed various petitions for writ of habeas corpus in state and federal court. On May 9, 1996, John L. Davis, the Appellate Chief in the El Paso District Attorney's Office, sent a letter to the DPS lab in Austin requesting that one of their analysts (Donna Stanley) contact Lifecodes "for a full explanation of the tests conducted by them and the results obtained, and to determine what further testing can and should be done." (*See* Exhibit 9.) Ms. Stanley conducted further DNA testing using the "DQ-Alpha" method, beginning in late 1996. She concluded that the DNA profile for the semen on the comforter was *different* than the profile for the semen on the bathrobe. However, she informed the District Attorney that in order to reach any further conclusions, she would need reference samples from Moon, the victim, and the two other males in the household (the victim's husband and the victim's son). No reference samples were obtained.

Additional DPS Testing (2002). In 2001, Texas passed landmark legislation allowing for post-conviction DNA testing (TEX. CODE CRIM. PROC. art. 64.01 et seq.) Moon filed a request for testing under the statute, and his request

was granted in 2002 pursuant to an unpublished order of the 346th Judicial Court of El Paso, Texas (Baca, J.) (*See* Defendant's Uncontested Motion for Findings at p. 1.) The evidence was sent to the DPS lab in El Paso in October 2002. *Id.* The El Paso lab conducted "Short Tandem Repeat" (STR) testing, a more advanced method of DNA testing, on the remaining evidence. The results explicitly excluded Moon as the contributor. The lab identified two male profiles from the samples (one from the comforter and one from the bathrobe). Both of these samples contained the victim's DNA and an unknown male's DNA, but neither contained Moon's DNA.

Reference testing (2004). In early 2004, the DPS lab results were compared to the victim's son, and he was also excluded as a contributor. In November 2004, the victim's ex-husband's DNA was compared to the profile and found to be the DNA from the contributor of the semen on the comforter.

Release (2004). Moon was released from prison in December 2004.

Exoneration (2005). On April 6, 2005, Moon was exonerated by the Texas Court of Criminal Appeals on grounds of actual innocence.

VI. EVOLVING STANDARDS OF PRACTICE IN FORENSIC ANALYSIS AND POST-CONVICTION DNA TESTING: 1988-2004

A. Basic Background re: Serology (1988)

At the time Mr. Moon's case was tried, DNA analysis was not yet conducted by DPS laboratories. (*See* Exhibit 10.) Serology testing was limited to analysis of bodily fluids such as blood, semen and saliva, to determine the blood group type of the donor and his or her status as either a "secretor" or "non-secretor." People who are identified as "secretors" have detectable blood group

antigens in other bodily fluids, while "non-secretors" do not. Approximately 15% of the population consists of non-secretors. (*See* Exhibit 11.) Therefore, serology testing in this case (as in all cases at the time) was limited to circumstantial evidence. At best, an analyst could only conclude that the defendant was a non-secretor who fell into the 15% sub-group of the general population. (*See* Exhibit 12.)

The FSC notes that DPS's Midland laboratory conducted additional testing for enzymes before trial in an attempt to gain more meaningful examination results. However, the results showed that the victim and the suspect shared the same PGM 1 enzyme, so the test did not furnish any further discrimination of the suspect. (*See* Exhibit 13.)

In addition, at the time the case was tried, DPS was only in the beginning stages of working with its accrediting agency, the Association of Crime Lab Directors-Laboratory Accreditation Board ("ASCLD-LAB") to establish quality assurance standards. The DPS Lubbock laboratory was first accredited by ASCLD-LAB in 1986. While some quality assurance controls were in place at the time of trial (*See* Exhibit 14), the protocols have been dramatically increased since that time. The impact of accreditation standards is discussed in Section C below.

B. Observations Regarding Serology Conducted by DPS

Two DPS criminalists testified in Moon's case. Glen Adams testified regarding the results of the serology testing and David Mahan testified regarding the hair comparison analysis he conducted. The hair analysis did not show a

match between Moon and any of the hairs found at the scene, and thus is not a focus of this report.

With respect to the serology analysis, Mr. Adams testified that the perpetrator's semen was found: (1) on a bathrobe that the victim used to cover herself after the rape; and (2) on a comforter on the bed where the rape occurred. (*See* Trial Transcript at 233.) Mr. Adams also testified that the semen on both pieces of evidence came from a "non-secretor" (*i.e.,* someone whose blood type is not detectable in other bodily fluids). (*See* Trial transcript at 236-237.) He told the jury that approximately 15% of the population consists of non-secretors, and that Moon was a non-secretor while the victim and the only two males in her household (her son and husband) were all "secretors" (*i.e.,* their blood type is detectable in other bodily fluids). (*See* Exhibit 15.)

As subsequent DNA testing showed, Mr. Adams was incorrect in his determination of secretor status for the semen donors from the comforter and robe samples. Because subsequent DNA testing showed that the semen on the comforter was indeed from the victim's husband, and the victim's husband was a secretor, Mr. Adams' conclusion that the husband could not have been the donor (because the donor was a non-secretor) was incorrect. DPS analyst Donna Stanley and serology experts Mark Stolorow and Lewis Maddox subsequently pointed out that the tests' failure to yield any detectible ABO blood group substance is likely attributable to the evidence being too degraded or diluted to obtain an interpretable ABO result (rather than the conclusion that the donor was a non-secretor). (*See* Exhibit 16; *see also* Exhibit 17.)

Taking this explanation into account, the results made it no more likely that Moon was the perpetrator than any other person. While the FSC does not believe sufficient information is available to reach a conclusion about why Mr. Adams did not identify this issue, the Commission notes that subsequent quality assurance initiatives over the last two decades have dramatically changed the way in which DPS analysts' work is conducted and reviewed. As the NAS Report notes, no method of forensic analysis (even DNA analysis) is immune from errors. Laboratories must be willing to accept the fact that no laboratory is perfectly accurate and strive to continually improve standards, training and quality control. (NAS Report at 47.)

C. Effect of Crime Laboratory Accreditation on Contemporary Standard of Practice

As previously stated, ASCLD-LAB is the entity responsible for accrediting DPS's crime laboratory system. As described in the NAS Report, ASCLD-LAB focuses primarily on laboratory management and operations, personnel qualifications, and the lab's physical plant. The following is a list of minimum accreditation requirements:

- Procedures to protect evidence from loss, cross-transfer, contamination, and/or deleterious change;
- Validated and documented technical procedures;
- The use of appropriate controls and standards;
- Calibration procedures;
- Complete documentation of all evidence examination;
- Documented training programs that include competency testing;
- Technical review of a portion of each examiner's work product;
- Testimony monitoring of all who testify; and
- A comprehensive proficiency testing program.

(*See* NAS Report at 198.)

The FSC understands that a number of changes have been made to DPS policies and procedures over the years as a result of evolving accreditation requirements, and that increasingly higher standards have resulted in ongoing improvements in DPS quality assurance. Some of the changes directly affect concerns raised by the complainant in this case, as follows:

(1) Analyst Hiring Process. One of the allegations in this case is that Mr. Adams was insufficiently prepared to perform his job as a serologist. This claim is based primarily on two items in his personnel file: (a) he received a "D" grade in his serology class at Texas Tech; and (b) his probationary period report in May 1987 indicated that he needed to "apply himself much more into gaining a better understanding of basic forensic serology." (*See* Exhibit 18.) A complete review of the record indicates that Mr. Adams showed continuous improvement with each subsequent review, and supervisors noted positive qualities that made him a good colleague within the lab. (*Id.*) Supervisors also repeatedly cited his willingness to learn and improve in his work. During this time period, DPS would have reviewed every analyst's transcript and overall grade point average in college before hiring an analyst, rather than focusing on any particular course grade. DPS assumed that all recent college graduates required comprehensive on-the-job training, and that no new employees came to the position with anything but a base-level knowledge of forensics. Moreover, DPS did not have the funds to hire analysts away from other laboratories, and thus most of its new hires were entry-level analysts requiring significant training. The FSC believes that DPS's

approach to hiring and training was indicative of the job market and state of the profession in the late 1980's.

Today, the job market for DNA analysts is significantly more competitive, and national standards require analysts to have certain levels of scientific education and maintain proficiency through continuous testing. National accreditation standards have also been a significant force in ensuring that analysts are properly educated and trained. The FSC observes that efforts are ongoing at the national and state level to determine whether standards should be increased and/or revised as technology evolves.

(2) Review of Cases. At the time Mr. Adams was performing serology testing, technical reviews of analyst's cases were conducted on a random basis. According to current DPS lab management, a criminalistics review team would review a sampling of a particular analyst's work twice per year as a method of spot-checking the analyst's performance. Approximately five of the analyst's cases would be reviewed each time. Though Mr. Adams was required to complete various quality assurance procedures for the testing in this case, unless a mistake was made in the quality assurance procedures, or the case was selected as part of the analyst's random review, no mechanism was in place to red flag the interpretive issues raised by Donna Stanley in her 1996 memorandum (*i.e.,* that the tests' failure to yield any detectible ABO blood group substance was more likely attributable to the evidence being too degraded or diluted than to the conclusion that the donor was a non-secretor). Today, every case is subject to a full technical review before a DPS report is issued. The FSC notes that DPS has

adopted this procedure even though ASCLD-LAB does not require a review in every case.

D. Contemporary Standard of Practice: DNA Analysis

The use of deoxyribonucleic acid (DNA) analysis was first introduced as a potential forensic science tool in the 1980's. (NAS Report at 40.) DNA is the fundamental building block for an individual's entire genetic makeup; the DNA in a person's blood is the same as the DNA in their skin cells, semen, and saliva. In 1990, the congressional Office of Technology Assessment released a report concluding that DNA tests were both reliable and valid for forensic use but required a "strict set of standards and quality control measures before they could be widely adopted." (*Id.* citing U.S. Congress, Office of Technology Assessment. 1990. *Genetic Witness: Forensic Uses of DNA Tests*. OTA-BA-438. Washington, DC: U.S. Government Printing Office, NTIS order #PB90-259110.)

In 1990, the Federal Bureau of Investigation established guidelines for DNA analysis. (NAS Report at 40.) In 1994, it created the Combined DNA Index System (CODIS), which allows federal, state, and local crime laboratories to exchange and compare DNA profiles electronically. (*Id.*) Over the past two decades, the use of DNA evidence in crime scene investigation has grown significantly. (*Id.*) National laboratory accrediting bodies and crime laboratories have worked to address concerns about the use of DNA evidence, such as questions involving contamination, degradation, and interpretation of statistical results. (*Id.*) As the NAS Report highlights, due to its "well-defined precision

and accuracy" DNA analysis has "set the bar higher" for other forms of forensic science. (*Id.* at 41.)

E. Effect of Post-Conviction DNA Testing Legislation on Contemporary Standard of Practice

In 2001, the Texas Legislature passed Senate Bill 3 (creating Chapter 64 of the Texas Code of Criminal Procedure) authored by Senator Robert Duncan (R-Lubbock). It sets forth a procedure for post-conviction forensic DNA testing, allowing a convicted person to file a request for a court order authorizing DNA testing of available biological material. It requires the court to order a test if certain conditions are met, and to appoint and compensate attorneys for indigent defendants under certain conditions. (TEX. CODE CRIM. PROC. art. 64.01.)

Under the statute, DPS conducts all post-conviction DNA testing, unless the convicted defendant requests an outside laboratory. (*Id.* at art. 64.03(c)). The test results in each case must be sent to the court, the prosecuting attorney and the convicted defendant. (*Id.* at art. 64.03(d)(3)). The statute's intent is to ensure uniform access to DNA testing and test results in appropriate cases. The Commission observes that the statute's impact in Texas has been significant, resulting in over 40 exonerations and numerous subsequent convictions of responsible criminals. It has also addressed concerns about inconsistency in post-conviction testing across the state, ensuring that a convicted defendant's ability to obtain testing is not left to chance or to the ability of any particular prosecuting attorney to follow up on a case.

VII. OBSERVATIONS REGARDING DNA TESTING BY DPS

A. Testing by DPS Lab in Austin (1996)

On May 9, 1996, John L. Davis, the Appellate Chief in the El Paso District Attorney's Office, sent a letter to the DPS lab in Austin requesting that one of their analysts (Donna Stanley) contact Lifecodes "for a full explanation of the tests conducted by them and the results obtained, and to determine what further testing can and should be done." (*See* Exhibit 9.) On May 24, 1996, Ms. Stanley received the biological material from LifeCodes, and began conducting further DNA testing using the "DQ-Alpha" method. She concluded that the DNA profile for the semen on the comforter was *different* than the profile for the semen on the bathrobe. She informed the District Attorney that in order to reach any further conclusions, she would need reference samples from Moon, the victim, and the two other males in the household (the victim's husband and the victim's son). (*See* Exhibit 19.)

On December 13, 1996, Ms. Stanley composed a memorandum to the file reiterating her position that additional samples were needed. She also commented on the original serology work, stating:

> "I would have expected the victim's BGS "A" should have been detected from these stains. None was detected. This would have suggested that perhaps the stains are not sensitive enough in this particular case to detect the victim's BGS. If so, then the suspect or semen donor to these stains may not be detected as well." (*See* Exhibit 17 at p. 1.)

On the memorandum was a note in Ms. Stanley's handwriting stating "This is only for my use. My opinion & conclusion of circumstances." It is unclear whether Ms. Stanley ever showed her memorandum to anyone within or outside DPS. It is therefore difficult to determine to what extent her supervisors

were aware that a key issue was not flagged in the initial serology work. Recent discussions with former supervisors indicate that the first time any supervisor recalls seeing the internal memorandum is in response to an Open Records Act request in 2004. Ms. Stanley is no longer living in Texas, and FSC staff has been unable to reach her as of this draft.

What is clear, however, is that Ms. Stanley requested reference samples from the prosecutor's office beginning in 1996. For example, the record shows that on May 17, 1996, Ms. Stanley submitted an affidavit to Mr. Davis stating that in order to properly test the evidence, she would require a new blood sample from the victim and Mr. Moon. This affidavit was attached to Moon's petition for writ of habeas corpus. (*See* Exhibit 20.) She also requested a blood sample from the victim's husband, because the victim stated that she had sexual intercourse with her husband the night before the assault. She further requested a sample from the victim's son, since the victim fled her home wearing her son's bathrobe. (*See* Exhibit 21.) Her January 2007 letter to Mr. Davis reiterates the need for reference samples. (*See* Exhibit 19.)

No reference samples were obtained in response to Ms. Stanley's request, and she left DPS shortly after drafting her internal memorandum. There is no indication in the file that the case was assigned to anyone else in DPS. In fact, FSC staff learned during the course of this investigation that DPS's practice at the time would have been to close the case once outreach had been made to a particular district attorney. Because DPS did not have authority to obtain reference samples on its own, it relied on prosecutors to conduct the necessary

follow-up, and closed the case if no response was received.

It is important to note that DPS crime laboratories were established for the purpose of supporting law enforcement agencies in Texas. Accordingly, DPS considers the police departments and district attorneys that rely on its services to be clients. DPS has traditionally relied on these clients to provide complete information (including follow-up where needed) so that DPS may perform its work in a complete and thorough manner.

The fact that no reference samples were obtained in this case until 2004 concerns many commissioners and underscores the critical impact of the 2001 post-exoneration DNA testing legislation. During the course of this investigation, FSC staff learned that one of the issues leading to the passage of the legislation was that DPS's ability to obtain follow-up testing materials from its clients was inconsistent from county to county. While some prosecutors responded in a timely manner, others lacked the ability, resources or willingness to obtain additional material. The 2001 legislation leveled the playing field in Texas by requiring courts to evaluate inmate requests and issue orders for testing on a case-by-case basis. Thus, an inmate's access to testing is not dependent on the perception of a particular district attorney regarding his responsibility (or lack thereof) to obtain follow-up biological material that could potentially lead to an exoneration. The FSC offers a few recommendations below to address remaining concerns about the timeliness of testing follow-up procedures in this case.

B. Testing by DPS Lab in El Paso (2003)

In May 2002, Mr. Moon filed a request for testing under the 2001 statute, and his request was granted pursuant to an unpublished order of the 346th Judicial Court of El Paso, Texas (Baca, J.) (*See* Exhibit 22.) The evidence was sent to the DPS lab in El Paso in October 2002. *Id.* The El Paso lab conducted "Short Tandem Repeat" (STR) testing, a more advanced method of DNA testing, on the remaining evidence. The results explicitly excluded Moon as the contributor. (*See* Exhibit 5.) The lab identified two male profiles from the samples (one from the comforter and one from the bathrobe). *Id.* Both of these samples contained the victim's DNA and an unknown male's DNA, but neither contained Moon's DNA. *Id.*

The file shows that Ms. Ceniceros first called the El Paso District Attorney's office (John Davis) on November 2, 2002, to inform him of her conclusion that Mr. Moon's DNA did not match the semen stains. (*See* Exhibit 23.) According to Ms. Ceniceros' notes at the time, Mr. Davis stated that he would work on getting samples from the son and husband to rule them out as contributors. *Id.* Ms. Ceniceros called again on November 18, 2002, and left a message requesting an update. *Id.* In January 2003, Ms. Ceniceros called Mr. Davis again. According to her notes, he said he would speak to Moon's defense counsel at an upcoming court date. *Id.* In February 2003, Moon's defense attorney contacted Ms. Ceniceros and told her that he would locate the family and get reference samples from Mr. Moon. *Id.* Further notes from Ms. Ceniceros indicated that as of April 2003, Mr. Davis had not heard back from defense counsel regarding recollection of samples. *Id.* At that time, Ms. Ceniceros

informed Mr. Davis that she would be releasing her report stating that Mr. Moon's DNA did not match the donor, and she did in fact release her report on the 24th of that month. In 2004, IP became involved in the case, and during the course of that year the reference samples were obtained. DPS's final analysis was presented to Judge Paxon in December 2004, and Mr. Moon was released from prison pursuant to court order.

The FSC observes that in November 2002, Ms. Ceniceros concluded that the DNA profiles on the comforter and the robe did not match Mr. Moon's profile. She then made numerous attempts to finalize the case in collaboration with the El Paso District Attorney and Mr. Moon's defense counsel. However, Mr. Moon was not released from prison until December 2004. The FSC is concerned that such a significant passage of time does not serve the interests of justice. As discussed in the Recommendations Section below, the FSC encourages DPS to: (1) review the facts involved in the time gaps in this case (both in 1996 and 2004); (2) determine whether any changes could be made to standard operating procedures to address similar scenarios in the future; and (3) implement changes to internal policies and procedures accordingly.

VIII. RECOMMENDATIONS

Due to the passage of time in this case, many recommendations that might otherwise have been made regarding analyst training and quality assurance standards have been covered by the application of ASCLD-LAB accreditation standards for all DPS crime labs in Texas. The FSC does not mean to imply that accredited crime labs cannot continuously improve beyond what is required

through accreditation, but rather that the national accreditation system has imposed increasingly more rigorous and consistent standards regarding quality assurance, proficiency testing, training, auditing, and supervision of casework. Though the FSC does not believe it is necessary to repeat ASCLD-LAB's accreditation requirements here, Commissioners believe the following initiatives (in addition to those imposed by ASCLD-LAB) would be helpful steps in addressing the concerns raised by this particular case:

RECOMMENDATION 1: DPS internal review of serology cases. After preliminary discussions with FSC staff, the DPS Lab Director initiated a review of all cases in which analyst Glen Adams testified at trial and the defendants are still incarcerated. The Director and FSC staff agreed that a prudent first step would be to assemble a group of analysts throughout the DPS laboratory system who still have expertise in serology to conduct an initial review of these cases, and identify whether any of the serology testing merits further review. DPS has identified 10-12 cases, and FSC staff expects those results to be returned at some point this summer. Members of the Moon panel can then make recommendations about any additional follow-up work that might be done on those cases, or whether any cases should be referred to the appropriate prosecutors, defendants and defense attorneys for review.

RECOMMENDATION 2: Consider assembling a peer review team to evaluate serology-based convictions for defendants still incarcerated. While the 2001 post-conviction DNA testing legislation has given defendants the opportunity to test remaining biological material when certain criteria are met, it

does not address situations in which a conviction was based primarily on serology analysis but there is no biological material or insufficient biological material remaining for testing. The FSC could consider recommending that DPS assemble a collaborative peer review team to consider whether the problematic serology analysis in this case was a systemic or isolated incident. To the extent any systemic problems are identified, the team could discuss cost-effective methods for identifying and referring serology-based convictions for additional review as necessary.

RECOMMENDATION 3: <u>Create system for flagging cases where additional biological material is requested by DPS but not received</u>. An issue of concern to the Commission in this case is the fact that important scientific conclusions could not be reached until DPS received reference samples, but DPS was dependent on its client (in this case the El Paso District Attorney's office) to determine how and when the samples were obtained. As previously noted, DPS analyst Donna Stanley communicated clearly in 1996 that she needed reference samples but DPS did not receive those reference samples from the prosecuting attorney. Further, in 2002, DPS analyst Christine Ceniceros concluded that Moon was not the donor of the semen on the robe or the comforter, but the El Paso District Attorney requested a reference sample from the victim's husband to determine whether he was a donor. It took two additional years for attorneys to obtain the reference samples. The FSC believes that DPS should reflect on the lessons learned in this case and consider developing a mechanism for flagging any critical case in which the response to a request for reference samples or other

critical material is delayed. While the FSC recognizes that the 2001 post-exoneration testing legislation may address many of these concerns, it may also be helpful for DPS to consider whether any further control mechanisms are advisable. The FSC encourages DPS to share the results of its analysis with the FSC and ASCLD-LAB upon completion.

[PANEL MEMBERS: OTHER RECOMMENDATIONS????]

Texas Forensic Science Commission

Justice Through Science

January 28, 2011

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Greg Abbott
Attorney General
P. O. Box 12548
Austin, TX 78711-2548

Re: Texas Forensic Science Commission Request for Attorney General Opinion

Dear Attorney General Abbott:

Pursuant to Section 402.042 of the Texas Government Code, I submit this request for an opinion regarding the jurisdictional scope of the Texas Forensic Science Commission ("FSC"). The FSC voted unanimously to approve this request. There is no litigation pending regarding the matters for which this opinion is requested.

In May 2005, the Texas Legislature passed House Bill 1068 (the "Act") which created the FSC by amending the Code of Criminal Procedure to add Article 38.01. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. In three pages, Article 38.01 sets forth the composition and authority of the FSC. The Act took effect on September 1, 2005. *Id.* at § 23. No changes have been made to Article 38.01 since that date.

The following statutory language is critical to the opinion request set forth below:

1. Effective Date Provision

The Act contains an effective date clause, which provides that changes made by the Act apply to:

(1) **evidence tested or offered in evidence on or after the effective date of this Act; and**

(2) **an individual who, on or after the effective date of this Act:**

A. is confined in a penal institution operated by or under contract with the Texas Department of Criminal Justice….;

John M. Bradley
Presiding Officer

Commission Office

Leigh Tomlin
Commission Coordinator

Texas Forensic Science Commission
Sam Houston State University
College of Criminal Justice
Box 2296
816 17th Street
Huntsville, TX 77341-2296

Phone: 1 (888) 296-4232
Fax: 1 (888) 305-2432

B. is confined in a facility operated by or under contract with the Texas Youth Commission….;

C. voluntarily submits or causes to be submitted a DNA sample as described in....; or

D. is ordered by a magistrate or court to provide a DNA sample under subsection G, Chapter 411, Government Code.

Id. at §22 (emphasis added).

2. Accredited Laboratory

Under Article 38.01(4)(a)(3) of the Act, the Commission shall:

> investigate, in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis **conducted by an accredited laboratory, facility or entity** (emphasis added).

3. Forensic Analysis

Article 38.01(2) refers to Article 38.35(a) for the meaning of the term "forensic analysis." Article 38.35(a) defines the term as follows:

> "Forensic analysis" means a **medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence**, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term includes an examination or test requested by a law enforcement agency, prosecutor, criminal suspect or defendant, or court (emphasis added).

Article 38.35 also expressly excludes certain types of analysis from the "forensic analysis" definition. For purposes of this opinion request, the most relevant exclusion is found in Article 38.35(a)(4)(D):

> an examination or test **excluded by rule** under Section 411.0205(c), Government Code (emphasis added).

Under Section 411.0205(b) of the Government Code, the Texas Department of Public Safety ("DPS") is responsible for accrediting crime laboratories and other entities that conduct forensic analysis in Texas. DPS is also authorized to designate certain forensic disciplines that are exempt from accreditation. *Id.* at §411.0205(c). Pursuant to its rulemaking authority, DPS maintains two lists of forensic disciplines, one including those that are subject to accreditation, and the other including disciplines that are exempt from accreditation. *See* 37 TEX. ADMIN. CODE §§ 28.145-28.147 (2010). There are, however, numerous categories of forensic analysis that do not appear on either list.

The questions for which the FSC requests an opinion are as follows:

1. Impact of Effective Date Provision: Does the Act's effective date provision restrict the FSC's investigative authority to cases in which the requirements set forth in that provision are met?

2. Meaning of "Accredited Laboratory": Does the Act limit the investigative scope of the FSC to allegations of negligence and misconduct involving forensic analyses conducted only by laboratories, facilities or entities that were accredited by the Department of Public Safety ("DPS") when the analyses took place?

3. Scope of the Term "Forensic Analysis": Does the Act prohibit the FSC from investigating fields of forensic analysis that have been expressly excluded by DPS pursuant to its rulemaking authority under Section 411.0205(c) of the Texas Government Code? When the FSC receives a complaint involving forensic analysis that is *neither* expressly included *nor* expressly excluded by the Act or DPS rule, does the FSC have authority to investigate such a complaint?

Since its creation in September 2005, the FSC has received numerous investigative requests from the public (referred to herein as "complaints"). Some complaints involve cases in which the evidence underlying the forensic analysis was tested or offered into evidence years (and sometimes decades) before the Act's effective date. In other complaints, the laboratory in question was not accredited at the time the analysis in question was performed. The FSC has also received complaints in which the forensic analysis is not expressly excluded from accreditation by statute or DPS rule, but also does not expressly appear on the inclusion list promulgated by DPS under its rulemaking authority.

In many of these cases, the FSC has struggled to determine the scope of its jurisdiction, while remaining responsive to concerns of the public and the laboratories and agencies under investigation. There is no established administrative construction for the questions set forth in this request. An Attorney General opinion regarding the FSC's jurisdictional and investigative scope would provide clarity to the public and other state agencies, while protecting the FSC and its members from potential liability for exceeding

statutory authority. The opinion would also assist the Legislature in deciding whether to amend the FSC's investigative authority.

The FSC respectfully requests a response to the questions set forth above as soon as possible. Please feel free to contact me if we may provide additional information.

Sincerely,

John Bradley
Presiding Officer
Texas Forensic Science Commission

CAUSE NOS. 50015 and 50033

EX PARTE	§	IN THE 346th DISTRICT COURT
	§	
BRANDON LEE MOON,	§	
	§	
APPLICANT	§	EL PASO COUNTY, TEXAS

AGREED AND STIPULATED FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION, AND ORDERS PURSUANT TO ARTICLES 64.04, 11.07, AND 11.65 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

Having reviewed the documents filed in cause numbers 50015 and 50033 and the official court records of the challenged convictions, and pursuant to the provisions of Chapters 11 and 64 of the Texas Code of Criminal Procedure, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Background

1. On January 14, 1988, a jury in the 327th District Court of El Paso County, Texas, the Hon. Enrique H. Pena, presiding, convicted Brandon Lee Moon, Applicant, of three counts of aggravated sexual assault, cause numbers 50015, 50032, and 50033, and the jury assessed Applicant's punishment at 75 years confinement and a $7,500 fine for each count.

2. On direct appeal, the Eighth District Court of Appeals reversed the conviction in cause number 50032; therefore, Applicant is currently confined in cause numbers 50015 and 50033.

3. All three counts arose from a single criminal episode in which the victim was attacked by an unknown assailant on the morning of April 27, 1987. During the attack,

the victim was forced to disrobe and was raped by the perpetrator at gunpoint in the master bedroom of her home. The victim testified that the perpetrator ejaculated inside her.

4. At the time of the attack, the victim was married and the mother of three children: a teenage son and twin daughters.

5. After the perpetrator left the house, the nude victim covered herself with her son's bathrobe and drove in her car to a nearby convenience store to call the police.

6. The victim was taken to a hospital, and evidence in the form of a "rape kit" (which included combed pubic hairs, fingernail scrapings, vaginal, cervical, and oral swabs, a blood sample, and vaginal saline washes) was collected from the victim.

7. The police also collected as evidence the bathrobe with which the victim covered herself immediately after the assault and the bedspread or comforter on which the rape occurred. Both items contained semen stains.

8. The victim testified that she had sexual intercourse with her husband on the bed the night before this attack, and that her husband and the rapist were the only two men with whom she had sexual intercourse at or around the time of the rape.

9. The victim identified Applicant at trial as the man who had raped her.

10. DNA testing was not performed on any of the physical evidence, including the comforter, the bathrobe, or the vaginal swabs, prior to Applicant's trial.

11. Applicant testified at trial, denied attacking the victim, and offered an alibi defense, which was partially corroborated by two witnesses.

12. At trial, the prosecution also presented the testimony of a woman who in 1985 had been raped by an assailant that matched the physical description of the man who raped the victim in this case. The *modus operandi* of each assault was highly similar and distinctive. The woman identified Applicant at trial as her attacker. Applicant denied attacking the woman.

Post-Conviction DNA Testing

13. In or around April 2003, El Paso DPS lab criminalist Christine Ceniceros created a partial DNA profile of Applicant from an old, degraded specimen of Applicant's blood. Ceniceros then conducted advanced Short Tandem Repeat (STR) DNA testing on the semen stains from the comforter and bathrobe, on a blood sample

from the victim, and on the degraded blood sample from Applicant.

14. On April 24, 2003, the El Paso DPS lab published the results of its findings. The report states that the STR-DNA tests yielded two distinctive male DNA profiles (one from the comforter and one from the bathrobe), each mixed with the victim's DNA. Each mixture is consistent with that resulting from an act of sexual intercourse with the victim.

15. Those DNA tests establish that the semen on the bathrobe and the semen on the comforter each came from a different male.

16. Those DNA tests establish that Applicant (on the basis of the partial DNA profile created from the degraded blood sample) is excluded as the donor of the semen in the mixed male/female stains on both the comforter and the bathrobe.

17. On December 8, 2004, Orchid Cellmark laboratories issued a report, supported by a follow-up affidavit by Mark D. Stolorow and Lewis Maddox (Executive Director and Laboratory Director of Orchid Cellmark, respectively), concerning the results of its STR-DNA analysis of a DNA sample from the victim's husband at the time of the offense, which report establishes that the husband shares the identical, 13-STR-loci DNA profile as the donor of the semen on the comforter.

18. The Cellmark report establishes that the husband is excluded as a potential donor of the semen on the bathrobe.

19. The El Paso County District Attorney's Office learned of the Cellmark report on Friday, December 10, 2004.

20. On Monday, December 13, 2004, the District Attorney's Office asked Christine Ceniceros to review Cellmark's conclusions.

21. Based on the information provided from Cellmark, including the DNA profile of the husband, Ceniceros agreed that the husband was excluded as a possible donor of the semen on the bathrobe, but that he was the donor of the semen on the comforter.

22. On Tuesday, December 14, 2004, and for the very first time, Ceniceros also created a DNA profile from extract on a slide obtained from a vaginal swab collected from the victim at the time of the rape examination, which extract Ceniceros had only recently (in December 2004) discovered was testable.

23. Thereafter, Ceniceros determined that the extract from the vaginal swabbing contained mixed male/female DNA, and there were two separate male donors in the male portion of that mixture. She was able to create a complete DNA profile of one of the

male donors and a partial DNA profile from the other male donor.

24. Thereafter, Ceniceros determined that the DNA profile of the husband, as provided by Cellmark, was consistent with the partial DNA profile from the vaginal extract, which was consistent with the victim's testimony that she had sexual intercourse with her husband the night before she was raped.

25. Thereafter, Ceniceros determined that the complete male DNA profile from the vaginal extract, which did not match the husband's DNA profile (as provided by Cellmark), did match the DNA profile of the donor of the semen from the bathrobe.

26. Thereafter, by comparing the partial DNA profile of Applicant, from the degraded blood sample, against the complete male DNA profile from the vaginal extract, Ceniceros determined that the partial DNA profile of Applicant did not match the male DNA from the vaginal extract.

27. Thereafter, Ceniceros entered the full DNA profile obtained from the bathrobe in CODIS searching for a match in Texas.

28. The Texas Department of Public Safety in Austin verified that Applicant's DNA profile had ben entered in and was currently in the CODIS system.

29. Ceniceros then received a report stating that the DNA profile entered by her from the bathrobe did not match any DNA profile in the CODIS system in the Sate of Texas.

30. The above summary of DNA testing and comparisons thus establishes that Applicant is conclusively excluded as the donor of the semen from the comforter, the bathrobe, and the vaginal extract from the victim's rape examination, and that the semen donor from the vaginal extract (other than the husband) and the bathrobe is unknown.

CONCLUSIONS OF LAW

1. The Court finds, pursuant to article 64.04 of the Texas Code of Criminal Procedure, that the results of the DNA tests are favorable to Applicant, in that the results make it reasonably probable that Applicant would not have been convicted had the results been available during the trial of the offense.

2. The Court further finds, pursuant to article 11.07 of the Texas Code of Criminal Procedure and by clear and convincing evidence, that no reasonable juror would have convicted Applicant in light of the new evidence, namely, the DNA test results and comparisons summarized above.

RECOMMENDATION

Based on the new evidence, namely, the results of the DNA testing and comparisons summarized above establishing that Applicant was not the donor of the semen found inside the victim, on the bathrobe, or on the comforter, and that the semen donor from the vaginal extract (other than the husband) and the bathrobe is unknown, the Court recommends that Applicant's requested habeas corpus relief be granted and that his convictions for aggravated sexual assault in cause numbers 50015 and 50033 be vacated.

ORDER FOR BOND PURSUANT TO ARTICLE 11.65 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

This Court, having approved the agreed findings of fact jointly stipulated to by the Applicant and the State, orders that Applicant be released on bond in the amount of $ 1 XX, until such time as the Texas Court of Criminal Appeals makes its final ruling on Applicant's article 11.07 writ application or further order of the Court.

ORDER TO THE TRIAL COURT CLERK

The Clerk of this Court is ordered to prepare a transcript of the proceedings had herein and forward such transcript, along with all applicable records according to the provisions of article 11.07 of the Texas Code of Criminal Procedure, to the Clerk of the Court of Criminal Appeals. The transcript shall include:

1. The indictments, judgments, and sentences in cause numbers 50015 and 50033;

2. The opinion of the Eighth Court of Appeals in cause numbers 50015 and 50033;

3. All pleadings filed by Applicant in this writ proceeding, including the writ application and attached exhibits; and

4. These findings of fact, conclusions of law, recommendation, and orders.

SIGNED AND ENTERED this the 21st day of December, 2004.

HON. SAM M. PAXSON
JUDGE PRESIDING

Agreed and stipulated to as to form and content:

Jaime E. Esparza
District Attorney, 34th Judicial District
SBN 06666450
Attorney for the State

Luis Islas
SBN 10435300
Attorney for Applicant

Barry Scheck, Innocence Project, Inc.
Member, State Bar of New York
Attorney for Applicant

Nina Morrison, Innocence Project, Inc.
Member, State Bar of New York
Attorney for Applicant

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

168TH JUDICIAL DISTRICT COURT

THE STATE OF TEXAS)

-VS-) NO. 48788-168TH

BRANDON LEE MOON)

Filed Jan. 5, A.D. 19 88
at 1:45 o'clock P. M
EDIE RUBALCAVA, Clerk, Dist. Courts
El Paso County, Texas
BY Angelo Dimas DEPUTY

EXCERPTS OF TESTIMONY

HABSARI KUMIRRADJAJA

AND

BRANDON LEE MOON

THE ABOVE ENTITLED AND NUMBERED CAUSE came on to be heard before the Honorable Ward L. Koehler, Judge of the 168th Judicial District Court, during such jury trial of March 4th, 1987, through March 5th, 1987, at which time the following proceeding were had:

Michael P. Nobles
Jail Magistrate's Court
El Paso, TX

A P P E A R A N C E S

FOR THE STATE OF TEXAS:

Mr. Joe Ed Boaz
Assistant District Attorney
El Paso County
El Paso, Texas

and

Mr. Don Gardner
Assistant District Attorney
El Paso County
El Paso, Texas

FOR THE DEFENDANT:

Mr. Norbert Garney
El Paso Public Defender
El Paso County
El Paso, Texas

MS. HABSARI KUMIRRADJAJA, having been called as a witness and after having been first cautioned and duly sworn, testified as follows:

DIRECT EXAMINATION

Q (BY MR. GARNEY) Ms. Kumirradjaja, my name is Norbert Garney. We met previously, outside in the hallway, have we not?

A Yes.

Q Let me give you just a little bit of instructions here. You are going to need to speak loudly, I know you have a soft voice, so I can hear your answers and the ladies and gentlemen of the jury can hear your answers and Mr. Nobles and the Judge can hear your answers and Mr. Boaz. Would you state your name full for the record?

A Habsari Kumirradjaja.

Q Would you spell that for the benefit of Mr. Nobles, please?

A H-a-b-s-a-r-i K-u-m-i-r-r-a-d-j-a-j-a.

Q Do you have a nickname you go by?

A Rika.

Q Now, Ms. Kumirradjaja, where do you live?

A 1617 Randolph, Apartment 35.

Q Are you a student?

A Yes.

Q Where are you a student?

A UTEP.

Q How old are you?

A 23 -- I'm 22.

Q Where were you born?

A Second of November, '64.

Q Where were you born?

A Indonesia.

Q How long have you been in the United States?

A One year. One year, three months, two months.

Q Do you know Mr. Moon?

A Yes.

Q How is it that you know Mr. Moon?

A Well, I knew him at the dorm when I was in the dorm, when I was living in the dorm.

Q When were you living in the dorm?

A Spring, '86.

Q Since then, you what, I guess you moved out of the dorm?

A Yeah.

Q And you moved into 1617 Randolph?

A Yes.

Q Approximately when was that?

A May, '86.

Q Do you currently live there?

A Yes.

Q Are you and Mr. Moon dating?
A Yes.
Q How long have you all been dating?
A About one year.
Q Before you is what has been marked as State's Exhibit Number 2. Would you take a minute and take a look at that jacket, please?
A This one?
Q Yes ma'am. Have you examined it?
A Yeah.
Q Have you ever seen that jacket before?
A No.
Q Have you ever seen Mr. Moon wearing that jacket?
A No.
Q Ms. Kumirradjaja, on November 10th of 1986, Monday morning, did something unusual occur at your apartment?
A Yes.
Q What happened?
A Well, I realized that my apartment had been robbed.
Q What time did you awaken that morning?
A Around 6 o'clock -- no, it was before 6 o'clock when I woke up, you know, I go up from the bed about 6 o'clock.
Q How long were you awake in bed?
A About half hour. I woke up about 5:30 or something

like that.

Q Do you live by yourself?

A No.

Q Who do you live with?

A With friends, two friends of mine. A guy and a girl.

Q Are they your roommates?

A Yes.

Q What are their names?

A The girl is Taneoklan and the guy is Eta Chan.

Q For the benefit of the record, would you spell those names for Mr. Nobles.

A The first one is Taneoklan, T-a-n-e-o-k-l-a-n and the other one is Eta, Eta Chan, C-h-a-n.

Q What's the first thing that you saw when you woke up that morning?

A Well, you know, I see kind of like my table, this side and I saw that my tape recorder was not there and then I kind of like, huh, and I saw my purse was not in the same place that I put, you know, not the usual place that I put.

Q Was anything taken from your purse?

A Yes.

Q What was taken?

A Money.

Q Approximately how much?
A About eighty dollars.
Q I'm sorry, 18 or 80?
A Eight zero, eighty.
Q All right. What did you do once you saw that somebody had been messing with your purse?
A Well, at first I -- well, the first thing I saw because my roommate was there already, she didn't realize it, so I kind of like, "Well, we've been robbed," kind of like, you know, I didn't know what to do, I sit and just -- the first thing I remembered, I just called him, that's the first person that I, you know --
Q "Him," meaning who, for the record?
A Mr. Moon.
Q What time did you call Mr. Moon?
A Around 6:30.
Q And did Mr. Moon come over to your apartment?
A Yes.
Q Approximately, I know it's hard to remember, what time did he arrive?
A I don't remember but he was pretty quick, about 5 or 10 minutes, something like that.
Q Did you call the police that morning?
A No -- I mean I didn't remember it, I didn't have any idea what to do. Mr. Moon told me, "Okay, call the

police and report it."

Q Who called the police and reported the burglary?

A He called the police.

Q "He," meaning who?

A Mr. Moon called the police.

Q You didn't call them?

A No.

Q And I take it sometime thereafter the police arrived?

A Yes.

Q Do you know when they arrived, approximately?

A It was pretty quick too, you know, ten minutes or something like that, but then, you know, I don't remember what time.

Q When Mr. Moon arrived at your apartment on the morning of November 10th, 1986, do you recall what he was wearing?

A Yes.

Q What was he wearing?

A A nylon jacket, kind of like a wind breaker jacket and a map on the jacket of Japan.

Q All right, what color was the jacket?

A It's dark blue and kind of grey, sliver-grey, you know, half-top-part, I think, is blue and the bottom part is kind of like grey.

Q Was he wearing a yellow shirt?
A No.
Q Okay, in the year that you have known Mr. Moon, have you ever seen him wear a yellow shirt?
A Yes.
Q Okay, what kind?
A Kind of like yellow and then has a stripe on it.
Q A short sleeve or long sleeve?
A Short sleeve.
Q It is not a solid yellow, long sleeve shirt?
A No.
Q Was anything else taken from your apartment besides eight dollars and a tape recorder?
A Yes, my watch and my roommate's jacket.
Q Your roommate's jacket?
A Yeah.
Q What kind of jacket does your roommate wear?
A I'm not sure but I think it's kind of like a grey jacket, I'm not sure of the material.
Q Is it similar to that tan one that's State's Exhibit Number 2?
A No, I don't think so.
Q It's a different kind of jacket?
A Yeah.
Q Do you know how, whom ever it was, got into your

apartment?

A Yeah, from the window.

Q Is that what you told the police?

A Yes.

Q Okay, what made you think that?

A Because the window was opened and, you know, up in the front of the window when you get in from the outside, it has a pot and it was moved.

Q You don't own that jacket, do you?

A No.

Q Have you ever received any of your property back, either the money or the tape recorder or the watch?

A No, just the jacket, my roommate's jacket.

Q How would you describe Mr. Moon's personality?

A Well --

Q Is that a hard -- do you understand my question?

A What -- I don't know what especially you want.

Q Is he a nervous person, calm person or whatever?

A Well, depends, sometimes, you know, but mostly pretty calm and --

Q How was he acting on the morning of November 10th, 1986?

A Toward me? Toward everything?

Q Yes.

A Well, you know, he was pretty calm, you know, I was

crying, you know, I kind of like in shock, you know, and he, you know, say, "Calm down, calm down," and then after a little bit I calm down and he say, "Okay, now, call the police." At first I cannot cause I cry and he say, "No, you have to call the police," and then he called the police.

Q Subsequent to, and by that I mean after November 10th, of 1986, had you had occasion to go to Mr. Moon's dormitory room?

A Yes, several times.

Q To visit?

A Yes.

Q Have you ever seen your money in his room?

A No.

Q Have you ever seen your tape recorder in his room?

A No.

Q Have you ever seen your watch in his room?

A No.

Q Have you ever seen him wearing your watch?

A No.

Q Did you give a statement to the police, I believe a lady, an Officer Coosac, on the morning of November 10th, of 1986?

A I don't understand what you mean.

Q Did you tell the lady what happened and she wrote

it down?

A Yes.

Q All right. I believe it is a tall blond lady?

A Yes.

Q Now, did you give a false statement; were you lying that morning?

MR. BOAZ: Ojbection, Your Honor, bolstering.

MR. GARNEY: Your Honor, he's opened the door, he's already intimated that it was a false report and I think I have an opportunity and an obligation to clarify that at this time.

THE COURT: Well, approach the bench here a minute.

(AT WHICH TIME, an off the record discussion was held, after which, the following proceedings were had:)

MR. GARNEY: I'll rephrase my question, Your Honor. Is everything that you told Officer Coosac on the morning of Novmeber 10th, of 1986, the truth?

MR. BOAZ: Objection, Your Honor, self-serving statement.

THE COURT: Overruled.

Q (BY MR. GARNEY) You may answer the question.

A Yes.

MR. GARNEY: I'll pass the witness, Your Honor.

* * * * *

CROSS EXAMINATION

Q (BY MR. BOAZ) Approach the witness, Your Honor?

THE COURT: Yes you may.

Q Can I call you Habsari?

A Yes, sure.

Q I want you to look at this. Okay, State's Exhibit Number 6. Does that have any resemblance, at all, to Mr. Moon?

MR. GARNEY: Objection, Your Honor, irrelevant. He's asking for an opinion from the witness.

THE COURT: Well, if she knows.

MR. GARNEY: That should be determined by the jury, Your Honor, not Ms. Kumirradjaja.

THE COURT: All right, I'll sustain the objection.

Q (BY MR. BOAZ) How long have you known Mr. Moon?

A About one year.

Q You didn't know him back in 1984?

A No.

Q You didn't know him in 1985?

A No.

Q When did you meet him?

A '86, February, yes, February.

Q Of last year?

A Yes, '86.

Q Okay. Now then, you woke up at what, 5:30 or 6

o'clock, which was it?

A 5:30, but I didn't get out from my bed.

Q Okay, when did you discover this alleged burglary of your apartment?

A After six.

Q Okay, and who discovered this alleged burglary of your apartment?

A Me.

Q Okay, and how did you discover this alleged burglary of your apartment?

A Because my tape recorder was not there and my purse was kind of like not in the same state that I left it before.

Q It looked like somebody had riffled through it?

A Yeah, yeah, that's it. I opened my wallet and my money was gone.

Q Okay, and you lost about eighty dollars?

A Yes.

Q United States currency?

A Yes.

Q Do you know the denominations? Was that four $20.00 bills or what was it?

A I don't know.

Q And what time was this when you discovered that your purse had been gone through and your tape recorder

was missing?

A Like I say, after six. Around 6:15, I believe.

Q 6:15?

A Yeah.

Q I want to be -- I want to be real, real positive here and careful with you now. It was about 6:15 a.m. and you are the one that discovered that your apartment had been burglarized?

A Yes.

Q Okay. So, when was your apartment burglarized?

A I don't know.

Q What do you mean you don't know?

A Well, do you mean the time? I don't know.

Q Did you hear anything during the night?

A No.

Q Did you see anybody or any figures in your apartment moving around?

A No.

Q Did you wake up by an alarm clock or do you just kind of wake up?

A I just got waked up by the telephone.

Q By the telephone?

A Yeah.

Q Oh, the telephone rang?

A Yes.

Q What time was that?
A Around 5:30.
Q Okay, and who was on the telephone?
A My roommate's parents called her from Indonesia.
Q So you woke up at 5:30.
A Uh huh.
Q But you realized that you had been burglarized at 6:15?
A Yes.
Q What did you tell the police when they came out, the police officers?
A I told them I had been burglarized and I said all the things that had been missing.
Q Okay, did you tell them what time the burglary occurred?
A No.
Q You didn't? Okay. Do you remember the blond haired female police officer?
A Yes.
Q Her name is Coosac, do you remember that?
A I don't know, I don't know that.
Q All right. All right, but I'm going to refer to her as Officer Coosac.
A Okay.
Q You didn't tell Officer Coosac that the incident

had occurred between 2 a.m. and 5 a.m.?
A Well, that's because I sleep about that time and I woke up about that time so he asked me what about that but I don't know what the time is.
Q Well, but do you remember telling one of the police officers that it was between 2 a.m. and 5 a.m.?
A Yes.
Q Okay, and why was that? What made you think that it occurred between 2 a.m. and 5 a.m.?
A Because I went to sleep about 2 and I woke up about 5.
Q Woke up about what time?
A Five.
Q I know I'm getting old and my hearing is not that good, but I thought you told these 12 people over there you woke up about 5:30.
A Okay, about 5:30, but you know, before that kind of like --
Q Didn't Mr. Moon tell you what time the burglary occurred; between 2 a.m. and 5 a.m.?
A He told me?
Q He told you to tell the police that that's probably when it happened?
A No.
Q Oh, he didn't? He called the --

A I thought about that already.
Q Huh?
A I thought about that already.
Q What do you mean?
A Well, I thought about 2 a.m. and I woke up about that time. I mean, that's obvious.
Q But you didn't discovery that there had been a burglary, in fact, you didn't get out of bed until, what, 6:15?
A Yeah, but my roommate was outside because when the parents called her -- it's kind of like when Indonesia call America, Indonesia pays more, so, they just called her and she called back. So she would not disturb me, she went out, so, it could not be that time.
Q Why would it have occurred, then, between 2 a.m. and 5:30 a.m.?
A I beg your pardon, I don't understand what you mean.
Q I'm trying to figure out why you told Officer Coosac that the burglary had to have occurred before 5 a.m.?
A Because cannot be, my roommate was outside, cannot be at that time.
Q Well, what do you mean she was outside?
A She was outside at that place, you know, all the

thing had been burglarized.

Q Okay, whose room is that where the burglary took place?

A The livingroom, the front room.

Q Okay, that's where your roommate was?

A Yes.

Q Your roommate was out there at 5 a.m.?

A Yes.

Q Why was she out there at 5 a.m.?

A Call her parents because her parents had called her.

Q I thought that was 5:30.

A Yes, about that time. I told you about 5, 5:30.

Q Habsari, isn't it true that your boyfriend told you to say that it happened before 5 a.m.?

A No.

Q Do you love him?

A Yes.

Q Do you want to see him go to prison for the rest of his life?

A No.

Q Would you do anything to keep him from going to prison?

A Do anything? What do you mean do anything?

A Would you do anything, within your power, to keep

this man from going to prison for the rest of his life?

A Inside the law, yes.

Q You wouldn't lie for him?

A No.

Q Now then, did you tell Officer Coosac that the only thing that was taken was your property?

A No.

Q Are you sure about that?

A Yes.

Q Did you ever tell any police officer that the only things taken were things that belonged to you?

A Well, I say it but it does not mean only me. I mean that because my roommate's thing is back. It's after they found my roommate's things, my roommate's jacket.

Q Well, let me ask you this. If Officer Coosac says that, in her report, "only items belonging to the complaintant," and you are listed as the complaintant, "were taken even though items belonging to the roommate were on display, they were not disturbed." Do you remember telling any police officer that?

A No.

Q That only your things were taken? Didn't you go down to the property office and claim one of those jackets as yours?

A No.

Q Do you remember when you talked to Detective Sal Olivares?

A When I talked -- I beg your pardon?

Q Do you remember talking to a detective, his last name was Olivares?

A Yes.

Q Okay, do you remember when that was?

A I beg your pardon?

Q Do you remember what day that was?

A No.

Q Could it have been on November 12, 1986, two days after this alleged burglary of your apartment?

A I might be, I don't remember.

Q What kind of tape recorder was missing?

A Portable tape recorder.

Q What brand?

A Sanyo.

Q What color?

A Grey.

Q Could it have been silver?

A Yeah, silver, grey-silver.

Q Cassette?

A Yes, and radio.

Q Okay, what kind of jacket was missing?

A It's a light jacket, grey jacket, light grey jacket.

Q A light weight grey jacket?

A I beg your pardon?

Q A light weight grey jacket?

A Yes.

Q What kind of watch was missing?

A It's a Champion but I cannot describe it.

Q A Champion?

A Yeah. It's marked as Champion.

Q Where did you purchase this Champion watch?

A Brazil.

Q When were you in Brazil?

A From '81 until I got here.

Q Do you have the proof of purchase?

A No.

Q Who did you purchase it from in Brazil?

A From store.

Q From a store?

A Yes.

Q You didn't get it from a Champion dealer?

A No.

Q Do you know what Champion is? The Champion Company?

A Uh huh.

Q Do you know what they are?
A In Brazil they produce watches.
Q You don't have a picture of that watch do you?
A No.
Q Do you remember telling the police officers that you remembered that the bills that were missing was a fifty dollar bill, a ten dollar bill and two $5.00 bills and ten $1.00 bills?
A Probably, I don't remember anymore.
Q What do you mean you don't remember anymore?
A I don't remember what I told her about the money. Probably it is, I don't know.
Q I'm not just talking about the female officer, let's talk about Detective Olivares for a moment, shall we?
A Okay.
Q Do you remember when you went down to pick up the jacket here at the police station?
A I didn't went down and pick the jacket up.
Q Who did?
A My roommate, the owner of the jacket.
Q Who is -- what is your roommate's name, the female roommate?
A I beg your pardon?
Q The girl that lives with you, what is her name?

A Taneoklan.

Q Okay. Have you ever seen Mr. Moon drive an automobile?

A No.

Q Do know if he has a driver's license or not?

A Well, yes he has.

Q He does have a driver's license?

A Not him -- he has a license but he didn't have the car, you know, the driver's license for the car, the material.

Q Are you -- have you ever been married?

A No.

Q Do you know what a common law marriage is?

MR. GARNEY: Objection, Your Honor, we are getting into the same area that we almost got into before and it is irrelevant.

MR. BOAZ: I just asked her about a common law marriage to the defendant.

MR. GARNEY: And that's irrelevant.

THE COURT: I'll overrule the objection on this case.

Q (BY MR. BOAZ) Are you a common law marriage to Mr. Moon?

A I don't know what common law marriage.

Q Well, it is where you agree to be married but you

don't go to a judge to get married and you agree to live together as husband and wife.

A No.

Q Was Mr. Moon over at your apartment on the night of November the 9th, the night before your apartment was burglarized?

A Yes.

Q And do you remember what he was wearing that night?

A No.

Q You don't have any idea?

A No.

Q Well, then let me ask you this. How can you remember what he was wearing when the police came over to your apartment to investigate the alleged burglary at your apartment?

A I just remember it. I just don't remember the other one.

Q You remember that but you don't remember what he had on the night before. Okay. Was it cold that night?

A I don't know.

Q You don't remember. Have you ever talked to Mr. Moon about this case that the State has against him?

A Well, yes, I know.

Q When was the last time that you talked to him about the case?

A Talked to him about the case?

Q About what you were going to testify here about today?

A About what I'm going to say now?

Q Uh huh?

A We never talked about that.

Q He never told you what to say?

A No.

Q He never told you what to tell the police?

A No.

Q And what time did he get over to your apartment that morning?

A Around 6:30.

Q Around 6:30. And the last time you had seen him was what, around what? When had he left your house the night before?

A About 12:30.

Q Okay, he had been over to the house the night before?

A Yes.

Q And he left a little bit after midnight, about 12:30?

A Yes.

Q And the next time you saw him was 6:30?

A Yes.

Q So you don't have any earthly idea what he was doing between 12:30 and 6:30, do you?

A No.

Q He could have been down there in Mr. Marquez's house, couldn't he?

MR. GARNEY: Objection, Your Honor, speculation.

THE COURT: Sustained.

A I beg your pardon?

Q (BY MR. BOAZ) Do you know if Mr. Moon owns an automobile?

A I beg your pardon?

Q Do you know if Mr. Moon owns an automobile?

A No he didn't.

Q A car or a truck?

A No.

Q Do you know if his parents do?

A Yes.

Q Okay, and what kind of truck does his dad have?

A Well, I don't know how to explain it.

Q Is it a pickup truck?

A Yes.

Q It's not a passenger car, it's a pickup truck, right?

A What do you mean passenger?

Q A passenger car, gosh, I don't know how to tell you

difference between that and a pickup. A pickup don't have a backseat.

A Yes.

Q And most passenger cars do have a backseat.

A Yes, it only has front.

Q It only has a front seat in it doesn't it?

A Yes.

Q You can fit three, maybe four adults in there?

A Yes.

Q And it has got a big long bed behind it?

A Yes.

Q And it's a chevrolet, isn't it?

A I don't know, I don't know the model.

Q Do you know Peggy Watkins?

A Yes, by seeing her only but not know. Never talked with her.

Q Okay, she says that she seen your boyfriend here, wearing a jacket that looked just like that one.

A Okay. But he doesn't have one like that.

Q He doesn't? I know he doesn't have one now, but he used to, didn't he?

A No.

Q What kind of jacket does he have?

A He has windbreaker and then a leather jacket.

Q Does he have any corduroy pants?

A Yes.
Q What color are they?
A Grey.
Q He only has one pair of them?
A No, he has black too.
Q Okay, two pair?
A Yeah.
Q And that's it?
A Yes.
Q Does he ever wear blue jeans?
A I beg your pardon?
Q Does he ever wear blue jeans?
A Yes.
Q Now, why was it that Mr. Moon called the police to come over to investigate the burglary at your house?
A Because I just don't know what to do. At that time, I just, you know --
Q And what time did he tell them that the burglary happened?
A He didn't tell them, I told them.
Q You did? Right?
A Yes.
Q Between 2 a.m. and 5 a.m.?
A Yes.
Q And Mr. Moon didn't help you with that at all?

A For me to say to them? No.

Q Now then, when the police came over to your apartment and you all reported this burglary where you lost this cassette recorder and this Champion watch, some money, a jacket, Mr. Moon was calm, was he?

A Yes.

Q Real calm?

A Yes.

Q He wasn't fidgety or nervous?

A No.

Q Well, you know, one of the police officers says that he was. One of the police officers says he was acting real nervous.

MR. GARNEY: Objection, Your Honor, improper impeachment.

THE COURT: Okay, I'll sustain the objection.

Q (BY MR. BOAZ) Do you remember, do you have an independant recollection of whether he was nervous or not? Do you really know?

A No he was not nervous.

MR. BOAZ: No further questions, Your Honor.

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REDIRECT EXAMINATION

Q (BY MR. GARNEY) Ma'am, I have one question for you. Does Mr. Moon smoke?

A No.

MR. GARNEY: Thank you. Pass the witness.

MR. BOAZ: No further questions.

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MARCH 5, 1987

(AFTER TESTIMONY BY Detective Olivares and the evening recess, the following proceedings were had:)

MR. GARNEY: The defense would recall Habsari Kumirradjaja.

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MS. HABSARI KUMIRRADJAJA, after having been previously called as a witness and previously sworn, testified as follows:

REDIRECT EXAMINATION

Q (BY MR. GARNEY) Ms. Kumirradjaja, are you the same Habsari Kumirradjaja that testified here yesterday in this proceedings?

A Yes.

Q And you remember who I am?

A Yes.

Q And you recognize the ladies and gentlemen of the jury?

A Yes.

Q I believe it was your testimony yesterday that a Champion watch was stolen from your apartment on the morning of November 10, of 1986?

A Yes.

Q How many Champion watches did you own at that time?

A Two.

Q Did you bring the other one with you this morning?

A Yes.

Q Would you please produce it this morning? May I approach the witness, Your Honor?

THE COURT: Yes.

Q (BY MR. GARNEY) Mark this as State's Exhibit 6, please. Ms. Kumirradjaja, I'm handing you what has been marked as Defense Exhibit Number 6 and ask you to describe that to the Court and to the jury, please. Tell them what it is.

A Well, it's a watch marked Champion, made in Natal, Brazil and this thing can go out and, you know, you can have which color you want it.

Q How long have you owned that particular watch?

A I have it since Christmas '85.

Q When did you buy -- where did you buy it?

A I didn't buy it, it's a gift for Christmas.

Q And where were you at the time you received that gift?

A Brazil.

Q The watch that was stolen, was it similar to that particular watch?

A Well, it's the same model but it's not similar, it's a different type, you know, the model is different.

Q How is it different?

A This was, the band went up, the watch went up from the thing, it's not the band that changes.

Q The watch that was stolen, did you have an extra band for it?

A Yes.

Q Did you bring that to the court today?

A Yes.

Q Would you please produce that, please? May I approach the witness.

THE COURT: Yes you may.

(AT WHICH TIME, Defendant's Exhibit Number 7 was marked.)

Q (BY MR. GARNEY) Ms. Kumirradjaja, I'm handing you what has been marked as Defense Exhibit Number 7 and would you please describe or tell the jury and the Court what that is, please?

A This is the actual band, I have one of this band, from the watch that has been stolen. I have a lot of, you know, different coloring, you can put the watch,

itself, and change the color of the band, it's somekind of rubber.

Q You like those kind of watches?

A Yes.

MR. GARNEY: Your Honor, at this time, I offer into evidence Defense Exhibits 6 and 7.

MR. BOAZ: No objections.

THE COURT: All right, Defense Exhibits 6 and 7 are entered into evidence at this time.

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

THE COURT: Yes you may.

Q (BY MR. GARNEY) Ms. Kumirradjaja, I'm handing you what has been marked as Defense Exhibit Number 8 and ask you to please tell the jury and the Court what Defense Exhibit Number 8 is.

A Well, it is one of my photos taken by surprise in Brazil and this is the watch that has been stolen.

Q Is that photo a true and accurate picture of you that was taken?

A Well, yes, it's me.

MR. GARNEY: Okay, Your Honor, I would offer into evidence what has been marked as Defense Exhibit Number 8.

MR. BOAZ: Objection, Your Honor, I would like to

take the witness on voir dire.

THE COURT: All right.

MR. BOAZ: May I approach the witness to obtain the photograph?

THE COURT: Yes you may.

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VOIR DIRE EXAMINATION

Q (BY MR. BOAZ) Who took this photograph?

A One of the people that work for my aunt in a store.

Q And where was it taken?

A My aunt's store.

Q And where is that?

A In Brazil.

Q And you don't know who took the picture?

A I know who. One of the other persons there.

Q And you can't tell whose in the picture, can you?

A Well, it's me, I don't know if you can tell it or not.

Q We would have to take your word for it wouldn't we?

A It's me.

Q And when was the picture taken?

A Either '85 or '84, I'm not sure.

Q And once again, we'll have to take your word for that?

A Yes.

Q Okay, and have you put a magnifying glass on this to tell what brand of watch it is because you certainly can't tell from the photograph, can you?

A I don't know.

Q You can't tell what kind of watch?

A I never tried to see it with a magnifying glass, so I don't know.

MR. BOAZ: No further questions, Your Honor.

THE COURT: All right.

MR. GARNEY: We offer Defense Exhibit Number 8, Your Honor.

THE COURT: All right, I'll admit Defense Exhibit Number 8.

MR. GARNEY: May I approach the witness?

THE COURT: Yes you may.

MR. GARNEY: No further questions of this witness, Your Honor, pass the witness.

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RECROSS EXAMINATION

Q (BY MR. BOAZ) May I call you Habsari?

A Yes.

Q That's easier for me.

A Okay.

Q Did Mr. Moon keep any of his clothes over at your apartment?

A I beg your pardon?

Q Okay, did Mr. Moon keep any clothing --

A -- in my house --

Q -- at your house?

A No.

Q None at all?

A No.

Q Now then, when the police came to investigate this alleged burglary at your apartment on the morning of November 10th of 1986, I guess you showed them this other watch so they would know what they were looking for, right?

A No I don't because it's practically, almost -- it's different, as you can see here.

Q Really. Isn't it a fact that you didn't have either of those things there on November 10th, 1986, at your apartment?

A Yes I do, I have it.

Q Isn't it, in fact, the truth, that that watch that is sitting right there on that table in front of you is probably the same watch that you reported to the police as having been burglarized at your apartment?

A I beg your pardon, I don't understand what it means.

Q That watch there -- you never had a watch stolen

because nobody burglarized your apartment.

A Someone burglarized my apartment. My watch had been stolen.

Q And only your property was stolen; none of the other people's property was stolen?

A My roommate's jacket had been stolen.

Q Well, you told the police that that morning that the only things taken were yours and that they didn't touch anybody else's.

A No I don't. The way I say it, I mean more of the things stolen is mine. Only my roommate's jacket has been stolen and the rest of it is mine.

Q All right. And you know for sure that the burglary occurred at your apartment between 2 a.m. and 5 a.m.?

A Something like that.

Q Well, you told the police between 2 a.m. and 5 a.m.?

A Yes. I'm not sure, I don't know what time, it was something like that.

Q It couldn't have been five minutes after 5 a.m.?

A It might.

Q It couldn't have been ten minutes?

A I don't know.

Q You had to report it to be stolen at that time prior to Mr. Marquez's house, when he caught your

boyfriend in his house and you knew that didn't you?

A I don't understand what you mean.

Q You had to report those things stolen for a time period that would enable him to say it couldn't have been me in there because the stuff they found in there had been taken from us at a time earlier than when Mr. Marquez's home was burglarized?

A I still don't understand what you mean.

Q Now then, tell me something about these two watches. I thought -- were they both gifts?

A No. The other one that had been stolen is no gift, I bought it.

Q It was purchased?

A Yes.

Q Okay, and do you know where in Brazil it was purchased?

A The city? Mundi Las Cruces.

Q And what particular store?

A Crucerio's.

Q And what particular street?

A Dr. Deodato Wertheimer.

THE COURT REPORTER: Please spell that.

A D-r. D-e-o-d-a-t-o W-e-r-t-h-e-i-m-e-r.

Q How long did you live in Brazil?

A Four years.

Q And you don't have anykind of proof of purchase?
A I have it, it's in Brazil, I didn't bring it here.
Q How long have you been here?
A One year.
Q So we'll have to take your word for it that you purchased it in Brazil at that time?
A Yes.
Q And you didn't show that watch or that watchband to the police officers when they were investigating this burglary at your apartment on November 10th, of 1986?
A No.

MR. BOAZ: No further questions.

MR. GARNEY: No further questions of this young lady, Your Honor.

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MR. GARNEY: May I have a moment to confer with my client, Your Honor?

THE COURT: All right, you may.

MR. GARNEY: Your Honor, at this time the defense would call Brandon Lee Moon.

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MR. BRANDON LEE MOON, having been called as a witness and after having been first cautioned and duly

sworn, testsified as follows:

DIRECT EXAMINATION

Q (BY MR. GARNEY) State your full name for the record, please.

A My name is Brandon Lee Moon.

Q Mr. Moon, what is your date of birth?

A 28, August, '61.

Q And how old are you today?

A I'm 25.

Q Of what ethnic extraction are you?

A I'm a Caucasian.

Q What is your current occupation?

A I'm a student at the University of Texas at El Paso.

Q In what year?

A I'm a Junior.

Q Have you attended UTEP for 3 years then?

A Yes sir.

Q Prior to UTEP -- what are you studying at UTEP?

A I'm studying Journalism.

Q Are you nervous right now?

A Yes sir.

Q Where were you born?

A I was born at Holoman Air Force Base in New Mexico.

Q Are your mother and father still living?

A Yes sir they are.
Q Where are they residing now?
A They live at 4620 Cupid here in El Paso.
Q Do you have any brothers and sisters?
A Yes sir I do.
Q What are their names, please?
A Full names, sir?
Q Yes, please.
A Bret Allan Moon, Brent Allan Moon, Sherland and I'm not sure what her middle name is, Sherland Moon and Shelly Lynn Moon.
Q Do you have a girlfriend?
A Yes sir, I do.
Q And who is that, please?
A Habsari Kumirradjaja.
Q Is that the same younglady that just testified previous to you?
A Yes sir.
Q How long have you all been dating?
A A little over a year now, sir.
Q Other than the study of Journalism at UTEP, do you participate in other activities?
A Yes sir, I do.
Q What are those activities?
A I am the yearbook photo editor and I'm in the ROTC

program.

Q What are your plans regarding that program?

A I plan to receive a commission in December of '88 and return back into the military service.

Q Have you been previously in the military service?

A Yes I have.

Q What branch of the service?

A I was with the army, sir.

Q And how long had you been in the army?

A Four years, sir.

Q What rank did you obtain?

A On active duty I obtained the rank of E-4 and in the reserves I obtained the rank of E-5.

Q What does that mean, I'm not a military person?

A Specialist 4 for active duty; sergeant for reserves.

Q Okay, back on November 10th, of 1986, Mr. Moon, where were you living?

A I was living at 905-b Barry Hall, UTEP.

Q And where do you currently reside?

A At the same room, sir.

Q Do you have a roommate, Mr. Moon?

A Yes sir, I do.

Q And who is that, sir?

A His name is Yu, Mr. Yu.

Q Is that the same Mr. Yu who testified yesterday?
A Yes sir.
Q Where were you at approximately 9, 10 o'clock on the evening of November 9, of 1986, I believe that was Sunday?
A I was in my girlfriend's apartment.
Q Habsari's?
A Yes sir.
Q What time did you arrive at her apartment?
A A little after dinner, so approximately 7 o'clock.
Q What time did you leave her apartment that night?
A Approximately 12:30, sir.
Q When you left her apartment, where did you go?
A I went back to my dorm room, sir.
Q Did you go anywhere else between your girlfriend's apartment and your dormitory room?
A No sir.
Q What did you do once you got back to your dormitory room?
A I went to bed, sir.
Q At what time did you wake up the next morning?
A 6:20, sir.
Q How do you know that?
A I looked at my clock and the clock read 6:25 and I set my clock five minutes fast.

Q Why do you do that?
A So that I'm not late.
Q What woke you up on the morning of November 10, of 1986?
A My phone, sir.
Q Okay, and did you answer the phone?
A Yes sir, I did.
Q Who called you?
A My girlfriend called me, sir.
Q As a result of that phone call, did you do anything?
A Yes sir I did, I went to my girlfriend's house.
Q And did you walk or drive?
A No sir, I ran to her house.
Q Why did you run over to her house?
A My girlfriend sounded upset.
Q When you arrived at the place where your girlfriend was living -- now, what address did she live at?
A 1617 Randolph, Apartment 25.
Q When you arrived there, who is the first person that you saw when you went to her door?
A She answered the door sir, my girlfriend did.
Q Did you have a key to her apartment?
A No sir.
Q As a result of talking to your girlfriend that

morning, did you do anything?

A Yes sir, I did.

Q And Mr. Moon, what did you do?

A I called the police, sir.

Q You called the police?

A Yes sir.

Q Why did you call the police?

A My girlfriend explained to me what had happened and I felt that we needed to have the police there.

Q What did you tell the police when you first called them?

A I told them that my girlfriend told me that her house had been broken into, that she had been burglarized.

Q Did a police unit subsequently arrive at your girlfriend's apartment?

A Yes sir, they did.

Q And was one of the officers who arrived, was the young blond lady, Officer Coosac?

A Yes sir.

Q Did you tell Officer Coosac anything when she arrived at the apartment?

A Officer Coosac began to question me and I explained to her that I wasn't the resident of the house and that she needed to speak with my girlfriend.

Q And did Officer Coosac then speak with Habsari?
A Yes sir.
Q Approximately how long were the police at your girlfriend's apartment?
A Ten to fifteen minutes, sir.
Q Other than what people may have told you that morning in the apartment, did you know anything about what happened the night before at your girlfriend's apartment?
A No sir, I didn't.
Q Have you ever been treated for a nervous condition in your life?
A Yes sir, I have.
Q When was that?
A When I was in approximately the third grade.
Q What was the condition for?
A Hyperactivity.
Q Did you receive counselling or medication? What was your treatment?
A Counselling.
Q When is the next time you heard anything about any burglary after November 10th, of 1986?
A Approximately a week later, sir.
Q Okay, now, please tell the ladies and gentlemen of the jury how is it you became involved in this thing

again?

A Detective Olivares called me at my dorm room and he asked me to come down to the police station to participate in a photo line-up, so I agreed to go down and I told him that I couldn't come down right at that moment but that I would come down as soon as I could and I went down there that afternoon.

Q And did you meet with Detective Olivares that afternoon?

A Yes sir, I did.

Q And was your photograph taken?

A Yes sir, it was.

Q After your photograph was taken, did you leave the police station?

A Yes sir, I did.

Q Is that where it was taken was the police station?

A Yes sir.

Q You were allowed to leave the police station?

A Yes sir, I was.

Q Where did you go after your picture was taken?

A I went back to my girlfriend's apartment.

Q Did you tell her what happened?

A She was with me.

Q When you came down to talk to Detective Olivares?

A Yes sir.

Q When is the very next time, to the best of your recollection, that you learned anything about this burglary or any other burglary?
A Detective Olivares called me about two weeks later and informed me that they had a warrant for my arrest.
Q Did you skip the State?
A No sir.
Q What did you do?
A I went down to the police -- the police station.
Q Did you go alone or were you with someone?
A No sir, I called my father and he picked me up and took me and my girlfriend went with me.
Q And you turned yourself in?
A Yes sir.
Q Who did you turn yourself in to?
A Detective Olivares.
Q In November of 1986, were you having any financial problems?
A No sir.
Q Who paid for your schooling?
A I paid for my schooling through the veterans administration and went through grants and loans, sir.
Q Are you still dating Ms. Kumirradjaja?
A Yes sir.
Q I'm having a hard time with that. May I approach

the witness, Your Honor?

THE COURT: Yes you may.

Q Mr. Moon, I'm going to show you what has been marked as State's Exhibit Number 1 and please tell me if you have ever seen that before in your life?

A Not before yesterday, sir.

Q When it was introduced into evidence in this trial?

A Yes sir.

Q I know this is going to come so would you please stand up and take off your jacket and try that jacket on?

A Yes sir.

Q Is that your jacket?

A No sir.

Q You can take it off. What kind of fit was that? How did it feel on you?

A Slightly short in the sleeves, tight in the shoulders.

Q What size jacket is that, Mr. Moon? Look at the label.

A It's a medium, sir.

Q Now, is there a make or a model of that jacket on the label?

A I believe so, sir.

Q Would you please tell the Court and jury what type of jacket that is?

A It's a William Berry.
Q Now, so there is not any confusion, what hall do you live in?
A I live in Berry Hall, sir.
Q Is Berry Hall named after William Berry?
A No sir.
Q Does Berry Hall have dormitory jackets?
A No sir.
Q Kind of like a club?
A No sir.
Q All right, who was Berry Hall named after?
A Named after John G. Berry.
Q Who was John G. Berry?
A He was the first president of the College of Mines at UTEP or what is now UTEP I should say.
Q Now, the keys aren't here in the courtroom right now, but there has been another item introduced by the State and I believe it's State's Exhibit Number 2, were some car keys and some apartment keys on a key ring with an emblem with an M; did you see those keys at the time they were introduced?
A Yes sir, I did.
Q Have you ever seen those keys prior to yesterday?
A Detective Olivares showed them to me the day that I was arrested, sir.

Q And did you tell Detective Olivares anything about those keys at the time he showed them to you?
A I told him that I have never seen those before.
Q Have you ever owned those keys before?
A No sir.
Q Have you ever owned that key ring with the little M on it before?
A No sir.
Q Did you own that apartment key?
A No sir.
Q Did you ever have it in your possession at anytime?
A No sir.
Q Do you own a key ring?
A Yes I do.
Q May I see that please? May I approach the witness, please?
THE COURT: Yes you may.
Q Why don't you remove the keys from it. Mr. Moon, I'm going to show you what is marked as D-9 and please tell the Court and the jury what D-9 is.
A This is my key ring, sir.
Q How long have you owned that key ring?
A Approximately two and a half years, sir.
Q The keys that you just took off of that key ring, what were the keys to?

A Keys to my dorm rooms. Lets see, one is the dorm room, one is the hallway room for the dorms and one is the room to the TV lounge, the other three keys go to the student publication offices, one opens the outside door, one opens the yearbook office and the other opens the photo lab door.

Q Other than the keys you described, do you own any other keys?

A Yes sir, I do.

Q What keys are those?

A Miscellaneous keys to locks, locker locks, pad locks.

Q Now, that is a distinctive style key ring that you have in your hand?

A Yes sir, it is.

Q Would you point out the distinguishing feature about that key ring to the jury?

A It's a Magruff Crime Key Ring, "Take a bite out of crime," key ring.

MR. GARNEY: Your Honor, at this time I will offer into evidence Defendant's Exhibit Number 9.

MR. BOAZ: We'll have to object. How could it possibly be relevant or material to this case.

MR. GARNEY: Because the State's theory, Your Honor, is that the key ring that was dropped in this

particular apartment that was burglarized, was this gentleman's and it goes directly to the issue of what key ring he owned.

MR. BOAZ: What key ring he owns now, some 4 or 5 months after the crime, I still don't see the relevance or material -- you know, I have got 2 or 3 different sets of keys. It is not going to aid this jury at all.

THE COURT: Well, I'll overrule your objection and let it in.

MR. GARNEY: Thank you, Your Honor. I believe it was your testimony that you have owned that key ring for two and a half years?

A Yes sir.

Q Not four or five months?

A No sir.

Q On the night of November 10th, early morning hours of November 10th, of 1986, from approximately 12:30 a.m. until approximately 6, 6:30 a.m., where were you?

A I was in my dorm room, sir.

Q Have you ever been to 1304 Randolph, El Paso County, Texas?

A No sir.

Q Do you know what it is?

A Approximately, yes sir.

Q Do you know it's a house?

A Yes.

Q You have been sitting here and you have heard all of the testimony?

A Yes sir.

Q On the night and the morning of November 9 and November 10, of 1986, did you enter a habitation at 1304 Randolph owned by Mr. Martin Marquez?

A No sir.

Q On the night, in the morning of November 10, of 1986, did you come face to face with Mr. Martin Marquez in his bedroom?

A No sir.

Q Have you ever lived in an apartment Number 9 or 6, in your life?

A No sir.

Q Do you own a solid yellow, button down, long sleeve shirt?

A No sir.

Q Do you own a pair of light blue corduroy pants?

A No sir.

Q Did you take a Champion watch from the residence of 1304 Randolph in the early morning hours of 1986?

A No sir.

Q Did you take a certain amount of money from the residence of 1304 Randolph in the early morning hours of

November 10, of 1986?

A No sir.

Q In the early morning hours, approximately between 2 and 5 a.m., November 10, of 1986, did you steal a Champion watch from 1617 Randolph, your girlfriend's apartment?

A No sir.

Q In the early morning hours of 1986, November 10, between 2 and 5 a.m., did you steal the amount of, I believe it was eighty dollars or fifty dollars, U.S. currency, from your girlfriend?

A No sir.

Q Do you own a jacket, Mr. Moon?

A Yes sir.

Q May I approach the witness, Your Honor?

THE COURT: Yes sir.

Q Mr. Moon, I am handing you what has been marked as D-10. Describe that to the jury and the Judge, please.

A This is my leather coat.

Q How long have you owned that jacket?

A I bought it in about 1979, so that's approximately 7 years, sir.

Q It looks like an old jacket. Did you wear that jacket last semister?

A Yes sir.

Q Why did you wear that jacket?
A It was cold and this is a very warm jacket.
Q What size jacket is that?
A It's a 42, sir.
Q Comparing those two jackets, which is the larger jacket?
A The leather one, sir.
Q You have never worn State's Exhibit Number 1 prior to today?
A No sir.
Q Do you know the young lady that testified yesterday? I believe her name was Peggy Watkins.
A Yes sir, I do.
Q How do you know Peggy Watkins?
A She's a girlfriend of a guy who lives down the hall from me and she's also a resident in the dorm where I live, on the same floor.
Q Have you ever spoken to her before?
A Very little, sir.
Q Is it usually in passing or did you have conversations with her?
A In passing, sir.
Q Have you ever gone out with her?
A No sir.
Q Other than the casual, dorm type atmosphere, do you

know her at all?

A No sir.

Q After you were arrested for the burglary which is alleged to have occurred on November 10, at 1304 Randolph, did you attempt to investigate this case yourself?

A A little bit, sir.

Q And what kind of attempt did you make?

A I got a copy of the Number One report and attempted to find out the prior residents of the house itself.

Q Now why were you trying to do these things?

A Because of something Detective Olivares said to me.

Q What was that?

A Well, that he asked me if I knew the names of two particular people who had lived in the house before.

Q And did you know who those people were?

A No sir.

Q You had to do a little foot work yourself to try to find out what was going on?

A Yes sir, I did.

Q Were you very successful?

A No sir, I wasn't.

Q Do you own an automobile?

A No sir, I don't.

Q In particular, do you own a General Motors

automobile?

A No sir, I don't.

Q Have you ever owned a General Motors automobile?

A No sir.

Q How do you get around?

A By foot or by bus. I also have a 10 speed bike.

Q It is not a key start bike, is it?

A No sir.

MR. GARNEY: I'll pass the witness, Your Honor.

* * * * *

CROSS EXAMINATION

Q (BY MR. BOAZ) Have you ever owned a yellow shirt?

A No sir.

Q Have you ever worn a yellow shirt?

A No sir.

Q What are you kidding me? You have never had a yellow shirt?

A I don't like yellow --

MR. GARNEY: Objection, argumentative, Your Honor, badgering the witness.

MR. BOAZ: Cross examination, Your Honor

MR. GARNEY: I understand that.

THE COURT: All right, but keep it within bounds.

MR. GARNEY: May I have a ruling on my objection, Your Honor?

THE COURT: I'll overrule it at this time.

Q (BY MR. BOAZ) Can you see this?

A Yes sir.

Q What color is it?

A It's yellow, sir.

Q And you have never, in the 25 years of your life, worn a shirt that looks something like this color?

A No sir. Sir, if I may clarify that.

Q I'm going to ask the questions here, okay.

A Okay.

Q I guess you are going to bring your wardrobe down here and show the jury that you don't have a yellow shirt in it.

A If necessary, sir.

Q We'll have to take your word without the whole wardrobe down here.

A No sir, you can check them.

Q How many other coats do you own?

A Two heavy coats and a windbreaker.

Q What colors are they?

A One is a multicolored blue and silver and the other one is kind of tan-corduroy.

Q Is it anything close to the color of that -- approach the witness, Your Honor? It is anything close to the color of State's Exhibit Number 1?

A No sir. The collar on one of the coats -- I should say the collar on one of the coats has a similar color.
Q Well, okay, lets not limit it to a jacket that you have owned. Have you ever borrowed a friend's jacket that would look similar to this?
A No sir.
Q Have you ever worn a jacket that looks similar to this?
A No sir.
Q Never?
A Just here, sir, when I put it on here, sir.
Q Really? Really?
A Yes sir.
Q Gollie, I wonder why Ms. Watkins would come in here and say that she saw you with a jacket that's nearly identical to this that you wore all the time?
MR. GARNEY: Objection, Your Honor, that's a side bar remark, that's not a question.
MR. BOAZ: It is a question, Your Honor, it's cross examination.
THE COURT: Overrule the objection.
Q I wonder why she would come into court here and say that she saw you wear a jacket almost identical to this up to around the middle of last semister when all of a sudden she didn't see you wearing it anymore?

MR. GARNEY: Objection, Your Honor, she said up until December of last semister. We can check the court reporter's notes to verify that.

MR. BOAZ: Well, I'll trust the jury to remember the testimony.

THE COURT: Mr. Boaz, return to the podium there.

MR. BOAZ: Well, I want him to try this on again.

THE COURT: All right.

Q (BY MR. BOAZ) Okay, would you zip it up? You can take it off now. Are you telling these ladies and gentlemen of this jury that that younglady came in here and misrepresented the truth to them about seeing you in a jacket that looks identical to State's 1?

A No sir, I'm saying she's mistaken.

Q Mistaken?

A Yes sir.

Q Now then, your lawyer asked you if you ever owned a General Motors automobile, a pickup truck, whatever.

A Correct sir.

Q And it is your testimony that you have never owned and General Motors automobile, pickup truck, any vehicle that's manufactured or sold by General Motors?

A Yes sir.

Q Okay. Well, have you ever had access to a General Motors vehicle?

A No sir.

Q You never get to drive your father's vehicle?

A No sir.

Q Your sister's vehicle?

A No sir.

Q You have never driven a General Motors car or friend's, someone's you borrowed?

A I have driven my grandfather's.

Q What kind of vehicle does he have?

A He used to have an oldsmobile.

Q Do you have a driver's license?

A Yes sir, I do.

Q Okay. When did you acquire your driver's license?

A I acquired my driver's license when I was 18.

Q Which jacket did you wear with you when you went over to Habsari's apartment that night before the burglaries?

A I don't believe I wore a jacket, sir.

Q Wasn't it cold?

A Yes sir.

Q How far -- you walked, right?

A Yes sir.

Q How far is the walk from your room at Berry over to your girlfriend's apartment?

A About a half mile, sir.

Q Why didn't you wear a jacket that night?
A I didn't feel a need for it, sir.
Q What about when you ran to her apartment the next morning, did you wear a jacket?
A I had a light windbreaker on.
Q And which windbreaker is that?
A It's the blue one, silver and blue.
Q When the police arrived at your girlfriend's apartment to investigate this alleged burglary, were you wearing the jacket?
A Yes sir, I was.
Q You had it on?
A Yes sir.
Q The whole time?
A I believe so, yes sir.
Q You didn't take it off?
A No sir.
Q So you had it on for sure?
A Yes sir.
Q I mean, you remember that for a fact?
A Yes sir.
Q Okay, good. How cold was it getting at night?
A Pardon, sir?
Q How cold was it getting at night, early morning around November 10, last year?

A Probably close to freezing, sir.
Q Now then, when you supposedly called the police to report a burglary at your girlfriend's house, did you report to them on the hours that the burglary occurred?
A No sir, I did not.
Q Who communicated that information to the investigating officers?
A My girlfriend did, sir.
Q And do you remember what she told them? Did you over hear the conversation?
A Slightly, yes sir.
Q Okay, what did you hear?
A Approximately between 2 and 5, 5:30.
Q Oh really, 5:30?
A Yes sir.
Q I wonder why the officers put on the report 5 a.m.?
A It may have been the way she said it, sir.
Q Well, she speaks good English doesn't she?
A Fair, sir.
Q It sounded like it when she testified in here.
A Yes sir.
Q When the police were there, were you a little bit nervous?
A Not really, sir.
Q Fidgety?

A I'm always that way, sir.
Q Are you presently married or have you ever been married?
A Yes sir.
Q What was your wife's name?
A Kun Suc Woo.
Q Is that the only time you ever have been married?
A Yes sir.
Q I take it that you have been divorced?
A No sir.
MR. GARNEY: Objection, Your Honor, under the same objection that Mr. Boaz had earlier, this is irrelevant in this proceedings.
THE COURT: Well, all right, I'll sustain the objection.
Q (BY MR. BOAZ) It is your testimony that you didn't wear anykind of a jacket, a windbreaker or anything of that nature when you went over to your girlfriend's apartment that night?
A Yes sir.
Q Where did you get those keys?
A Pardon, sir?
Q Those keys?
A Which keys, sir?
Q That we introduced into evidence that was found in

that jacket?

A I didn't have them, sir.

Q Didn't you find them somewhere?

A No sir.

Q And that's how you got that key to that home?

A I have never had those keys, sir.

Q No one gave them to you?

A No sir.

Q You have never had them in your possession, ever?

A No sir.

Q Do you know where the house is at 1304 Randolph in the City of El Paso, County of El Paso, State of Texas?

A Approximately, sir.

Q Have you ever been by the street there, by the house?

A No sir.

Q You have never been on the premises?

A No sir.

Q You have never been in the yard?

A No sir.

Q Never walked by the sidewalk in front of the house?

A No sir.

Q Never drove by as a passenger or a driver of a vehicle?

A No sir.

Q Well, when you were doing this investigation, you didn't -- you weren't curious to go over there and look at this house and see if you could learn something that might help you?

A Yes sir, I was.

Q Why didn't you go over there?

A Well, I didn't feel that would be proper, sir.

Q And it is your testimony that you never have been in the vicinity?

A Yes sir.

Q Okay, let me see if I understand what you and Habsari are telling this jury. You know, correct me where I'm wrong. You all are taking the position that a burglar, somebody, we'll call him the mystery man, burglarized Habsari's apartment, stole one of the jackets belonging to one of the occupants of that apartment, stole a Champion watch from that apartment, then went a couple of blocks down to Mr. Marquez's house and broke in there where he laid the jackets down, stole another Champion watch and then --

MR. GARNEY: Objection, Your Honor --

MR. BOAZ: -- then got caught --

MR. GARNEY: -- objection, Your Honor, Counsel is testifying, he's not asking a question. He's also interjecting speculatory type matters in here that have

not been testified to. If he has a question to ask, ask away.

THE COURT: I think it is a question, I don't know, I haven't heard it all. Let me hear the rest of the question.

A Could you repeat from the beginning, sir.

Q (BY MR. BOAZ) Aren't you and Habsari trying to tell this jury that the same man that allegedly burglarized her apartment, also went to Mr. Marquez's house and tried to burglarize his apartment and got Champion watches in both locations?

A No sir. We are saying that her apartment was burglarized and that some of the stuff that was taken from her apartment was found at the other one. I would have to speculate as to anything from that, sir.

Q Well, you know, it's obviously somebody that has been in that apartment, burglarized Mr. Marquez's home.

A Yes sir, I would agree with that.

Q That's going to be the mystery burglar or you?

A Are you asking for --

Q Because you have been in that apartment before, haven't you?

A Whose apartment?

Q You had access to that other jacket, whoever it belonged to and it belonged to one of the occupant's of

the apartment, didn't it?

A Yes sir.

Q And you had access to that jacket?

A No sir.

Q Excuse me?

A I didn't have access to it.

Q You mean you couldn't of picked it up when you were visiting the apartment?

A I don't think the roommate would have liked that very much, sir.

Q Well, maybe you could have done it without her knowledge.

A No sir.

Q They don't like you, if it was a cold night and getting down to freezing, you might not have brought that heavy jacket with you but that little light weight jacket there and you said, I better put two jackets on, I have got to walk back to UTEP and I'm going to stay warm?

A No sir.

Q Okay, that would be just impossible, wouldn't it?

A I was dressed warmly, sir.

Q That is just impossible, that couldn't have possibly happened?

A It's possible.

Q Are you and Habsari going to get married?

A I don't know, sir.

Q Have you ever discussed marriage plans with her?

MR. GARNEY: Objection, Your Honor, irrelevant.

THE COURT: Well, I'll overrule it.

MR. BOAZ: Bias on the part of the witness to testify in his behalf.

THE COURT: I overrule the objection.

Q (BY MR. BOAZ) Have you all ever discussed marriage plans?

A Not really, sir.

Q Are you all serious?

A To an extent, yes sir.

Q Do you love her?

A Yes sir.

Q Why was it that Habsari told the investigating officers at the apartment that everything taken in this alleged burglary was hers?

MR. GARNEY: Objection, speculative.

MR. BOAZ: Well, he was there, he has got the personal knowledge.

THE COURT: Well, if he heard.

MR. GARNEY: I believe the way the question was phrased, Your Honor, he's asking what Ms. Habsari mental processes were and he can't testify to that, Your Honor, he's not competent to.

THE COURT: Well, he can deny that he knows what she's thinking about.

MR. BOAZ: Let me rephrase.

THE COURT: Rephrase the question.

Q (BY MR. BOAZ) Did you hear Habsari tell either one of the investigating officers that the only things taken belonged to me and not my roommate?

A No, I couldn't testify to that, sir.

Q You didn't hear that then?

A Not exactly, sir.

Q If that was the fact, wouldn't you find that a little bit odd, the coincidence that the burglar would come in there and take only one of the occupant's belongings?

A The only thing that was obvious, sir, the only thing that could be seen was my girlfriend's stuff.

Q Now then, would you tell these ladies and gentlemen of the jury what kind of clothing you were wearing, about what, 7 a.m. on November 10th, 1986, when you were at Habsari's apartment and Officer John Wadsworth and Candy Coosac were there investigating the alleged burglary?

A Yes sir, I was wearing blue nylon sweats with a matching jacket and I had a T-shirt on.

Q Okay, what color was the T-shirt?

A I don't remember.

Q It couldn't have possibly have been yellow, right?
A No sir.
Q Because you have never worn a yellow shirt in your entire life?
A I don't own one, sir.
Q Right, but you had blue pants on, is that what you you are saying?
A Yes sir.
Q And you had a jacket on?
A Yes sir.
Q You remember that for sure?
A Yes sir.
Q Tell me this. How can you remember the pants that you had, the jacket that you had but you can't remember what color of shirt that you had on?
A I described the shirt, sir. I quite intentionally grabbed the sweats.
Q Once again, was it this color or any variation of this color?
A No sir.
Q Not at all?
A No sir.
Q Not even close?
A Not even close.
Q Not even close. Have you ever worn a mustache?

A Yes sir.

Q What kind of mustache do you grow?

A I'm not sure I understand your question.

Q Well, would you describe it? What kind of -- you know, mine comes out all red and puffy.

A Kind of light mustache, it's red in color. I keep it trimmed to the sides of my mouth and across my lip.

Q Were you wearing the mustache at the time that Habsari's apartment was burglarized?

A I believe so.

MR. BOAZ: Appraoch the witness, Your Honor?

THE COURT: Yes you may.

Q (BY MR. BOAZ) Would you look at State's Exhibit 5, is the photograph above Numerical 1 a photograph of you?

A Yes sir, it is.

Q Is it a true and fair and accurate representation of the way you looked at the time that photograph was taken?

A It's a little bit dark.

Q Other than that, is it a fair --

A Yes sir.

Q Here, here, here, let's take State's Exhibit 4 instead. That's a better one, right?

A A bit, sir.

Q That's a much better photograph, isn't it?

A It's a bit, sir.
Q Okay is that a good, true and accurate depiction of the way you looked when that photograph was taken?
A As a photographer I would say no.
Q No? What's the problem?
A It's too dark.
Q Do you have a mustache on there?
A A light one, yes sir.
Q You don't keep a change of clothing or any clothes at all at Habsari's apartment?
A No sir.
Q I guess you have got a witness or two that will establish your alibi for the jury?
A No sir.
Q Someone that saw you there at UTEP leaving the dorm?
A No sir.
Q How about Yu, your roommate?
A He was asleep when I came in and asleep when I left, sir.
Q Mr. Moon, isn't it a fact that you were the man that Martin Marquez says was you in his home, in his bedroom on November 10th, 1986?
A No sir.
Q And he caught you and you ran leaving that jacket,

one of the -- Habsari's jacket or one of the roommate's jackets and you just took off and he tried to catch you and couldn't?

A No sir.

Q And you ran straight to Habsari's apartment and said, "Oops, I have been caught in a house, we had better call in a false burglary so we can cover ourselves and we'll say that that jacket was stolen, we'll say that one of those Champion watches was stolen?"

A No sir.

Q Mr. Moon, I like to consider myself a fair man and I would like to tell you something. You know, it's not to late to tell the truth about this and I think this jury would find leniency with you --

MR. GARNEY: Objection, Your Honor, may we approach the bench.

THE COURT: All right, approach the bench.

(AT WHICH TIME, an off the record discussion was held, after which the following proceedings were had:)

MR. GARNEY: May I have a ruling on my objection, Your Honor?

THE COURT: The objection is sustained.

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

THE COURT: Yes you may

Q (BY MR. BOAZ) See that composite?

A Yes sir.

Q Do you think that bears any resemblance to you?

A No sir.

Q Not even close?

A I don't feel so, no sir.

MR. BOAZ: No further questions. I pass the witness.

MR. GARNEY: I have no further questions of Mr. Moon, Your Honor.

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C E R T I F I C A T E

THE STATE OF TEXAS)

COUNTY OF EL PASO)

I, Michael P. Nobles, the Official Shorthand Reporter for the El Paso Criminal Magistrate's Court, do hereby certify that the facts as stated by me in the caption hereto are true; that the above and foregoing answers in response to the interrogatories as indicated were made before me by the witness or witnesses hereinbefore named, after said witness had been first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth and the same were thereafter reduced to typewriting by me and under my direction.

I further certify that the above and foregoing hearing as set forth in typewriting is a full, true and correct transcript of the proceedings had at the time of the taking of said hearing.

Given under my hand and seal of office on this the 5th day of January, 1988.

Michael Plez Nobles

MICHAEL PLEZ NOBLES
Jail Magistrate's Court
El Paso, Texas 79901

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

327TH JUDICIAL DISTRICT

THE STATE OF TEXAS	)	
	)	No. 50015-327
vs.	)	50032-327
	)	50033-327
BRANDON LEE MOON	)	

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F A C T S

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December 28, 1987
January 11, 1988
January 12, 1988
January 13, 1988
January 14, 1988

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137 1989

Margarito (Max) Vega
Court Reporting
214 City County
El Paso, TX 79901

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

327TH JUDICIAL DISTRICT

THE STATE OF TEXAS	)	
	)	No. 50015-327
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*Exhibits marked by counsel prior to trial or during trial

**Substituted for original

°Introduced outside presence of jury

°°Introduced in presence of jury

137 1875

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

327TH JUDICIAL DISTRICT

THE STATE OF TEXAS)
)
vs.) No. 50015-327
)
BRANDON LEE MOON)

---oOo---

THE ABOVE-STYLED AND NUMBERED CAUSE came on to be heard before the Honorable Enrique H. Peña, Judge of the 327th Judicial District Court, El Paso County, Texas, pursuant to a motion to suppress filed by the Defendant, on the 28th day of December, 1987, at which time the following evidence and testimony was adduced before the Court:

A P P E A R A N C E S

FOR THE STATE OF TEXAS:

MARCOS LIZARRAGA, ESQ., Assistant District Attorney, 303 City-County Bldg., El Paso, Texas

FOR THE RESPONDENT:

EL PASO COUNTY PUBLIC DEFENDER'S OFFICE, by NORBERT J. GARNEY, ESQ., Attorney at Law, 528 E. Overland, Suite B, El Paso, Texas

---oOo---

137-1876

MONDAY, DECEMBER 28, 1987

THE COURT: The State of Texas versus Brandon Lee Moon, No. 50015, what says the State?

MR. LIZARRAGA: Marcos Lizarraga for the State of Texas, ready, your Honor.

THE COURT: What says counsel for the Defendant?

MR. GARNEY: Norbert J. Garney for the Defendant, ready, your Honor.

THE COURT: All right. As I understand, we're here on a motion to suppress identification, is that correct?

MR. GARNEY: Yes, sir.

MR. LIZARRAGA: Yes, your Honor.

THE COURT: Both sides ready to proceed?

MR. LIZARRAGA: The State is ready.

MR. GARNEY: Defense ready, your Honor.

THE COURT: Call your first witness.

MR. LIZARRAGA: Jeffery Dove.

JEFFERY K. DOVE,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. State your name for the record, please.

A. Jeffery K. Dove.

Q. And how are you employed?

A. I'm a detective for the El Paso Police Department.
Q. How long have you with the El Paso Police Department?
A. Nine years.
Q. How long have you been a detective?
A. Approximately three years.
Q. Approximately three years?
A. Yes.
Q. Did you have occasion to get involved in the Brandon Moon case?
A. Yes, I did.
Q. And this is the case in which Dana Mocherman was one of the alleged victims?
A. Yes.
Q. As a result of your involvement in the case, did you ever come across Brandon Moon?
A. Yes, I did.
Q. When was the first time you had any dealings with him personally?
A. The first time would have been on May 2nd.
Q. Okay, and would that be 1987?
A. Yes, it was.
Q. Can you tell the Court the extent of your dealings with him on that day?
A. I had signed him out of the County Detention Facility for the purpose of arranging a physical lineup.

Q. And where was this physical lineup being conducted?
A. In the Crimes Against Persons' office.
Q. And that's located where?
A. City-County Building, El Paso, Texas.
Q. Right across the street from the jail?
A. Yes, sir.
Q. And when you went to check him out, do you remember any conversation that you had with him when you were at the jail?
A. None at the jail.
Q. Then when you took him over to Crimes Against Persons, did you have any conversation with him?
A. Yes, I did.
Q. Can you tell the Court what conversation you had?
A. I read subject Brandon Lee Moon his Miranda Warnings and explained to him that he would be standing in a physical lineup. I asked him if he had an attorney.
Q. Did he respond to that?
A. He said that he had spoken with an attorney named Norbert Garney, and he wasn't sure if he was officially retained, but it was his opinion that Mr. Garney was handling his bond arrangements.
Q. Okay. Did he say anything else or did you say anything after that?
A. I asked him if he wanted Mr. Garney contacted; he said no because he wasn't sure if he was handling his case or not.

Q. Was anything else said about an attorney in the course of the conversation?
A. Not to my recollection.
Q. Did he request that you get him an attorney?
A. No, he didn't.
Q. Did he say that he did not want to participate in the lineup?
A. No; quite the contrary, he told me he knew what was going on and would participate.
Q. Okay. Now, while you were talking to him on that day and during the course of the conversation, what was his demeanor?
A. Very cooperative and seemed to know what was going on.
Q. And why did you think he seemed to know what was going on?
A. Well, I take it he's an educated person and that he acted like he knew what was going on.
Q. Did you talk to him about anything else during the course of that morning?
A. Yes, he talked about some of his classes at UTEP.
Q. All right.
A. And something about military, ROTC, and some of his aspirations to be in the military, the National Guard, I think.
Q. All right. Did he say anything that morning that seemed irrational to you?

A. Not that I could detect.
Q. Did he seem illiterate to you?
A. No.
Q. Were you aware of any prior dealings that he had with the police?
A. It's my understanding that he has been arrested before.
Q. All right.
A. I didn't personally work any of those cases.
Q. Did he give you an indication at all, either verbally or otherwise, that he wanted an attorney present for this line-up?
A. No, he didn't.
Q. Did he give you any indication, verbally or otherwise, that he did not understand what a lineup was?
A. He told me that he did understand what was going on when I explained to him what a physical lineup was.
Q. What happened after these conversations?
A. He was instructed to then change into some jail blues and out of the orange clothing that he was wearing.
Q. And then what happened after that?
A. We waited for the other four participants to arrive.
Q. Four participants to what?
A. The four participants that would be standing in the line-up with him.
Q. And did the other four participants change into jail

blues?

A. Yes, they did.

Q. Was the lineup conducted?

A. Yes, it was.

Q. Approximately what time was the lineup completed?

A. I don't remember exactly, it seems like it would have been -- Can I have a moment to check my statement?

Q. Yes.

A. I would say approximately two hours.

Q. Okay. During that entire time, during the lineup, did he ever request an attorney be present?

A. None to me.

Q. All right. The way the lineup was set up, you were the officer present in the lineup room at all times, is that correct?

A. That's correct.

Q. And in Brandon Moon's presence, is that correct?

A. That is correct.

Q. Were you present in the same room of the people that identified him were going through?

A. No.

MR. LIZARRAGA: Pass the witness.

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Detective Dove, I don't think an introduction is

necessary. My name is Nobert Garney and we have met on prior occasions, haven't we?

A. Yes, sir.

Q. And we have also spoken over the phone, have we not?

A. Yes, sir.

Q. Now, referring to this lineup on May 2nd, 1987, involving Brandon Lee Moon, did Mr. Moon at any time ever say, "I affirmatively waive my right to counsel?"

A. Not in those words.

Q. All right. Did you ever ask him, "Mr. Moon, do you affirmatively waive your right to counsel during this physical lineup?"

A. Are you asking me if I said that?

Q. Yes, did you ask him that question?

A. No, sir.

Q. During the time that the lineup was conducted was Mr. Moon free to leave?

A. No, he wasn't.

Q. And if he had attempted to leave what would you have done?

A. We would have taken him into custody.

Q. Okay. If Mr. Moon had refused to participate in the lineup what would you have done?

A. I suppose we would have tried to convince him to cooperate.

Q. Now, Mr. Moon was in your custody during the time of this lineup, wasn't he?

A. Yes, he was.

Q. He was under the authority of the Police Department, was he not?

A. That's correct.

Q. At any time was Mr. Moon permitted to wear civilian clothes?

A. No.

Q. He was always in jail garb, either in blues or orange, was he not?

A. That's correct.

Q. Now, Detective Dove, when an individual is placed in a lineup, physical lineup, does the CAP, that is, Crimes Against Persons' Division, have any kind of standard form for waiver that they ask a defendant to sign prior to participation in a lineup?

A. Yes, they do.

MR. GARNEY: May I approach the witness, your Honor?

THE COURT: Yes.

(At this time counsel handed court reporter a document to make as DX-1 for identification.)

Q. Detective, I'm going to show you what has been marked as D-1, and ask you to describe that to the Court, please?

A. This says that it's a waiver of the right to have an attorney present at the lineup.

Q. You recognize that form?

A. Yes.

Q. Is that the standard form which is utilized by CAP during the lineup or when someone is presented for lineup?

A. Yes, it is.

Q. Was that form utilized on the occasion of Brandon Lee Moon?

A. No, sir.

Q. Why not?

A. I was not aware of this form on that particular date, May 2nd, 1987.

Q. How long have you been working at the CAP during that time?

A. About two years.

Q. Look at the form, D-1, and tell me when that form was last revised.

A. 8-26-80.

Q. Wouldn't that indicate to you that at least during the two years that you've worked at CAP that form did exist in the CAP files?

A. Yes, sir.

Q. As a matter of fact, at least from the indication on D-1, that form has existed for the last seven years, has it

not?

A. Yes, sir.

Q. And you did not give Mr. Brandon Moon to sign the standard CAP waiver for attorney form?

A. I did not.

Q. Now, you did call me, did you not, during either just prior to the lineup or during the lineup, is that correct?

A. I remember having some conversations with you, but I don't remember the exacts dates.

Q. Do you recall whether you talked to me before or after the lineup occurred?

A. I believe it was after.

Q. So I was informed after the lineup occurred?

A. To the best of my recollection.

Q. I would like to believe that obviously if you had called me at the lineup, had I wanted to participate I couldn't have because it had already been accomplished, had it not?

A. Evidently.

MR. GARNEY: I pass the witness.

THE COURT: Anything further, counsel?

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Detective Dove, how many lineups have you conducted prior to this time?

A. This was the first physical lineup I conducted.

Q. Who normally does the lineups at CAP?
A. The case agent or the detective handling the case.
Q. Were you aware that such a form existed?
A. Not on that date.
MR. LIZARRAGA: Pass the witness.

RECROSS-EXAMINATION

BY MR. GARNEY:
Q. Detective Dove, who was in charge of Brandon Lee Moon's case at that time?
A. On the Dana Mocherman case I was the case agent.
Q. You were the case agent?
A. Yes.
Q. Which means you're the top man or --
A. I'm the investigator in that case.
Q. Detective, were you aware at the time the lineup was conducted that Mr. Moon had already been charged with the aggravated sexual assault on Dana Mocherman?
MR. LIZARRAGA: Objection, calls for a legal conclusion.
THE COURT: Overrule the objection.
Q. Were you aware?
A. Yes, I was.
MR. GARNEY: I pass the witness.
THE COURT: Counsel?
MR. LIZARRAGA: No more questions.

THE COURT: Call your next witness.

MR. LIZARRAGA: Joe Villa.

JOE VILLA,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. State your name for the record, please.

A. My name is Joe Villa.

Q. How are you employed?

A. I am employed as a detective with the El Paso Police Department.

Q. And how long have you been employed with the El Paso Police Department?

A. I've been with the Police Department for approximately 21 years.

Q. How long have you been a detective?

A. Approximately 10.

Q. What has been your involvement in the Brandon Moon case involving the victim, Dana Mocherman?

A. I had occasion to meet with the victim, Dana Mocherman; subsequent to that meeting I obtained -- the Defendant, Brandon Lee Moon, was identified by Mrs. Mocherman.

Q. Did you obtain a warrant?

A. Yes, sir, I did obtain a warrant.

Q. Did you arrest him?

A. Yes, sir, I did.

Q. What day?

A. I believe it was May the 1st.

Q. Would that be 1987?

A. 1987, right.

Q. Did you execute the complaint and affidavit in the case?

A. Yes.

(At this time counsel handed document to reporter to mark as SX-1 for identification.)

Q. I am handing you what has been marked as State's 1. Could you tell me what that is, please?

A. This is the certificate of magistrate warning given by Judge Andrew Baca on May 1st where it shows that he warned Brandon Lee Moon of his rights.

Q. And were you present during that?

A. Yes, sir, I was.

(Counsel handed document to reporter to mark as SX-2 for identification.)

Q. I'm handing you what's marked as State's 2. Can you tell me what that is?

A. This is the affidavit that I made to obtain a warrant for Brandon Lee Moon.

Q. When did you make that affidavit?

A. I made it on April 30th, 1987.

Q. And was the warrant issued as a result of that?
A. Yes, it was.
Q. When did you arrest Brandon Moon?
A. On May 1st.
Q. And where did you arrest him?
A. At UTEP campus; I believe it was Barry Hall.
Q. All right. And who was with you?
A. I went to Barry Hall with the UTEP police, Sgt. Aguirre, and Officer Carl Davis.
Q. Okay. Approximately what time did you arrest him?
A. Approximately 4:10 a.m.
Q. And what happened when you went in to arrest him?
A. The UTEP officers knocked on the dormitory door and there was an answer from within the room; the officers entered the room and found that Brandon Lee Moon was there. He was advised that there was a warrant for his arrest and that he was being arrested. At that point Officer Carl Davis advised Moon of his constitutional rights.
Q. Would that be his Miranda Warnings?
A. Yes, sir.
Q. And what was Mr. Moon's reaction to that?
A. He was highly upset at the situation, our presence, the lights being turned on.
Q. Did he give any indication that he understood his rights?
A. As I recall he was very upset and he kept saying, like,

that he knew of his rights, that somebody would be in a lot of trouble for this.

Q. And just for the record, why was he arrested at 4:00 in the morning?

A. We arrested him at 4:00 o'clock in the morning because we learned that he was a student at UTEP; we had gone to the UTEP police office earlier that day and we learned from the UTEP police that he had not been to class in several weeks, but that he was still registered at the dormitory. They checked with the dormitory manager and learned that his hours were very -- he kept odd hours. I asked the police to call me whenever he arrived at his room. Okay? And on May the 1st I was called at home at 1:30 in the morning, and by the time that I got over to the UTEP police office was somewhere around 3:30 in the morning.

Q. Okay. After he was arrested and his rights were read there in his room, what happened to him?

A. He was transferred to the UTEP police office.

Q. Did you ever read him his rights?

A. Yes, sir, I did.

Q. Where?

A. At the UTEP police office.

Q. And these were his Miranda Warnings?

A. Yes, sir.

Q. Did he give any indication to you that he did not

understand what you were reading him?

A. No, sir.

Q. Did he at anytime ask you to get an attorney for him?

A. No, sir, he didn't.

Q. What happened after you were in the UTEP police office?

A. I requested a patrol unit to assist me in transporting him down here to the police station. When we got to the police station we went before Judge Andrew Baca, and Judge Baca gave him his magistrate's warnings, and that's when he signed this.

Q. State's Exhibit 2?

A. Yes.

Q. Were you there when that occurred?

A. Yes, sir, I was.

Q. And when Judge Baca gave him his warnings, did he at that time, to the best your recollection, request an attorney?

A. No, he did not.

Q. Did he ever request an attorney of you during the entire time?

A. No, sir, he did not.

Q. Okay.

MR. LIZARRAGA: We'd like to offer State's Exhibit No. 2 for the purpose of this hearing.

THE COURT: Counsel?

MR. GARNEY: No objections, your Honor.

THE COURT: It will be received.

(WHEREUPON, State's Exhibit No. 2, marked previously as SX-2 for identification, was received into evidence.)

Q. At anytime during your dealings with Mr. Moon after the initial arrest, did he seem like he was in such pain or not aware of what was going on around him?

A. No, sir.

Q. And did he seem like he was in any kind of stupor?

A. No, sir.

Q. Did he seem like he -- How would you evaluate his intelligence based upon the conversations that you had with him?

A. Well, he was conversing with me, he was a rational person, he was upset at the time, but there was no indication that he -- just an average person, he was not someone that could not exercise reason, like that.

Q. Did he ever tell you anything about Norbert Garney, his attorney?

A. No, sir.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Detective Villa, were you present during the lineup of May 2nd, 1987?

A. Yes, I was.
Q. And at that time did Mr. Moon ever indicate to you that he would waive his right to an attorney?
A. No, sir.
Q. Never did?
A. No, sir.
Q. You never asked him?
A. No, sir, I didn't.
Q. Any time previous to May 2nd from the time that he was arrested the day before until the time the lineup, did he ever come up to you and say, "Detective Joe Villa, I wish to waive my right to an attorney?"
A. No, sir, he did not.

MR. GARNEY: I pass the witness.

THE COURT: Counsel?

MR. LIZARRAGA: No further questions, your Honor.

THE COURT: You may step down. Call your next witness.

MR. LIZARRAGA: We rest, your Honor.

THE COURT: Mr. Garney.

MR. GARNEY: Your Honor, I would like to call Brandon Lee Moon for the limited purpose of this hearing to determine whether the proper lineup procedures were utilized.

THE COURT: Yes, sir.

MR. GARNEY: At this time, your Honor, I would like

to offer D-1 into evidence.

THE COURT: Any objections?

MR. LIZARRAGA: None.

THE COURT: All right, received.

(WHEREUPON, Defendant's Exhibit No. 1, previously marked as DX-1 for identification, was received into evidence.)

BRANDON LEE MOON,

the Defendant, called as a witness, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GARNEY:

Q. State your name for the record.

A. My name is Brandon Lee Moon.

Q. How old are you?

A. I'm 26.

Q. Mr. Moon, are you the same Mr. Moon who's been charged with aggravated sexual assault occurring on or around April 27th, 1987?

A. Yes, sir.

Q. And do you know the gentlemen who just testified?

A. Yes.

Q. Both Detective Villa and Detective Dove?

A. Yes, sir.

Q. And did you participate in a physical lineup on May 2nd of 1987?

A. Yes, sir.
Q. And will you explain to the Court the circumstances which found you inside that lineup, that is, how did you end up in that lineup?
A. I was called out of the cell, brought down to the second floor, where I met Detective Dove, and he told me that I was to stand in a lineup. I said okay. They took me across to the Police Department and had me change in blues and put me in the lineup.
Q. At the time you were transported to the lineup, were you in cuffs?
A. Yes, I was.
Q. Did they let you off across the street by yourself or did they accompany you?
A. I was accompanied.
Q. Who were you accompanied by?
A. Detective Dove.
Q. Were you in jail clothes at that time?
A. Yes, I was.
Q. At any time during May 2nd, were you out of jail clothes?
A. No, sir.
Q. At any time during May 2nd, were you out of the custody of the Sheriff's Department or the Police Department?
A. No, sir.
Q. Mr. Moon, did you at any time sign a waiver of your

right to counsel during the physical lineup?

A. No, sir.

Q. Did you at any time refuse to sign such a waiver?

A. No, sir.

Q. Were you even shown such a waiver?

A. No, sir.

Q. Let me show you what has been marked as D-1. Please look at it. On May 2nd, 1987, were you shown that particular form, or one like it?

A. No, sir.

Q. Did you ever tell Detective Dove that "I wish to waive my right to an attorney?"

A. No, sir.

Q. Were you ever asked if you wished to waive your right to an attorney?

A. No, sir.

Q. Did you ever tell Detective Villa that you wished to waive your right to an attorney?

A. No, sir.

Q. Did he ever ask you, "Mr. Moon, do you wish to waive your right to an attorney during this physical lineup?"

A. No, sir.

Q. Mr. Moon, did you have an attorney during that lineup?

A. No, sir.

MR. GARNEY: I pass the witness.

CROSS-EXAMINATION

BY MR. LIZARRAGA:

Q. Mr. Moon, you have participated in lineups before, haven't you?

A. No, sir.

Q. You never have?

A. No, sir.

Q. You heard the testimony of the two detectives that testified right now and what they said was basically correct?

A. Yes.

Q. Did you ever tell Detective Dove or Detective Villa that you did not want to participate in a lineup?

A. No, sir.

Q. How old are you?

A. I am 26.

Q. Can you tell the Court what the extent of your education is?

A. College education, two years.

Q. Anything else, high school?

A. Yes, sir, high school.

Q. Any other type of education?

A. I have my military training, I have electronics in tech school.

Q. Okay, were you in the military?

A. Yes.

Q. For how long?
A. For four years.
Q. And you have been involved in the criminal justice system before, is that correct?
A. Yes, sir.
Q. Dating at least back to 1984, is that correct?
A. Yes.
Q. You've been arrested before?
A. Yes.
Q. You've been read your rights many times, isn't that correct?
A. Yes, sir.
Q. You know what your rights mean, don't you?
A. More or less.
Q. Okay. You did retain counsel back in '84 in a case pending against you, is that correct?
A. Yes, sir.
Q. So you were aware that you were entitled to counsel at every stage of the proceedings against you, is that right?
A. Not exactly. I knew that under certain circumstances that I could have counsel.
Q. You've seen Dragnet on TV, haven't you?
A. I used to.
Q. You've heard the Miranda Warnings on TV and --
A. Yes.

Q. -- you heard the part where they say you have a right to have an attorney, if you can't afford one, one will be appointed for you. You've heard that various times, haven't you?
A. Yes.
Q. Even before you became involved in the criminal justice system?
A. Yes.
Q. And you wouldn't classify yourself as an idiot or anything like that?
A. No, sir.
Q. Of at least average intelligence, isn't that correct?
A. Yes.
Q. So you know what your rights are as far as having an attorney?
A. Basically.
Q. And in fact when Detective Villa asked you when you were arrested whether you wanted to give a statement, and you exercised one of those rights and you said no, isn't that right?
A. Yes.
Q. And you knew that was one of your rights?
A. Yes.
Q. And in fact when Detective Villa told you the following day or that particular day on May the 1st, asked you he could search your apartment, you told him no, he couldn't do it

without a warrant, isn't that correct?

A. I asked to have my attorney present.

Q. Yes, if your apartment was going to be searched, is that correct?

A. Yes, sir.

Q. So you knew that you were entitled to an attorney even though you were going to be in jail and your apartment was going to be searched, isn't that correct?

A. I was told at that point that I was not entitled to an attorney to be present at that time.

Q. All right. You were told that you were not entitled to an attorney --

A. That's right.

Q. -- being present? Okay. During the search?

A. Yes.

Q. But you are aware that you have rights at various proceedings for an attorney?

A. Yes, sir.

MR. LIZARRAGA: No more questions.

THE COURT: Counsel.

REDIRECT EXAMINATION

BY MR. GARNEY:

Q. Mr. Moon, were you told that you would not have to participate in the lineup if you did not wish to on May 2nd, 1987?

A. No, sir.

Q. Mr. Moon, are you aware of the distinction that the Supreme Court has made, at least were you aware on May 2nd, 1987, a distinction that the Supreme Court has made, that you have a right to an attorney during physical lineups after you have been charged but not before?

A. No, sir.

Q. When did you become aware of that distinction?

A. Just a few days ago.

Q. And who made you aware of that?

A. You did.

MR. GARNEY: I pass the witness.

THE COURT: Counsel.

MR. LIZARRAGA: No more questions.

THE COURT: You may step down. Any further witnesses?

MR. GARNEY: No, your Honor.

THE COURT: Anything further, counsel for the State?

MR. LIZARRAGA: No, your Honor.

THE COURT: Motion will be denied. Draw up an order, please.

(WHEREUPON, the proceedings in the motion to suppress were concluded, and the Court was adjourned.

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

327TH JUDICIAL DISTRICT

THE STATE OF TEXAS	)	
	)	No. 50015-327
vs.	)	50032-327
	)	50033-327
BRANDON LEE MOON	)	

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THE ABOVE-STYLED AND NUMBERED CAUSE came on to be heard before the Honorable Enrique H. Peña, Judge of the 327th Judicial District Court, El Paso County, Texas, with jury trial commencing on the 11th day of January, 1988, and concluding on the 14th day of January, 1988, at which time the following evidence and testimony was adduced before Court and Jury:

A P P E A R A N C E S

FOR THE STATE OF TEXAS:

MARCOS LIZARRAGA, ESQ., Assistant District Attorney, 303 City-County Bldg., El Paso, Texas

FOR THE DEFENDANT:

EL PASO COUNTY PUBLIC DEFENDER'S OFFICE, by NORBERT J. GARNEY, ESQ., Attorney at Law, 528 E. Overland, Suite B, El Paso, Texas

---oOo---

MONDAY, JANUARY 11, 1988

(The following proceedings were had before the jury panel:)

THE COURT: Good afternoon, ladies and gentlemen of the jury panel. Good afternnon, counsel. Cause No. 50015, the State of Texas versus Brandon Lee Moon. What says the State?

MR. LIZARRAGA: The State is ready, your Honor.

THE COURT: Counsel for the Defendant?

MR. GARNEY: Defense is ready, your Honor.

THE COURT: Ladies and gentlemen of the panel, this afternoon we are going to go through a process of selecting a jury, twelve of you, through a process of elimination, to hear this case. This afternoon the State of Texas is represented by Mr. Marcos Lizarraga. Will you please stand so the jury panel can see you? Mr. Lizarraga is an Assistant District Attorney in and for the 34th Judicial District Court. And the Defendant is represented by Mr. Norbert Garney, an attorney here in El Paso, and the Defendant, Mr. Brandon Lee Moon, will you please stand? You may be seated.

Let me explain a little bit about the procedure in this case. After I explain about the procedure I am going to then explain the principles of law that are applicable in all criminal proceedings. When I have concluded my remarks, then the State of Texas will have an opportunity of talking to you,

asking you questions, you all have filled out a questionaire. Is there anyone who is on this jury panel that did not fill out a questionaire Friday? Now if I don't get any response to any of my questions, by your silence I'm going to have to assume, of course, the obvious. After Mr. Lizarraga gets through, Mr. Garney will then have an opportunity of talking to you. When we have concluded, we will take a recess, the attorneys will then take what we call their strikes, that is, each side has the opportunity of looking at the list and striking ten names for whatever reason that they may want to. And the first twelve that are remaining on this list will actually be the jury that will be impanelled. So it's really not a selection, it's a process of elimination whereby we end up with twelve people. Afterwards we will come back and we will sit the jury, the balance of you may be excused, I have to receive orders from the District Clerk as to what to do with the balance of the jury panel, then the jury will be administered an oath, I will give you some instructions that you all are to follow during the course of this trial, then the State will read the indictment, the Defendant will enter his plea of guilty, then the State will have an opportunity of making an opening statement and proceed with their case in chief. When the State rests, that is, present all of its evidence in its case in chief, then the Defendant will have the opportunity, if he so desires, -- I will explain

some principles that will be applicable during that phase -- to proceed. When the Defendant rests, and if the State has no rebuttal witnesses and closes their case, then it will be the duty of the Court to prepare a written charge on the law. Then the Court will bring you in, read the charge, you will hear summation of counsel, and then you will go to the jury room to deliberate on your verdict. If a jury says a defendant -- and I'm not talking about this case now, because we cannot discuss the facts of this case -- but if the jury says a defendant is not guilty, we thank you, we pay you for your services, and you are on your way. On the other hand, if, a defendant is found guilty by a jury, that defendant has a right to make an election to have the same jury impose sentence. So we will go into the second phase and at that time it will be very similar to the first phase with the State opening their case and finally closing, ultimately, then you will deliberate on the punishment that you assess.

Now, the Defendant in this case is charged with the offense of aggravated sexual assault, that allegedly occurred here in El Paso County on the 27th day of April, 1987, and the complaining witness is a woman by the name of Dana Mocherman. Mocherman. Now, aggravated sexual assault means rape, but it becomes aggravated because the State has charged that the Defendant used a deady weapon, a firearm. So, in other words, the State has alleged, one, that a rape occurred, and,

secondly, that a firearm was used. That makes it an aggravated sexual asault.

In asking you questions about the principles of law as to why you may feel you are not or do not want to sit on the jury, if you are embarrassed about answering from the audience, raise your hand and we will be more than happy to take you during the recess. As you sit here, as you sit here at this moment, all of you are qualified to sit in that jury box and be jurors in this case. Now, there may be something in your background, there may be something that occurred during your lifetime. There may be a principle of law that you do not agree with. That in and of itself does not disqualify you from sitting in this box and being a member of a jury. What disqualifies you is if you allow those experiences, those opinions, those biases that you may have, or that you cannot follow the law, that's what will disqualify you. Now I'm going to ask a very general question and go row by row, and, once again, if you do not answer I must assume then that in answer to the question that you all feel up to this point, and you haven't heard from Mr. Lizarraga or Mr. Garney, that you have no problem. Knowing that this is an aggravated sexual assault, an aggravated rape, is there anyone on the first row, for whatever reason, that feels they could not be fair and impartial both to the State, the people of the State, or to this Defendant?

On the second row? On the third row. On the fourth row? On the fifth row? And the last two persons, Michelle Escobar and Cleotilde Barraza. Is there any reason?

Keep that question in your minds as I proceed through my explanation, as Mr. Lizarraga proceeds through his questioning, and also Mr. Garney, whether you can serve, you're the only ones who know. And the only purpose of asking you these questions, of course, is to find twelve of you that have no biases, no opinions. As an example, if a victim's husband was on this panel, obviously, I mean, he couldn't be fair and impartial. I think we all would agree with that. That is, if Mr. Mocherman were here and was sitted there, he couldn't very well be objective in this case, because his wife would've been the victim. That's the bottom line. And I imagine another question that you have to think about, as we go through these proceedings is that, if you found yourself on this side of the bar, in the Defendant's shoes, would you want someone in your present frame of mind to be selected to sit in that jury box and judge you? If you answer that in the negative, no, then you and I know that there's something wrong, but, on the other hand, up to this point if you can truthfully search your soul and your heart and your mind and answer yes, I can be fair and impartial to all sides, then you would qualify as a juror in this case.

Now, the indictment that is being brought against this

Defendant is a piece of paper that is returned by a Grand Jury and filed in this Court. The purpose of having an indictment, of course, is to invoke the jurisdiction of the Court and to have the Defendant answer to the felony charges. And I will instruct you at this time, and I will instruct the jury later on in writing, that the indictment is no evidence of guilt. That is, you cannot consider it as any evidence of guilt on the part of the Defendant. As a matter of fact, you will be charged that the fact that an individual may have been arrested, may be confined, has been charged or indicted for any offense, is no evidence of guilt. An indictment, basically, is very analogous to a traffic citiation. You're going down the freeway, all of a sudden you see red lights behind you, an officer stops you and advises you that you had been speeding. And as you protest, he is writing that ticket out, he asks you to sign that ticket. The fact that you sign that ticket doesn't mean anything. It's only a promise on your part to appear in municipal court to face the charge of speeding. When you get to court, there is a complaint filed, very similar to an indictment, and you plead not guilty. The State has to prove you're guilty of speeding, you don't have to prove anything.

Now, is there anyone on this jury panel that feels where there's smoke, there must be fire? What do I mean by that? I mean, well, we're here, there's a judge, there's a

court reporter, a bailiff; there's a state prosecutor, there is defense counsel. We're here. There's an indictment. You may feel, there must be something to it, otherwise we wouldn't be here. Knowing that the indictment is no evidence of guilt, is there anyone that would attach any significance to the fact that an individual has been indicted by way of feeling that he must be guilty of something? Is there anyone on this jury panel that feels that way? By your silence then I must assume that all of you can follow the law that an indictment is no evidence of guilt.

Tied in to the fact that an indictment is no evidence of guilt, there is another principle of law that the Defendant, as he sits here, he is clothed with a veil of innocence. If, for example, twelve people were in that jury box, and I call on the State to proceed and the State said, we have no witnesses, we rest. The jury having heard no evidence, it would be incumbent on those twelve people to go to the jury room and return a verdict of not guilty. Why? Because he is presumed innocent, he is clothed with a veil of innocence, and the State has brought forward no evidence to remove that veil of innocence and to establish his guilt. Now, is there anyone who is troubled with that principle of law? That all persons who are accused of a crime, all persons who are indicted for an offense, are presumed innocent. You see, all you need to do is go down about ten or thirteen blocks across

the river into Mexico and there you are presumed guilty. You have to prove your innocence under their system of law. But not here. It's the reverse. And it bothers a lot of people, especially people that have been victims of crimes, that a person, even though he may have been caught, and I quote, "red-handed", he's presumed innocent until proven guilty. Is there anyone that has trouble with that principle of law?

Tied into that principle of innocence is the fact that the State of Texas, represented by Mr. Lizarraga, has to prove guilt. It is his burden to prove guilt. The Defendant does not have to prove anything, because he's innocent. And remember this: The State has to prove whether a defendant is guilty or not guilty. There is no such thing as proving someone innocent. You are presumed innocent until that presumption is removed. Now, is there anyone that is troubled by the fact that Mr. Lizarraga, representing the State, has to do all the work, has to do all the proving? By your silence I assume, then, you adhere to that principle.

Now, not only must Mr. Lizarraga prove and establish guilt, but he has to do it by beyond a reasonable doubt. Under our system of law, we have various standards or proof. But, basically, the standards that are applicable are, a preponderance of the evidence in civil cases. The greater weight of credible evidence. You have an automobile accident, you have two people in court; he who produces 51 percent of

the credible evidence, that person wins the lawsuit. In a criminal case, though, the State, because of the presumption of innocence and because the State has to do all the proving, has to prove each and every element of the offense beyond a reasonable doubt. It's a higher standard. As an example, supposing we have a jury, and supposing we're trying a murder case, and they allege that the murder occurred here in El Paso County. And they prove every element of the indictment beyond a reasonable doubt, that the defendant and no one else killed the victim, that he used a firearm, or any other weapon, but the State fails to prove that it occurred in El Paso County. Lo and behold, during the case, it comes out that the murder occurred in Doña Ana County in New Mexico, in an adjoining county. Now that jury would have to find that defendant, in spite of the fact that they have proved that he did the killing, not guilty, because the State has not proved one of the elements, and that is that it occurred here in El Paso County, Texas.

Beyond a reasonable doubt, unfortunately, cannot be defined. We judges are not allowed to define it during the time that I charge you. But I can tell you, and I'm sure that Mr. Lizarraga and Mr. Garney will tell you, beyond a reasonable doubt doesn't mean beyond a shadow of a doubt or beyond any doubt whatsoever. Basically, what beyond a reasonable doubt means is, when you see it you'll recognize it. When

twelve people, collectively, using common sense, hear the evidence, they go back to the jury room and, collectively, dicuss the case, deliberate on the case, they will know when a reasonable doubt exists. Why do I say that? Because reasonable doubt is based on reason. The twelve of you that are selected will go back, discuss the case, and if there is any doubt in your mind that is based on reason, then I will instruct you that you have to resolve that doubt in favor of the Defendant and say by your verdict, not guilty. All of you/go through your life experiences have been called upon to make a decision, and a lot of times you made a snap decision, you can decide things very easy, but once in a while you hold back. You hold back because your gut, your head, tells you that there is a doubt there. Don't act this way, don't act that way. And you're refraining from acting, you're hesitating from acting, because you have a doubt that is based on reason. Now, is there anyone here that would have problems if selected to sit in that jury box, hearing the evidence from the witnesses, and after hearing all of the evidence and have problems trying to decide whether the defendant is guilty or not guilty beyond a reasonable doubt? Is there anyone that would have problems with that?

As jurors your job is to sit in the jury box, be attentive, listen to the evidence. What I say is not evidence. The questions that the attorneys ask is not evidence. The

only evidence that you can use to decide whether a defendant is guilty or not guilty, are the answers that witnesses give. That's the first step. Then the second step is, that as jurors you have awesome power in that you can believe everything that a witness says, you can believe half, or you can believe nothing. That is your responsibility and that is the awesome power that a jury has. I have nothing to say. I sit here as the referee between the State and the Defendant. I make rulings on legal questions. But when it comes to facts, the twelve of you that are selected to be members of this jury will decide. If twenty witnesses testified and you want to believe all twenty, that's your prerogative; if you want to believe ten, that's your prerogative; if you don't want to believe any of those twenty witnesses, that's your prerogative, and nobody can quarrel with that, nobody can appeal from that decision that you make. They can appeal from my ruling, but they will never be able to interfere with your thought processes as to who to believe, as to who not to believe. You look at a witness, you look at their demeanor, how they testify and then you decide whether to believe that witness or not. Is there anyone that would have problems with that?

Now, a defendant in a criminal case has a very basic constitutional right. And that is the right not to testify. It's known as your Fifth Amendment right against self-incrimination. A defendant can say after the State rests, I rest,

not put on any evidence, witnesses, because it goes back that he is presumed innocent until the State proves and establishes his guilt. Now if a defendant does not take the stand, then the Court will instruct you that you cannot take that fact as any evidence of guilt, neither can you penalize a defendant, neither can you hold it against him. Now I know all of you here, 42 of you are sitting here, and you say, you know, that's contrary to what we go through life learning. I want to know both sides. And this runs contrary to common sense, runs contrary to human experiences. All of you that are parents know that when a child tells you something there is always another side to it. But in a criminal case, a defendant has a right not to say anything, testify or anything, and you can't hold it against him, and you cannot not even consider it against him; you can't even take it as a circumstance against him. Now, is there anyone on row number one that is troubled by that concept of law? That just feels, no, it's wrong, I just cannot follow that law. I disagree with it, I mean, we're here, it's only common sense that I listen to both sides before I can decide. Understanding that you may not, because the Constitution gives a defendant the right not to testify. Is there anyone troubled with that concept? On the second row? Third row? Fourth row? Finally, the last two ladies in the back? By your silence then I must assume that you all can follow that principle of law.

Criminal proceedings are biforcated proceedings, ladies and gentlemen. By that I mean there's two stages and I'll touch briefly on them. The first stage is the adjudicatory, the guilt or nonguilt. If guilt is found, then a defendant is entitled to make an election as to who is to sentence him. Now in this case, ladies and gentlemen, the defendant has filed a motion that if he's found guilty the jury is to do the sentencing. Right away I'm sure some of you are thinking, my God, we're getting way ahead of the game here. There's talk about presumption of innocence, burden of proof, and now we're talking about a defendant making an election. Under the Texas statutory scheme, a defendant, even before you all came in, has to make a choice. That's the law. If he doesn't, he loses that choice. So he has to. I'll instruct that simply because this Defendant has made an election of sentencing is not to be considered as any evidence of guilt.

Further, a defendant, prior to trial, prior to coming here, prior to you all being here, has to make an election whether to apply for probation. And, once again, I'll instruct you, that the fact that this Defendant has made an application for probation, doesn't mean that he's guilty of anything, you can't hold it against him, he's merely following Texas law. Now this is, for example, a law that I disagree with personally. But that doesn't mean anything. I have to follow the law, and whether I like it or not, that's

immaterial. That's the law and that's what we do here.

Knowing that the Defendant has made an election if he's found guilty, is there anyone on this jury panel that feels that under no circumstances they could sentence a human being? There are some people that for whatever reasons, religious, moral, personal experiences. Is there anyone on this jury panel that just cannot, under any circumstances, sentence an individual to the penitentary? And I'm going to explain a little bit more on that.

MR. LIZARRAGA: Your Honor, may we approach the bench?

THE COURT: Yes.

(At this time counsel approached the bench and a discussion ensued off the record and out of hearing of the jury panel.)

THE COURT: Under Texas law an aggravated sexual assault is a first degree felony. That is, if a defendant is convicted, he can be sentenced to a minimum of five, maximum of 99 years or life imprisonment and in addition a $10,000 fine can be assessed. That's the range of punishment that the legislature has set forth for those persons that are found guilty of a first degree felony. I'm going to ask a question, very general question, is there anyone on this jury panel that disagrees that aggravated sexual assault should be a first degree felony, carrying five to 99 years or life

imprisonment or in addition a fine of $10,000? Whether you feel it's too harsh or it's not harsh enough? By your silence I must assume that all of you agrees with the general sentencing scheme on first degree felonies.

Now I'm going to ask you some important questions, and I'm not talking about this case simply because you don't know anything about this case. As a matter of fact, I don't know anything about this case. But, is there anyone on this jury panel that cannot conceive of a fact situation involving an aggravated sexual assault where after finding a defendant guilty you could never under any circumstances assess five years in the state penitentiary? That's the minimum. Five years. On the other extreme, is there anyone on this jury panel that cannot conceive of a fact situation where after having found a defendant guilty of aggravated sexual assault could not assess 99 years? You see, if you cannot assess five, you cannot be fair to the Defendant, on the lower extreme. If you cannot assess 99 years, you cannot be fair to the State, to consider the whole range. Not that we're asking you to contract yourselves or to bind yourselves at this time on this case. We're not talking about that. But you have to be able to work within the statutory scheme. Is there anyone that cannot conceive of a fact situation, after hearing all of the evidence and convicting someone of aggravated sexual assault, that could not assess life imprisonment?

By your silence to all three questions, then, I must assume that all of you can conceive of a fact situation where you could assess five or 99 years or life imprisonment, and of course anything in between five and 99.

Now, the Defendant, as I told you, has applied for probation. Now, under Texas law, if a defendant is convicted of a felony offense, and if the defendant proves and establishes that he or she has never been convicted of a felony offense in this state or in any other state, and if the sentence that is imposed by a jury does not exceed ten years, that person is eligible, and I want to underscore that word, eligible, for probation. That is, he has to prove that he's worthy of probation. Merely because he applies for probation, merely because he proves that he's never been convicted doesn't mean that he's automatically entitled to probation. You must understand that there's two conditions: One, the sentence cannot exceed ten years. If it's eleven years, he becomes ineligible for probation. So it's got to be ten years, and in this case it would be from five to ten. And, no covictions. And then the jury has to decide whether he's worthy. Now a word of caution. When a jury says ten years and recommends to the Court probation, the Court must grant probation. There's no if's, but's or and's. Even though the law calls it a recommendation on the part of the jury, it is binding on the Court and the Court has to grant probation.

Question number one. Is there anyone on this jury panel that does not know what probation is, basically, generally? By your silence, then, I must assume that you all have a general understanding of what probation is. Now, is there anyone on the first row that because of the nature of the offense would automatically say no to probation? That, in other words, couldn't sit here and listen to all the evidence without any preconceived notions, opinions or biases, and look at all the facts of the case. Is there anyone that is totally opposed to probation simply because of the nature of the offense or for any other reason? On the second row? On the third row? Fourth row? Fifth row? Last two jurors? By your silence I must assume that all of you would not automatically say no to probation because of the nature of the offense.

Now, is there anyone on the first row that merely because a defendant makes an application for probation and merely because he can prove that he's never been convicted of a felony, would automatically grant probation? In that case, you would be unfair to the State, you would say if those two things occurred, automatically I don't care what the facts show, I don't care anything, I'm going to grant it. Is there anyone on the first row that would automatically grant probation? On the second row? The third row? Fourth row? Fifth row? The last two jurors?

Now, I'm going to ask one final question, then I'll turn

it over to Mr. Lizarraga. As you sat here for the last 20-30 minutes, hearing me talk, you haven't heard Mr. Lizarraga or Mr. Garney, is there any reason, up to this point, that would make you feel that you could not be a juror in this case for whatever reason, that is, because of strong opinions, biases, you can't follow the law for whatever reason?

Mr. Lizarraga, you may proceed.

(At this time the voir dire examination of the jury panel was conducted by the counsel for the State and counsel for the Defense. After the voir dire examination, the following proceedings were had:)

THE COURT: Ladies and gentlemen, at this time we are going to take a recess while the attorneys go over the list and make their preemptory strikes. We'll recess for about 20 minutes.

(A recess was taken at this time.)

(After the recess the following proceeding was had out of the presence of the jury panel:)

THE COURT: Go ahead, Mr. Garney.

MR. GARNEY: Comes now Norbert Garney, attorney for the Defendant, Brandon Lee Moon, and makes the following motion that he allowed to try together during the trial of this cause, in cause numbers 50015, 50032 and 50033. All of which allege an aggravated sexual assault against the same alleged victim, the only difference being --

THE COURT: Give me the cause numbers.

MR. GARNEY: 50015, 50032 and 50033. All allege an aggravated sexual assault, all against the same victim, on the same day, all arising out of the same offense. We beseech the Court at this time to allow us to try these three causes together.

THE COURT: I'll allow you, if you all want to, I don't care.

MR. GARNEY: Thank you, your Honor.

THE COURT: Then we'll go ahead and try all of them.

(At this time the jury panel was brought into courtroom and twelve members from the panel were selected as the jury to hear this case, and after they had taken their seats in the jury box, the following proceedings were had:)

THE COURT: Is the jury properly seated?

THE CLERK: Yes, your Honor.

THE COURT: Counsel for the State, are you satisfied with the jury?

MR. LIZARRAGA: Yes, sir.

THE COURT: Counsel for the Defendant?

MR. GARNEY: No objections, your Honor.

THE COURT: What are we going to do with the remaining balance?

THE CLERK: We are going to pay them.

THE COURT: Ladies and gentlemen of the remaining jury panel, if you will remain a few minutes outside the courtroom, your pay vouchers are being prepared and you will be paid for your services here Friday and today. At this time the Court will excuse you and thank you very much for your services. You are excused.

(The remainder of the jury panel left the courtroom, the Court proceeded to swear in the jury, after which the following proceedings were had:)

THE COURT: Ladies and gentlemen of the jury, by the oath that you all have taken, you have become officials of this Court and active participants in the administration of justice. I'm going to give you some instructions, instructions that you should follow throughout the trial. First of all, you will not discuss anything about this case with anyone, including your respective spouses. You will be kept together at all times, you will have your meals together. If tomorrow, for example, we have an overnight recess, you will be allowed to go home, however, you will not discuss anything about this case or the testimony that you heard, and at this time I will further instruct you that you will not read anything about it in the newspapers or see anything on television that may be reported about this case.

Now, the attorneys, witnesses and all of the parties involved in this lawsuit are under instructions not to talk

to you. And they are further instructed that they are not to accept any type of favors, however slight, such as rides, food or refreshments, and that goes the other way around as far as you're concerned.

As Mr. Lizarraga had explained to you previously that all they can do is a casual greeting, that you must understand their aloofness to you. You will always be in the company of the bailiff, Mr. Miller Carr. Our jury room is located down the hallway. In the mornings we will start promptly at 8:00 a.m., and be prepared tomorrow to work late into the evening, both tomorrow and Wednesday. In the jury room there will be coffee available for you in the morning for those of you that come early; we get here around 6:30 in the morning, so if anybody wants to come here that early the jury room will be opened and there will be coffee available. Tonight I'm going to have the indictments read to you, the three indictments in this case, and then we'll hear the pleas of the Defendant, and then we will retire for the night and start promptly tomorrow at 8:00 a.m.

Mr. Lizarraga, you may read the indictments to the jury.

MR. LIZARRAGA: In cause No. 50015, in the name and by the authority of the State of Texas, the Grand Jurors for the County of El Paso, State aforesaid, duly organized as such, in the January Term, A.D. 1987, of the 120th Judicial District Court for said County, upon their oaths in said

Court present that Brandon Lee Moon on or about the 27th day of April, One Thousand Nine Hundred and Eighty-Seven, and anterior to the presentment of this indictment, in the County of El Paso and State of Texas, did then and there unlawfully, intentionally and knowingly by threats of violence directed toward Dana Mocherman caused the penetration of the female sexual organ of Dana Mocherman, a person not the spouse of Brandon Lee Moon by means of the sexual organ of Brandon Lee Moon, without the consent of Dana Mocherman, and at the time of the threat Dana Mocherman believe that Brandon Lee Moon had the present ability to execute the threat, and in the course of the same criminal episode, Brandon Lee Moon used and exhibited a deadly weapon, to-wit: a firearm, against the peace and dignity of the State, signed by the foreman of the Grand Jury.

THE COURT: What is the plea of the Defendant to the indictment?

MR. MOON: Not guilty.

MR. LIZARRAGA: In cause No. 50032, in the name and by the authority of the State of Texas, the Grand Jurors for the County of El Paso, State aforesaid, duly organized as such, in the January Term, A.D. 1987, of the 120th Judicial District Court for said County, upon their oaths in said Court present that Brandon Lee Moon on or about the 27th day of April, One Thousand Nine Hundred and Eighty-Seven,

and anterior to the presentment of this indictment, in the County of El Paso and State of Texas, did then and there unlawfully, intentionally and knowingly by threats of force directed toward Dana Mocherman, caused the sexual organ of Dana Mocherman, a person not the spouse of Brandon Lee Moon, to contact the sexual organ of Brandon Lee Moon, without the consent of Dana Mocherman, and at the time of the threat, Dana Mocherman believed Brandon Lee Moon had the present ability to execute the threat, and in the course of the same criminal episode, Brandon Lee Moon used and exhibited a deadly weapon, to-wit: a firearm, against the peace and dignity of the State, signed by the foreman of the Grand Jury.

THE COURT: The plea of the Defendant?

MR. MOON: Not guilty.

MR. LIZARRAGA: In cause No. 50033, in the name and by the authority of the State of Texas, the Grand Jurors for the County of El Paso, State aforesaid, duly organized as such, in the January Term, A.D. 1987, of the 120th Judicial District Court for said County, upon their oaths in said Court present that Brandon Lee Moon on or about the 27th day of April, One Thousand Nine Hundred and Eighty-Seven, and anterior to the presentment of this indictment, in the County of El Paso and State of Texas, did then and there unlawfully, intentionally and knowingly by threats of force and violence directed towards Dana Mocherman, caused the penetration of

the female sexual organ of Dana Mocherman, a person not the spouse of Brandon Lee Moon, by the means of the finger of Brandon Lee Moon, without the consent of Dana Mocherman, and at the time of the threat, Dana Mocherman believed Brandon Lee Moon had the present ability to execute the threat, and in the course of the same criminal episode, Brandon Lee Moon used and exhibited a deadly weapon, to-wit: a firearm, against the peace and dignity of the State, signed by the foreman of the Grand Jury.

THE COURT: The plea of the Defendant?

MR. MOON: Not guilty.

THE COURT: Ladies and gentlemen, we stand recessed until tomorrow at 8:00 a.m. Goodnight.

(WHEREUPON, the Court was adjourned until 8:00 a.m., January 12, 1988.

MORNING SESSION

TUESDAY, JANUARY 12, 1988

(The follwing proceedings were had in the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen. Good morning, counsel. You may proceed, Mr. Liazrraga.

MR. LIZARRAGA: Thank you, your Honor. Good morning, ladies and gentlemen. This is my opportunity to give you my opening statement in this case, what I anticipate the evidence will show.

On Sunday evening, April 26th, 1987, after all the kids were in bed, Dana Mocherman, housewife, mother of three, relaxed with her husband, and then they made love. It has been one of the last plesant things that she's done because only a few hours later at 9:00 o'clock the following morning, April 27th, 1987, Dana Mocherman thought she was going to die. Her day began by taking her children to school. She stopped off at her neighborhood Safeway store, bought some groceries, drove home, unloaded the groceries at her house, left the front door opened momentarily so that she could take the groceries, the perishables in the kitchen. She carried a bar of soap that recently been purchased to her bedroom to deposit it in the bathroom that was located in the master bedroom. She thought she was alone in the house, until she stepped back into her hallway, she saw man wearing a hat down

to his eyes and holding a gun, looking this way, looking that way, looking into the kitchen, looking for her. She saw his profile. She got a good look at him. And then she tried to sneak out of the front door. But that man turned around and faced her, and then she saw his face. She studied his face, because he approached her and they were less than a foot apart.

Now, the man that was in her house knew exactly what he was doing, because some of the first orders to her from his mouth were, "Turn around. Don't look at me." And that's when Dana Mocherman began to think she was going to die. But she didn't. She lived to tell about it. That's what you're going to hear today. You're going to hear about what happened in that house, and how because of Dana Mocherman's observations of this man, she was able to identify that man as being the man sitted here in the courtroom, Brandon Lee Moon.

What does a rapist who knows exactly what he's doing, what does he do after he rapes a person? You will hear evidence on that as well.

I would call Dana Mocherman to the stand.

THE COURT: Dana Mocherman, please.

MR. LIZARRAGA: Your Honor, I have this diagram that I would like to --

THE COURT: You want to put it up there? Is she going to go up to it?

MR. LIZARRAGA: Yes, sir.

THE COURT: All right, go ahead and mark it.

(At this time counsel marked diagram as SX-1 for identification, and attached diagram to blackboard.)

DANA ELIZABETH MOCHERMAN.

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. State your full name, please.

A. Dana Elizabeth Mocherman.

Q. And, Mrs. Mocherman, have you ever testified before?

A. No.

Q. How old are you?

A. I am 32.

Q. How old were you in April of 1987?

A. I was 32.

Q. Where are you from?

A. I'm from Houston, Texas.

Q. How long have you been here in El Paso?

A. Since July the 1st, 1985.

Q. 1985?

A. Yes.

Q. What is your occupation?

A. I am a housewife right now.

Q. What were you in April of 1987?

A. A housewife.
Q. Have you ever been occupied before that date?
A. Yes.
Q. Where?
A. Coronado Bank.
Q. For how long?
A. A year and a half.
Q. When did you quit working at Coronado Bank?
A. In December.
Q. Of what year?
A. '85.
Q. '85 or '86?
A. '86.
Q. Was it --
A. I don't know.
Q. Was it in December before the April of '87?
A. Yes.
Q. What were your duties at the bank?
A. I was a bank teller.
Q. What did you do there?
A. I took care of customer deposits and withdrawals, cash checks.
Q. Had you ever worked at a bank before?
A. Yes.
Q. Where?

A. I worked for MBank West here in El Paso, and before that I worked at Guarantee Savings and Loan Assocation in California.

Q. Have you ever been arrested?

A. Never.

Q. Have you ever been charged with --

MR. GARNEY: Objection, your Honor.

THE COURT: Sustain the objection.

MR. GARNEY: Could you instruct the jury to disregard that last --

THE COURT: Disregard that last question and answer, please, ladies and gentlemen of the jury.

Q. Mrs. Mocherman, where do you live?

A. At 337 Belvidere.

Q. And what part of town is that?

A. On the west side.

Q. Is it southwest or northwest?

A. Southwest.

Q. Is it close to the Coronado Bank where you used to work at?

A. Yes, it is.

Q. Who do you live with?

A. My husband, Reid Mocherman, and my --

Q. What does he do?

A. He is in construction.

Q. And who else lives with you?

A. My three children.

Q. Do you live in an apartment or a house?

A. A house.

Q. How many bedrooms do you have?

A. Four.

Q. Back in April of 1987, did you live in the same house that you live at now?

A. Yes.

Q. What is that address?

A. 337 Belvidere.

Q. Is that in El Paso County, Texas?

A. Yes.

Q. Mrs. Mocherman, I'm going to ask you to take this marker and please approach the board over here.

(At this time witness left witness stand and approached diagram attached to blackboard.)

Do you recognize that diagram?

Q. Yes, I do.

Q. What is that diagram of?

A. My home; the inside of it.

Q. All right. Is it 337 Belvidere?

A. Yes.

Q. And is it marked State's Exhibit No. 1 at the lower corner?

A. Yes, it is.
Q. Will you please write your address at the very top of that diagram?
A. Yes.
Q. Is there a street intersecting that part of Belvidere close to your house?
A. Yes.
Q. What street would that be?
A. Sierra Negro.
Q. And you live on the corner?
A. No.
Q. You live near the intersection?
A. Yes; it's a "T" intersection at the very top of the "T".
Q. Okay. On that diagram that you have there, will you please label your bedroom?

(Witness indicated on diagram.)

And will you please label your kitchen?

(Witness indicated on diagram.)

Is that bottom left area that you labeled as a kitchen, is that entire area a kitchen?
A. No, it isn't.
Q. What is it?
A. This is my kitchen cooking area and this is my dining area. (Indicating.)
Q. Okay. And what is the room right above that?

A. That's our living room.

Q. Okay. Will you label it, please.

(Witness indicated on diagram.)

Label it big as possible so that the jurors can see it.

What separates your living room from your kitchen?

A. There's a wall here, and this is a bar-like, you can see through it, it has poles going up and down on it.

Q. All right. Do you have a stereo component in your living room?

A. Yes, I do.

Q. Would you please get the red marker and mark the approximate location of your stereo component?

(Witness indicated on diagram.)

And from that stereo component, get your blue marker, will you draw arrows into the possible ways that you can enter your kitchen.

(Witness indicated on diagram.)

What is the room next to your kitchen?

A. This is a foyer outside.

Q. It's outdoors?

A. Yes.

Q. Would it be fair to label it "Outdoor" or "Outdoor foyer"?

A. Yes.

Q. Please label it.

(Witness indicated on diagram.)

Go ahead.

A. This room is an entrance system, entrance area.

Q. Is it part of your hall?

A. You can call it that.

Q. All right. The room right above that, on April of 1987 whose room was that?

A. That was my son's room.

Q. What's his name?

A. Samuel Christopher.

Q. What do you call him?

A. Chris.

Q. How old is he?

A. He's 16.

Q. Why don't you go ahead and put Chris' name on the top?

(Witness indicated on diagram.)

With your red marker mark Chris' room. Will you please draw where on April of 1987 his bed was located?

(Witness indicated on diagram.

All right. What is the room next to Chris' room?

A. My daughter's.

Q. And what is her name?

A. Sandra Marie.

Q. How many daughters do you have?

A. Two.

Q. How old are they?
A. They're ten now.
Q. Both of them?
A. They're twins.
Q. Will you please label that "Sandra's Room", if that's what it was on April 27th?
(Witness indicated on diagram.)
And the room next to Sandra's?
A. Amanda's.
Q. Will you please label that? And Amanda is one of the twins, I take it?
A. Yes.
(Witness indicated on diagram.)
Q. Is there a door in your bedroom?
A. Yes
Q. Which one is on there?
A. It opens down this way.
Q. Will you please draw a line sticking out with the red marker?
A. Out?
Q. Out to whichever way it opens. Does it open into the bedroom?
A. Yes.
Q. Why don't you draw the line into the bedroom?
(Witness indicated on diagram.)

I take it the hinges are on the top left corner?

A. Right.

Q. Is there anything in your hallway, any furniture?

A. None.

Q. Where is the front door?

A. Here. (Indicating.)

Q. Will you please get your red marker and draw a line across where the front door would be? Make a heavy mark so that the jurors can see it. And label it, please.

(Witness indicated on diagram.)

Now, this foyer that you labeled, are there any other doors in the foyer besides the front door?

A. Yes, there is.

Q. Where?

A. It would be here. (Indicating.)

Q. Go ahead and draw a dark red line. What kind of a door is it?

A. Iron.

Q. Is it a door or gate?

A. It's a gate.

Q. Will you label it as a gate?

(Witness indicated on diagram.)

Q. And are there any windows facing into that foyer?

A. There is a window from the bathroom, the window from the bathroom that the children use.

Q. Okay. Why don't you with your blue marker label the children's bathroom? Let's call it the "Hall Bathroom."

(Witness indicated on diagram.)

And with your red marker please label the window in your bathroom that leads into the foyer.

(Witness indicated on diagram.)

And that would be the master bedroom. Can you label that with a blue marker "Master Bedroom"?

(Witness indicated on diagram.)

Where are the entrances to the master bedroom?

A. Here. (Indicating.)

Q. Will you label that, please.

(Witness indicated on diagram.)

Q. Which way does the door open? Is it a door?

A. Yes.

Q. Which way does it open?

A. Back to the wall in the bathroom.

Q. Do you have -- Are there any other windows in that master bedroom?

A. No.

Q. And moving on into your bedroom, are there any windows in your bedroom?

A. Yes, this is the window. (Indicating.)

Q. Okay. Is that the only window in your bedroom?

A. Yes.

Q. I'm going to hand you a black pen. Will you please label the windows and the doors, just with small letters?

(Witness indicated on diagram.)

Did we label the stereo?

(Witness indicated on diagram.)

Why don't we label Chris's bed?

(Witness indicated on diagram.)

Then with your red marker, will you please draw where your bed is located or was located back on April of 1987?

(Witness indicated on diagram.)

Is your bed smaller than Chris'?

A. No.

Q. Go ahead and approximate the size of it. Why don't you label it, please? What kind of bed is it?

(Witness indicated on diagram.)

A. It's a water bed.

Q. How long have you had it?

A. About three or four years.

Q. On the outside of your house, are there any structures that are not on that diagram?

A. Yes, sir, there are.

Q. Let's start in the back.

A. Okay.

Q. What do you have in the back yard?

A. There is a sliding patio door, glass. And Around that

area is another foyer that is made of iron.

Q. Why don't you go ahead and draw it in.

(Witness indicated on diagram.)

And that is also an outdoor foyer?

A. Yes.

Q. Go ahead and label it.

(Witness indicated on diagram.)

Is there anything else in the back yard?

A. On all of the windows there is wrought iron.

Q. Are there any windows to your house that don't have wrought iron?

A. No.

Q. Are there any other entrances?

A. The two bathrooms; this one and this one are small. (Indicating.)

Q. Okay. But they are closed by --

A. Yes, by iron.

Q. Are there any other windows in the house that do not have wrought iron?

A. None.

Q. Are there any other doors leading in out of your house?

A. Yes.

Q. Where?

A. This door in the garage. (Indicating.)

Q. Okay.

A. And then there's the door here that leads out to where my trash cans and stuff is.

Q. Will you please draw where that --

A. Okay.

(Witness indicated on diagram.)

Q. And label it, please.

(Witness indicated on diagram.)

The door that you mentioned in the garage leading out to the -- would that be the left? Is it opened or locked, is it a wooden door?

A. Well, it's a wooden door and then on the outside of it is an iron door.

Q. All right, so it's kept locked. Was it locked in April of '87?

A. Yes.

Q. Going back to your back yard, do you have any other structures back there?

A. Right outside the iron foyer I have a Jacuzzi here.

Q. Okay, go ahead and label it.

(Witness indicated on diagram.)

And what else?

A. And I have an outdoor swimming pool.

Q. Why don't you go ahead and label that.

(Witness indicated on diagram.

Where do you park your car?

A. Here. (Indicating.)
Q. Do you always park it there?
A. Not always, sometimes I park it here. (Indicating.)
Q. Where did you park it in April 27th of 1987?
(Witness indicated on diagram.)
And what kind of a car is it?
A. It's a jeep Cherokee.
Q. Why don't you just put "Jeep" on there?
(Witness indicated on diagram.)
Did you park it facing inward or outward?
A. Inward.
Q. Why don't you put an arrow on that box indicating which way it was facing?
(Witness indicated on diagram.)
Q. Okay. What do you have in the front of your house? Do you have any bushes?
A. Yes.
Q. Just generally with a blue marker draw in there X's to indicate the bushes.
(Witness indicated on diagram.)
A. They start about here and go all the way to the end of of the house.
Q. Any other bushes?
A. They're all out in front.
Q. Are these the type of bushes where somebody could

conceal themselves?

A. They are large, some of them are trees.

Q. What about around the garage, do you have any bushes where somebody could conceal themselves?

A. Yes, we have trees, and the trees are in the front lawn area, and along the garage there are very large bushes and some small ones and more large.

Q. Okay.

A. And here is the water fountain. (Indicating.)

Q. All right. Now, will you please label wherever it's located, the front of your house? Label it on the poster.

A. The front?

Q. Yes, just the front.

(Witness indicated on diagram.)

Q. And that front faces?

A. Out to the Sierra Negro, the street.

Q. Out into the street, it intersects your street?

A. Yes.

Q And what is behind your house?

A. I have a wall, about a four foot wall, and then there's nothing but desert.

Q. And what do you have on either side of your house?

A. Neighbors.

Q. Are their yards also enclosed by fences or walls?

A. Yes.

Q. Okay. Go ahead and have your seat, Mrs. Mocherman.

(Witness took witness stand.)

The door that leads into your hallway, what kind of a door is it?

A. There's a storm door that leads into the front of my house, it covers my wooden door.

Q. Okay. And it separates your outdoor foyer from your hallway?

A. Right.

Q. Deos the date of April 27th, 1987, call to mind an unforgetable event for you?

A. Yes, it does.

Q. Do you remember what happened the day before, that being April 26th?

A. Yes, I do.

Q. Do you remember what happened the day after that?

A. Yes, I do.

Q. I want to go back to April 26th, 1987.

A. Okay.

Q. What day of the week was it?

A. It was a Sunday.

Q. Do you remember if you went to church that day?

A. Yes, I do.

Q. Do you remember what time the kids when to bed?

A. Yes.

Q. Can you tell us what happened on Sunday evening, Sunday afternoon?
A. Well, Sunday evening around 9:00 o'clock, all my children were tucked in bed, and my husband and I went to our bedroom.
Q. Do you remember them being tucked to bed at 9:00?
A. Yes.
Q. And you just testified Chris is 16 years old?
A. Yeah.
Q. What kind of a 16-year-old goes to bed that early?
A. Well, he was 15 then -- well, he had been very busy that week, and Monday is a school day, and we require our children to go to bed early on school nights.
Q. So all the children were in bed, and then what happened?
A. My husband and I went into our bedroom.
Q. What did you do when you went to bed?
A. We shut our bedroom door and turn on the television, crawled in bed.
Q. All right.
A. We were talking, watching TV.
Q. Okay.
A. And we were going to make love, and we smoked some marijuana, and then made love.
Q. Let me stop you there. Did you have anything to drink that evening?
A. No.

Q. You didn't?
A. We don't drink.
Q. What happened after you made love?
A. We went to sleep.
Q. Do you remember what time you went to sleep?
A. Around 11:00.
Q. That being 11:00 at night?
A. Yes.
Q. Do you remember the following morning?
A. Yes, I do.
Q. Do you remember getting up in the morning?
A. Yes.
Q. Did you have any kind of hangover or do you recall feeling bad?
A. No.
Q. Tell us what happened that morning.
A. That morning I got up, I went to the kitchen and put on coffee, got my children up, one at a time, they have to kind go in shifts because they share that bathroom and each one of them takes their shower, then they come to the kitchen table and they either have cereal or whatever they eat; after they eat their breakfast, they get dressed, get ready for school. We leave the house every school morning about 8:00 o'clock or so, hurry, hurry, hurry.
Q. Typical household?

A. Right.
Q. Where do your children go to school?
A. My twins go to school at Carlos Rivera, it's an elementary, and my son at that time was going to Morehead, it's a middle school, junior high.
Q. Who took them to school?
A. Well, my son caught the bus, he leaves at 7:30, and the twins, we leave at 8:00, I drive them.
Q. Okay. What is your husband's name?
A. Reid.
Q. When does Reid leave the house?
A. Different times, usually very early, he's the boss of the crew.
Q. On April 27th, you recall what time he left the house?
A. About 7:45.
Q. He left the house before you did?
A. Yes.
Q. You took your twins to school?
A. Yes.
Q. What did you do after you dropped them off?
A. I dropped them off, I had to run back to my house for checks.
Q. Why?
A. I buy them lunch tickets, and I didn't have the checks in my purse, so I had to go back and get them. Then I drove

back to the school, went into the office and paid for the lunch tickets; then I drove to my car and drove to Safeway.

Q. About how far is that Safeway from Carlos Rivera, can you tell?

A. I'm not a very good judge of the distance, but I would say it's within six city blocks.

Q. What did you do at Safeway?

A. Well, Monday is my house cleaning day and I needed some different things to get my laundry done and the house cleaned up, so I bought my cleaning aids and picked up a package of lunch meat, a package of cheese, I went to the line and paid for it and drove straight home.

Q. About how long were you shopping at the Safeway store?

A. 15 to 30 minutes, in and out. I know the store pretty well.

Q. How many groceries did you buy?

A. I had five or six bags.

Q. What kind of bags?

A. I had one paper bag and the rest were plastic with the handles on them.

Q. Did you have so many groceries that you couldn't carry them all in at once?

A. No, they package them light, you know, I'm kind of a small person, that's my store, I shop there, they know me, espcially the morning girls.

Q. All right. Did you go home from the store?
A. Exactly, straight home.
Q. Where did you park?
A. In the front of my garage door, pulled right up to the front of the garage door.
Q. From what street did you approach your house?
A. Sierra Negro. I came down Belvidere, the new Belvidere, to Resler, took Resler to Sierra Negro, and after the stop sign on Sierra Negro I got to my driveway.
Q. Okay. Did you stop at the stop sign?
A. Of course.
Q. Do you remember what the lighting was that morning?
A. It was a nice pretty sunny morning.
Q. Did you see anything unusual at that stop sign right across from your home?
A. No.
Q. Did you stop?
A. Yes.
Q. Then what happened?
A. I stopped at the stop sign, made sure there weren't any cars coming, drove up into my driveway, got out of the car, put my purse on my shoulder, strapped the bags that were plastic on to my arm, picked the paper bag up, closed the car door with my rear end, let myself in the gate, let myself in the front door, and threw my purse down into the entrance

off of my shoulder and I just kind of unloaded everything.

Q. Okay. The bags, you took them all on one trip?

A. Yes.

Q. Okay. Including the paper bag?

A. Yes. The plastic bags were strapped on to my arms and the paper bag I held on to it.

Q. And you said that you threw them down and you labeled your outdoor foyer -- well, relative to the outdoor foyer, where did you throw down the groceries?

A. Right into the entrance.

Q. How far away from the door?

A. A foot and a half, two feet.

Q. Did you close or lock the gate door that leads from the foyer out from your driveway?

A. No.

Q. Did you close or lock the door or storm door that leads from your foyer into your hallway?

A. Well, the storm door has a string on it, and when you open it it closes itself and comes and shuts itself, but it was shut, so I didn't lock it.

Q. What about your door?

A. It was opened.

Q. What did you do after you dropped your groceries in the hallway?

A. Well, I knew that I only had one bag that had anything

in it that would spoil, so I -- that was the paper bag -- I picked it up and I walked up to my kitchen area, and I sat down on the bar, and they had put my lunch meat and cheese in with a bunch of soap and stuff, so I took the lunch meat and cheese and put it in the refrigerator --

Q. Is that a no-no?

A. To me it is. Then I picked up the two bars of soap that were there, and I was fixing to start doing the things that I had to do; I took the bars of soap, walked down my hallway into my bedroom, and I took the one bar of soap, put it inside my shower stall, and I came out of my bathroom, back through my bedroom --

Q. Let me stop you right there. After you put the soap down in the shower stall, what were you going to do?

A. I was going to go to the other bathroom, put the other bar in my children's bathroom.

Q. And at that time was it your impression that there was anyone else in the house?

A. No, not at all.

Q. Was there suppose to be anyone else?

A. No.

Q. How long had you been in your house at the time that you went to your bathroom and put the soap down?

A. Just a few minutes, 15 minutes.

Q. What happened next?

A. Well, I stepped out of my bedroom into my hall, and I turned my head just like I was going to walk down the hall, and there was a man standing in my living room.

Q. All right. Where in your living room was this man standing?

A. Right in front of my stereo cabinet.

Q. Which way was he facing?

A. Into the kitchen.

Q. What did he appear to be doing?

A. He was pivoting from one foot to the other, looking into the two entrances, like he was looking for me.

Q. What happened?

A. He was holding a gun, he was wearing a stocking hat on his head, in shorts and in a shirt. And --

Q. Let me stop you right there. Did it appear to you that he had seen you?

A. Not at this time.

MR. LIZARRAGA: May I approach the witness, your Honor.

THE COURT: Yes.

Q. I'm going to hand you what has been marked as State's Exhibit No. 2, and can you tell me what that is?

A. This is the stocking hat that belonged to my son.

Q. Okay. And what relevance does it have to what occurred on April 27th?

A. It's similar to the hat he had on; it's different in color and size.

Q. All right. Will you please take it out of the bag? I notice that your hair is all made up, but will you please put it on the way that you saw that man wearing it on --

MR. GARNEY: Your Honor, objection, the lady has testified that it's different in coloring and size, and any putting it on her head would be prejudicial.

THE COURT: I will sustain the objection.

MR. LIZARRAGA: Your Honor, may she at least put it over her head to show the --

THE COURT: No, counsel, it's not the same hat. If you want to recreate something you have to recreate it as it occurred on April 27th.

MR. LIZARRAGA: I understand that, your Honor.

THE COURT: I will sustain the objection.

Q. All right. When you saw this man standing in front of your stereo, what else did you notice about him besides the hat?

A. His profile.

Q. His profile?

A. I immediately started noticing things about him.

Q. We'll get to that in a second. What was running through your mind when you first saw him?

A. I wondered what he was doing in there because I hadn't

let anyone into my home. I had recently -- the day before I had pool man out.

Q. Pool man?

A. Pool man, cleaning my pool.

Q. All right.

A. I was kind of hoping it was one of them. I don't know why, I knew that he wouldn't have a gun, but, I guess it was just grasping.

Q. All right. And what did you do next?

A. He hadn't turned or seen me, so I thought that maybe I could get to the front door; I was very aware that being in the back of my home that I was trapped in there, every window has a bar on it, you can't get out of them, and the doors in my bedroom, all the locks have been fixed so that the children can lock themselves in their rooms, so I never could run into any room and lock any doors. I thought I could quietly sneak out into the hallway and get to the front door I could get out of the house.

Q. Where were you when all these thoughts were going through your mind?

A. Walking down the hallway.

Q. How far did you get?

A. Right about to the door of Sandy's bedroom, right about between there and the bathroom door.

Q. What happened when you got to about Sandy's bedroom?

A. He saw me, and he immediately came running toward me, he just kind of jumped over all the grocery bags and my purse and stuff.

Q. All right. Once he saw you, did you say anything to him?

A. I did.

Q. What did you say?

A. "Hey."

Q. Mrs. Mocherman, why did you say that?

A. I was thinking I could maybe, "Hey, what are you doing?" Maybe just talk my way, you know, out.

Q. Did you say that before or after he jumped over the groceries?

A. Before. As soon as he turned and saw me.

Q. What was his reaction?

A. He just launched at me.

Q. How far would you say you got to Chris' room when he saw you?

A. I got to my daughter's room.

Q. All right. Did you go any further down the hallway?

A. No.

Q. Why not?

A. He had a gun, like this, between us. (Indicating.)

Q. All right.

A. And he was telling me, "Get back, get back in there."

Q. You are holding your hand in the form of a gun above your abdomen or your chest?
A. He had it like this, between us. (Indicating.)
Q. And did you get a good -- What happened?
A. He kept telling me to turn around and not to look at him.
Q. And what did you notice about him?
A. Everything.
Q. Well, tell the jurors what you noticed.
A. Well, when all this started I thought I was going to be killed or something. There was also the hope that if I did live through it --

MR. GARNEY: Objection, your Honor, this is not responsive to prosecutor's question.

THE COURT: Overrule the objection.

Q. Go ahead.
A. If I lived through it I wanted to be able to tell the police every possile detail I could recall, and I began taking in everything I could. Under the circumstances I realized I was nervous, but I was very aware of what was going on.
Q. Will you please tell us what you noticed?
A. I noticed the structure of his face, we were nose to nose; I noticed his physique; I noticed the size of his body; I noticed the shape of his nose; I noticed the color of his complexion; I noticed his hands. I just noticed everything I could scope.

Q. Approximately how long did you look at his face? How far was he from your face?
A. Just nose, face to face.
Q. What was his demeanor?
A. What do you mean?
Q. How was he acting like?
A. He was -- he acted like he was mad at me, you know, very angry at me; he kept telling me to turn around and not look at him. It wasn't that I didn't want to do what he was telling me, I wasn't doing it on purpose, but I just couldn't jump, I was frozen, and instead of turning around I was walking backwards. I just continued to take in everything I could.
Q. Now you said that you thought that you were going to get killed. Why did you think that?
A. He had a gun, he was in my home, he was angry, hostile.
Q. How do you know he was angry and hostile?
A. His voice, his actions, the things he was doing.
Q. What was he saying?
A. He was telling me that to get back, he just wanted my money, just going to rob me, to just turned around, not look at him, to get in there. I wasn't very cooperative.
Q. Did you tell him anything during this time?
A. Yes.
Q. Will you tell the jurors what you told him?
A. Well, immediately I began to beg him to please not kill

me because I have three kids, I just kept saying it over and over, "Please don't kill me, I have three kids, they need me. Please don't kill me."

Q. What did he say to that?

A. He told me just to be quiet, to shut up, to get in there.

Q. When was the first time, if he did, that he laid a hand on you?

A. In the hallway.

Q. Tell us what happened.

A. He kept telling me to turn around, not to look at him, and my knees were giving way, just getting real faint, and then my knees gave way and he grabbed me by the arm, he was forcing me back, and when we got to my bedroom entrance, that's when he turned me around and put the gun to the back of my head.

Q. What do you mean he put the gun to the back of your head?

A. He took the gun, he put it right there. (Indicating.)

Q. You are pointing behind your right ear?

A. Yes.

Q. How do you know it was a gun?

A. I've seen it, I felt it, it was cold, very cold, and he was pressing it deep to my neck.

Q. By this time what part of the bedroom were you in when he put the gun to --

A. It was at the doorway entrance, he had to push me in.

Q. What happened when he pushed you in into the doorway?

Did he say anything?
A. He told me to lay down on my bed, to get up on my bed face down.
Q. Mrs. Mocherman, I'd like for you to, as best you can, to quote him, okay? What did he say?
A. He said, "Get up on the bed, lay down, I'm just going to rub you, I want you to get up there right across the bed, get all the way up there so that I know you can't get up."
Q. Now, did you get on the bed?
A. Yes; I just fell across it, kind of fell into it.
Q. All right. And did you fall into it, for example, the same position you would normally be when you go to sleep on it?
A. No.
Q. You just fell across?
A. Yes, I did, I just went to the side of it and just fell over it.
Q. And when you fell across it, was position were you in?
A. I was facing him in a -- took my arms like this as I fell and tuck them in and I just fell like this in my bed with my head down.
Q. Why did you tuck yourself in?
A. Well, at that time I had a lot of jewelry on, and he was telling me he was going to rob me, and I didn't want him to take my wedding band and stuff, so I was like hiding my fingers from him.

Q. When you fell on the bed the first time, what do you remember him saying?
A. He told me to get all the way up on the bed; when I did fall my legs -- I fell about to my knees and the rest of my legs were hanging out over the edge of the bed, and he wanted me to get up all the way on the bed.
Q. And did he make known to you why he wanted you to get up all the way on the bed?
A. He was going to go get my money now, and I got real upset because I didn't have any, just finished buying groceries and spent it all.
Q. What I'm saying is, did he tell you why he wanted you to go all the way up on the bed?
A. So I couldn't get off the bed.
Q. He told you that?
A. "Now you can't get up."
Q. What were you wearing that morning?
A. I had a pair of blue jeans and I had a sweat shirt and I had on a pair of moccasins that you just slip into, slide on. That's all.
Q. What happened to your shoes when you fell on the bed?
A. They stayed on my feet.
Q. What happened next?
A. He laid down on top of me and put the gun to the back of my head, told me to be quiet, not make any noise, that he

just wanted to touch me, to feel my breasts, and then he slid his hand up into my shirt and he started feeling my breasts, and then he told me to take my shirt off, but he also told me not to move, he told me not to move a muscle, to be quiet, to be still, he had the gun, I was afraid to move, I was just petrified, so I took it off.

Q. Okay. Did he ever get off of you?

A. He moved enough that I could take my shirt off, but he was still back there.

Q. Did you ever -- You hadn't seen his face?

A. I had my eyes - I was just so tense, I just looked like, shut, not looking.

Q. Did you ever sneak a peek?

A. Yes.

Q. When was that?

A. As I said, my head was laying down on the bed, you know, and I could tuck my head, my chin into my chest, and you could kind of see out like that, and I guess when I was taking my shirt off or right after that -- whenever it was that he leaned up to shut my bedroom window, I could see him then.

Q. How do you know he shut your bedroom window?

A. Because I could see what he was doing.

Q. And where was your bedroom window in relation to where you were laying?

A. I was laying on the bed this way, my bedroom window is

at the head of my bed, and we weren't that far from that window, and with his knee still on the edge of the water bed, he reached up to my bedroom window and pulled it shut.

Q. Did he do anything else?

A. He walked and shut the window in the bathroom.

Q. That would be the window that leads from your bedroom into -- from the bathroom into the foyer?

A. Yes.

Q. How do you know he did that?

A. Because I was watching from under my arm, kind of, from that position I could see what he was doing.

Q. Was that before or after you got your shirt off?

A. After.

Q. And at that point did you have anything else off?

A. No. I don't think so.

Q. And up to that point had he made any threats to you?

A. He told me to be quiet.

Q. Why was he telling you to be quiet?

MR. GARNEY: Objection, your Honor, calling for speculation.

THE COURT: Overrule the objection.

Q. Were you doing anything that would cause him to tell you to be quiet?

A. I just kept saying, "Oh, God, please don't kill me. I have three kids." I just kept saying that the whole time.

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Q. Did you think he had the ability to kill you?
A. Oh, yes, I believed very much that he was going to kill me.
Q. After he shut the bathroom window, what did you do?
A. He came back to the bed, he placed the gun back at the back of my head, he told me to take my pants off, and I didn't want to, I didn't move, and he kind of pushed the gun on the back of my head, he said, "I told you to take your pants off." I reached down and I unbottoned them and I began to slide them down, slow, and I slid them down just over my derriere, and then he just grabbed them and pulled them off of me, and when he pulled them off like that that's when my shoes dropped off.
Q. At that time were you laying down all the way on your bed or were you up on your fours or --
A. I was laying all the way across my bed, then he reached up and he took my legs and spread them apart, and then the next thing that happened he put his fingers inside of me, and he asked me if it felt good, and the next thing he did --

(Reporter's note: At this point witness was very distraught and was in a highly emotional state and any further testimony was inaudible.)

Q. Where was the gun all this time?
A. In the back of my head.
Q. Did he say anything else to you besides asking you if it felt good?

A. Before he went inside of me he asked me if I wanted him.
Q. And what did you answer him?
A. I said, "What do you want me to say?"
Q. What did he say?
A. (Answer inaudible.)
Q. Okay. Up to that time was there anything else that you recall saying to him?
A. Well, I couldn't shut up, I just kept saying, "Please don't kill me, I have three kids. Oh, God, please don't kill me, I have three kids." I just -- I couldn't -- it was just like I was praying out loud. I quit talking to him, I was talking to God. He kept telling me to shut up.
Q. Did he ever call you any names?
A. No. I don't remember.
Q. Okay.
A. He also -- he told me to shut up or he was going to blow my brains out.
Q. How many times did he tell you that, that he was going to blow your brains out?
A. I don't remember.
Q. Was it more than once?
A. Yeah, it was.
Q. More than three?
A. Maybe about three or so.
Q. Then what happened?

A. Well, he told me just to lay there and not to move a muscle, he said, "Just stay there, don't move a muscle or I'll blow your brains out. I'm going to go get your money now." And I wasn't moving a muscle, I was just laying there, and a few seconds later, some time passed, it was real quiet, and all of a sudden, I heard (witness indicated by stamping her feet twice on the floor), like he jumped or, your know, a thud, and he said, "I told you not to move," and I thought, oh, God, this is it. And then --

Q. Let me stop you right there. Let me go back a second, I need to cover some points. Now, you said that he put his fingers in you. Would that be in your vagina?

A. Yes.

Q. And you said that he entered you?

A. Yes.

Q. And would that be with his penis?

A. Yes.

Q. And did you mean that he entered your vagina?

A. Yes.

Q. And you testified that after he was through you were laying still and he came back and he jumped?

A. Yes; I could just hear it, I didn't see it, but when I heard him screaming, "I told you not to move," you know, I could see him, and I said, "I swear to God, I swear to God, I haven't moved, I haven't moved."

Q. You told him that?
A. Yes.
Q. Did he respond to that?
A. No.
Q. What happened next?
A. I closed my eyes because I didn't know what was going to happen next, and then I heard the front door shut, the storm door, I heard it close, but I thought he was tricking -- oh, I remember something.
Q. Go ahead.
A. After he entered me with his penis and before he left and said he was going to get my money, he asked me, he said, "Okay, don't lie to me, because I've been watching you and I know what time someone is going to be home." My husband is in construction, and he doesn't drop in every day on a regular basis, but there are times that he just drops in when he's in the area and says, "Hi, Honey," and I took a chance that maybe he was lying or something, you know, and I said, "Well, sometimes my husband drops by to see me during the day, you know." That's when he said he was just going to get my money now, and that's when he left the bedroom for the first time, and then he came back and he said, "I told you not to move," and then he left the house.
Q. How do you know he left the house?
A. Because I heard the storm door shut, but I didn't really

know he'd left the house, so I just laid there, I thought he was playing with me, and I didn't think it was over because of the question he had asked me, and I was just laying there, and I was beginning to get very very cold and I could feel moisture running out of me, it was a real sickening feeling.

Q. What do you mean by that?

A. Just felt real disgusted.

Q. What do you mean by the moisture?

A. It was semen.

Q. Was it your impression that he had ejaculated in you?

A. Yes.

Q. He did?

A. Yes, definitely.

Q. So what happened?

A. Well, I laid there for a few minutes, I just decided that I couldn't take it anymore, I felt so yuki, I just wanted to cover myself with something, so I began to ease off the bed, real real slow, and I had my eyes closed real tight, and I was saying things, like, "Please, sir, can I just get dressed, please. Can I please get off the bed now?" I didn't know where he was, I didn't know if he had actually left, or if he was waiting somewhere, or what was going to happen. So I took the chance, I do have faith and I had been praying, just took the chance, and I slowly backed off my bed, I had my eyes closed, you know, because if he was there I didn't

want to know. I backed off the bed and I stood up very slowly, my knees were kind of weak, and I was still holding my arms, like this, and I slowly opened my eyes, real slowly, and kind of began -- instead of looking around the room I was kind of turning my body, looking, I was very afraid, I didn't know where he was. And when I saw that he wasn't in the room I thought I could make a break for it, and I jumped and ran, I jumped out of my hallway, I didn't see him, I was looking around really quick, I wanted out of there, and I thought with the bedroom doors and stuff, I thought, "God, he could be behind any of them, you know, anywhere," and I just wanted out of the house, I thought if I could get out of the house I would be safe. By this time I've got a good trot going, and I'm coming down the hall and trying to, as cautiously and quickly as I can, and I'll make it, and across my son's bed, on the bed rail, on the bottom end of his bed, his bathrobe was laid there, and I had left, like I said when I came in to my house, I just put my purse there and my wallet and my keys were on top. So I ducked into my son's room and grabbed the robe and I jerked up the keys and go out my front door, and as I'm going out the front into the froyer I'm putting the robe on, and I go through the iron gate, clutching the robe like this, and I jump into my car and locked the door and turn the ignition on and just drove out of my driveway, and I didn't even look, you know, I'd rather die in a car wreck.

Q. Let me stop you right there. I'm going to hand you what I have marked as State's Exhibit No. 3. Can you tell us what that is, please?

A. This is my son's robe.

Q. And what relevance does it have to the events that you just told us about?

A. Well, this the robe that I grabbed and put on as I was leaving the house, and this is the robe that I ran into the Circle K with, and this is the robe that I went to the hospital with.

Q. Do you recall the robe having any holes in it?

A. No.

Q. Do you see three holes in it now?

A. Yes.

MR. LIZARRAGA: Your Honor, I would like at this time to offer State's Exhibit No. 3 into evidence.

THE COURT: Counsel?

MR. GARNEY: No objections, your Honor.

THE COURT: It will be received.

(WHEREUPON, State's Exhibit No. 3, previously marked as SX-3 for identification, was received into evidence.)

MR. LIZARRAGA: For the record, I am showing counsel State's Exhibit No. 4.

Q. Mrs. Mocherman, I am handing you what I have marked as State's Exhibit No. 4. Can you tell me what that is?

A. My bedspread.

Q. And it has some markings on it. Are those markings that were on there on April 27th, 1987?

A. No.

Q. When was the last time that you saw this bedspread last year?

A. That morning.

Q. Did you see it after that?

A. No.

Q. And is this the bedspread that was on your bed when you were assaulted?

A. Yes.

MR. LIZARRAGA: Your Honor, I would like to offer State's Exhibit No. 4 into evidence.

THE COURT: Counsel?

MR. GARNEY: No objections.

THE COURT: It will be received.

(WHEREUPON, State's Exhibit No. 4, previously marked as SX-4 for identification, was received into evidence.)

MR. LIZARRAGA: For the record, I am handing Mr. Garney for his inspection items marked State's Exhibits No. 6, 7, 8, 9, 10, 11 and 12. Items which I had previously shown to him.

MR. GARNEY: I have examined them, your Honor.

MR. LIZARRAGA: May I approach the witness?

THE COURT: Yes.

Q. Mrs. Mocherman, I am handing what has been marked as State's Exhibit No. 6 which is a photograph. Can you tell me what that is a photograph of?

A. This is a photograh of the front of my house, the entrance and the garage.

Q. Okay. And does it fairly and accurately depict the way your home looked back in April of '87?

A. Yes, it does.

Q. Setting that aside, I am handing you what is marked as State's Exhibit No. 7, which is a photograph. Tell me what that is a photograph of?

A. This is a photograph of the wrought iron enclosed foyer, the storm door and the entrance into my home.

Q. And does that fairly and accurately depict the way your door appeared on April of 1987?

A. Yes, it does.

Q. And are the windows to your bathroom visible in State's Exhibit No. 7?

A. No, not really.

Q. Any part of the window is visible?

A. The ledge is visible, maybe because I know it's there.

Q. All right. I am handing you a red marker. Will you just make a dot on that ledge, State's Exhibit No. 7. Well, make an "X" on it.

(Witness complied with counsel's request.)

I'm handing you what's been marked as State's Exhibit No. 8. Can you tell me what that is?

A. This is the wooden door and the front entrance, what I call the entrance hall.

Q. Okay. And does that photograph accurately depict the way the door looked in April of 1987?

A. Yes, it does.

Q. And in the photograph, is it opened or is it closed?

A. It's opened.

Q. On the photograph there is also what appears to be a mat and appears to be a grocery bag. Would that be consistent with how your house looked like when you left it?

A. Yeah.

Q. On April 27th, 1987?

A. Yes.

Q. There is a dark item in the middle at the bottom. Can you make that out?

A. No.

Q. I'm handing you what is marked as State's Exhibit No. 9, which is also a photograph. Can you tell me what that is?

A. My bedroom.

Q. Just to give a little perspective to that particular photograph, will you please put a rectangle where your window is located and mark that with a red marker that I just handed

you.

(Witness complied with counsel's request.)

Okay. Was that window exposed or unexposed on April 27th, 1987?

A. It was closed.

Q. Were there any curtains or blinds?

A. Yes.

Q. And will you please put a "W" inside the rectangle to identify it as the mark that you made for the window?

(Witness complied with counsel's request.)

And will you please on that photograph -- That photograph contains your bed, is that correct?

A. Yes.

Q. Will you please draw a line indicating the approximate way that you were laying on it?

(Witness indicated.)

And you've drawn an arrow. Does that indicate the direction you were facing with your head?

A. Yes.

Q. Looking at the photograph, there's an item of clothing at the bottom right. Can you identify that?

A. That's my blue jeans.

Q. There appear to be some shoes at the bottom of that photograph.

A. My shoes.

Q. Are those the jeans and the shoes you were wearing on April 27th, 1987, when you were assaulted?
A. Yes.
Q. Okay. And on the right of that photograph, there appears to be a white line that could either be the border of the picture or a white wall which would've been in there when the picture was taken. Can you tell which of those two it is?
A. No, I can't tell.
Q. There is also some type of pillow at the foot of your bed. Was that there on April 27th, 1987?
A. Yes.
Q. And there appears to be an item on the bed close to where that red mark was made when you marked it in the position in which you were laying. Can you tell what that is?
A. It's a bar of soap.
Q. Do you know whether that bar of soap stayed there or not?
A. I forgot all about it.
Q. Okay. And after you left on April 27th, 1987, after you left your home, did you again see your comforter in that house?
A. No.
Q. Was it gone when you got back?
A. Yes, it was.
Q. Okay. I'm handing you what's marked as State's Exhibit No. 10, which is also a photograph. Can you tell me what that depicts?

A. My jeans and shoes.
Q. Again, looking at the right border of the picture, can you now tell what that is?
A. My closet door, I think.
Q. All right. Does it fairly and accurately depict what your room looked like on April 27th, 1987?
A. Yes, it does.
Q. When you arrived back at your house, after you testified you went to the hospital, do you recall where your jeans were when you got back?
A. They were not there.
Q. I'm handing you what's marked as State's Exhibit No. 12, which is also a photograph. Can you tell me what it is a photograph of?
A. The bar of soap that's lying on my bed.
Q. And does that appear -- When you say on your bed, is that on your bed or on your comforter?
A. On my comforter.
Q. And is that the comforter that you previously identified as State's Exhibit No. 4?
A. Yes, it is.
Q. Does it fairly and accurately depict the way your comforter looked with a bar of soap?
A. Yes.
Q. Does it fairly and accurately depict your comforter as

you recall it on April 27th, 1987?

A. Yes.

Q. I'm handing you what's marked as State's Exhibit No. 11, which is also a photograph. Can you tell me what that is a photograph of?

A. Yes.

Q. What?

A. It's a semen stain.

Q. And where is that located?

A. On my comforter.

Q. Okay. Is that stain that you saw on April 27th, 1987?

A. I just got off the bed; I don't recall noticing it.

Q. All right. Is the photograph at least consistent with a close-up of your comforter?

A. Yes, it is.

MR. LIZARRAGA: Your Honor,at this time I'd like to offer into evidence the following exhibits, State exhibits, Nos. 6, 7, 8, 9, 10, and 12.

THE COURT: Counsel, any objections?

MR. GARNEY: No objections, your Honor.

THE COURT: They will be received.

(WHEREUPON, State's Exhibits No. 6, 7, 8, 9, 10, and 12, previously marked as SX-6, SX-7, SX-8, SX-9, SX-10, and SX-12 for identification, were received into evidence.)

Q. Mrs. Mocherman, do you recall ever seeing the man that

was in your house on April 27th, do you recall having seen him before that date?

A. Never.

Q. Did you see anymore than what you have just described as far as the top of his head?

A. No.

Q. Approximately how low was the hat pulled?

A. The hat was pulled down, right over his eyebrows, right to the eyebrows. It was also pulled around down on to his ears and it concealed his hair.

Q. Were you able to see any part of the hair on his head?

A. No.

Q. The man who did this -- Now, this may sound like a silly question, but I need to ask it. Was he your spouse?

A. No.

Q. What happened -- You were describing, before I interrupted you, how you were leaving your house. What happened next?

A. I drove down the driveway, and the neighbors were all gone, so I thought if I could get somewhere where there was a lot of people, I'd be safe, you know, so I drove to the corner of my street where there's a Circle K, and I drove there because the lady that works there is not really a friend, but she's a familiar face.

Q. Do you know her name?

A. Her name is Araceli, first name basis. I am kind of a

creature of habit, you know, "That's my Circle K; that's my Safeway." Anyway, I drove into the parking lot, got out of my car, I ran into the store, and I was very upset and scared, I didn't know where he was, I was very afraid, and I ran into the store, asked her to help me, "Please call the police." I ran to the back of the store and hid there. I wasn't dressed for the public. I felt very ashamed, very ashamed. I just wanted to hide, to hide until the police came. Then the police came, the neighborhood came, I was pretty leery of everybody, just very frightened. So when the man walked back there, it scared me, I told him to get away from me, and then a woman walked back, she told me everything was going to be okay. They put me on the stretcher, they took me out into the ambulance, I was sitting on the stretcher in the ambulance.

Q. Where did the ambulance take you?

A. To the hospital.

Q. What happened at the hospital, Mrs. Mocherman?

A. Well, I was laying there and it wasn't that it was actually burning, but I just couldn't stand it; I knew not to wash up and it had been on me for some time, and I wanted the semen off, and I kept begging them to please let me wash it off, but they made me wait. They examined me, what I would call pelvic examination, did what they do. I'm not a doctor, I don't know what all is involved, but it was a pelvic examination. After the examination I was allowed to go shower.

Before I got into the shower my husband arrived at the hospital, and there was an officer there; everybody was asking questions, all kinds of questions, and I finally took a shower, and then I was allowed to go home.

Q. What time did you get home, do you remember?

A. No, it didn't matter, I was just home.

Q. This man that was in your house on April 27th, 1987, this man that raped you. If you saw him again you think you would be able to recognize him?

A. Definitely. I feel sure of it.

Q. Will you carefully look around the courtroom and tell me if you see this man sitting in this courtroom?

A. Could you move, please? Could you look at me, please? Yes, I do.

Q. Will you please point him out?

A. He is the man sitting there. (Witness indicated by pointing at Defendant.)

Q. The man without the glasses?

A. Yes.

MR. LIZARRAGA: Will the record reflect that the witness has pointed to the Defendant and identified him?

THE COURT: Yes.

Q. Can you please elaborate on some of the characteristics that can allow you to identify this man?

A. The way his eyes are set, the shape of his nose, the

structure of his face, the way his hands are, the color of his skin.

Q. Are there other characteristics that you noticed that would allow you to confirm that this was the man?

A. Could you have him stand up?

MR. LIZARRAGA: Your Honor, I would ask that --

THE COURT: Will the Defendant please stand?

MR. GARNEY: Objection, your Honor, I don't think this is within the general rules of --

THE COURT: Overrule the objection. Please stand up, Mr. Moon.

(At this time Defendant stood up.)

MR. LIZARRAGA: Your Honor, could we put him in the position where there is nothing between him and the witness?

THE COURT: Go ahead and stand over here, Mr. Moon, in front of the witness.

(Defendant stood up in front of witness.)

THE WITNESS: That's him. I'm sure that's him.

THE COURT: You may take your seat.

Q. Mrs. Mocherman, did you assist the police in any way so that they could determine the identity of the person that did this to you?

A. Yes; I went down to the westside police station, and was asked to put together what they call a composite drawing.

Q. When did you do this composite drawing?
A. Tuesday, the day after.
Q. Who did you meet with?
A. I met with Detective Joe Villa of the westside police station.
Q. And when you saw -- When you were asked to do this composite, did you know at that time, before you went in there, that that's what they call it?
A. No.
Q. Will you tell the jurors what happened, how did you put it together?
A. Well, he handed me like a little file box type object, and it was full of these pieces of plastic, and it was grouped by eyes, nose, faces, ears, etc., and they were plastic, and each had just different features on them, and you placed one on top of the other and -- it was like putting a puzzle together -- and you kept doing this until you came up with what you saw, and you were given as much time as you needed, and, you know, it was real -- it just took a little time and you just kept going until you put it together and it was what you saw, or as close to it as you make it. So I just kept working at it until I could get it all together, and when I finished I said, "Detective Villa, this is as close as I can get it," and I handed it to him.
Q. Let me ask you this, Mrs. Mocherman, are there any

differences in his appearance today from his appearance as he appeared in your hallway?

A. Yes.

Q. Could you please elaborate on that?

A. Well, he's dressed in a business suit, he's clean, he's shaved, I can see his hair. That's about it.

Q. At the time that he was in your home, did he have any facial hair, mustache?

A. Well, I told the detective that he was unshaven, that I was not sure that he might have had a mustache.

Q. Can you tell right now whether he had it back then or not?

A. Not really, no.

Q. This identification that you made of him, is that the identification that you based from the day that you saw him in the hallway or from another time?

A. From what I saw, it's burned in there; it's hard to explain to people what you see.

Q. Have you seen him again between the time that you saw him in your hallway on April 27th of '87 and now that he's sitting here in the courtroom?

A. I was asked to go downtown on a Saturday to view a lineup of suspects --

MR. GARNEY: Objection, your Honor, of any admissibility of the lineup. It's bolstering, the witness has not

been impeached.

THE COURT: Overrule the objection, counsel, I've already ruled, a written order on that lineup.

Q. Let's go back, Mrs. Mocherman. You said on Tuesday you went to the westside police station?

A. Yes.

Q. And you drew up a composite?

A. Yes.

Q. You get a chance to see the composite? Well, you drew it up.

A. Yes, I drew it up.

Q. What happened after you finished with the composite?

A. I was excused.

Q. And who did you give the composite to?

A. Detective Joe Villa.

Q. And then what happened after that?

A. After I went home?

Q. Yes. When was the next time you heard from the police or had contact with the police?

A. I believe it was the next day.

Q. What happened the next day?

A. I went back to see Detective Villa. He showed me a group of pictures, and asked me if I recognized anyone in that group of pictures as to the man that was in my home that day and that attacked me. I looked them over and pointed to

one, and he marked it with an "X", and that was it.

Q. Did he ever ask you about the gun?

A. Yes.

Q. When was that done?

A. I believe that was Tuesday.

Q. Was that before or after the composite?

A. I'm not real positive.

Q. Okay. And what was done in regards to the gun?

A. He just asked me if I knew what kind of gun it was.

Q. Did you know?

A. Yes.

Q. How did you know?

A. Well, as a bank teller we had been trained on the different types of guns that we might be approached with by robbers in the case the bank was held up, and I knew the difference between a revolver and a handgun, an automatic. I'm also a gun owner, and I have a revolver and I knew the gun that I saw was a revolver.

Q. Where was your gun when all of this was happening?

A. Well, we have children, so the gun is never loaded, and I keep it hidden so they can't get hold of it, and it was stuck down in one of our bedroom drawers covered up with all my husband's T-shirts and things.

Q. Did you ever find anything missing from your home after this occurred?

A. No.

MR. LIZARRAGA: May I approach the witness, your honor?

THE COURT: Yes.

Q. I'm going to hand you what's marked as State' Exhibit No. 24. Can you tell me what that is?

A. Yes, this is the sheet that Detective Villa showed me, asked me if the weapon that was used was on this sheet.

Q. Okay. And what was the result of that inquiry?

A. Well, when I showed him the weapon that I identified, he asked me to write my name across the square and put the time and the date on it.

Q. And does that appear to be the original lineup sheet that you saw?

A. Yes, because that's my signature.

Q. And you saw, basically, what appears to be a photocopy of a bunch of guns. Is that what you saw or did you see a book with pictures in it?

A. This is what I recall seeing.

MR. LIZARRAGA: I would like to introduce State's Exhibit No. 24.

THE COURT: Counsel?

MR. GARNEY: No objection, your Honor.

THE COURT: Received.

(WHEREUPON, State's Exhibit No. 24,

previously marked as SX-24 for identification, was received into evidence.)

MR. LIZARRAGA: Your Honor, may we approach the bench?

THE COURT: Yes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

MR. LIZARRAGA: May I approach the witness?

THE COURT: Yes.

Q. Mrs. Mocherman, I am handing you what has been marked as State's Exhibit No. 23. Can you tell me what that is?

A. This is the picture of the composite drawing that I put together all by myself.

Q. And would that have been April 28th, 1987?

A. Yes.

Q. Are you -- Is it your opinion that April 28th, 1987 was the day after this incident occurred?

A. Yes.

Q. I'm handing you what's marked as State's Exhibit No. 20. Can you tell me what that is?

A. This is the picture that Detective Villa showed me and asked me if any of them was the man.

Q. Okay. And will you please turn over State's Exhibit No. 20 and tell me what that is?

A. This is the signed statement -- it's a piece of paper

that asks me if this is what I did. And I signed it.

Q. Is that your signature?

A. Yes, it is.

Q. All right. I'm handing you what's marked as State's Exhibit No. 20A, which also contains a blue file stamp that says "Copy" on it. Can you tell me what that is a copy of?

A. It's a copy of the photo and of my signature.

Q. Which are in the back of State's Exhibit No. 20?

A. Yes.

Q. I'm handing you what's been marked as State's Exhibit No. 21. Can you tell me what that is?

A. This is pictures from the same thing.

Q. State's Exhibit 20?

A. Yes.

Q. Okay. And what is the difference -- well, do you recall the item that you're holding right now?

A. Yes.

Q. What was the purpose of that?

A. For me to be able to mark it and put my name on all that and saying that this is what I saw.

Q. All right. And what is that as marked as, what exhibit is it?

A. Exhibit 21.

Q. Okay. And are you saying that this is State's Exhibit No. 20 and the exhibit that you examined and then made your

marking on State's Exhibit No. 21?

A. Yes.

Q. And is this your signature on State's Exhibit No. 21?

A. Yes.

MR. LIZARRAGA: Your Honor, at this time I would like to introduce into evidence State's Exhibit No. 23, which is the composite that has been identified by the witness; State's Exhibit 20, for the purposes of this trial, which is the original lineup, with a request to the Court that I be allowed to substitute State's Exhibit 20A, which is the copy of State's Exhibit 20, front and back, and State's Exhibit No. 21 which is the results of the photo lineup as signed by the witness and was identified by her.

THE COURT: Counsel?

MR. GARNEY: Your Honor, I have no objection to State's Exhibit No. 23, but I do object to State's Exhibit Nos. 20A and 21 as stated in my motion.

THE COURT: It will be overruled, admitted.

MR. LIZARRAGA: Your Honor, will we able to substitute on State's Exhibit 20A?

THE COURT: Any objection, counsel?

MR. GARNEY: No objection, your Honor.

MR. LIZARRAGA: May I show State's Exhibits 20, 21 and 23 to the jury at this time?

MR. GARNEY: May we approach the bench, your Honor?

THE COURT: Yes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

MR. LIZARRAGA: Your Honor, for the record, I will be allowed to show the jurors State's Exhibit No. 20A, 21 and 23?

THE COURT: Yes

MR. LIZARRAGA: Your Honor, for the record, State's Exhibit No. 20 is not in evidence.

THE COURT: Well, it is in evidence, but you substituted it. You offered it, he objected, I overruled it. It's in evidence, but the thing is for the purpose of this trial, it was substituted.

MR. LIZARRAGA: Right, okay. Thank you, your Honor.

(At this time State's Exhibits Nos. 20A, 21 and 23, previously marked as SX-20A, SX-21 and SX-23 for identification, were received into evidence.)

Q. (By Mr. Lizarraga) Mrs. Mocherman, when you viewed this lineup do you recall it being a Tuesday or Wednesday?

A. I think it was Wednesday.

Q. All right; it was after you gave the composite, is that correct?

A. Yeah.

Q. And you were called to the station again that week?

A. Yes.

Q. And what day of the week would that have been?
A. The day they asked me to come was on a Saturday.
Q. Okay. And did they tell you that it was going to be for a lineup?
A. Yes.
Q. Where was that lineup conducted?
A. At the downtown police station
Q. Would that be here in this building?
A. Yes, it was.
Q. You had to wait outside of a room, is that correct?
A. Yes.
Q. And then they asked you to come in this room?
A. Yes.
Q. What happened inside of that room when you walked in, after you walked in?
A. After I walked in I viewed several men standing there, they were all dressed alike, and they were all standing in the same exact position.
Q. Let me ask you something. Were they standing with their hands up or their hands down or --
A. They were folded.
Q. Were all of them folded?
A. I believe that -- I remember they were either folded, in front of them or they had them back behind them; I'm not sure what it was.

Q. Did they all --
A. I believe they were down by their side.
Q. All right. Did they all look the same as far as what they were wearing, their clothes?
A. Yes.
Q. What position were they standing in when you walked into the room?
A. Forward, facing forward.
Q. Facing you?
A. Yes.
Q. And what had been your instructions regarding as far as once you stepped in that room?
A. To just relax and take my time. That was it.
Q. All right. And when you walked in and you viewed the men, were they wearing hats at that time?
A. No.
Q. Were you able to pick someone out as being the person who was in your hallway on April 27th, 1987?
A. Yes, I was.
Q. Did you ask them to do anything special with that person or the group?
A. I asked to please see him with the cap.
Q. Okay. And what did the police do?
A. They granted my wish.
Q. Did they put the cap on everyone?

A. Yes.
Q. And after seeing the particular individual with the cap on, were you able to pick one out?
A. Yes.
Q. Did they tell you that you had to pick somebody out?
A. No.
Q. And who did you pick out?
A. I picked out Brandon Moon.
Q. Did you know his name?
A. Not at that time.
Q. Is he the same person that is sitting here in the courtroom that you identified?
A. Yes, he is.
Q. Did they have you mark something indicating who you had picked out?
A. Yes.
Q. And have you seen that individual since then?
A. No.
Q. Is there anyone else besides, perhaps, any member of your household, anyone else besides the person that you have identified, as being the one that could've been on your comforter on April 27th, 1987?
A. No.
Q. Mrs. Mocherman, did you give Brandon Moon permission to rape you on April 27th, 1987?

A. No, no.

MR. LIZARRAGA: Pass the witness.

THE COURT: Let's take our morning recess at this time, ladies and gentlemen, we are going to take a 15-minute recess, I'll send you to the jury room.

(A recess was taken at this time.)

(The following proceedings were had after the recess:)

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Mrs. Mocherman, my name is Norbert Garney, I'm the attorney here defending Mr. Moon. Have we met previously?

A. No.

Q. And I don't believe we have never spoken over the phone or otherwise, have we?

A. No.

Q. You understand that I have to ask you certain questions at this time as did Mr. Lizarraga.

A. Yes.

Q. Now, before we go any farther, I'd like to show what is going to be marked as Defense Exhibit No. 1. May I approach the reporter, your Honor?

THE COURT: Yes.

(At this time counsel handed reporter a wall-size map to mark as DX-1 for identification.)

Q. Mrs. Mocherman, I would ask you to walk over to D-1, and I'll walk over there with you because it's a rather large map. Now I would ask you to put a red "X" where your house is on the map.

(Witness left witness stand and approached the map.)

Mrs. Mocherman, this is a map of the northwest portion of El Paso and to help orient you, this is Mesa street (indicating) running along this way; this is UTEP (indicating), highlighting the yellow down here in the lower right-hand corner, and I have taken the liberty to highlight part of Belvidere street in yellow; now, Belvidere continues in that fashion. Will you mark on this map where your house is, please?

A. It would be about right here (indicated on map), because Belvidere and Sierra Negro, that's the intersection, and, like I said, it's like a "T", and my house is right here.

Q. And you have indicated the position of your house with a red dot?

A. Yes.

Q. That's close enough. Thank you. Go ahead and take your seat, ma'am.

(Witness took witness stand.)

Mrs. Mocherman, did you give a statement in this case to the police?

A. Yes.

MR. GARNEY: May I see those statements, your Honor?

THE COURT: Furnish them to counsel, Mr. Lizarraga.

Q. Mrs. Mocherman, while he is looking, you actually gave at least two statements, is that correct?

A. Yes.

Q. The first statement being on 4-27-87 and the second statement being on -- I'm sorry. The first statement being on 4-29-87 and the second statement being on April 30th of 1987.

A. Okay.

Q. Does that sound about right?

A. Yes. Well, I gave a statement the day after, that was a Tuesday, and then I talked to a Detective Dove, and I believe that was a Saturday.

Q. I'll show you your statements to refresh your memory.

MR. GARNEY: Your Honor, if I might have a moment to review the District Attorney's files, as I notice that page two of one of the statements is missing and I'd just like to read it.

THE COURT: All right.

Q. Mrs. Mocherman, how long have you lived at the house on Belvidere street?

A. As I said, we moved into that house on July 1st of 1985.

Q. And you've lived there continously since?

A. Yes.
Q. Now, referring you back to the morning of 4-27-87, what time did you awake?
A. About 6:30 in the morning.
Q. And what's the first thing that you did?
A. I went and made coffee.
Q. Are you and your husband coffee drinkers?
A. Yes.
Q. And what time did you awake the children?
A. After the coffee is put on, I go to the bedroom and get them up, and then they have to shower.
Q. Approximately what time are we at now, about 7:00 o'clock?
A. No, not yet.
Q. A little before 7:00?
A. Yes.
Q. And how did your morning proceed, what was the next thing that you did?
A. Got dressed.
Q. And your husband and your children are still at home at this time?
A. Yes.
Q. And approximately at 8:00 o'clock, I believe you testified, you left the house with your children to take them to school?

A. With the twins.

Q. And prior to that, at approximately 7:30, I believe your son took the bus to school?

A. Correct.

Q. At the time that you left the house at 8:00 o'clock had your husband already left?

A. He had already left.

Q. What time did he leave the house?

A. About a quarter to 8:00.

Q. And the next time you saw him, I suppose, was at the hospital?

A. Yes, sir.

Q. And not any time between?

A. No.

Q. After you dropped your children off at school, what did you do next?

A. I drove back to the house to get the checks.

Q. Do you know approximately what time that was?

A. It was early in the morning, it was before 8:30.

Q. Sometime between 8:00 and 8:30?

A. Yes, sir.

Q. And you returned home?

A. Yes.

Q. And was your house locked at that time?

A. Yes.

Q. You had to let yourself in with the key?
A. Yes.
Q. And then you returned to the school where your twins were?
A. Yes.
Q. And you bought some meal tickets, I believe?
A. Yes.
Q. And from the school where did you go?
A. Straight to Safeway.
Q. Where is the Safeway located?
A. It's at the intersection of Belvidere and Shadow Mountain.
Q. Do you know approximately what time you arrived at the Safeway?
A. Probably around 8:30, 8:40.
Q. And I believe you testified that you had shopped for approximately 15 to 30 minutes.
A. Yes.
Q. Would it be fair to say that since you had picked up at least six bags of groceries it would probably be closer to 30 minutes than 15?
A. Well, as I said, it was just cleaning items, and that eliminates at lot of aisles, and I know that store like the back of my hand, and I just ran in and got what I needed and ran out; that early there's no lines, that's why I shop early.

Q. But you ended up with six bags of groceries?
A. Five or six.
Q. Okay. And did you go directly home from Safeway?
A. Yes, sir.
Q. Did you feel anybody was watching you in the Safeway parking lot?
A. No.
Q. Did you see anybody following you?
A. No, but I wasn't looking for anybody.
Q. Did you notice anything strange in the parking lot?
A. People.
Q. But, in any event, you never felt threatened at Safeway?
A. No.
Q. That would put you back home at approximately 9:00 o'clock, 9:10, something like that?
A. Well, you have to realize that all of these occasions are like right after the other, the school is five to seven minutes from my house, the store is three minutes from the school, and the stores five to seven minutes from my house.
Q. That would anticipate my next question, Safeway is approximately five to seven minutes by automobile from your home?
A. Yes.
Q. I don't want to appear to be difficult, Mrs. Mocherman, but let's talk about the events that occurred when you got

home. When is the very first instance that you noticed an individual in your home that you can recall?

A. Three to five minutes after I arrived home.

Q. And exactly where were you in your home when you first noticed someone standing there?

A. I just stepped from my bedroom into my hallway.

Q. Was there anything in your hands?

A. That bar of soap.

Q. Now, you wear glasses, Mrs. Mocherman?

A. Sometimes.

Q. Why do you wear glasses?

A. To read.

Q. Are you nearsighted?

A. No.

Q. Are you farsighted?

A. It's just stigmatism.

Q. You wear contacts?

A. No.

Q. Were you wearing your glasses that morning?

A. No.

Q. Again, which bedroom or bathroom were you coming in out of at the time that you first noticed someone?

A. The master bedroom.

Q. And I believe you were coming out of the door that you indicated up at the top of that master bedroom that's in the

diagram, is that right?

A. Yes.

Q. Now, this diagram, by the way, is not drawn to scale, is it?

A. No.

Q. There's no way to determine distances by looking at the diagram alone?

A. No.

Q. How far approximately would you say that you were from the point that you were standing to the point that the man was standing in your home, I believe it was in front of the stereo, at the time you first saw him?

A. How far, approximately?

Q. Yes, ma'am. In other words, how long is your hallway?

A. Approximately 12 feet or more.

Q. Would 12 to 15 feet be fair?

A. I guess; I don't really know.

Q. And I believe it was your testimony that at the time that you first saw this individual, he wasn't looking at you?

A. Right.

Q. He was looking into the kitchen pivoting back and forth, I guess, trying to look through the opening in your wall to the doorway?

A. Yes, sir.

Q. And if I understand correctly, you would've seen the

left profile, I suppose?

A. Yes.

Q. Because your bedroom would've been where you're sitting and the kitchen would've been where the jury is sitting?

A. Exactly.

Q. And so the first thing you would've seen is an individual just rocking back and forth this way? Or perhaps turning this way? (Indicating.)

A. No, he was not turning, he was just pivoting from foot to foot.

Q. Didn't look at you at all?

A. No.

Q. At that time?

A. No, sir.

Q. So you did not see any facial features whatsoever at that time?

A. I saw the left side of his face.

Q. Did you notice any scarring or tatooing?

A. No.

Q. When is the first time that you got a full face look at that gentleman?

A. When he turned around to come at me is the first time I saw his full face.

Q. By the way, when you first saw him, were you frightened?

A. Surprised.

Q. Just kind of taken aback?
A. Yes, sir.
Q. And this happened before you actually saw this person's face?
A. Yes.
Q. And how long a look did you get at this man that was in your home?
A. Three to five minutes.
Q. You stood there three to five minutes as he was rocking back and forth?
A. I'm talking -- You said how long did I get a look?
Q. At the time you were looking at his left profile, how long did you look?
A. I'm not really sure.
Q. Five seconds?
A. Longer than that. It might have been 15 seconds.
Q. You were kind of shocked and surprised at this time, so you didn't look at your watch, did you?
A. Not at all.
Q. Were you wearing a watch?
A. Yes.
Q. So somewhere between -- let's say five to 15 seconds -- you were looking at the left profile of this person in your home?
A. Approximately.

Q. I understand these are approximations, one doesn't normally look at his watch. What's the very next thing that happened?

A. After he saw me, he immediately came towards me, jumped over the stuff that was in his way, continued toward me.

Q. When the person first turned and saw you, did you make a noise or something to cause him to look toward you?

A. No.

Q. He just happened to turn around and unfortunately you were there?

A. Yes.

Q. And the very next thing that happened to you, I believe you said that he had jumped over the groceries or stepped over them, and just came directly towards you?

A. Yes.

Q. Now, when is the very first time you saw a gun?

A. When I walked out into the hallway.

Q. At the time you were looking at the left profile?

A. Yes, sir.

Q. And you weren't frightened at that time?

A. Well, I was frightened, but I also was thinking how to get away, possibly.

Q. Okay. By running past the person out through the front yard?

A. No, by getting to the front door before he noticed me.

Q. Let's just talk about that gun a little bit. I noticed State's Exhibit No. -- I believe it was 24 -- it's black and white, it doesn't show the color of the gun, but -- What color was the gun?

A. Silver chrome plated.

Q. What we might normally call a nickle-plate gun?

A. Yes, sir.

Q. Okay. It wasn't a black gun?

A. No, sir.

Q. And it was definitely a revolver?

A. Yes, sir.

Q. No question about it?

A. No, sir.

Q. And approximately -- it looked like what we call, normally, a snub-nose?

A. Yes.

Q. Meaning the barrel length of maximum length of about two inches?

A. Yes, sir.

Q. What kind of gun do you own, ma'am?

A. A .357 Magnum.

Q. Okay. It doesn't sound like a snub-nose to me. It has a very long barrel?

A. Yes, sir.

Q. So you're familiar with barrel lengths?

A. Yes, sir.
Q. And is yours nickle-plated also?
A. No, sir.
Q. It's a black gun?
A. Yes.
Q. So, you can certainly tell the difference between black guns and nickle-plated guns?
A. Yes, sir.
Q. When the person jumped over the groceries and came toward you, did he stop any time during that 15 feet or 12 feet before he got to you or did he just come right up to you?
A. He came right up to me.
Q. How long did that take, approximately?
A. A flash.
Q. How did you feel at that instant?
A. Terrified.
Q. What was this person doing with the gun?
A. He was holding it -- he was holding it on me.
Q. Was this person right-handed or left-handed? Could you tell the way he was holding the gun?
A. He was holding it on his right hand.
Q. At that terrible moment, what did you do? Did you jump to the side, did you try to get away?
A. No, I couldn't.
Q. You were just frozen on --

A. Yes.
Q. -- your tracks?
A. I froze.
Q. All right. When this man approached you, did he grab you at that time?
A. I don't think so.
Q. Did he say anything to you at that time?
A. He was telling me to get back.
Q. Were you shoved back, ma'am, at all by his hand?
A. No; it was the gun that was making me go back.
Q. Sure. Okay. Now, describe the man's facial features at the time that he came up to you. What exactly did you see?
A. Well, he was unshaven.
Q. Let's talk about that. Unshaven meaning that he had a beard?
A. No.
Q. Or just --
A. Unshaven.
Q. A growth?
A. Someone that had not shaved.
Q. Did your husband shave every day?
A. Not on weekends, sometimes he doesn't.
Q. He has a medium or a heavy beard?
A. I would call it heavy.
Q. So you know how men look like when they haven't shaved

for maybe one or two or three days?

A. I guess so.

Q. Let's see if we can approximate, and I understand that it's an approximate estimation, Mrs. Mocherman, but how much stubble did you see? Did it look like a man who hadn't shaved for a month?

A. No, not at all, that would be a beard.

Q. Okay, a couple of days, perhaps?

A. Maybe a day, maybe two, it would depend on the type of beard.

Q. So it would be somewhat heavier than a five o'clock shadow?

A. Yes.

Q. That would be fair?

A. Yes.

Q. And that would explain, I suppose, why you couldn't really tell the police if he had a mustache or not, is that right?

A. I don't think that would be the reason.

Q. Why couldn't you tell the police whether the man had a mustache or not?

A. I really don't know.

Q. I believe you testified very strenously that you paid very very close attention to detail.

A. Yes, I did.

Q. For the very purposes of identification?
A. I did.
Q. And one of the most prominent features on a man's face, generally, would be a mustache, would it not?
A. It would.
Q. And yet you cannot tell the jury at this time whether that man was wearing a mustache or not, can you?
A. Not a hundred percent.
Q. That's fair enough. Okay, ma'am, I believe you started to answer a question earlier and I think I might have interrupted. You testified that you got a good look at the man's face for three to five minutes?
A. Yes.
Q. At what time did this occur?
A. From beginning to end.
Q. Beginning where?
A. From stepping out into my hall, from him turning toward me, from the encounter in the hall, from the point that he turned me around at my bedroom entrance and put the gun to the back of my head and told me not to look at him.
Q. At the time that he turned you around in the hall, did he physically grab your arm?
A. Yes.
Q. And did he just kind of rotated you away from his face?
A. Just pulled on my arm, I turned my body around.

Q. His right hand or his left hand?
A. I guess his left since he had the gun on his right hand.
Q. And after you were rotated away from him you never really saw him face-on again. Would that be fair?
A. That would be fair.
Q. And in all fairness now you did catch him peripherally while he was in your bedroom?
A. I did catch him peripherally.
Q. Right. And I believe you testified that's when this man was fiddling around with your window --
A. Closing the window.
Q. Was he drawing drapes or blinds or was he closing the glass panes?
A. He closed the glass panes, pulled the shades.
Q. He did pull the shades?
A. The shades was up just a little.
Q. Okay. I believe that in one of these photographs you indicated -- May I approach the witness, your Honor?
THE COURT: Yes.
Q. You indicated that you were laying across the bed at the time you caught that man in your peripheral vision, is that correct?
A. Yes, sir.
Q. I'm going to show you what has been marked as State's exhibit No. 9. You've drawn an arrow where I suppose that's

where your head was facing this way? (Indicating.)

A. Yes.

Q. And, of course, you were sill faced down?

A. Yes.

Q. And you were cradling your arms -- I know this is very difficult and I guess maybe you were trying to bury your face in the covers on one occasion.

A. On one occasion.

Q. What did this man do? You testified that he had gotten up to draw the window -- exactly how was that done?

A. I don't know exactly.

Q. I believe you testified that his knee was on the bed?

A. Yes.

Q. And that he -- Was the other leg on the floor?

A. I think so.

Q. You don't really know.

A. No.

Q. Okay. Now, did he face the window at the time that he started pulling the window down and closing the shades?

A. Yes, he did.

Q. So, out of your peripheral vision, what you would've caught is the back of his head?

A. No, again, the side of his face.

Q. I guess it would, again, be the left side, is that right?

A. Yes, sir.

Q. But not a face-on view?
A. No, sir.
Q. Okay. So, Mrs. Mocherman, the only face-on view that you had of a man who was in your home that day occurred in the hallway after he started to approach you?
A. Yes, sir.
Q. The one time?
A. Yes.
Q. And you are telling the jury that the entire episode took between three and five minutes?
A. Yes.
Q. Now, you must have been extremely terrified at that time?
A. I was very frightened.
Q. And you testified to this, I'm sure, that you were in fear of your life?
A. Definitely.
Q. Have you ever been so terrified in all your life?
A. Never.
Q. As a matter of fact, a lot of times, you know, when one is as terrified as you were, time seems to stretch out, does it not?
A. Yes, you just kind of lose track.
Q. That's right.
A. It could fly by quickly or it could stretch out.

Q. One really never knows how much time one spends in that kind of situation.
A. Yes.
Q. I suppose that at that time when this man was coming at you in the hallway your main concern was probably as a mother for her children and for your life? Is that fair?
A. Yes.
Q. You have been shown previously what has been marked as State's Exhibit No. 2, I believe, and I believe you stated that that was your son's hat?
A. Uh-huh.
Q. I believe you also testified that is not the same color of the cap that the person was wearing nor is it the same size, is that correct?
A. That's right.
Q. What color was the cap that the man was wearing?
A. It was dark, like almost a chocolate brown.
Q. I believe you testified that the cap was pulled down to the level of the eyebrows?
A. Yes, sir.
Q. And did it cover the eyebrows?
A. It basically laid right on them.
Q. Could you tell whether the eyebrows were thick or thin?
A. Not exactly, just where they begin.
Q. You know some people have what's called a bridge, you

know, it's just one continuous eyebrow across the forehead. Did you notice anything like that or were they separate?

A. He was scowling at me, like, you know, frowning at me, so they were pretty close together.

Q. So you really couldn't tell whether it was actually a bridge or not?

A. I guess not.

Q. Mrs. Mocherman, what color were his eyes?

A. He was in my hallway and there are no lights out in the hall and I'm not sure of the color.

Q. Did you ever tell the police they were a particular color?

A. Not that I remember.

Q. Was your hallway dark at the time?

A. It wasn't light, there was no light in the house, I had just come in.

Q. Well, that's where we're coming to next, at the end of the hallway -- Is there a hall light, by the way?

A. Yes, there is.

Q. That light was turned off?

A. Yes, sir.

Q. Are there any windows which let light directly into the hall?

A. The bedroom windows.

Q. What I'm saying, are there any windows in the hall?

A. No.
Q. I believe you testified earlier that it was sunny outside?
A. Yes.
Q. But, certainly, there was no sunlight in your hall, is that correct?
A. Not completely.
Q. Well, let's be fair, what is correct, please?
A. Well, I had raised the shades in the windows just a little and cracked each window because as I said it was cleaning day and I like to air the house out, so the light was from the sunlight outside it wasn't pitch dark black, it was lighting.
Q. Now let's talk about the window in your bedroom. How many windows do you have in your bedroom?
A. In my bedroom? I have one big plate window.
Q. And you testified that there was blinds on the windows?
A. Shades.
Q. Or shades. And you testified that they were closed except for a two inch-three inch slot?
A. Yes.
Q. Now, do the shades open in this manner or do they --
A. They roll up.
Q. So it would've been like a two-inch slot that --
A. Yes.

Q. -- would allow the light to come in?
A. Yes, sir.
Q. Okay. Now, how wide is that window?
A. 64 to 72 inches.
Q. Somewhere between five to six feet?
A. Yeah.
Q. Now, that would've been the only source of light for your hallway at that time, wouldn't it?
A. No, sir, because the children's bedroom are also off of that hallway and the bathroom is off of that hallway.
Q. Had you opened up the windows in their bedrooms?
A. Yes. They were in the same position and also my front door was opened and the light coming in from outside.
Q. Was it as light as this courtroom or darker?
A. It was darker.
Q. How much darker?
A. There were no electric lights on.
Q. So the only source of light would've been, I guess, a defused sort of light from at least one or two bedrooms?
A. From four bedrooms.
Q. You are referring to the four bedrooms, all of which are opened to about four inches?
A. Yes.
Q. Were all the doors to the bedrooms opened?
A. Yes.

Q. So you're not sure of the color of the man's eyes at all?
A. Not a hundred percent.
Q. Now, did you smell anything about the man?
A. No.
Q. And by that, I mean, such as smoker's breath.
A. No.
Q. Alcohol?
A. No.
Q. Marijuana?
A. No.
Q. I understand this is a difficult question but I must ask it, Mrs. Mocherman. Do you know if the man who assaulted you is circumcised?
A. No, I don't.
Q. Did you get a good look at the man's teeth?
A. No, not really a good look.
Q. Could you tell whether he was missing any?
A. I'm sure if he had been missing I would have noticed.
Q. Could you tell if there were, like Lauren Hutton, a big gap in the middle?
A. No.
Q. In other words, nothing remarkable about the teeth at all?
A. Not a big gap, no.

Q. Or any gap at all?
A. Not that I noticed.
Q. There's nothing in particular that would have drawn your attention towards his teeth?
A. Not really.
Q. I believe you testified, Mrs. Mocherman, that the man in your home was wearing short pants?
A. Yes.
Q. Are we talking short shorts or long shorts or --
A. Regular.
Q. Like walking shorts?
A. No, they weren't like long Bermuda shorts or anything, they were a pair of corduroys.
Q. What color were they?
A. Brown.
Q. Did they have big pockets on the sides or anything like that?
A. They had pockets on the side.
Q. What kind of shoes was this man wearing?
A. Tennis shoes.
Q. What color were they?
A. They were two-tone, a light colored, old.
Q. By light colored you mean white or cream or something like that?
A. Yes.

Q. They certainly weren't blue, were they?
A. They had blue on them.
Q. Where was the blue?
A. Well, the part that comes in on the side of the feet.
Q. Okay. Are you familiar with -- Could you tell the make?
A. No.
Q. You know, some makes have very distinctive insignia, like Nike, I believe, has a big swirl. Did you notice like a big swirl on the shoes?
A. No, I did not.
Q. Silly question. Did you notice the color of the laces?
A. I don't believe so. I believe they were white, but I didn't give much to the laces.
Q. At the time that the man came toward you I guess you really didn't spend much time watching his feet, did you?
A. Yes, I was watching him and the gun.
Q. Since he was wearing shorts you must have gotten a look at his legs.
A. Yes.
Q. How would you describe his legs?
A. Pale, hairy.
Q. Any scars that you could tell?
A. Not that I could tell.
Q. Was this man wearing socks?
A. No.

Q. So you could see down to his ankles?
A. Yes.
Q. Did you notice if this man was wearing any rings on his fingers?
A. No.
Q. Was he wearing any rings?
A. Not that I saw.
Q. Wrist watch?
A. No.
Q. Any kind of jewelry?
A. Not that I noticed.
Q. No chain around the neck?
A. Not that I noticed.
Q. All right. I believe that you testified that this man said quite a few things to you during the course of the morning, is that right?
A. Yes.
Q. How would you describe the quality of his voice?
A. Well, he was standing right in front of me and he just spoke normally, clearly, distinctly, directly.
Q. Did he shout at you at any time?
A. Yes.
Q. How would you describe the pitch of his voice? What I mean by that, Mrs. Mocherman, was it a low voice or high voice?

A. Low.
Q. Compared to my vioce, would it be higher or lower?
A. It might be lower, but it was a lot softer in the hallway.
Q. Did you notice a lisp or any sort of speech impediment? Oh, you did testify that he spoke very distinctly, clearly.
A. Yes, he did.
Q. I won't make you repeat all the things he said to you, but did he use any profanity to you?
A. No, not that I recall.
Q. Pardon my language, but such language as maybe "goddam", something like that?
A. Not that I recall.
Q. Okay. I believe you also testified, ma'am, that when this ordeal over nothing was taken from your home?
A. No, sir.
Q. No money was stolen from your purse?
A. No.
Q. Getting back to the man's voice again, I believe you testified that he had a very angry type voice?
A. He seemed angry.
Q. But he never shouted at you or did he shout at you?
A. He shouted during the time that he was in my home, in the hallway he spoke to me, and when I would not turn around, he shouted for me to turn around. There were times when he

did shout.

Q. What kind of shirt was he wearing?

A. A pullover.

Q. Like the polo type?

A. Yes, sir.

Q. Short sleeve or long sleeve?

A. Short sleeve.

Q. And the color, please, ma'am?

A. It was brown and yellow or tanish color, cream.

Q. Was there a pattern to the shirt?

A. Yes, sir.

Q. And what was that, please?

A. It was stripped, two-tone.

Q. Were the stripes horizontal or vertical?

A. Horizontal, across.

Q. Now, I suppose since he was wearing a short sleeve shirt you got a look at his arms?

A. Yes.

Q. Why don't you describe his arms?

A. Pale, hair on his arms.

Q. Muscular or nonmuscular?

A. Nonmuscular.

Q. This man that had the hat on, was it pulled down over the top of his ears?

A. Yes, sir.

Q. Mrs. Mocherman, I believe you testified that you picked out Brandon Moon from a photo lineup conducted sometime after this event, is that correct?

A. Yes.

Q. Now, you didn't actually tell the police that it was Mr. Moon at that time, did you?

A. No, sir.

Q. As a matter of fact, you told the police that you just weren't sure about it, is that right?

A. I said that it looked like the man that I "X'd".

Q. All right. In other words, it looked like a man that you "X'd" but you didn't tell the policeman that it was the man?

A. Not at that time.

Q. And then sometime subsequent to that there was a physical lineup?

A. Yes.

Q. Now, how many people were in the photo lineup?

A. I believe it was five.

Q. And how many people were in the physical lineup?

A. It was six in the photo lineupe and five in the physical lineup.

Q. Now, Mr. Moon apparently appeared twice in these lineups, once in the photo lineup and once in the physical lineup, is that correct?

A. Yes.
Q. Did any other participants of either lineup appear twice?
A. Not that I remember.
Q. As a matter of fact, what happened was that Mr. Moon was placed in a photo lineup with four other individuals, you put an "X" on his picture, is that right?
A. Yes.
Q. And sometime afterwards he was placed in a physical lineup with four or five other different individuals and you chose him?
A. I did.
Q. He's the only person you saw twice?
A. He is the man I saw in my hallway.
Q. He's the only man that you saw twice in those lineups, is that correct?
A. Yes, he is.
Q. Mrs. Mocherman, I believe you testified that the night before this thing happened to you, you had smoked some marijuana?
A. Yes, sir.
Q. And how much did you smoke?
A. About half of a joint.
Q. Is that all?
A. I shared that with my husband.

Q. Did you get high?
A. I relaxed.
Q. Are you used to marijuana?
A. Yes.
Q. How long have you been smoking it?
A. Quite a while.
Q. In terms of years will you tell me, please, approximately?
A. Approximately about ten years.
Q. I'm sorry?
A. About ten years.
Q. Would it be fair to say that that would be on a daily basis?
A. Regularly.
Q. As a matter of fact, I believe you did tell the physician who examined you that you smoked on a daily basis, did you not?
A. Yes, I did.
Q. Ma'am, you understand why I must ask these things?
A. Yes.
Q. How would you describe the nose of the man who was in your room on the morning of April 27th, 1987?
A. It was thin, long, kind of flinty.
Q. I believe you testified earlier that one of the things you noticed about the man who was in your house, was his

hands, is that right?

A. Yes, sir.

Q. What was distinctive about the man's hands?

A. They were real pale, the finger tips were shaped more to a point than flat or rounded, and his hands looked very like he didn't work hard, they were, if you will excuse the expression, "sissy" type.

Q. I understand. In other words, perhaps, feminine hands?

A. Well, they appeared feminine. Yes, I guess that would be what I'm trying to say.

Q. When you say "pointed", you mean like the nails were cut toward a point or were the fleshy part itself --

A. The fleshy part, and I don't mean like pointed to a sharp point.

Q. And were the nails trimmed or were they long, if you recall?

A. They were neatly trimmed.

Q. Did the man take his shirt off?

A. I don't know.

Q. You mean, you never saw his chest?

A. Yes, sir.

Q. The type of sleeve on his polo-type shirt, was it a short sleeve or longer sleeve?

A. I guess it was about that length.

Q. What you would call it about half a sleeve, perhaps?

Or halfway to the elbow, perhaps?

A. Yes, about -- maybe a little shorter.

Q. Did it have a type of elastic around it which gathers it to the arm or --

A. No.

Q. -- was it loose?

A. It was loose.

MR. GARNEY: May I have a moment, your Honor, I am almost finished?

THE COURT: Yes.

Q. One last thing, Mrs. Mocherman, did you ever see a strange car parked anywhere near your house at the time that you first drove up?

A. No, sir.

Q. When you were lying on the bed, did you hear anybody driving away from your home?

A. Not at all.

Q. When you ran out of your house, did you see any strange cars at all?

A. I just stepped in my car and drove off.

Q. And that's when you drove on down to the Circle K?

A. Yes.

Q. How many minutes away from the Circle K are you?

A. It took me -- Well, how many minutes in a normal time, driving the speed limit --

Q. Did you speed to the Circle K?
A. Yes, I did.
Q. And you did not see anybody drive away from your house at that time?
A. No, I didn't.
Q. Mrs. Mocherman, the man's legs, were they muscular or were they thin?
A. How would you describe them? He was an average built man, he was not skinny at that time.

MR. GARNEY: I pass the witness, your Honor.

THE COURT: Mr. Lizarraga, any redirect?

MR. LIZARRAGA: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Mrs. Mocherman, may I get you to mark where the Circle K is located on this map that Mr. Garney brought in?

(Witness left stand and approached map.)

Why don't you put an "S" and circle it for Safeway and put a "K" and circle it for Circle K?

(Witness indicated.)

Had you ever seen this map before?
A. Never.
Q. And that is Defense Exhibit 1, is that correct?
A. Yes, sir. And this is the Circle K. (Indicating.)
Q. Also, why don't you mark where the school is?

A. The school is Escondido.
Q. Is it on the map?
A. It doesn't say Carlos Rivera.
Q. Why don't you just put school on there?
(Witness indicated.)
All right. You have marked "School" and "X'd" out the school with a green marker, is that correct?
A. Correct.
Q. All right, thank you, you may have your seat.
(Witness took witness stand.)
Mrs. Mocherman, you mentioned to Mr. Garney that it's difficult for you to tell time sometimes?
A. Yes.
Q. All right. And is this something that occurs to you only in situations like that or is it difficult for you to tell the time in other instances?
A. Well, I think I am usually a pretty good judge of time, but an estimate.
Q. Okay, fair enough. If you'll look at the clock at the back of the courtroom and I snap my fingers (counsel snapped fingers at this time), and then I snap my fingers again (counsel snapped fingers), that is fifteen seconds. Does that surprise you?
A. Not really.
Q. Okay. And given that that amount of time is fifteen

seconds, do you have a clear understanding or idea of how long perhaps you observed the Defendant when he was facing the stereo?

A. About 20 seconds, 15 to 20 seconds.

Q. 15 to 20 seconds?

A. Yes.

Q. Okay. What about the amount of time that you were able to look at him face to face once he jumped over the groceries? Once he jumped over the groceries and you saw him face to face, given those 15 seconds, about how much time do you think you saw him between there and the bedroom when he turned you around?

A. Three minutes.

Q. Three minutes in the hallway?

A. At least three to five minutes.

Q. All right. Fair enough. Okay. Do you have a driver's license?

A. Yes, sir.

Q. Do you need glasses to drive?

A. No, sir.

Q. Can you tell us a little bit about your glasses? You said that you have stigmatism. What is that? Let me ask you this. Do you need glasses to see me?

A. No.

Q. You can make out my features?

A. Yes.
Q. Can you see the clock in back of the courtroom?
A. Yes.
Q. Okay. What do you use your glasses for?
A. I have this stigmatism that I was born with, and when I read for any length of time it makes me sleepy. And if I wear my glasses I can read and read and read and I don't get sleepy.
Q. Basically, then, your eyes feel sleepy?
A. Yes.
Q. Now, when Mr. Garney was asking you about the length of your hallway. Are you a whiz at estimating distances?
A. Not at all.
Q. Your husband is in construction. Is he a whiz at that?
A. He's very good at it.
Q. He does that every day?
A. Yeah.
Q. Do you?
A. No.
Q. From where you're sitting to where I'm standing, do you have any idea what the distance is?
A. About two feet.
Q. That's fine, I just want to know what you think about that. I'm going to walk, and I want you to tell me to stop as soon as I am as far as the man in front of your stereo

was when you saw him from your bedroom door. Do you understand my question?

A. Yes.

Q. Okay. I'm going to walk out to the back of the courtroom -- Is the distance longer than the courtroom?

A. No.

Q. Okay. Tell me when to stop when you think I'm about as far as --

A. Stop. From me to you directly in a straight line. Now.

Q. Okay. So your testimony is that when the man who was standing in front of your stereo, you got a profile view of him, you were approximately this far away from him?

A. Approixmately.

MR. LIZARRAGA: Your Honor, may I measure that distance at a recess and introduce it into the record?

THE COURT: Yes.

Q. When Mr. Moon was in your hallway and he was wearing the hat, did he appear nervous to you?

A. Yes.

Q. All right. Will you please describe that nervousness? What was there about him that made you think he was nervous?

A. Well, he was just in such a hurry, you know, he was real pushy, in a hurry.

Q. Well, did that nervousness manifest itself physically? Did he appear jumpy? Did he appear --

A. Like in a hurry, you know, he seemed angry that I wouldn't turn around in a hurry and not look at him.

Q. You said you saw him close the window.

A. Yes.

Q. Can you show us from where you're sitting what you saw, how you saw, what kind of movements he made? Will you please stand up?

(Witness stood up.)

You said that he was kind of kneeling on your bed, and then what did you see him do?

A. He was like this. This is my bed. (Indicating.)

Q. Where is the window?

A. Here. (Indicating.) And he was like this. And he just leans and takes it in, just pulls it close.

Q. Okay. You've got your hand open like that. Is that the way you saw him or did he grab it or just push on the window?

A. He just pulled it like this. (Indicating.)

Q. Okay. On the frame or on the window?

A. On the frame.

Q. The frame is metal, is that correct?

A. Yes.

Q. Is it one of those frames that have the protruding --

A. Lift.

Q. Lift. Exactly. So that it's possible to touch just

the edge of that lift and close the window, is that right?

MR. GARNEY: Objection, your Honor, counsel is testifying.

THE COURT: Overrule the objection.

Q. Will you answer the question, please?

A. Yes.

Q. It is possible?

A. Yes, sir.

Q. Okay. Let's talk about your testimony from Mr. Garney regarding Mr. Moon's eye color. You're saying that you're not sure what color his eyes were?

A. Yes.

Q. All right. The lighting was not as bright as it is here in the courtroom, is that correct?

A. Not at all.

Q. Okay. Can you tell the color of my eyes from where you're sitting?

A. Yes.

Q. What color are they?

A. Black.

Q. Black? You're looking far away from me. From close up, tell me when you can start seeing the color of my eyes?

A. They're brown.

Q. They're brown? Okay.

MR. GARNEY: May the record reflect that Mr.

Lizarraga is approximately five feet away from the witness?

THE COURT: Yes.

Q. Given the light in your hallway, could you tell us if you saw brown eyes that day?

A. No.

Q. Why can you tell us that you did not see brown eyes that day?

A. Because of it was very hazy lighting, almost dark, there was some light but it was morning light and just a very small amount, and I explained that there are no windows in the hall, and that the light was coming from openings in the shade of the bedroom window.

Q. All right. If I were in your hallway, would you be able to tell me that I did not have brown eyes?

A. No.

Q. How can you make that distinction?

A. It seemed so dark, so very dark.

Q. The person in your hallway, what did his eyes look like?

A. His eyes were angry eyes.

Q. I'm talking about the color.

A. I believe I told the police that I thought they were hazel.

Q. You can't tell for sure whether they were green or blue?

A. No, sir.

Q. Or hazel?

A. No, sir.
Q. Is the lighting in your hallway brighter, better in April than it would be, say, now in winter at 9:00 o'clock in the morning?
A. It would depend on what kind of a day it was outside.
Q. Okay. And you testified that it was a bright day?
A. It was.
Q. Is it the kind of lighting that you can see, Mrs. Mocherman?
A. Yes.
Q. Do you need to turn the lights on to walk down your hallway?
A. No.
Q. Okay. If one of your children were to walk in that hallway, would you be able to tell who they were?
A. Of course.
Q. All right. It's probably not a fair question, would you be able to tell which one of your twins it was?
A. Exactly.
Q. You could?
A. Yes.
Q. With that light in the hallway?
A. Yes.
Q. Are they identical twins or fraternal?
A. Identical.

Q. You said that the corduroys were of the "hang tan" variety?
A. Yes.
Q. Is that a brand name, is that what "hang tan" is?
A. Yes.
Q. Were you able to identify the corduroys as being that particular brand or you're just saying they were?
A. That type.
Q. Will you please tell the ladies and gentlemen of the jury what you mean by "hang tan" corduroys?
A. My son wears "hang tan" corduroy shorts.
Q. How do you know they're "hang tan"?
A. Because it is a brand name.
Q. They are on your son's shorts?
A. Yes. On the inside, on the label. And they have this little feet with little toes.
Q. On the inside or the outside?
A. On the pocket.
Q. All right.
A. His I didn't notice any feet on them, but they were similar to the length and the cord of some shorts that my son has and that was why I -- it's hard to explain these things.
Q. That's okay. Where is it that you noticed the blue color in his tennis shoes?

A. It was when he was standing in the living room.
Q. In the living room?
A. Yes, sir; he was standing in front of the stereo cabinet.
Q. You could see the color blue on his tennis shoes from that distance?
A. Yes.
Q. And you are saying that this individual's voice while high-pitched was perhaps lower than Mr. Garney's?
A. When this man first start talking to me it was like he was talking, you know, "Get in there, get back there," he was talking low, but as the conversation progressed he became angerier and angerier and, you know, "Get back, get back." His voice, he was using a low tone.
Q. Which you described as high-pitch?
A. Yeah.
Q. Have you heard this man, Brandon Moon, talk since the incident in the hallway?
A. No, sir.
Q. Tell me something about the shirt he was wearing, was there anything unusual about that shirt?
A. Well, it just seemed like -- I wouldn't consider it a nice -- it would be something I would wear around the house, maybe clean house with it. It wasn't like it was a nice new outfit; it seemed kind of old and wrinkly.
Q. What you mean by "wrinkly"?

A. Well, it seemed like it might have been -- well, like wadded up or just thrown and then you pick it up and it's all crinkled, like that.

Q. All right.

MR. LIZARRAGA: Your Honor, may I introduce State's Exhibit 1 into evidence.

THE COURT: Counsel, any objections?

MR. GARNEY: No objections.

THE COURT: Received.

(WHEREUPON, State's Exhibit No. 1, previously marked as SX-1 for identification, was received into evidence.)

Q. Mrs. Mocherman, when you went to the photo lineup, you told Mr. Garney that you pointed him out in the picture but you didn't say, "That's him." Can you tell us why?

A. Well, from what I remember I believed that it was him but I would have to see him in person before I could be a hundred percent sure.

Q. And why is that?

A. Well, I feel like as long as I live, I know his face, I know what I saw, even if I can't explain it in words, I know what I saw, and I didn't want to be wrong. I just want to do what is right. I wanted to be sure that it was the right person.

Q. You didn't think it was right to say that at that point?

A. Not at that point, not until I had seen him.

Q. Fair enough. Let's talk about this man's hands.
A. Okay.
Q. What were you able to see -- When were you able to notice them the day that he raped you?
A. I really noticed them when he was laying on top of me, squirming around beside me in the bed. That's when I noticed them close.
Q. Mrs. Mocherman, will you please stand up.

(Witness stood up.)

On the surface behind you, will you please place your hand in the position that you saw his hand when he was on top of you. Was it closed or opened?
A. Well, kind of like that. (Indicating.)
Q. Okay. Were you able to observe his fingers?
A. Yes.
Q. Were you able to observe his finger tips?
A. Yes.
Q. Okay, please sit down.

(Witness sat down.)

Was there anything unusual that you would consider unusual about the shape of that particular hand?
A. I thought it was unusual.
Q. In what way?
A. Well, it was just -- his skin was so pale, it looked sick, it looked like he never got out in the sun, ever.

Q. Would that be consistent with his complexion otherwise or could you tell in the light that you had in the hallway?
A. Well, the hands are in my bedroom.
Q. Was the light better in the bedroom?
A. Yes, much better.
Q. Mrs. Mocherman, I'm going to show you my hand, and I'm going to ask you if, in your opinion, there's anything unusual about it?
A. No.
Q. Okay. But the hand that you saw you thought it was unusual?
A. Different.
Q. All right. Given my hand, what was there about his hand that would make it unusal and make it different?
A. Your hands, the tops of them are round.
Q. Okay.
A. To me that's usual. The top of his fingers are more like above his nail and more pointy and puffy.
Q. Okay. And what did you mean, again, using my hand, what did you mean by -- What was it about them that made you think they were effeminate? That's the word Mr. Garney used.
A. Okay. Your hands, you know, you have some callus. His were just so white and so soft, his had no calluses, like he didn't do no strenous work with them, you know, he sure wasn't a mechanic or a construction worker or anything like

that.

Q. You understand that's something that can change whether one has calluses or not?

A. Yes.

Q. You understand you can't change the shape of the fingers?

A. Yes.

MR. LIZARRAGA: Your Honor, may the Defendant show the jurors his hands?

THE COURT: Counsel?

MR. GARNEY: I have no objection, your Honor.

THE COURT: All right. Mr. Moon, approach the jury box, please. Let the record show the Defendant is approaching the jury box so that they can view his hands.

MR. LIZARRAGA: Your Honor, may the Defendant show them to the witness?

THE COURT: Yes.

(At this time the Defendant showed his hands to the witness and proceeded to show his hands to the jurors.)

Q. Will you please describe what you mean that they were pointed?

A. The way the meat of his skin coming up above the nail and the way they are long and straight to the end.

THE COURT: You may take your seat, Mr. Moon.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

RECROSS-EXAMINATION

BY MR. GARNEY:

Q. Mrs. Mocherman, I just have a few questions to follow up here. At the time you gave your original description to the police, did you not describe the person in your home as being in his mid-thirties?

A. Yes.

Q. Was there something about his skin or his eyes to make you think he was middle-aged?

A. No. I used that figure because I'm in my mid-thirties, and, again, it's just a judgment and everybody's judgments are different; it was just an estimation.

Q. That was precisely my next question. You're in your mid-thirties, aren't you?

A. Yes, sir.

Q. And you know, generally, what people look like in their mid-thirties?

A. I guess so.

Q. And you have friends in your mid-thirties?

A. Yes.

Q. And you did tell the police that the man was in his mid-thirties?

A. Yes.

Q. By the way, on D-1 you had a chance to examine it and run through the streets and all and arrive at the positions

of the Circle K and the school and the Safeway and your home. Does D-1 appear to be a fair and accurate portrayal of the west side in the area in which you live?

A. Yes. It just seems to be awfully large.

Q. But that is area on the west side where you live?

A. Yes, sir.

MR. GARNEY: Your Honor, at this time I would like to offer D-1 into evidence.

THE COURT: Counsel?

MR. LIZARRAGA: No objections, your Honor.

THE COURT: Be received.

(WHEREUPON, Defendant's Exhibit No. 1, previously marked as DX-1 for identification, was received into evidence.)

Q. I believe you testified to the prosecutor just now about the light in the hallway, and if I may quote you and correct me if I'm not correct, your testimony was that it was very hazy, the lighting was almost dark, and it was a very small amount. Isn't that what you just told the jury?

A. Yes.

MR. GARNEY: I pass the witness.

THE COURT: Anything further, counsel?

MR. LIZARRAGA: One last question, your Honor.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Mrs. Mocherman, can you estimate how long it would take

to trot on down to your Circle K store?

A. On foot?

Q. Yes.

A. Fifteen minutes.

Q. How many blocks is it?

A. Three or four city blocks.

Q. Three or four --

A. I'm talking of just walking.

Q. Okay. How about running?

A. I send my son sometimes, and a round trip it takes him about 30-40 minutes. I don't know, because I don't go, so it's hard to tell.

Q. All right. Thank you.

MR. LIZARRAGA: That's all.

THE COURT: Ladies and gentlemen of the jury, at this time we are going to take our lunch recess. I'm going to send you in company of the bailiff to Luby's Cafeteria. We'll start promptly at 1:00.

(Lunch recess was taken at this time.)

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AFTERNOON SESSION

TUESDAY, JANUARY 12, 1988

(The following proceedings after the recess before the jury:)

THE COURT: Call your next witness.

MR. LIZARRAGA: Dr. Paul Navar.

PAUL DAVID NAVAR,

called as a witness for the State, after being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. State your name for the record, please.

A. Paul David Navar.

Q. And how are you employed?

A. I'm the director of the emergency department at Sierra Medical Center.

Q. Is that here in El Paso County, Texas?

A. Yes, it is.

Q. What qualifications do you have for that position?

A. I'm a trained emergency room physician.

Q. Are you licensed in the State of Texas as a physician?

A. Yes, I am.

Q. What are some of your duties as a physician?

MR. GARNEY: Excuse me. In the interest of economy, your Honor, I will stipulate to the qualifications

as to the expertise of the doctor.

THE COURT: Thank you.

Q. Dr. Navar, does Sierra have a contract with the City?

A. Yes, there is a contract between the City and the County for the emergency physician at Sierra to perform rape examinatins.

Q. Okay. And basically what does these rape examinations consist of?

A. They consist of taking the history of a physical examination of a suspected rape victim and also collection of evidence.

Q. Okay. I'm handing you what's marked as a rape kit, a clean rape kit, and I'll ask you to please pour the contents out on your desk and explain what you do whenever a rape victim comes into your emergency room.

A. Okay. Initially, the suspected victim comes into the facility in the company of the police, usually. A history is taken by the nurse and the physician in attendance and then a physical examination of the patient is performed. In addition to looking for evidence of trauma, both bodily trauma and trauma to the vaginal area, we collect some specimens, and this is what the majority of these kit specimens are used for, collection of swabs of the vagina and the cervix, looking for sign of infection, signs of sexual penetration, signs of semen or sperm.

Q. Okay. Then you said the suspected victim comes in -- What is your role, Doctor? Are you a law enforcement officer?
A. No, I'm not.
Q. Okay. In this terminology, "suspected victim," or "suspect," or "suspected perpetrator." Is that your job to determine whether someone was assaulted or wasn't assaulted?
A. No. My job is merely to perform a physical examination and to collect evidence for medical and legal purposes. I'm not a legal officer, it's not my job to make judgments regarding the patient's history or whatever.
Q. Fair enough. Did you have an opportunity on April 27th to examine a lady by the name of Dana Mocherman?
A. Yes, I did.
Q. And do you recall that examination -- Do you recall that incident of your own independent recollection?
A. Yes, I do.
Q. Okay. Did you bring some medical records with you regrding that examination?
A. Yes, I have a copy of the medical examination that I performed that day.
Q. Okay. I'm handing you what has been marked as State's Exhibit No. 25. Would you please tell me what that is?
A. This is a copy of the sexual assault record that we made and --
Q. Okay. Will you please go through State's Exhibit No.

25 and compare it with contents of your hospital file to insure that all of the data is in it?

A. The records are identical.

Q. Okay. And it's true, is it not, that your particular records have additional information, like for billing purposes, but nothing regarding the actual examination?

A. That's true.

Q. Okay. Looking at your original records, please, and I'll ask you some questions regarding State's Exhibit 25, the actual medical report is ten pages long, is that right?

A. Nine pages, I believe.

Q. Nine? Okay. Let me hand you Exhibit No. 25 --

MR. GARNEY: To clarify it, your Honor, there's a 6 and a 6A.

MR. LIZARRAGA: Okay, thank you.

Q. All right. So there are ten actual pages. Would you agree with me?

A. Yes, sir.

Q. All right. And is this a rape report?

A. Yes, it is.

Q. And it's entitled "Alleged Sexual Assault-Rape, Medical Report," is that correct?

A. Yes.

Q. Is that the one that you filled out?

A. That is the one.

Q. All right. What kind of information do you put on there initially?

A. The very first information is a history of the assault complaint.

Q. Okay. You anywhere make the report?

A. Yes; the date of the report is dated at the bottom of the page, and the date of the assault is printed at the bottom of the first page.

Q. Okay. Do you also record the time which the patient, in this case, Dana Mocherman, arrived at the hospital?

A. Yes.

Q. What time would that have been?

A. That is recorded at 10:30.

Q. Okay. When a person arrives at your hospital, are they automatically -- Do you immediately begin filling out, "They stepped into the doorway at 10:30?"

A. The time is usually put on the page as the time that the nurse encounters the patient -- there may be a lag of some time between the time when the patient enters the doorway and the time that the exam is actually performed.

Q. Do you have any idea what that last time, what the range of that last time could be?

A. Oh, it could be as much as a couple of hours.

Q. And you also got the name of the officer that brought the patient, is that correct? That was with the patient?

A. Yes.
Q. All right. On this particular incident you made some notations at the bottom of the first page. Can you tell us, after reading your notations, what happened regarding this particular incident?
A. The patient told me that she was assaulted, sexually assaulted by a white male who broke into her house, held her at gunpoint and sexually assaulted her in her house.
Q. Okay. What other information do you elicit from patients that you may have recorded that?
A. Okay. Additional information is, in terms of a sexual history, the patient reported to me that there was vaginal penetration and orgasm by the assailant one time; she also said there was no oral or anal penetration.
Q. Any particular reason why you need that kind of information about there being orgasm by the assailant?
A. That's important from the aspect of later on the examination when we do the pelvic examination, we're looking for evidence of sperm. If the victim has stated that orgasm was achieved by the assailant that we would expect to find sperm on the examination.
Q. Okay. Orgasm is the word that you use -- Are we talking about ejaculation then?
A. No; those aren't identical.
Q. Can you explain?

A. Well, ejaculation usually accompanies orgasm, but it's not -- it is entirely possible that a person could have orgasm and not have ejaculation.

Q. So you could have a victim who's been penetrated -- I mean, you'll find nothing, semen or sperm, because there may have been orgasm from which she perceived, but there was no ejaculation from the perpetrator?

A. That's a possibility, yes.

Q. Going to page 2 you took certain informtion down from Mrs. Mocherman, is that correct?

A. Yes.

Q. You got her age?

A. 32.

Q. Okay. Will you explain the other observations that you made?

A. The information that was given to me by Mrs. Mocherman, she said that she had been pregnant four previous times and had delivered three times; she had a spontaneous miscarriage twice. The age of menarche is the age in which she started to menstrate, and that was at age 13, and we record for the record the date of the last menses, and in Mrs. Mocherman's case, she had had a hysterectomy in 1981, so she would not have had any periods since 1981.

Do you want me to continue to --

Q. Yes, please do.

A. We asked the patient if she knows herself to be pregnant, obviously, in this case, the answer was no; we asked if there were any symptoms of pregnancy, and, again, the answer was no; we asked when the most recent sexual intercourse occurred prior to the alleged assault --

Q. And you used the word "coitus" for that, is that correct?

A. Right.

Q. Okay.

A. And Mrs. Mocherman stated that that was on April the 26th.

Q. All right. Did you take that to mean April 26th of that year, the day before, or did --

A. I took that to mean the day before.

Q. Okay, go ahead, please.

A. We asked if there was a condom used during that sexual encounter, and the answer was no; we asked if there isn't any current mode of contraception, and, again, Mrs. Mocherman had had a previous hysterectomy.

Q. So she would not need --

A. She would not need contraceptives.

Q. All right.

A. We asked if the patient was a virgin prior to the assault. The answer was no. We asked if vaginal tampons are used. The answer was no.

Q. What is that significant in the case such as Mrs.

Mocherman where there was an unknown assailant?

A. If vaginal tampons are in place during the assault, it can alter the results of the evidence.

Q. Continue, please.

A. Item 11, we asked if during the alleged assault the penis penetrated the vulva, and the answer was yes; whether the assailant experienced orgasm, the answer was yes; and whether the assailant wore a condom, and the answer was no.

Q. And what is the vulva, please?

A. The vulva is the outer anatomic area just outside of the vagina.

Q. And then what else did you ask?

A. We asked whether after the assault occurred whether the patient has douched, bathed, defecated or urinated.

Q. Is that unusual for the patient to do any of these four?

A. It depends on the time since the assault whether or not the patient has done any of these; we encourage suspected victims not to do any of these items because they can alter the evidence. In Mrs. Mocherman's case, she had not douched, she had not bathed or showered, she had not defecated, but she did admit to having urinated prior to the examination.

Q. Please continue.

A. On page number 3 we ask if the patient has any knowledge of any present illness. The answer was no. Whether the patient is taking medication. In Mrs. Mocherman's case she

admitted to taking Estrogen. And whether or not she has any allergies.

Q. What would somebody take Estrogen for?

A. In her case, someone who's had a previous hysterectomy and has had removal of the ovaries, might require additional harmones to replace the harmones that the body is lacking.

Q. Is it unusual for someone to take Estrogen?

A. Not when they've had a hysterectomy.

Q. Is it a mind altering drug?

A. No, it isn't.

Q. Please continue.

A. Item 14 we ask about previous vaginal surgical procedures, again, Mrs. Mocherman had admitted that she had a vaginal hysterectomy in 1981, and that she had had two previous cesarean sections.

Item 15, we asked if in the 24 hours prior to the alleged assault, whether the patient used any alcohol or drugs. Mrs. answered that she had smoked marijuana. And, additionally, we date and time and try to record the frequency of use and the amount of ingestion. She stated that she did not use alcohol, but that she smokes marijuana daily.

Q. Is there any significance to that?

A. The reason we ask that question is in terms of trying to find something about regarding consent. We presumed that if the patient is intoxicated, they may or may not have

a good memory of what happened to them.

Q. Okay. Would that be information that would be vitally necessary in a case where consent is not the issue?

MR. GARNEY: Objection, your Honor, that calls for a legal conclusion on the part of the --

THE COURT: Sustain the objection.

Q. Okay. Now, when she arrived there and you started examining her, did you have any opportunity to observe her demeanor?

A. Yes, I did.

Q. Will you tell us a little bit about that?

A. Initially, when Mrs. Mocherman arrived she was quite upset and distraught, naturally; prior to my examination she had a chance to be counseled by the Rape Crisis social worker and the nurse, and by the time that I examined her, she was very calmed and quite cooperative.

Q. Okay. What about her perceptive abilities, how did you observe those? What did you observe those to be during your conversations with her?

A. She seemed to be quite normal.

Q. Did she appear to you at that time to be intoxicated?

A. No, she did not.

Q. Did she appear to you at that time to exhibit any unusual symptoms that might be drug-induced?

A. Not at all.

Q. Was she hallucinating?
A. No.
Q. Did she appear to have any blackouts?
A. No.
Q. Once you elicited all this information, what happened?
A. After the historical information is obtained, then we performed an examination of the patient and collection of evidence.
Q. Will you tell us a little bit about that?
A. Okay. We start with just a general examination of a patient; we obtain vital signs on the patient, it's recorded on page 4. Mrs. Mocherman's pulse was 80, respiration was 20, the blood pressure was 110 over 70.
Q. Were those within normal limits?
A. They were all normal. We used -- the first thing that we do is we use a ultraviolet lamp and shine that on the clothing and skin of the victim, and we observed for signs of fluorescent. The reason we do that is because seminal stains typically fluoresce under ultraviolet light, and in this particular case there were some stains that appeared to be present on the bathrobe.
MR. LIZARRAGA: May I approach the witness?
THE COURT: Yes.
Q. I hand you what has been marked as State's Exhibit No. 3. Is this consistant with the bathrobe that you recall?

A. Yes, this is the one.
Q. What do you do with these items? You just mentioned this ultraviolet stuff. Basically, what are you doing and why?
A. Basically, we're trying to identify that possibility of any seminal stains that may be on the clothing, record that in the record, so that at a later date the crime lab can observe and perhaps run tests on the specimens and see if they are indeed sperm.
Q. Would Mrs. Mocherman, female, have seminal stains without having had someone deposit them in her?
A. She herself could not produce semenal stains.
Q. I guess what I'm getting at is, when you find a stain and you shine the light on there, and you've got a female, if there's a light it's indicative of something foreign, is that correct?
A. Well, certainly there are a lot of other things that fluoresce under ultraviolet, not necessarily semen, but, the use of the light is to look for semen stains and at a later date determine whether or not it is indeed semen.
Q. Okay. Go ahead and continue with your analysis that you have on page 4.
A. Okay. On item number 2, it's a subjective analysis of my estimation of the emotional status of the patient, and, again, by the time that I had examined Mrs. Mocherman,

she was quite calm and cooperative. Further, review of the clothing revealed no further stains of foreign material, and that's recorded on item number 3. Then an examination of the body surface of the patient is done. Looking in particular for bruises, lacerations, scratches, any unusual marks, and in this case none were found.

Q. What is it that you're looking for and why are you looking for that?

A. For any signs of trauma; the patient was choked, we're looking for signs of bruising; the patient was hit with a weapon or whatever, we're looking for a sign of external trauma.

Q. Okay. Please continue.

A. We examine a patient's mouth and fingernails in case there was a struggle and sometimes there may be skin or filaments of clothing deposited underneath the fingernails.

Q. And what was the result of your examination of Mrs. Mocherman?

A. In Mrs. Mocherman's case, the mouth and fingernail examination was normal.

Q. Incidentally, Dr. Navar, where are these examinations conducted?

A. They are conducted in the gynecologic examining room of the emergency department.

Q. Okay. I'm handing you what's been marked as State's

Exhibit No. 39. Is this an item that looks familiar? You initialed those?

A. I don't initial this particular item; this appears to be a sterile covering that we use in the cases of -- it is what generally covers our examination tray.

Q. Okay. And is it unusual to collect these after you have examined the rape victim?

A. To my knowledge, we haven't been collecting those.

Q. Okay, fair enough. Will you please look at the marking on here?

A. Okay. This is a covering of an examination tray and the time that the tray is put together is put on the tray, and it looks like there's a marking of April of '87.

Q. These items that were collected, what might they have on them?

A. They might possibly have some secretions on them. When we open the kit it's not unusual to put a speculum after we have done the examination on that particular sterile field.

Q. Now, I'm handing you what's been marked -- you want to go ahead and put those items away -- well, you do perform various tests, right?

A. Yes.

Q. Can you just basically describe what some of those objects are? Hold them up so the jury can see them.

A. These particular items are connective swabs; they're in

sterile container and we use them to obtain samples from the cervix and the vagina of the patient.

Q. Why don't you go ahead and open one of those items. It's just a Q-tip looking device in a sterile plastic cover.

Q. What do you do with that?

A. We use it to swab the vaginia and the cervix.

Q. And then what do you do with the swab?

A. Afterwards the swab is replaced and the swab is tagged with a label that has the name of the patient and placed in the rape kit and the kit is sealed.

Q. Why don't you stick that back in the envelope? What else do you have there?

A. We have a comb; we use the comb to comb through the vaginal hair of the victim.

Q. You mind holding it up, please?

A. Yes. We're looking for loose hairs which might belong to the victim.

Q. Would it be unusual -- You never know what kinds of hair are found and you yourselves don't perform the analysis, is that correct?

A. That's correct.

Q. Please continue.

A. We have two plastic pipettes; the pipettes are used to instill a saline solution into the vagina and then after that the pipette is used again to draw out the vaginal

secretion along with the saline, and we use that for examination for possible sperm, and also for later testing by the crime lab for the determination of possible sperm.

Q. Okay. The beauty of a pipette is that you can take small amounts even though you put a lot of suction pressure on there, is that correct?

A. Well, in this case it looks like it has the capacity of about two or three millimeters.

Q. Once you put the saline in there, how do you withdraw it?

A. We put the saline in and typically allow it to set in the vagina for a period of time, about 20 or 30 seconds; we might try to pull any kind of vaginal secretion that we have into the saline, and then the pipette is reinserted and with pressure samples are drawn out.

Q. Do you reinsert it into a container or the vagina?

A. Okay. What we do, after we draw the fluid out with the pipette, a drop of the fluid is placed on some glass slides which we have also in the kit, and then the remaining fluid, aside from that one or two drops that we use, is placed in this red container.

Q. Is there any blood drawn?

A. Yes, blood is drawn.

Q. Where is that drawn?

A. In an additional blood tube, it is not in the rape kit.

They are later placed in the rape kit, but they don't start in the rape kit, initially.

Q. They're from the hospital?

A. They're from the hospital.

Q. And they are vacutainers?

A. Yes, that's correct.

Q. And can you tell us why they are called vacutainers and why they need to be --

A. Using the tubes to draw the blood in order to encourage the blood flow into the tubes, there is a vacuum in the tube, and that's why they are called vacutainers, and the reason they are not placed in the rape kit initially is because they have an expiration date and the vacuum slowly resolves in the tube, and so we have to use tubes that are quite fresh.

Q. Are they sterile?

A. Yes.

Q. And is there anything else in there in that particular rape kit that I handed you?

A. These are the glass slides that I mentioned. In addition, we have -- this is a two by two centimeter gauze which we use in cases where there is a suspected oral penetration, we ask the patient to place this in their mouth, and if sperm is present in the mouth, often it's absorbed by this, and after the patient has had this in their mouth for 30 minutes or so, we take it out and it's placed in a container and also

placed in the rape kit.

Q. Will you please put away the items that you have already described in the envelope that I gave you?

A. Okay.

Q. I'm handing you what's been marked as State's Exhibit No. 32.

A. This is the original rape envelope that the original rape kit was used in the examination of the victim.

Q. Why don't you stick it in this plastic bag, please?

A. Okay.

Q. I am handing you what's been marked as -- I'm handing you the contents of that rape kit and will you please pick up each item, and will you insure it was an examination taken by Dana Mocherman by confirming any markings that are on there and please call out the exhibit numbers so that I can refer to it?

A. Okay. Each item has a label that we make at the time of the examination with the patient's name; in this case it has Mrs. Mocherman's name on it, and each item is initialed by myself. I have Exhibit No. 34 --

Q. Why don't you put that back in the envelope? Now, what was that Exhibit 34?

A. This is the swab of the vaginal and cervical secretions.

Q. Okay.

A. I have item No. 33 which are the envelopes, collection

of loose hair from the pubic area of the victim, fingernail scrapings, known head hair of the victim and a known pubic hair of the victim. Each one has been labeled and initialed.

Q. Okay. What is it marked as?

A. It's Exhibit No. 33.

Q. And these are State exhibits, is that correct?

A. Yes, sir.

Q. Will you please put that inside the bag?

A. Okay. The next item is State's Exhibit No. 35. This appears to be the vaginal saline washings of Mrs. Mocherman. State's Exhibit No. 38 is a blood sample.

Q. Whose blood sample?

A. From Mrs. Mocherman. State's Exhibit 37 is an additional cervical swab.

Q. Would that be Mrs. Mocherman's swab?

A. Yes. And State's Exhibit No. 36 is the glass slides of the vaginal secretions from Mrs. Mocherman.

Q. Now, you collect some of this stuff and the nurses collect the others, is that correct?

A. Yes, that's correct.

Q. But it's all done under your supervision?

A. That's correct.

Q. Are you satisfied that all of the items in the rape kit are items that you handled in one way or another on April 27th, 1987?

A. Yes, I am; each one has my initial.

Q. Are you satisfied that they originated from Dana Mocherman?

A. Yes.

MR. LIZARRAGA: At this time I'd like to introduce, your Honor, State's Exhibits Nos. 32, 33, 34, 35, 36, 37 and 38.

THE COURT: Counsel?

MR. GARNEY: No objections, your Honor.

THE COURT: They will be received.

(WHEREUPON, State's Exhibits Nos. 32, 33, 34, 35, 36, 37 and 38, previously marked as SX-32, SX-33, SX-34, SX-35, SX-36, SX-37 and SX-38, were received into evidence.)

Q. Who were these given to once you collected these items?

A. After these items are collected they are placed in a manila envelope labeled "Rape Kit", sealed, and placed in a locked box that is at the hospital.

Q. And then the police pick it up and they are sent for analysis?

A. That's correct.

Q. Now, getting back to your examination, looking at page 5, you were collecting some of this, the nurses were collecting some of this, and you were doing your examination of Mrs. Mocherman?

A. That's correct.

Q. Going from page 5, what other information did you elicit?
A. Okay. On page 5, the information from the pelvic exam is elicited, in particular we look for evidence of trauma, evidence of any blood or dry secretions in the perineal area.
Q. Okay, let's talk about items that you did not fill out, for example, "Evidence of Trauma"; when would you fill something like that out?
A. If there had been a laceration, perhaps, or a scrape or an abrasion in the perineal area, I would have mentioned it.
Q. All right.
A. In her case I didn't see any of that.
Q. What would you have put down if that person went into shock?
A. What do you mean by shock? You mean the medical terminology regarding shock or psychological shock?
Q. You're the one that examined Dana Mocherman, Doctor, if she had been in either of those shocks, can you explain to us what the significance of that would have been?
A. Well, if indeed she was in shock, in the medical sense of the word it means the patient has inadequate tissue perfusion, that would be recorded in the vital signs that would be recorded in the general examination; also, we would know the evidence of any kind of external trauma on the previous page.
Q. Where you testified that her vital signs were within

normal limits?

A. Right.

Q. They would be abnormal?

A. They would be abnormal if she was in shock.

Q. Any other kind of shock?

A. Well, in the emotional sense of the word, that's also on page 4 when we give our estimation of the emotional status of a patient.

Q. That would be number 2, where you marked "calm, cooperative"?

A. That's correct.

Q. Going to page 5, there's nothing in there as evidence of trauma, what else did you check for?

A. Okay. There wasn't any evidence of any kind of vaginal lacerations or abrasion on the examination, and that's recorded in items 4 and 5. Then of course when we examine and do a bimanual examination of the cervix and the uterus. In Mrs. Mocherman's case the cervix and uterus were absent because she had a prior hysterectomy.

Q. Okay. If somebody is actually assaulted, would you expect necessarily blood or secretion or a hymen or whatever you have marked down here as "Normal" or "None"?

A. No, not necessarily. Someone can be sexually assaulted and not have any evidence fo external trauma.

Q. Please continue.

A. Finally, in the examination we look at the anus for any signs of anal penetration. There was no evidence of that in Mrs. Mocherman's case.

Q. All right. Page 6 is a sketch of the perineal area. Anytime we record we note a laceration or an abrasion in that area, we draw it out on this particular page.

Q. It is a rather large sketch. You mind holding it up and showing it to the jury? In a layman's terms, that is basically an open vagina?

A. That's correct, it's a sketch of the vaginal area of the female.

Q. Okay, and what would you do on that mimeograph?

A. If we note any type of external trauma in the form of a laceration or abrasion or bruise, any type of dry secretions, blood, etc., then we record in that area. And nothing is recorded on this page because that examination was normal.

Q. Okay, she wasn't cut up or anything like that?

A. That's correct.

Q. Would that necessarily mean that there was no sexual assault?

A. Not necessarily.

Q. Is it unusual for you not to find anything?

A. Not really.

Q. Turning to page 6a, which is also a rather graphic mimeograph. Would you please show that to the jury? And

that is basically a penis, is that correct?

A. Yes, it's a sketch of the male perineal area.

Q. Okay. Why is this in this particular packet?

A. This packet is the universal packet that we use not only for females' sexual examinations but also for male rapes, and that's why that particular picture is included, and also when we examine alleged assailants if we find any markings we also include them on the sketch.

Q. And do you do that as part of your contract with the city?

A. That's correct.

Q. Please turn to page 7. Can you tell us what that is?

A. Page 7, we have a record of the lab tests and specimens that we collect; these are all items that we previously shown; we collect a tube of clotted blood and it's labeled; we trim the fingernails into the envelope and label them; we comb and collect any free pubic hair; we cut off a few of the public hairs of the patient and label it; some head hairs of the patient are also obtained; we look for any loose hair on the skin, and any dry blood and label that; and we place the aspirated vaginal secretions into the test tube and label it. We also use the aspiration with the pipette and place it in the dry test tube as well.

Q. And you got items marked 1 through 10, and you check them off as you do them, or do the nurses check them off?

A. No, these are the ones I check; I check off as the specimen is either obtained by myself or the nurse.

Q. Okay. What I guess I'm trying to say is, for example, you may get an envelope and nurse will say, "I got the hair here," and it's already labeled "Hair", as you described in one of these previous exhibits. So it's sealed and you just check it off, is that correct?

A. It's not sealed until I examine the contents.

Q. Fair enough. You got here where you examined a wet saline mount for sperm. There are two items: "Present" and "Motile". What does those mean?

A. Okay. What we do is with the pipette after we have placed typically a no liter of saline in the vagina, that's withdrawn and a drop of that fluid is placed on a clean glass slide and a cover slip is put on it, and then we take it over to the pathology laboratory and under a microscope we examine that and look for evidence of sperm. In this particular case I noted that sperm was present on the wet saline mount, but that sperm was not motile.

Q. And what does that mean?

A. Motile means moving.

Q. Is it possible to find -- When you see it on those super microscopic things you see what looks like a little bean with a tail.

A. That's what it looks like, yeah.

Q. And if it's moving you actually see it moving?
A. It looks like a little tail.
Q. And that's what you call movement, that would be motile?
A. That would be motile, yes.
Q. All right. Is it possible to have sperm that is not motile?
A. Yes.
Q. What is the significance of that?
A. Well, there are two possible things, the longer the time that the sperm is in the vagina, typically, it becomes increasingly nonmotile, and this can be anywhere from 30 minutes to 12 hours or longer. The other possibility is that the ejaculate of the assailant may only contain nonmotile sperm.
Q. And, for example, if Mrs. Mocherman had had intercourse the night before with her husband and had been attacked the following day, would there be any significance as to whether anything that you found in there was motile or not?
A. We wouldn't be able to make any kind of conclusions in that regard. All we would be able to record is whether there was sperm present in the vagina, and we certainly wouldn't be able to identify it visually.
Q. Okay. Will you please continue with what else followed on page 7?
A. After the examination and the collection of the

specimens we usually ask the patient, we offer the option, if the patient so desires, to douche with the saline Betadine; and then for prevention of any possible veneral disease, in particular gonorrhea or syphilis, a patient is treated with a liquid suspension containing Amicillin and Probenicid, which are antibiotics. If there is a possibility the patient could become impregnated by the rape, we offer the possibility of taking some conjugated Estrogen for several days which in effect prevents implantation of the fertilized ovum. In Mrs. Mocherman's case this was not an item that we needed to pay attention to because she had a previous hysterectomy.

Q. Okay. Items that are not checked off on any of these pages are usually items that, in your opinion, don't need any attention?

A. Yes, that's correct, the remaining items on the page are like alternative treatments depending on the patient's drug allergies, for instance, if the patient has a Penicillin allergy we can't give her the Ampicillin or Probenicid, we have to use an alternative drug. And if the patient is allergic to Penicillin and is also pregnant we have to offer a different type of medication.

Q. Now, in your final page which is page 9 of 9?

A. That's important for the patient to be followed up for re-examination both from a physical and psychological standpoint. So the patient is usually referred to either to the

Rape Crisis service or to their regular physician or gynecologist. In this case the item under Rape Crisis is checked and the patient is referred for referral to Reproductive Services if necessary, their physician, and other services that may be required.

Q. What time did you conclude your examination of Mrs. Mocherman?

A. It's recorded here that I concluded it at 11:30 p.m.

Q. You spent approximately an hour with her?

A. Approximately.

Q. Do you do other things during that hour?

A. There may be just a very slight lag between the time that I perform the examination and the time that I complete the chart; that's usually no longer than ten minutes or so. Basically, that would include after collection of evidence taking the slide over to pathology and looking underneath the microscope, and then putting the evidence all together in the package and sealing it and then concluding the record.

Q. Okay. Would it be possible for you as a physician when you're examining someone who uses minute amounts of marijuana over the past ten years to know any affects of that marijuana?

MR. GARNEY: Objection, your Honor, I don't believe that's --

THE COURT: Sustain the objection.

Q. In your experience as a doctor, was there anything about

Mrs. Mocherman that led you to believe that anything that she had to tell you was distorted or that she was not in full control of her senses?

A. No, not at all.

MR. LIZARRAGA: Your Honor, I would at this point like to offer into evidence State's Exhibit No. 25, Mrs. Mocherman's medical report.

THE COURT: Counsel?

MR. GARNEY: No objection, your Honor.

THE COURT: Received.

(WHEREUPON, State's Exhibit No. 25, previously marked as SX-25 for identification, was received into evidence.)

Q. Doctor, would it be fair to say, just to basically conclude your testimony, after you collect one of these rape kits, you've got certain items that you took out where you have a known person, that being, for example, the blood and the swab -- well, the blood -- for example, a saliva swab where there was no contact with the mouth, otherwise that swab would be tainted by foreign matter if someone, for example, was to stuck his penis inside somebody's mouth, that would contaminate the mouth, but if you have a swab and there was no such act, then you would have a given, a known specimen from a known person, is that correct?

A. Correct.

Q. And the blood -- for example, Mrs. Mocherman's blood,

because of the assault had occurred the way that she described it to you, would not have been tainted with the assailant, any contaminants from the assailant?

A. Mrs. Mocherman blood?

Q. Right.

A. No, it would not be contaminated.

Q. Now, her vagina would be?

A. Conceivably.

Q. Conceivably. So if you take a sample out of there, you don't know if you're taking -- if on that swab you are getting a sample of her vaginal fluids or someone else's seminal fluids, is that right?

A. They would be mixed together.

Q. Okay. And, for example, the fingernails, you take scrapings of the fingernails. If there was a struggle, would you conceivably find foreign matter there?

A. Yes, you could.

Q. What else do you collect? You take the swab, the blood. Oh, the fluids, the vaginal fluids.

A. Okay. The reason for taking the vaginal fluids, basically, are to identify the presence or absense of sperm or seminal fluids in the vagina. That's done a couple of ways: one, we do a direct examination with the microscope, as I previously mentioned, looking for sperm, and in Mrs. Mocherman's case it was noted, and then there are times when

we may not note sperm on the examination of the wet mount, yet there are certain substances in the sperm, namely a substance called acid phosphatase, which can't be tested for chemically, and so if there has been some times since the assault and no sperm is present because it has disintegrated, then it can also be detected whether or not the patient has had seminal fluid injected in the vagina because there may be some residual acid phosphatase still present.

Q. Okay. And can you have some of these substances solidified, because they dry, and then made liquid again by putting the solution and running tests on those?

A. Certainly. I guess in the case of, for instance, seminal stains on clothing, they may be dried but you can scrape the area and add a drop of saline to it and put it in solution again.

Q. Okay. As far as the seminal fluid, can you from seminal fluid detect certain characteristics about the donor of that fluid, the person who from whom that fluid came from?

A. You can in many cases blood-type a person on the basis of their seminal fluid. This is one of the reasons why our collection of blood testing is done on the victim. For instance, if the victim uses one blood type and the seminal fluid or fluid containing another blood type, then we know it can't come from the patient.

Q. Okay. And you know that it can't come from someone

who has a blood type that doesn't match that unknown?

A. That's correct. About 85 percent of the population are known as secretors. And what that means is that they secrete their blood type antigens in body fluids. The remaining 15 percent do not and so in those 15 percent of instances you would not be able to type somebody from a seminal fluid, but the majority of the cases you can.

Q. Okay. Now, you yourself did not perform any analysis on who these specimens or whatever you call those things that you took up that have been previously introduced into evidence, did you?

A. No, just aside from the examination of the wet mount for sperm. I just did the physical examination and the collection of evidence.

MR. LIZARRAGA: Thank you very much, Doctor, pass the witness.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Dr. Navar, my name is Norbert Garney, I represent Mr. Moon in this particular proceeding. Have we ever met before?

A. To my recollection, no.

Q. I don't believe we have discussed this case over the phone either, have we? or have had any type of conversation prior to your testimony here today?

A. I think that's correct.

Q. All right. Dr. Navar, I just have a few questions. One thing I am curious about, Doctor, sperm is simply a component of the seminal fluid, is it not?

A. That's correct.

Q. Would I be incorrect in believing that it's a rather small constitutent of the entire seminal fluid, or is it more substantial?

A. Well, the majority of the seminal fluid, of course, would be water, and there are a number of complex sugars and proteins in the seminal fluid itself. The sperm is the only living component in the field.

Q. In terms of percentages, let's say, what percentage of any given normal specimen which would constitute sperm as opposed to other constitutents?

A. You mean by volume or by weight?

Q. By volume.

A. You know, I'm not an expert in that area, but I would estimate about 20 percent, 18 to 20 percent.

Q. At any event, the motility or nonmotility of the sperm, did that have any -- strike that. Did the motility or non-motility of sperm have any significance as far as identifying the specific donor?

A. No, not really, it doesn't. What the motility of the sperm tells us is, it can give you some idea in terms of how

long it's been since the vaginal penetration and ejaculation. If the ejaculation has happened soon, or the examination is conducted within a short time after, you might expect to see motile sperm, but there aren't any hard or fast rules in terms of how long it takes for a sperm to go from a motile state to nonmotile. That's depended on a number of different variables, and, again, you just really can't make any conclusions regarding the motility of sperm.

Q. And, more specifically, you can't draw any conclusions as to the donor of any particular amount of sperm whether it be motile or not?

A. No, not really; the sperm from a donor could be motile and then could develop nonmotility in the vagina, or the other alternative is it could be nonmotile from the beginning. So you couldn't say that because a sperm was nonmotile in the vagina that it had to come from somebody who produces nonmotile sperm.

Q. Regarding this component acid phosphatase, Doctor, is that correct?

A. Yes, sir.

Q. Okay. What exactly is that, Doctor, in layman's terms, please, so I can understand you?

A. It's an enzyme or protein that's contained in sperm and it is not a typical component of, say, blood or serum, or instance, in any measurable amount. It's seen in quite

large amounts of sperm, so that chemically if we, you know, if you have a sample of fluid that might contain sperm or sperm by-products, then you do a chemical examination where you might check acid phosphatase level; if it's high then you presume that there was sperm there present.

Q. You've given me a different type of acid phosphatase in the sperm?

A. I would have to confess I really don't know the answer to that one.

Q. Have you ever heard of anybody typing for someone according to acid phosphatase?

A. No, no one would type anyone in terms of acid phosphatase. It would be pretty much the same across the board.

Q. I guess what I'm driving at, Doctor, if that does not come from that component, one would test to find out if any particular individual had sexually assaulted the lady?

A. No.

Q. Now, I believe you testified that there are secretors and nonsecretors?

A. Yes.

Q. Is that kind of a hard and fast rule? Are there other types of people, or are they simply secretors and nonsecretors?

A. Well, you are either a secretor or you're not, in terms of this particular methodology of typing.

Q. One wouldn't secrete one time and then on another one?

A. No, not to my knowledge. It would have to be one or the other. It's a genetic -- something that's in your genes. If you have a certain gene, then you are a secretor. If you are lacking that gene, then you are a nonsecretor.

Q. Is that an abnormality or is it just kind of the way things are?

A. That's just a method of typing people. Just like there are some people with type O blood and some people with type A blood type.

Q. The fact that one might be a secretor or a nonsecretor, is that being associated with blood type, let's say?

A. You mean the mortality of the body, big person or a small person?

Q. Yes, smaller or bigger, perhaps.

A. I confess that I don't know.

Q. You don't know of any correlation like that?

A. No.

Q. In your expertise?

A. That's right.

Q. I, an individual, is a nonsecretor. Just clinically, simply, what does that mean?

A. What that means is that if you take a sample of that person's saliva or seminal fluid, then you won't be able to pick up any of their blood group agents. You wouldn't be able to test for antigens and proteins that are contained

on surfaces of the cells. You are probably familiar with certain blood types, A and B and O. If a person is a non-secretor that means that they don't secrete their blood group antigens in their body fluids, whereas, someone who is a secretor, you can take a sample of that fluid, either saliva or semen or whatever and you would be able to find those antigens of type A or type B or O or whatever the blood type of a person would be.

Q. Assume for a moment, Doctor, that I am a secretor and I give you some of my saliva. You could tell me my blood type?

A. Right.

Q. And would that be as accurate as if you drew blood from my arm?

A. It would probably be more accurate from the sample of the arm, but you could do it. With the technology that we have today, you could do it either way pretty accurately.

Q. Assume for the moment that I'm a nonsecretor and I gave you some of my saliva. Are there any factors that you positively identify which could be correlated to my blood type?

A. There are a number of minor blood groups that you might be able to identify that involved quite a lot of testing, but in terms of the major blood groups, A, B, and O, you wouldn't be able to determine that.

Q. But there are some factors that you can pick up to identify people with nonsecretors too?
A. Yes; there are certain people that secrete different types of aminoglobulins in their saliva that might be possibly used to type them. As far as I know they are not used commonly.
Q. It's forensically possible to do so?
A. I would think so, although I'm not an expert in that area.
Q. Doctor, I've been giving my saliva as an example here, would the same be true of one's semen or seminal fluid?
A. Yes.
Q. Doctor, have you ever heard of a test called "DNA Analysis?"
A. I've heard of it.
Q. Do you know where it's done or if it's done?
A. I couldn't really tell you.
Q. You're not familiar with that concept?
A. Well, I'm familiar with the concept of analyzing someone's DNA or to type their genes, but I'm certainly not familiar with how it's done or where it would be done.
Q. Do you know of the mechanics of how it's done?
A. No, I don't.
Q. Will you explain the concept to the jury, please?
A. As I understand what you'r getting at, you can take someone's chromosomal tissues and you can separate them and

examine them under a microscope and using different chemicals and techniques you can determine who carries what types of genes. Let me just give you an example. I guess in a Down's syndrome person they have three number 21 chromosomes that can be analyzed chemically, and you take a sample of either blood of either blood or tissue and look at the nucleus of an individual's chromosomes and there are an abnormal amount of chromosomes, and DNA of course is the makeup of chromosomes -- I presume that's what you're talking about?

A. Yes, that's what I'm talking about. Doctor, referring you attention to page 3 of the medical examination of Ms. Mocherman. I don't want to quarrel with this, but is it possible to test someone's blood for marijuana?

A. Yes, it is.

Q. What is the name of that test?

A. We took what we call a toxicologic screen.

Q. Is that a very simple examination?

A. It involves just taking a sample of the blood of the patient and submitting it for analysis.

Q. Do you need a large amount of blood, let's say, a quart?

A. No, not really.

Q. Maybe a cc?

A. Simply vacutainer tube, I would think.

Q. Much like a tube which you had shown to the jury previously?

A. Uh-huh.
Q. What's the name of the test that's done? Specifically, what -- strike that -- Specifically, what element are you looking for when you're looking for marijuana?
A. We're looking for a drug called THC, which is the main halucinogenic component of marijuana.
Q. And was that done in Ms. Mocherman's case?
A. Not to my knowledge.
Q. Was there any medical reason why it was not done? That is, did she suffer from an enormous loss of blood that you couldn't draw anymore blood?
A. No.
Q. Did Ms. Mocherman tell you how much she had smoked the night before?
A. I don't recall her giving me an amount in terms of how many marijuana cigarettes; she just admitted that she had smoked some marijuana.
Q. And, finally, Doctor, you have no medical evidence whatsoever that you can offer this jury which could conclude that shows that Mr. Moon had sexually assaulted Dana Mocherman?
A. No; I'm just responsible for conducting the examination and collection of the evidence.
Q. All right. You conducted no tests personally?
A. Aside from the examination of the wet saline mount for

sperm.

Q. Yes, sir. And you just testified that that's not a conclusive test for identity?

A. That's true.

MR. GARNEY: I pass the witness, your Honor.

THE COURT: Anything further, counsel?

MR. LIZARRAGA: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Just to clarify something, Dr. Navar, this motility-nonmotility, the item that's contained in your medical report on page 7.

A. Okay.

Q. If you conducted your examination over an hour after there was a deposit of sperm in someone's vagina, then, basically, if there are no motile sperm, those findings are more insignificant then if you had found motile sperm, is that correct?

A. Yes, that's correct; that doesn't mean that if sperm is present but the sperm is nonmotile, that doesn't mean that that could've come from a sexual intercourse that occurred as soon as an hour before. If there was sperm present and it was motile that would imply that the sexual intercourse had occurred relatively recent. But I can't put an hour other than within twelve hours.

Q. Okay. And over here where you found no motile sperm, from that information you can't even speculate whether it was Mrs. Mocherman's sperm you were looking at or whether it was her assailant's sperm? You can't even speculate on that if it is nonmotile as you listed on the sheet, is that correct?
A. That's correct. All I would be able to say is whether or not there was sperm in the vagina at the time of the examination.
Q. Okay. And so, for example, if a victim came in and said, "Doctor, I got raped 30 days ago, and I have not had intercourse with anybody since then." You check her and you find motile sperm, then what is the significance of that?
A. She's got to be telling a lie.
Q. Okay. But in this case, it has nothing to do -- It is just significant, in your opinion, as to whether it was motile or nonmotile sperm?
A. The only thing that this tells us is that there was sexual intercourse within some period of time.
Q. And that's because --
A. Probably within three days.
Q. That's because you found sperm?
A. Because sperm was present, that's correct.
Q. And then the motility --
A. The motility really doesn't say anything one way or the other in this case.

Q. Why would you order -- If you were treating a rape victim, why would you order a test for marijuana, a drug screen?

A. We don't typically do it; I really can't think of an instance why it would be necessary unless the victim requested the test.

Q. Would you order one if you got a victim that you suspected that they had OD'd on a substance?

A. The test for marijuana, unlike, for instance, the test for alcohol, is one that doesn't typically return from the laboratory for 24 to 48 hours. So in terms of using it to help in the treatment of the patient, it really is not of any use, because by the time that you get the results back, you know, by that time it's been a day or two afterwards, you kind of have to make your decision regarding treatment of the patient based on your clinical examination.

Q. Okay. And just to finally clarify something, does the lab do a DNA analysis?

A. Not to my knowledge.

Q. Have you ever ordered a DNA analysis?

A. No, that's a test that would typically be ordered by a geneticist, and that's not a test that's typically ordered down there at Sierra.

Q. This secretor and nonsecretor tests that you were talking about, a lay person like myself could be confused by the

terminology. For example, when you say secretor, it doesn't have anything to do with, for example, that person's ejaculation, per se?

A. No, it's more of a genetic term.

Q. Okay. And would you agree with me that's basically something that evolved from the discovery of the turn of the century where everything, really, some of the more significant things about blood that we discovered, people quit trying to transfuse, say, sheep's blood into human, because they found out that human blood had something that sheep's blood doesn't and they just don't jive. Now --

THE COURT: I hate to stop you, but I don't know what that has to do with this case now, about sheep and the turn of the century. We're talking about April 27th, 1987. I'm going to object, I'm going to sustain my own objection, and we're going to start trying this case.

MR. LIZARRAGA: Your Honor, I --

THE COURT: I don't want to hear anymore about it, Mr. Lizarraga.

MR. LIZARRAGA: No, I'm not going to talk about sheep.

THE COURT: All right, let's move on with this case.

MR. LIZARRAGA: This secretor-nonsecretor, are you prohibiting me from going into --

THE COURT: No, sir. It's been well-covered, I don't know what you're getting into sheep and the turn of the century in regards to secretors and nonsecretors.

MR. LIZARRAGA: All right, your Honor.

Q. I believe you said that 85 percent of people are non-secretors?

A. That's correct.

Q. Would it be fair to say that that means that in 85 percent of the population there is a particular component that is found in the blood that is also found in other body fluids?

A. I think the correct way of describing it would be that in 85 percent of the population they have a gene, okay, which is responsible for secreting certain antigens, certain substances in their body fluids other than blood, namely saliva and semen, in such a way that these could be tested for a type.

Q. Okay. And so the remaining 15 percent, if you were to get -- what is typical is that this stuff in the blood will not be found in the saliva, and that's why they are called nonsecretors?

A. Yes; the population that's called nonsecretors, while they may have these particular blood group substances in their blood, for some reason they are not able to be tested, or they do not show up at secretions such as saliva or semen.

Q. So you could take a known sample of blood and from that

sample determine whether an individual fits into the 85 percent of secretor status versus the 15 percent of the non-secretors?

A. Yes.

Q. Okay. You could take an unknown -- Let's just say, for example, if a victim, the person in the case, was one of these two groups, let's say she was a secretor, and you found semen in her vagina, would it be possible, if you had enough semen, to determine whether the semen came from a secretor or non-secretor?

A. Yes.

Q. Okay. So, you know that she's a secretor, and you find out that a nonsecretor deposited that semen, and a secretor deposited that semen as well, what conclusions could you draw? What would be significant about that?

A. You mean in terms of the examination? If you have semen from a nonsecretor, okay, --

Q. That's the minority?

A. Yes, the minority. You wouldn't be able to type it, okay, if you have a sample of it.

Q. You can classify it as --

A. You can classify it as a nonsecretor. If you had semen from a secretor you could classify it as a secretor.

Q. Okay. Would it be possible, for example, in a case where there is a -- I'm talking of Mrs. Mocherman -- and it

turns out -- if her husband turns out that he is a secretor, and it turns out that Mrs. Mocherman is a secretor, and then nonsecretor semen or sperm is found in her, what can we say about what Mr. Mocherman's contribution was?

A. That if Mr. Mocherman is a secretor and Mrs. Mocherman is a secretor and nonsecretor sperm is found in the vagina then you could presume that the sperm found in the vagina was not that of Mr. Mocherman.

Q. Okay. And then let's just say that Mrs. Mocherman is a secretor, Mr. Mocherman is a secretor, and we find that there is nonsecretor sperm in there, and an individual, a suspect who is a secretor, a secretor is a suspect, is there any link there?

A. If the suspect is a secretor and the sperm that is found is of a nonsecretor variety, that would not lend to a whole lot of credibility to that person being the suspect. We certainly wouldn't expect the nonsecretor sperm to be from a secretor.

Q. Okay. And, finally, Dr. Navar, I am handing you what has been marked as State's Exhibit No. 40 and No. 41. Those are two items that I never showed you before, is that correct?

A. That's correct.

Q. Okay. Are the cover sheets on each one of those typical Sierra medical records?

A. Yes, they are.

Q. And based on what you see on there, State's Exhibit No. 40, that being the record from Sierra Hospital, would it be fair to say that it indicates that on a certain day blood was drawn from a person by the name of Reid Mocherman?

A. Yes, that's correct.

Q. And that the blood was drawn for the benefit of the police department?

A. Yes; the medical report states that a sample collection required or requested by the police department of willing donors regarding a suspected sexual assault case.

Q. Okay. Did it have Reid Mocherman's age on there?

A. His age is 32.

Q. Okay. And looking at State's Exhibit No. 41. Is that virtually the same thing for an individual named Chris Mocherman?

A. Yes, it is.

Q. And what is Chris Mocherman's age?

A. 15.

MR. LIZARRAGA: Your Honor, I would like to introduce into evidence State's Exhibits No. 40 and 41.

THE COURT: Counsel?

MR. GARNEY: No objection.

THE COURT: Received.

(WHEREUPON, State's Exhibits Nos. 40 and 41, previously marked as SX-40 and SX-41 for identification, were received into evidence.)

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

RECROSS-EXAMINATION

BY MR. GARNEY:

Q. Dr. Navar, I just have a few questions for you. Assume for the moment that the suspect is a nonsecretor and you find seminal fluid in the fluid and that is also of a nonsecretor nature. Can one conclusively say that the suspect is the one who sexually assualted that person?

A. No.

Q. And the reason is because it simply places that person in a pool of many many potential subjects.

A. 15 percent of the general population.

Q. And if we had a mathematical quiz, out of a million people that could be what, 150,000 people?

A. Yes.

Q. All right. And that's as close as you could get, provided no other tests are done?

A. Right.

Q. Now, are any particular problems involved in determining whether sperm is of a nonsecretor or secretor type mixed together?

A. Well, I --

Q. Would you like me to clarify that?

A. Yes.

Q. Let's say we have a vial, and we put in half secretor's sperm from an unknown donor and half nonsecretor's sperm from an unknown donor. Can you separate them and run tests on them?

A. I don't think that you can. If you ran a test on the whole volume of sperm you would probably get a positive secretor test.

Q. All right. But you know of no way to separate out the two?

A. No, not from that type of sample.

Q. Assume for the moment that a young lady had sexual intercourse with her husband in the evening, let's say 10:00 o'clock in the evening, and the next morning at approximately 9:00 a.m., would you still expect to see some seminal fluid present in her vagina from her husband?

A. It certainly is possible; the length of time that is generally recognized that sperm lives in the vagina is as long as three days. Typically, however, it's unusual to find any evidence of sperm much beyond 24 hours.

Q. I'm talking about seminal fluid, not sperm. Would you expect to see seminal fluid present in the vagina?

A. You could see traces of seminal fluid present.

Q. Now, at the risk of being very elementary, I believe that your examination revealed that Ms. Mocherman had a hysterectomy in 1981, is that correct?

A. Yes.
Q. Just very very briefly, what does a hysterectomy entail?
A. In Mrs. Mocherman's case she had a vaginal hysterectomy, and what that entails is that there was removal of the uterus through an incision that is made actually in the vagina.
Q. And to clarify to the jury, Ms. Mocherman does not at this time have a uterus?
A. That's correct.
Q. However, she does have a vagina?
A. Yes.
Q. And that vagina can serve as a receptacle for the sperm?
A. Yes.

MR. GARNEY: I pass the witness, your Honor.

THE COURT: Anything further, counsel?

MR. LIZARRAGA: No more questions, your Honor.

THE COURT: May this witness be excused?

MR. GARNEY: No objections, your Honor.

MR. LIZARRAGA: None from the State.

THE COURT: You may be excused, Doctor, thank you.

MR. LIZARRAGA: May we approach the bench?

THE COURT: Yes.

(At this time a discussion was had at the bench outside the record and out of hearing of the jury.)

THE COURT: Ladies and gentlemen, at this time we will take a ten-minute recess.

(The following proceedings were had after the recess:)

THE COURT: Call your next witness.

MR. LIZARRAGA: Call Glen Adams to the stand, please.

GLEN DAVID ADAMS,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Will you state your full name for the record, please?

A. Glen David Adams.

Q. And how are you employed, Mr. Adams?

A. For the Department of Public Safety.

Q. And were are you presently assigned to, what location?

A. I work in Lubbock, Texas, in the crime laboratory.

Q. Where were you this morning when you got up?

A. I was in Lubbock, Texas.

Q. What time did you arrive here in El Paso?

A. I think it was about 8:05 El Paso time.

Q. Okay. What is your job in Lubbock, Texas, with the Texas Department of Public Safety?

A. I was work as a chemist and serologist.

Q. And what is a serologist?

A. A serologist is a person who studies blood serums,

basically to determine the quantity and component of blood such as antibodies, proteins, enzymes, and things like that.

Q. Okay. What kind of practical application does a serologist promote outside of the forensic field, outside of police, law enforcement people? Are there any serologists here in town, in our hospitals?

A. Yes, there are.

Q. What do they do there?

A. Probably do things like testing for antibodies for the detection of antigens on red blood cells, to do ABO typing, and other select typings, and also things like mononucleosis, and other tests like that.

Q. A person that's going to get a blood transfusion, does a serologist probably babble in that process?

A. What they actually call them, the method is part of serology, but that's what an immunohymothologist would actually be doing.

Q. Fair enough. In the police-law enforcement or in the forensic field, what is your job as a serologist?

A. Well, basically, my job is for blood typing, which are involved with criminal cases such as sexual assault cases, murder cases, burglaries, things like that.

Q. Okay. Does that mean that working for the DPS out of Lubbock, if there's a murder or a sexual assault you are flown in to El Paso to investigate the scene or anything like

that?

A. No, it's not.

Q. Okay, what do you do?

A. Basically, what the Department of Public Safety consists of is law enforcement officials who have been trained to collect evidence, collect all of the evidence, and if it involves blood samples, we usually go to a hospital personnel who collects the samples and then those samples are sent to us at the Department of Public Safety for analysis.

Q. Okay. Would it be fair to say, just as an analogy, that you are sort like the FBI of Texas providing these types of services for law enforcement?

A. Right, correct.

Q. Okay. You did mention about sexual assaults. In a sexual assault case, what would you typically do as a serologist?

A. Well, as a serologist, to prove certain things, we go through all of the evidence that they submit, and usually they submit blood samples, hair samples, saliva samples, the victim's clothing, and things of that nature, and what we go through and we try to do is to find on any of the victim's clothing any semen samples or from her vaginal slides, vaginal swabs, anything like that, evidence of semen being present or blood on some of these items, and then what we try to do is to match those up with either the victim or

the suspect to either eliminate or include the possibility that the suspect could be involved.

Q. And eliminate and include is basically what it's all about, is that right?

A. Right.

Q. And there's a word on here, I think we'll make it just for identification purposes as State's Exhibit No. 21.

THE COURT: No, I think that should be 42.

MR. LIZARRAGA: Right, it should be 42. I'll make it State's Exhibit no. 42.

Q. And it's got a title: "DPS Special Assault Analysis." In all fairness, your job is not to take it in and say, "A particular individual did something," but, rather, like you said, to include or eliminate that person from a group?

A. Right.

Q. Okay. So, with this DPS sexual analysis, can you tell us right now that you won't be testifying as to whom committed what in this case?

A. Correct, I will not.

Q. Did you complete a report on an analysis that you worked on in this particular case, that being Dana Mocherman and Brandon Moon?

A. Actually, the report --

Q. Were you a part to that report?

A. Yes, I was.

Q. And is it dated November 17th, 1987?
A. Yes, it is.
Q. Is it two pages long?
A. Yes, it is.
Q. I hand you what's been marked as State's Exhibit No. 28. Will you please compare the copy that I've just given you with what you have in your file.
A. Yes, they are the same.
Q. Let me have it so that I can ask you some questions. Typically, when you receive -- Do you know what a rape kit is?
A. Yes, I do.
Q. Okay, do you get those in the laboratory?
A. Frequently.
Q. All right. And when you get all these separate components you get blood, you get swabs, you get hair. What is it that you do, for example, with the blood of a victim?
A. Well, on any blood sample, we go ahead and type for ABO and the Lewis, which is a screen status thing, and at that point we wouldn't do any further testing until we have the suspect's samples to compare it to.
Q. Okay. And let's say you get suspect's samples of the same things, the swab, the blood, the hair.
A. We go ahead and type that blood also -- Let me do it this way.
Q. Go ahead.

A. When we usually get the rape kit in we go through the kit and check it for all the items, do the blood sample, type the sample, and do a preliminary check for semen on all the other items, like the vaginal swabs and the vaginal slides. Then when we receive a suspect's sample we go ahead and type the suspect's blood to see if they have the same types, and then do further testing on the suspect's blood and saliva samples, hair samples, and make a comparison.

Q. Okay. And you might compare some of your findings from known group, the blood group or the secretor-nonsecretor status with items that are unknown. You don't know where they originated from.

A. Right.

Q. In this case, looking at State's Exhibit No. 42, you received a sample you would blood-type it?

A. Right.

Q. You said an ABO where you get the blood types?

A. Right. That's the blood group system.

Q. And then you would determine secretor-nonsecretor?

A. Right.

Q. And there are different ways to determine that?

A. That's correct.

Q. Okay. And as to the secretor-nonsecretor, is a fair generally accepted percentage, would that be 85 percent of the population secretor and 15 percent nonsecretor?

A. That's correct.
Q. And then you do certain tests with -- semen tests?
A. Right.
Q. And sperm tests?
A. Right.
Q. Okay. If I group it all into one you can call it semen or sperm?
A. Right.
Q. Let's say that you have an unknown. Let's say you have an item that there may have been some semen detected on it. Can you confirm that there was semen?
A. Yes, sir, we can.
Q. Okay. There was a preliminary detection, say, with one of the lamps. What do you call them? When do they call the lamps?
A. The lamps?
Q. Is there such a test that you put a florescent light and if there is semen it has a certain color?
A. Well, we don't do that testing. What we do, there are ways of detecting the seminal stains without laser lights and things of that nature. What we do is go through and by visual means and by the use of what we call a azophosphate spot test, go through and just go over every inch of the clothing until we find a stain.
Q. Okay. Is this something that would have been done in

a sexual assault case, the azophosphate test?

A. Azophosphate. Yes, it is.

Q. And is that a generally accepted test for determining where there is semen present?

A. Correct.

Q. Let's just say that you got a robe or a comforter with suspected semen.

A. Okay.

Q. What do you do when you get that?

A. Well, okay, if my presumptive test was positive, we go ahead and do other tests, what we call a P30 test, which is a semen specific protein that we look for on the stain, and if that's positive we know that there is semen there.

Q. Okay. Was this done in this particular case?

A. Yes, it was.

Q. What was that test done on it?

A. It was done on -- the P30 test was done on item number 4, the comforter.

Q. Okay. And what else?

A. Okay. On some of the other items a P30 was not done to confirm the presence of semen. What we did on the other items, which are the vaginal swabs, the dark blue bathrobe, and it was also done on the comforter.

Q. Okay.

A. We looked for what we call spermatozoa, which are sperm.

Q. So you look for spermatozoa first and if you find it then there's no need to do a P30, is that right?
A. Right.
Q. And if you don't find it and you do the P30 then you can determine that there was semen?
A. Right.
Q. Okay. Was a test done on the bathrobe for semen?
A. On the bathrobe?
Q. Yes.
A. Yes, it was.
Q. All right. What was the result of that test, did you find any or not?
A. Yes, we did, it was positive.
Q. Okay. So on the bathrobe would it be fair to put on here "Yes"?
A. Yes.
Q. State's Exhibit 42. Okay. On the comforter?
A. On the comforter we found spermatozoa and P30 and it would be positive to say that there was semen.
Q. Okay. So it would be fair to put "Yes" under the sperm-semen on the comforter?
A. Yes.
Q. You said there were two swabs?
A. Right. There were two swabs that were received and both of them had semen on them.

Q. Both of those swabs were received with the rape kit from the items taken from the alleged victim's person.
A. Right.
Q. Okay. One of the swabs was identified as coming from the vaginal?
A. Right.
Q. And the other swab?
A. It was unmarked.
Q. Was there a test for semen on the vaginal swab?
A. Yes.
Q. And what was the result of that?
A. That there was semen there.
Q. And for the unmarked swab, was a test for semen run?
A. Yes.
Q. And what was the result of that?
A. There was semen there.
Q. Okay. So, basically, given that the swabs were taken from a female, if you run these tests on the swabs, you can say that it was male semen on there?
A. Correct.
Q. And if there were any secretions on the comforter that included those of a female, given the result of the semen-sperm test, you would conclude that there was also male substances on there?
A. Correct.

Q. And the same for the bathrobe, there were stains or there was presence of semen or sperm on the bathrobe, you would conclude that even if they were mixed with vaginal secretions there was some male deposits?

A. Right.

Q. Okay. And then you had your known items, those being the blood types of the individuals whose blood was submitted to DPS, is that correct?

A. Correct.

Q. Okay. Now, the complaining witness or the victim in the case, if her name were Dana Mocherman, do you have a listing there for submissions of the victim?

A. Yes, I do.

Q. Okay. Was her blood typed?

A. Yes, it was.

Q. What was her blood type?

A. She is a blood type A.

Q. Okay. And did you have any submissions for her spouse?

A. Yes, I did.

Q. What was his blood type?

A. His blood type was also A.

Q. Okay. And were there any submissions from the victim's son?

A. Yes, there was.

Q. And what was his blood type?

A. His blood type was O.
Q. And you have a child from an O blood type?
A. Yes, you can.
Q. Okay. And was Brandon Moon's blood, the suspect, also typed?
A. Yes, it was.
Q. And was that blood type?
A. His blood type is O.
Q. Okay. Now, blood typing would not apply for the seminals, the secretions on the bathrobe, the comforter or the swabs, is that correct?
A. Correct.
Q. So would it be fair to put -- it's a "No", it doesn't apply, is that correct?
A. Right.
Q. Determination of secretor-nonsecretor status, was that done?
A. Yes, it was.
Q. And were you able to do that from the semen samples that were drawn?
A. Yes, I was.
Q. And was that done with any of the semen that was extracted from the bathrobe?
A. Yes, it was.
Q. All right. And what secretor-nonsecretor status did

that have?

A. We found no blood group substances to make a nonsecretor.

Q. Nonsecretor? Okay. So from the semen on the bathrobe you got a determination of nonsecretor. Would it be fair to label it that way on State's Exhibit 42?

A. Yes, it would.

Q. Okay. And on the comforter, the bedspread, were you able to make a determination of secretor-nonsecretor status based on the sample of sperm and semen that you had?

A. Yes, I was.

Q. And what was the status?

A. Nonsecretor.

Q. All right. And it was on the basis of the sperm-semen on the comforter?

A. Correct.

Q. Would it be fair to label that in the manner that I am labeling it on State's Exhibit 42?

A. Correct.

Q. All right. And from the swab, the vaginal swab that was taken from Dana Mocherman in which sperm received was tested, was there enough of that sperm-semen substance to make a determination of secretor-nonsecretor?

A. Yes, there was.

Q. Okay. And what was that determination?

A. Nonsecretor.

Q. Nonsecretor? Okay. So would it be fair to label it the way I have it on State's Exhibit 42?

A. Yes, it would.

Q. Okay. On the unmarked swab on Dana Mocherman in which sperm or semen substances were found, were they found in enough volume to be able to make a determination of secretor-nonsecretor status?

A. I called that one inconclusive because the amount of semen was too low to determine.

Q. Okay. And going to your known subjects, was a determination of Dana Mocherman's secretor or nonsecretor status made?

A. Yes, it was.

Q. Okay, and was it made on the basis of her -- What fluids from her body?

A. They were made on the basis of both her blood sample and a saliva sample.

Q. Okay. Which would you consider more accurate?

A. The saliva sample.

Q. Saliva? Okay. What was that, were they both the same determination?

A. Yes.

Q. And was she a secretor or nonsecretor?

A. She is a secretor.

Q. And what about her spouse, Reid Mocherman?

A. He is also a secretor.
Q. And what about Chris Mocherman, her son?
A. Again, he is a secretor.
Q. And, finally, was a determination of the secretor-nonsecretor status made of Brandon Moon?
A. Yes, it was.
Q. And what is he?
A. He's a nonsecretor.
Q. Now, on Brandon Moon, was that determination made on the basis of his blood or saliva?
A. It was made on the basis on his blood sample and semen sample that we received from him.
Q. So you also got a semen sample?
A. Yes.
Q. That wasn't detected -- I'll put it in parenthesis -- It wasn't detected in the manner that these other ones were?
A. Correct.
Q. You got a sample?
A. A known sample.
Q. Okay. Were any semen samples taken from Dana Mocherman's spouse or her son?
A. No, there weren't.
Q. And none were taken from her?
A. No.
Q. Mr. Adams, I need to ask you some questions about these

tests and about your results. The kind of tests that you run you said that you made a determination on saliva and blood?

A. That's correct.

Q. And you said that the saliva would be more accurate?

A. Correct.

Q. Why?

A. What we're testing for is the ability to secrete into your body fluids, so, naturally, if you test body fluids themselves other than blood and get positive results for secretor status or nonsecretor status, then obviously that is, you know, where everything lies.

Q. Okay. And you mentioned that there two particular tests that were done to determine the status. You mentioned the Lewis typing?

A. Correct.

Q. And what is the other one?

A. It's called an absorption inhibition.

Q. Are these two tests, they both tell you the same thing?

A. Correct.

Q. They are just different methods?

A. Right.

Q. Or they are different things that you look at?

A. Right.

Q. Why do you run both tests?

A. In the case of the Lewis testing; the Lewis antibodies which are on the surface of the red cells are adsorbed on to the cells after birth. When cells are born, you know, they are not on the cell yet, they come from the blood itself and then they are placed on the surface of the cells. Now, when you take the blood out of the body and put into a tube and let it set for one or two days or a week or so, the antibodies tend to fall off and they may not be detected, and that's why you get your -- there's Lewis A's and Lewis B's and sometimes you will get no results at all from your Lewis. So, in those instances a certain percentage of those people are nonsecretors and a certain percentage of those people are secretors that you can't detect, so you go to the saliva or the semen or urine whatever the body fluid that it is you're looking for or you want to test and do the absorption inhibition test and you will get definite answers from that.

Q. Which of these two tests are more accurate?

A. More accurate?

Q. Or is there such a thing?

A. They are both very accurate tests as long as, like I said, the blood samples are fresh, but a lot of times we receive blood samples that are not fresh, so we always back-up our information with an absorption inhibition test.

Q. What would interfere with that kind of a test?

A. The absorption inhabition test?

Q. Yes.
A. On a saliva test, unknown saliva sample, nothing. I mean, aside from procedural errors on my part which we safeguard against.
Q. Given the secretor-nonsecretor status for the unknown swab, the one that was unmarked, which is the last one on State's Exhibit 42, where it says "Inconclusive"?
A. Yes.
Q. You said there wasn't enough of a sample?
A. Right. You know, unknown samples, samples that may have been so deluded that we were just unable to detect substance in the saliva, or the semen, if it was greatly deluded. They would have to be extremely deluded.
Q. Okay. If you've got a vaginal swab and it appears you don't have enough to make that kind of a determination, would it be consistent if the other swab was, for example, it wasn't swabbed correctly or wasn't swabbed enough, could that problem arise?
A. Certainly.
Q. How do you know if you have enough or don't have enough?
A. We do quantitation tests, either you can quantitate the acid phosphatase, which is a component of semen, or you can quantitate the P30, which is also a component of semen.
Q. Otherwise you don't get a result?

A. Right, right.

Q. Which is what happened on that one that was inconclusive?

A. Right.

Q. If there was a mixture -- well, let's say you have a vaginal fluid where a man had orgasm into it; so there's a mixture of vaginal with sperm.

A. That's right.

Q. And the subject from which the vaginal secretions came from was a secretor.

A. Okay.

Q. If you ran a test on a mixture of those two and you came up with a nonsecretor result, what would you conclude from the sperm or the semen?

A. That the semen was most likely deposited by a non-secretor.

Q. Okay. If they mixed in with each other, is there some sort of a chemical reaction where that would affect the test?

A. No. Blood group substances from one individual to the next are basically the same as far as the structure of the substance, but mixing them together would only make a mixture of the different substances, and they have no affect on each other.

MR. LIZARRAGA: Your Honor, at this time I would like to offer State's Exhibit No. 28.

THE COURT: Counsel?

MR. GARNEY: I have no objections to State's Exhibit 28.

THE COURT: It will be received.

(WHEREUPON, State's Exhibit No. 28, previously marked as SX-28 for identification, was received into evidence.)

MR. LIZARRAGA: Pass the witness.

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Mr. Adams, my name is Norbert Garney; I am representing Mr. Moon in these proceedings. We may have spoken on the phone, have we not?

A. Yes, we have.

Q. I knew I had spoken to either you or Mr. Mayham and perhaps both.

A. I believe it was both of us.

Q. And I believe we spoke a couple of days ago, maybe last week sometime?

A. Yes, it was.

Q. At which time we had discussed some of these lab reports of which you are testifying today.

A. Correct.

Q. Now, Mr. Adams, I believe you previously testified that it's not your job to determine who actually sexually assaulted a young lady, is it?

A. Correct.

Q. And, as a matter of fact, as a result of all your conclusions here, in all your testimony and all your charts, you still can't testify to that, can you?

A. No, I cannot.

Q. The reason is because nothing that you come up with so far is conclusive, is it not?

A. Yes; some of the results that I've come up with are conclusive in the fact that my testing results of A, B and O and the secretor status are conclusive.

Q. I understand that. Let me rephrase my question. All the tests that you ran are not conclusive as to the identity of Mr. Moon, are they?

A. Correct.

Q. There's no way that you can testify from all the examinations that you ran and the conclusions that you come to and that were written on that chart, that Mr. Moon sexually assaulted Dana Mocherman?

A. Correct.

Q. In fact, to be fair, the very best you can do is place him in a pool of potential subjects?

A. Correct.

Q. And some pools are larger than others?

A. Correct.

Q. Some are smaller than others?

A. Correct.

Q. But you have certainly not eliminated everyone else in a particular pool?

A. That's absolutely correct.

Q. Through the use of any chemical analysis whatsoever?

A. Correct.

Q. Now, I do have a couple of questions about the Lewis typing test. You said there are type A and type B results.

A. Right.

Q. Will you explain to the jury what that means?

A. What we have are antibodies that have been developed by chemical companies which will attach to the surface of cells, in different combinations, depending on what actually exists on the surface of those cells. If that person is a Lewis A-positive, then we will get a good group with the A, and if that Lewis person is B-positive, we will get a good group with the B-positive cells. The combinations that you get are A-positive, B-negative, A-positive, B-positive, or A-negative, B-negative, things like that.

Q. Let's put that in layman's terms. If I am an A-positive on the Lewis, what does that mean?

A. That's more than likely is going to mean that you're a nonsecretor.

Q. All right. And if I am a type B on the Lewis?

A. Type B. It depends on what your A is. If you're an A-positive, B-negative, you're going to be a nonsecretor.

Q. Now, that is the exam that you ran on -- Was that the blood of Branon Moon?

A. Correct.

Q. In the Lewis examinations, you run on blood alone?

A. On whole blood samples.

Q. You don't run that on semen samples?

A. No, we do not.

Q. Okay. Now, was the Lewis run on the sample of Mr. Moon?

A. Yes, it was.

Q. And what was the result of that?

A. We got an A-positive and B-negative.

Q. And that means that Mr. Moon is a nonsecretor?

A. Correct.

Q. Now, is there an accuracy variability or standard of deviation in those particular exams?

A. In the Lewis typing?

Q. Yes, sir.

A. If there is an error rate it's because of what I did, possibly, but we have safeguards or controls that we run to protect against that sort of thing. So there is more than likely no error. Like I said, the only possible thing that could go wrong with that is the blood sample was too old to detect on the Lewis.

Q. How old or how fresh should a blood sample be for an accurate reading?

A. It should be tested within two weeks, because there are two methods, they are slide methods, which can detect it, but DPS's policy is to not let them go more than a week.

Q. When was Mr. Moon's blood tested for the Lewis exam?

A. That was tested on 5-18-87.

Q. Some four days after submission?

A. Right.

Q. Now, did you perform an examination on the semen of Mr. Moon to determine whether he's a secretor or nonsecretor?

A. Yes, we did.

Q. And what was the result of that particular examination?

A. On his semen we got a test that's called an "inhibition test," and we got no inhibition, so that means he's a non-secretor.

Q. Could you explain that, because it sounds almost reverse? If there's no inhibition, logically you would expect a secretor. Perhaps there's a language problem.

A. Right. If there is inhibition, that means that the test is positive for blood group substances in that fluid, which makes that person a secretor.

Q. Now, I believe you also give the nonsecretor-secretor tests on substances from the persons of Reid Mocherman and Chris Mocherman.

A. Yes, we did.

Q. And that substance was blood for both subjects?

A. It was blood and saliva.
Q. You didn't test the semen of either subject?
A. No, we did not.
Q. All right. And you found both tests with blood and saliva of Reid and Chris Mocherman being secretors?
A. Correct.
Q. Were any other examinations performed besides the typing and the secretor-nonsecretor determinations?
A. Yes; some samples were sent to Midland for enzyme analysis.
Q. Well, I'm talking about what you did personally in your lab.
A. No, there were not.
Q. Okay. No comparisons were done from any other --
A. Well, there were hair comparisons, but they were not done by me.
Q. Okay. Were they done by someone in your lab?
A. Right, they were done by Mr. David Mayham.
Q. And they are included in this report?
A. Correct.
Q. That is State's Exhibit No. 28?
A. Correct.
Q. And what were the results of those hair comparisons?
A. Hairs that were found in this case were not similar to the suspect's hair.

Q. Let's clarify that. They were not similar?
A. They were not similar.
Q. Now, where were hairs found on the particular items that were given to you?
A. Hairs were recovered from a dark blue bathrobe, the peach comforter.
Q. By the way, were you sent the bathrobe to the lab?
A. Yes, all the stuff was brought in. You mean, was it sent by mail or --
Q. That doesn't matter. Did you examine that bathrobe yourself?
A. No, I did not examine the bathrobe myself.
Q. But it was received at your lab?
A. Yes, it was.
Q. Now, there were holes cut out of it. Did you receive it in patches or did you receive the whole thing?
A. The whole thing, the items were cut out.
Q. Do you have the samples of the hair with you?
A. The samples of the hair? I do not have them with me; they were sent back to the submitting official.
Q. Okay, they were sent back to the District Attorney's office in El Paso County?
A. Yes, they should have the samples.
Q. Now, you know, this study doesn't say much. It says, "No hairs found on bathrobe (No. 3) or comforter (No. 4) are

similar to the suspect's known hair." I assume we're talking about Mr. Moon when you're talking about suspect?

A. Correct.

Q. In what way were they dissimilar?

A. Well, what David does is he takes all the hair samples that he's collected from any other items of the victim's clothing and tries to match those up with the known samples of the suspect. And he visually looks at them for color and to see if they are Negroid, Mongoloid, or whatever, and then if it warrants any further testing to look at them under what we call a stereoscope which magnifies about 50 times, and he compares the color and other things like that and scales and things like that on the surface of the hairs.

Q. And assuming that characteristics match, you can narrow down your suspect pool rather impressively, can you not?

A. Well, the only determination you can make in hair analysis is that those hairs could have come from the suspect. There's no percentages as far as what pool of people he could belong to, except for like Negroid or Mongoloid, like that.

Q. To be clear as to the other determination you can make, that they could not have come from the suspect.

A. That's correct.

Q. In fact, that's the determination you make in your report?

A. Correct.

Q. So the hairs you examined on Ms. Mocherman's robe and on the comforter could not have come from that man, Mr. Moon?

A. Correct.

Q. Those hairs were submitted by the El Paso District Attorney's office for you to examine or someone in your particular laboratory?

A. Correct.

Q. And out of your duty to do so that's what you all do?

A. Correct.

Q. Now, you received as part of your samples the known head hairs from Ms. Mocherman, did you not?

A. Yes, we did.

Q. You also received, as part of your samples, the known pubic hairs of Ms. Mocherman, did you not?

A. Yes, we did.

Q. Were the suspect hairs compared to those two samples?

A. No, they were not.

Q. It seems like they should've been to find out if you had the same sample, is that right?

A. No, it's not our policy to pursue that. If the suspect's hair do not match the hairs that we find, the known hairs that we find, then there's no need to go through and determine whether they were similar to the victim, because the work case would be phenomenal to do it that way, and

since there's no need to do that since the suspect had already been eliminated from those hairs.

Q. Now, in order to be fair, let's assume for a moment that the hair samples which you examined do not match Ms. Mocherman, do not match Reid Mocherman, and do not match Chris Mocherman, then they must come from somebody else. Is that a fair statement to make?

A. They must come from somebody else? Correct.

Q. I mean, that's only logical. And since we determined conclusively that they didn't come from Mr. Moon, they must have come from somebody else? Isn't that fair?

A. Correct.

Q. Which means that there could've been a fourth party that we don't even know about?

MR. LIZARRAGA: Objection, calls for speculation.

THE COURT: Overrule the objection.

Q. Just a logical extension of what you testified.

A. Correct.

MR. GARNEY: I pass the witness.

THE COURT: Counsel.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Does the DPS do DNA analysis?

A. No, we do not.

Q. Does the FBI do it?

A. No, they not do it. They are currently working on a procedure to get that organized here in the United States, but mostly that's something that the British, who are leaders in the forensic field, are working on.

Q. It's still in the pioneer stages then?

A. Yes, it is.

Q. Just to clarify some things, Mr. Adams, the secretor-nonsecretor status that you got for Dana Mocherman was from her saliva and her blood?

A. Correct.

Q. Okay. And the secretor-nonsecretor status that you got for her spouse was taken from what?

A. His blood and saliva.

Q. And the secretor-nonsecretor status for her son?

A. It was taken from his blood and saliva.

Q. Okay. And the nonsecretor status determination made for Brandon Moon was taken from his sperm and from where else?

A. His blood sample.

Q. Okay. And then, of course, the bathrobe, comforter and the swabs were, as you already indicated, from sperm-semen samples only?

A. Correct.

Q. There were hairs found on the bathrobe, is that correct?

A. Correct.

Q. All right. And what was done with the hairs from the

bathrobe, what were they compared to?

A. They were compared to the suspect's known hair, head hair, and pubic hair.

Q. To see if they matched?

A. Correct.

Q. Would that be consistent with the suspect never having touched the bathrobe or worn it?

A. No. I mean, just because he touched an item of clothing or other items, doesn't mean they're going to be positive.

Q. Okay. What can you say on the bathrobe -- All you can say is that the hairs didn't match?

A. Correct.

Q. It doesn't mean anything either way as far as -- a person could still wear a bathrobe and there might not be hairs.

A. Correct.

Q. All right. Would there be any hairs if they were wearing a cap?

A. That would greatly reduce the chances of hair being deposited.

Q. Okay. Now on the hairs on the comforter were compared to what? Whose hair?

A. The comforter?

Q. Yeah.

A. It was also compared to the suspect's hair.

Q. So, the only way that you would do any further checking, under the circumstances that you understood this case to have, would be if there was a positive match?

A. Right. If the hair were similar to the suspect's hair, then we go ahead and do a full analysis of those hairs with the victim's hairs and possibly with anyone else who was involved.

Q. Okay. So, if a person was wearing a cap while he was in the comforter, would you necessarily have hairs of that person?

A. Not necessarily.

Q. Would you likely not have hairs?

A. Not head hairs, anyway.

Q. Okay. And were there any other hairs submitted that were compared?

A. There were hairs from the suspect and the victim.

Q. Okay. Were the vaginal hairs compared?

A. The pubic hairs? Yes, they were also compared.

Q. Okay.

A. And they were found to be different.

Q. The only way that they would match up was if the person who -- the only way, for example, that hairs taken from the victim's crotch area would match up was if the person who had contact with her had left the hair, is that correct?

A. Correct.

Q. So, the hairs that were submitted from the victim and the suspect, nothing matched up?

A. Correct.

Q. What does that mean?

A. It just means that the hairs did not match, the hairs did not match the suspect's hairs; the hairs that are collected from an individual are usually done with what we call a comb and just comb through, so combing through the hairs could -- I mean, the comb may just naturally snag a few and pick up a few and that could be what we analyze.

Q. Okay. And whether a person is a secretor or nonsecretor that puts them in a particular gene pool, the fact that there are no comparisons, does that put either the victim or the Defendant in any particular type of pool?

A. With the hairs, you mean?

Q. Yeah.

A. No, it does not.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

RECROSS-EXAMINATION

BY MR. GARNEY:

Q. Mr. Adams, this won't take long. You are referring to a number of papers there before you.

A. Yes, I am.

Q. Are there papers there before you which are not reflected

in State's Exhibit No. 28, this two-page document?

A. No, there is not. All of what should be on the page that I am referring to should be on that.

Q. Are you referring to this same identical paper that I have on my hand?

A. No, I have some other papers which are notes and things like that.

MR. GARNEY: Your Honor, may I have time to examine those notes? May I approach the witness?

THE COURT: Yes.

Q. All right. Mr. Adams, the hairs that we're talking about, did you determine whether they were head hairs or pubic hairs?

A. I'd have to look at my notes.

Q. You know what, Mr. Adams, in order to save time, I've just been informed that Mr. David Mayham is also present to testify, and since he did the comparison, I won't ask you anymore questions at this time.

MR. GARNEY: I pass the witness at this time, your Honor.

THE COURT: Counsel?

MR. LIZARRAGA: I have nothing further, your Honor.

THE COURT: You may step down, sir, thank you. Call your next witness.

MR. LIZARRAGA: David Mayham.

DAVID MAYHAM,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Mr. Mayham, do you have notes of the tests conducted?

A. Yes, I do.

Q. I am going to hand you what has been marked as State's Exhibit No. 28 which is a report dated November 17, 1987. Is that contained in your notes?

A. Yes, it is.

Q. All right. And then I'll put before you various items which you will perhaps readily recognize. I'm going to ask you, from all of these items, specifically, what was done regarding the hair samples that were submitted?

A. Would you like to ask specific questions regarding --

Q. Yes. I guess to get started, as part of your analysis in a sexual assault case, you are also a chemist, is that right?

A. Yes, that's correct.

Q. And you work for DPS along with Mr. Adams?

A. Yes.

Q. In Lubbock?

A. Yes.

Q. And you both work in the laboratory?

A. Yes, that's correct.
Q. And you both sometimes share the same job, you basically do the same type of work in many areas?
A. That no longer occurs.
Q. Okay. That day in April or July when this report was -- when some of these tests were done, was that the case?
A. I think Glen Adams came to our laboratory in August and he continued some of the work that I had done on this.
Q. Okay. Some of the things that have been done on this case were done by Glen Adams because you moved on to another job within the department, is that right?
A. Yes. We reorganized our laboratory. We had two chemists there at the time, we now have five. So our jobs became more specific, and at that time I was doing the serology work, now Glen Adams is doing the serology.
Q. All right. Now, on this particular case, did Glen Adams do any of the hair work?
A. No, he did not.
Q. What is the objective in what you're trying to do whenever you analyze hair?
A. I look at the known hairs to see if any hairs -- excuse me, the unknown hairs -- to see if any of those hairs could be from the suspect in question.
Q. Okay. So you get a known from the suspect?
A. Yes.

Q. And you compared it to the unknown?
A. Yes.
Q. How did the hairs match up? How did you get what you call a postive comparison?
A. We look at hairs under a comparison microscope and at many characteristics that hairs possess, and looking at all those characteristics we determine whether or not those hairs match.
Q. Okay. When you look for hairs -- Let me show you what has already been marked at State's Exhibt No. 3, which is a blue bathrobe. Do you recall working on that?
A. Yes, I recall working on it.
Q. How do you know you worked on it?
A. Our case number is present on this item; it's L5L-30910; my initials are present and the item number is present also.
Q. Okay. Do you normally mark up, try and mark everything that you work on?
A. Yes, I do.
Q. Let's just say from this bathrobe, would you have been the person who put those holes in there?
A. Yes.
Q. Why would you have done that?
A. I cut out the stains present to analyze the stains.
Q. Okay. And when you go over these items, did you get any hairs off of the robe?

A. Yes, I did.
Q. Did you get every possible hair that you could get off of the robe?
A. Yes, I did.
Q. Could you still have hair left over on the robe?
A. Possibly.
Q. Why is it that you don't go over these robes with meticulous microscopic detail over the entire surface?
A. If you use a microscope to analyze that, which you couldn't, there's no way, it would take years to -- You may be talking of a sterile scope, that sort of thing, that is possible but it hasn't been done yet.
Q. Okay. So you visually look for the hairs on the item?
A. Our current practice is to scrape an item of clothing on to a piece of paper and collect that for scrapings and from those scrapings analyze or compare whatever you have.
Q. You do this quite often, or at least back then you were doing it quite often on sexual assault cases, is that correct?
A. Yes, that's correct.
Q. Is that unusual not to have a hair matchup?
A. No, it's not.
Q. In fact, it's usually expected?
A. To not find hairs that match?
Q. Right.
A. I don't look it at that way. I look at cases however

they come in, sometimes we find hairs of the suspect, sometimes we don't.

Q. And, scientifically, if you do not find hairs from a suspect, on a scientific basis, does that mean that the suspect was not ever there or did not commit the crime?

MR. GARNEY: Objection, your Honor.

THE COURT: Sustain the objection.

Q. All right. Once you have found these hairs, in all the cases that you receive, or that you received that day, if the unknown hairs -- the unknown hairs could have been all the hairs that could not be attributed to the victim or the suspect, is that correct?

A. Unknown hairs are just hairs that are present on items of clothing or whatever that are not directly pulled or cut from the head region or the pubic region.

Q. All right. So you have a robe, you look for hairs on there. What did you match the hairs from the robe on to?

A. I did not match those hairs from the robe to anything.

Q. Okay. Why not?

A. As is our policy, we analyze, as I said earlier, hairs, unknown hairs to hairs from the suspect. If those hairs happen to be similar to the suspect's hairs, those hairs will then be compared to the victim's hairs to see if they also are similar to the victim's hairs, otherwise, the time element would be -- it would take months to work one case, and

we receive over a hundred cases a month.

Q. Okay. So you didn't get any hairs from the robe?

A. Yes.

Q. What did you do with them?

A. I mounted them on one slide.

Q. And?

A. I found some animal hairs and one human head hair, a Caucasian hair, a brown hair.

Q. And what did you do with those? Did you compare them to anything?

A. Yes, to the suspect's hair.

Q. And there was no match?

A. No, match.

Q. All right. Were you aware when you did that that there was no indication that the suspect had not been anywhere near the robe?

A. I'm sorry.

Q. Did you get information that the suspect hadn't even been near the robe and had never even touched the robe?

A. No, I was not aware of that.

Q. Does that matter in your analysis?

A. As far as the robe having any contact with the suspect?

Q. Uh-huh.

A. I don't understand what you mean.

Q. That's okay, let me go on. There were hairs taken from

comforter?

A. Yes.

Q. And what did you do with those hairs?

A. I compared those hairs stereoscopically, which is just a magnification of those hairs and compared those with the suspect's hairs.

Q. Did you get a match?

A. No match.

Q. All right. So, in order for there to be a hair that you found on the comforter the suspect would have to drop hair on there, one of his hairs?

A. Yes.

Q. So why stop? What is your objective when you're doing the hair analysis?

A. It's to determine whether any suspect's hairs are present in the unknown hairs.

Q. Okay. And there weren't any? Where else did you get hairs?

A. On the comforter.

Q. I thought we just -- Tell me about the comforter.

A. The comforter is the same situation as the robe we referred to earlier. Hair from the comforter , there were animal hairs present, there were human head hairs and pubic hairs, also body hairs; I stated that no comparison was made between these and the victim other than some hairs appeared

foreign to the victim. Those hairs were mounted on a slide and I observed them to be brown Caucasian hairs.

Q. So, the hairs that appeared to be foreign from the victim, you don't know if they belonged to Reid Mocherman or Chris Mocherman, the spouse and the son?

A. No, I don't know.

Q. But you couldn't tell whether they belonged to a dog or a cat or whatever? They are nonhuman hairs?

A. Yes, I determined that they were animal hairs.

Q. All right. Anywhere else that hair were taken from. What about the hair from the vagina, the pubic hairs from the victim? Was there a scraping or a comb?

A. There were head hairs from the victim and there were no known pubic hairs from the victim; a representative sample was mounted of the head hairs and all of the pubic hairs were mounted.

Q. I'm sorry?

A. All of the pubic hairs of the victim were mounted.

Q. Okay. And what were they compared to?

A. There were not -- I didn't do any extensive comparisons. Those hairs from number 4 I state that no comparison was made between these and the victim other than some hairs appeared foreign to the victim.

Q. Okay. Were those compared to the suspect's?

A. The victim's hairs?

Q. I'm sorry. Is there not a combing that's done of the victim to see if perhaps the suspect left a hair there during the intercourse?

A. We received an item which I have labeled "Loose Pubic Hairs," and in that item there were no hairs found.

Q. So there was a combing and nothing dropped in there?

A. Right.

Q. Okay. And is that consistent with the fact that the combing is just to see if there are any loose hairs?

A. Correct.

Q. So, in the end, basically, the conclusion is that none of the hairs, none of the unknown hairs, matched those of the suspect?

A. That's correct.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Mr. Mayham, my name is Norbert Garney, I represent Mr. Moon in this proceeding. I am here to ask you a few questions. Have we spoken over the phone previously?

A. Yes, we have.

Q. I think I have spoken both to you and Mr. Adams at one time and I believe that was last week?

A. I believe it was.

Q. As as matter of fact, I think I spoke with you specifically about your analysis and conclusions of hair samples?
A. Yes, sir.
Q. Let's talk about those again. I believe you indicated that there were a number of hairs found on the robe, is that correct?
A. And what was the nature of those hairs? Were they pubic hairs or were they head hairs?
A. In my notes I say that there was one human head hair, Caucasian hair, it was brown, and there was animal hairs.
Q. Okay. Obviously the animal hairs we can exclude from consideration?
A. Yes.
Q. And the one human head hair that you found, it is not Mr. Moon's?
A. Yes, that's correct.
Q. Did you conclude whose hair that was?
A. No, I did not.
Q. Now, are you a chemist, sir?
A. Yes, I am.
Q. Are you Master's level, Bachelor's level, Doctor's?
A. I have a Bachelor's degree in chemistry and biology and a Master's degree in chemistry.
Q. As a Master's level as a chemist, does that qualify you as a scientist?

A. I don't know what the qualifications for a scientist are.

Q. Fair enough. You work for the Texas Department of Public Safety?

A. Yes, sir.

Q. And that is a law enforcement organization, is it not?

A. Yes, it is.

Q. Now, I believe you testified that you are looking for one thing when you compare human hairs, that is, you look for a match, is that correct?

A. No, it's not correct. I look at any unknown hairs to see if any of those unknown hairs match any of those hairs from the suspect. If they do, then I compare those hairs that match the suspect's hairs to hairs from the victim or anyone else that may be in the household. Now, no hairs matched the suspect's hairs, so therefore no further analysis was performed on those hairs.

Q. All right. That's the operational procedure that I'm leading up to. If, let's say, for example, a certain situation, you get a positive match, then you do further analysis in order to confirm that match, do you not?

A. To confirm the match, no. Once I make a match, the match has already been confirmed.

Q. Well, it's my understanding that if you make a preliminary match, let's say, one known hair, you have an unknown,

and, let's say, the unknown is from Mr. Moon, the unknown is from the comforter and the robe, and you compare the two and you make a match. What's your next procedure?

A. The next procedure is to look at that hair, compare that with the known -- it has to be a pubic hair, the known pubic hair is from the victim.

Q. And what's the purpose of that, sir?

A. Since hairs do not possess sufficient characteristics to identify them as being from a particular individual -- in other words, it's not just unique to that person, it may be, but it may not be, since hairs do not possess an ID number or social security number, therefore those hairs are compared with the victim's to see if they match the victim's also.

Q. And if they do not match what's your next procedure?

A. That's usually the end, unless there's an investigation, there's more people involved and they request more hair samples.

Q. Otherwise?

A. That's the end.

Q. When you examine these hairs do you look at them under a microscope?

A. These particular hairs here?

Q. Any hairs.

A. It just depends upon the case.

Q. It this particular case, how were these hairs examined?
A. These hairs were examined with a stereomiscroscope, which is magnification from normal vision.
Q. Of how much?
A. I think it's approximately 50 to 60 times.
Q. Are you able to determine details from the hair under a stereomiscroscope which you would not be able to detect with the unaided eye?
A. Yes.
Q. So, in any event, once a preliminary match is made, you move on to eliminating from the victim and wherever else is necessary, is that correct?
A. Yes.
Q. And if a preliminary match is not made, then you just stop your investigation?
A. That's correct.
Q. So, it would be fair to say that when you do make a preliminary match you try and make the case, that is, you investigate somewhat farther?
A. I never try to make a case. My job is to determine whether any of the unknown hairs are from the suspect, and that's what I try to do.
Q. Your job is not to determine where those hairs came from, period?
A. As I said earlier, if we did that on each case, it

would take me several months to work each case. I don't have the time, and, as far as I know, no one out in the field does that.

Q. Time constraints aside, that's not your job, is it?

A. That's correct.

Q. So that, if indeed, the hairs came from a fourth individual, and, let's assume for the moment that individual committed the crime, you wouldn't be looking for anything like that, as far as your routine lab analysis?

A. That's correct.

Q. Because you would have stopped your investigation at the preliminary stages once you found you didn't have a preliminary match?

A. That's correct.

Q. And that's your lab office routine?

A. As far as I know, that's our state-wide system and also the FBI -- I don't believe they do a match on each of the hairs.

Q. All right.

A. Or anyone else that I know of.

Q. Now, the hairs found on the comforter itself, was there a mixture, I believe, you said of human hairs and animal hairs, is that correct?

A. Yes, I believe so.

Q. All right. It is fairly easy to distinguish, let's

say, cat hairs from dog hairs and human hairs?

A. Yes, it is.

Q. And as a trained professional you can pick that up pretty quickly?

A. Yes.

Q. Now, the types of human hairs found were both pubic and head hairs, were they not, from the comforter?

A. Let me refer to my report. Yes, that's correct.

Q. And you compared the human head hairs to the known sample of Mr. Moon and found it to be negative?

A. Yes.

Q. And you compared the human pubic hair to the known sample of Mr. Moon and found it to be negative, did you not?

A. Yes, that's correct.

Q. And you didn't bother to compare the hairs found to the hairs of Dana Mocherman, did you?

A. I stated --

MR. LIZARRAGA: Your Honor, I'm going to object to that characterization. He's already testified that --

THE COURT: I will sustain the objection, counsel. We're getting repetitious now.

MR. GARNEY: Yes, your Honor, I'll move on. I believe that's all I have, I pass the witness.

THE COURT: Anything further, counsel.

MR. LIZARRAGA: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. One last question, Mr. Mayham, the DPS also does an enzyme typing test, is that correct?

A. Yes, that's correct.

Q. All right. Let me hand what has been marked as State's Exhibit No. 43. Can you identify it, please?

MR. GARNEY: Your Honor, may we approach the bench?

THE COURT: Yes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

MR. LIZARRAGA: I have no further questions.

THE COURT: All right. Counsel?

MR. GARNEY: Nothing further, your Honor.

THE COURT: You may step down. May this witness be excused?

MR. LIZARRAGA: Just a moment, your Honor.

THE COURT: All right.

MR. LIZARRAGA: May I have one last question, your Honor.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Mr. Mayham, let me show what has been marked as State's exhibit No. 44. Is this one of these basic kits that you

examined in which the contents of that kit originated from the suspect in this case?

A. Yes, that's correct.

Q. All right. And would that include a semen sample and a blood sample?

A. Yes.

Q. And what else?

A. Head hairs, pubic hairs, chest hairs, and a mouth swabbing.

MR LIZARRAGA: No further questions, your Honor.

THE COURT: Anything further, counsel?

MR. GARNEY: No, your Honor.

THE COURT: May this witness be excused?

MR. GARNEY: No objections.

MR. LIZARRAGA: None from the State.

THE COURT: You may be excused, sir, thank you. What about Mr. Adams?

MR. LIZARRAGA: Yes, Mr. Adams can also be excused.

THE COURT: Mr. Garney?

MR. GARNEY: No objections, your Honor.

THE COURT: All right, Mr. Adams can also be excused. Call your next witness.

MR. LIZARRAGA: The State calls as its next witness, Araceli Ramirez.

THE COURT: Araceli Ramirez.

ARACELI RAMIREZ,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Please state your name for the record.

A. Araceli Ramirez.

Q. Araceli, is it Miss or Mrs.?

A. Miss.

Q. Okay. Miss Ramirez, how old are you?

A. 25.

Q. And in April of 1987, how were you employed?

A. Circle K.

Q. What did you do at Circle K?

A. I was the store manager.

Q. And which Circle K was that?

A. 7300 North Mesa.

Q. Looking at State's Exhibit No. 1, which is a map, would that be consistent with where the Circle K is located?

A. Yes.

Q. What were your duties as a manager of that Circle K?

A. I managed the store and I helped the customers.

Q. And were you on duty on the morning of April 27th, 1987?

A. Right.

Q. Did something unusual happen?

A. Right.
Q. Did you know Dana Mocherman prior to that date?
A. Yes, she was a regular customer.
Q. What did you know her as?
A. "Cool Miles."
Q. Okay. That's the way you --
A. Yes, that's what she buys in movies.
Q. Okay. But did you know her on a first name basis?
A. . Yeah, I knew her, you know, I knew her kids, I knew, you know, I knew her twins, her boy, her husband.
Q. Okay. And when she came to your store on April 27th, do you remember approximately what time she arrived there?
A. It was early in the morning.
Q. You don't know the exact time?
A. No.
Q. And what was so unusual about the way that she arrived?
A. She came in screaming and she wanted me to hide her; she kept screaming that he had a gun.
Q. Okay. How did she arrive at your store?
A. It looked like a terry cloth bathrobe, a blue one.
Q. Do you know how she got to your store?
A. In her truck; she was in a red truck.
Q. You say a truck. What do you mean by that?
A. A Cherokee.
Q. Jeep Cherokee?

A. Yes.
Q. Did it look like a truck or did it have a cover on the back?
A. It looked like a truck to me.
Q. And when she ran into the store and she wanted you to hide her, did you hide her?
A. Yeah, I grabbed hold of her and I took her to the back room.
Q. How did she park in the parking lot?
A. Kind like she just stopped the car, you know, she really didn't park, she just threw the car there.
Q. All right. Did she in fact stop the car?
A. Yes, she did, because she had the keys with her.
Q. Did she hit anything in the parking lot?
A. No, she was long ways from the curb.
Q. And as a result of her going there, did anyone call the police?
A. Yeah, I did.
Q. You called the police?
A. Yes.
Q. Did she ask you to call them?
A. She was screaming that he had a gun and to get the police.
Q. How long was she in the store?
A. Before I called the police or after?

Q. Yes. Well, I'm sorry, how long was she in your store that day or during that episode?

A. Oh, 15-20 minutes, 30, maybe.

Q. Who took her away?

A. The paramedics.

Q. Did the police also arrived?

A. Yeah.

Q. Had you ever seen her that alarmed before?

A. No, never.

Q. Did she give you any indication that something as traumatic as someone having a gun had not happened to her?

MR. GARNEY: Objection, your Honor.

THE COURT: I'm going to sustain the objection.

Q. What happened after she left?

A. She gave me her Cherokee keys and I called Reid, her husband, and that was it.

Q. How did you know where to call him?

A. She told me.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

MR. GARNEY: I have no questions of this witness.

THE COURT: You may step down. May this witness be excused?

MR. LIZARRAGA: Yes, sir.

MR. GARNEY: No objections, your Honor.

THE COURT: You may be excused, Miss Ramirez, thank you. Call your next witness.

MR. LIZARRAGA: Your Honor, may we approach the bench?

THE COURT: Yes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

MR. LIZARRAGA: The State calls Officer Dove.

JEFFERY KEN DOVE,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. State your full name, please.

A. Jeffery Ken Dove.

Q. And how are you employed?

A. I'm a detective for the police department, City of El Paso.

Q. And how long have you been a detective?

A. Three years.

Q. And prior to that how long had you been with the El Paso Police Department?

A. Approximately seven years.

Q. You've been with them a total of ten years?

A. Just about.

Q. Where were your duties before you were a detective?
A. I was a patrol officer.
Q. What are your duties now that you are a detective?
A. I'm a case agent.
Q. What does that mean?
A. It means I do the follow-up initial complaint reports.
Q. Okay. Did you have occasion to work on a case involving Brandon Moon and Dana Mocherman?
A. Yes, I did.
Q. What was your, just basically, your involvement in the case?
A. I was assigned to the case of Dana Mocherman, a sexual assault case, since I work in the sex crimes division, Crimes Against Persons' office.
Q. Did you have an occasion while working on the case to conduct a lineup?
A. Yes, I did.
Q. And what was your involvement with the Defendant?
A. I was the one that went over to the County jail.
Q. And when was that? That was originally when he was arrested?
A. After he had been arrested.
Q. And what did you do then?
A. Took him over to our office to arrange for a physical lineup.

Q. And how many days after he had been arrested did you do this?

A. I believe it was the very next day.

MR. GARNEY: Your Honor, we object to this line of testimony, as I believe counsel is attempting to bolser his ID witness.

THE COURT: Overrule the objection.

Q. In a lineup in which you are going to have live subjects, what is it that you attempt to do?

A. We attempt to have the complainant or victim choose the person whom they believe to be the actor in the crime or whatever they witnessed the individual do.

Q. Okay. And what steps do you take to insure that this identification is not unfair?

A. Well, in these particular cases, as always, we try to get all-White males of the approximate same age with features that are approximate, so as not to try to point to anyone individual, make one person stand out. Try to make it as fair as possible.

Q. All right. And in this particular lineup, you did not have any contact with the witnesses, is that right?

A. With the witnesses?

Q. With the witness who identified him.

A. No, sir, I was inside the room with the lineup participants.

Q. And you're dealing only with the people who participated in the lineup?
A. Right.
Q. Okay. And how many people were there?
A. There was five.
Q. What kind of clothing were they wearing?
A. They were wearing jail blues.
Q. Why jail blues?
A. That was the only common clothing that we could have all participants to wear.
Q. Okay. And the Defendant in this case, Brandon Moon, was he allowed to pick his spot in the lineup?
A. Yes, he was.
Q. Now, when the witness came into the room you didn't know that because you were working in conjunction with another officer, is that right?
A. That's right.
Q. But, basically, what was the procedure inside with the five people that were participating in the lineup?
A. Myself and Detective Villa had arranged that he would bring the respective witnesses in and stand on one side of the two-way glass, the mirror, and he would give me instructions when to start turning the participants in the physical lineup certain directions.
Q. So you don't know what happened outside of the glass?

A. No, I don't.
Q. You were not a participant to that?
A. No.
Q. All right. When the witness was viewing the lineup, were the participants in the lineup told to stand in a certain way?
A. Initially, yes.
Q. Okay. And did you have them turn?
A. Yes, I did.
Q. And did you have each of them wear a cap?
A. Yes, we did.
Q. All right. Detective Dove, I'm handing you what's been marked as State's Exhibit No. 39. Do you know what that is?
A. Yes, I do.
Q. What is it?
A. This is a hospital gown, disposable gown.
Q. Okay. Have you seen that before?
A. Yes, I have.
Q. When?
A. This was part of the evidence that was collected from Sierra Medical.
Q. Okay. Did you have occasion to take the Defendant, Brandon Moon -- Do you see him sitting here today?
A. Yes, I do.
Q. All right. Did you have occasion ever to talk with him?

A. Yes, I did.
Q. Okay. Informally?
A. Yes, sir.
Q. Did you have occasion to take him to the hospital?
A. Yes, I did.
Q. And why did you take him to the hospital?
A. I had a search warrant to collect body fluids from him.
Q. Is that common?
A. No, it's not.
Q. And that is frequently done with rape suspects?
A. Yes, it is.

MR. LIZARRAGA: Your Honor, may I confer with counsel for a second?

THE COURT: Yes.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Detective Dove, we've known each other quite sometime, have we not?
A. Yes, sir.
Q. Going back to my prosecutor days, I believe.
A. I believe so.
Q. Detective, I believe that at one time you had procured a search warrant to seize the fluids, the bodily fluids, and

some hair samples of Mr. Moon, is that correct?

A. Yes, sir.

Q. And did you personally take Mr. Moon to the hospital to have that done?

A. Yes, sir.

Q. And did Mr. Moon in any way fight his going down to the hospital to give you those samples?

A. No, sir, he did not.

Q. As a matter of fact, he was quite cooperative, was he not?

A. Yes, sir, he was.

Q. When the doctor or the nurse tried to take his blood he didn't try to pull away from them and refuse to give them his blood, did he?

A. No, sir.

Q. Okay. He didn't try to get away when they tried to cut his hairs, did he?

A. No, sir.

Q. As a matter of fact, I believe you obtained a semen sample or, at least, the hospital did, from Mr. Moon?

A. I did get a sample which I believed to be that.

Q. I'm sorry, sir.

A. I did get a sample that I believed to be that.

Q. Okay. And quite clearly that would require enormous cooperation, did it not, to obtain a semen sample?

A. Yes, sir.
Q. As a matter of fact, the way the sample is obtained, is that the subject from whom the sample is obtained, has to masturbate into a small sterile cup?
A. I believe so.
Q. All right. And Mr. Moon did do that upon request?
A. Yes, he did.
Q. Now, during the physical lineup that was conducted of Mr. Moon back in May of 1987, was Mr. Moon cooperative at that point?
A. Yes, he was.
Q. And you told him to stand up in the lineup area, and did he do so?
A. Yes, he did.
Q. Did he in any way attempt to hide his face from Ms. Mocherman when she was looking at him?
A. No, sir.
Q. Did he attempt to change his position or posture from the other persons in the lineup?
A. None that I could detect.
Q. As a matter of fact, I believe you had the individuals put the stocking cap on, did you not?
A. Yes.
Q. And did Mr. Moon refuse to do that?
A. No, he didn't.

Q. In fact, all the gentlemen did, they all put the stocking cap on?
A. Yes, sir.
Q. Now, I believe Mr. Moon was arrested in his dormitory on the UTEP campus, is that correct?
A. I did not participate in that arrest.
Q. You did not participate in his apprehension at all?
A. No, sir.
Q. Are you aware that a search warrant was executed for his dormitory room on the UTEP campus?
A. After the fact.
Q. You did not participate in --
A. No, sir.
Q. All right. Detective Dove, I'd like to ask you a few questions regarding D-1, the map.

(At this point the witness left the stand and approached D-1, the map.)

Q. Detective Dove, this has previously been admitted into evidence and identified as a map of the northwest section of El Paso. What we have here is a red dot showing the location of Ms. Mocherman's house. Does that appear to be in approximately the right area?
A. Yes, it does.
Q. And own at the corner here, we have four letters, "UTEP", which, I understand, stand for the University of

Texas at El Paso. Do you see that?

A. Yes, sir.

Q. Again, does UTEP appear to be in the right position in relation to this entire map?

A. Yes, sir.

Q. All right. Do you know how far it is coming up Mesa from UTEP to Ms. Mocherman's house?

A. No, sir.

Q. Have you ever clocked that?

A. No.

Q. Have you ever clocked the distance along the freeway from UTEP to Ms. Mocherman's house?

A. No, sir.

Q. Has any detective in your division or anyone investigating this case done that, to your knowledge?

A. No, sir.

Q. Detective Dove, you may have your seat.

(The witness took the stand.)

Did you give any statements in this case?

A. Yes, sir.

MR. GARNEY: May I see those, please?

THE COURT: Mr. Lizarraga.

Q. While I'm waiting for those, did you investigate to see if Mr. Moon owned an automobile in April of '87?

A. I believe at one time we were trying to establish as

to whether he owned an automobile, however, the results of that were that I could never corroborate it, but that he had been borrowing cars.

Q. My question was, did he own an automobile?

A. Not to my knowledge.

Q. Are you aware of a note that a Dr. Marchino gave to anyone in your department?

A. I'm not aware of a note.

Q. Are you aware of a note given by Dr. Marchino to anyone in the Sheriff's Department?

A. No, sir.

Q. Are you aware of the existence of any kind of note that I'm referring to from Dr. Marchino?

A. No, sir, I'm not.

MR. GARNEY: Pass the witness, your Honor.

THE COURT: Counsel.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Detective Dove, the Defendant was cooperative in giving you, as you told Mr. Garney, the body fluids?

A. Yes, sir.

Q. Now, he didn't call you up and volunteer to do that, did he?

A. No, sir.

Q. In fact, when you first asked him he said he didn't

want to do it until you showed him that you had a warrant, isn't that correct?

A. Correct.

MR. GARNEY: Objection, your Honor, that would be custodial interrogation.

THE COURT: Overrule the objection.

Q. You said that was correct?

A. Yes.

Q. And then once you told him that you had a warrant, his attitude changed?

A. Yes, sir.

Q. Now, you started talking about an investigation as to whether the Defendant owned a car and you said that you determined that he borrowed cars?

A. This was information that was given to me by Detective Villa.

Q. Okay. And as to this note from -- Have you ever heard of Professor Marchino?

A. No, sir.

Q. All right. If any notes were collected on this particular case, would they go to you as a case agent?

A. Yes, they would.

Q. Did you receive any?

A. No, sir.

MR. LIZARRAGA: Pass the witness.

THE COURT: Anything further, counsel?

MR. GARNEY: No, your Honor, except that I would ask that this witness not be excused.

THE COURT: All right. Call your next witness.

MR. LIZARRAGA: The State would call Detective Joe Villa.

JOE VILLA,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Will you please state your name?

A. Joe Villa.

Q. And how are you employed?

A. I am employed as a detective for the El Paso Police Department in the burglary division.

Q. How long have you been with the burglary division.

A. I've been with burglary division approximately four years.

Q. What do you do in the burglary division?

A. My duties are to conduct follow-up investigations on burglary and theft cases that occur in my field, my area of work.

Q. And how long have you been in the police department, Detective Villa?

A. I've been in the police department for 21 years.
Q. And where have you served in the department during those 21 years?
A. I've served in the patrol division, then was assigned to the theft division, narcotics division, and now I'm with the burglary division.
Q. All right. On a sexual assault where an individual would have gone to someone's home, why would you be investigating that?
A. This particular case --
Q. Well, just generally speaking, why would you be investigating a sexual assault where someone goes into a home?
A. This was a burglary of habitation in that someone had broken into a person's home to commit a felony.
Q. Okay. Will you please approach Defense Exhibit 1, which is right behind Mr. Garney, and can you tell us were Dana Mocherman's house would be?
(Witness left stand and approached DX-1.)
A. Okay. (Indicating.)
Q. And the Circle K store in that same area.
A. Yes, sir. (Indicating.)
Q. Have you ever been there?
A. Yes, I have.
Q. All right. And where the University of Texas at El Paso would be.

A. It would be down here. (Indicating.)
Q. All right. Have you had occasion to drive from Mrs. Mocherman's house down to the university?
A. Yes, sir, I have.
Q. How many so-called quick routes would there be?
A. Well, you can go down Mesa street, down from Belvidere, straight down Mesa to Sun Bowl, and then where you can go down Mesa to Sunland Park, and then get on the freeway on Sunland Park where you can go down Belvidere, up Mesa and then catch the freeway. So, basically, those are the three major routes.
Q. Okay. Have you taken any of those routes?
A. Yes, sir, I have.
Q. Which ones?
A. I have taken all three of them.
Q. You have timed yourself?
A. Yes, sir.
Q. On all three of them?
A. Yes, sir.
Q. From Mrs. Mocherman's house?
A. Yes.
Q. Can you tell me what the shortest route was?
A. The shortest? I would have to review my notes.
Q. Go ahead and review them. Have these been typed up on a report form yet?
A. No, sir.

Q. You did this recently, didn't you?
A. Yes, sir.
Q. When?
A. Last Saturday. I don't have those particular notes with me.
Q. You recall the times?
A. Yes, sir, I do.
Q. Okay. Go ahead and give me the times.
A. Going down Mesa street to Sun Bowl, it took me 15 minutes. Taking Mesa street to Sunland Park, I believe it was 11 and a half minutes.
Q. That was the freeway route?
A. Yes, sir. Through Sunland Park.
Q. All right.
A. And going down Mesa street -- the third one I don't recall exactly, but it was close to going down Sunland Park, I don't recall exactly.
Q. The third one was Mesa to where?
A. Catching Mesa, up here at the freeway, around seven thousand block of North Mesa and then taking the freeway.
Q. So, that would mean turning to catch the freeway as if you were going towards Doniphan?
A. Well, from Belvidere, taking a right and going towards Doniphan on Mesa.
Q. And you would be driving away from the university?

A. Yes, sir.
Q. Okay. As opposed to the Sunland Park where you drive to Belvidere and turn toward the university, is that correct?
A. Well, from Sunland Park I drove down North Mesa to Sunland Park and then to the freeway and then from there on to Schuster.
Q. All right. And 11 and a half minutes was the fastest time that you could do it in?
A. Yes, sir.
Q. Now, was that done speeding?
A. No, sir, just normal driving.
Q. Go ahead and have your seat, Detective Villa.

(Witness took the stand.)

Will you please explain what your initial involvement was in this case?
A. My initial involvement was that I received this report that was made by Dana Mocherman. After receiving the report I called her and discussed the case with her.
Q. And you took a report?
A. And she came down to my office, she met with me, she gave me the details of the incident which had happened, and she told me she had gotten a good look at the person who had assaulted her.
Q. Okay. As a result of her coming down, how long after this event occurred did you meet with her?

A. I believe that this incident occurred on April the 27th, and I think it was the 28th, the next day, that I met with her.

Q. And did you have an opportunity to compile a composite based on her information?

A. Yes, sir, I did.

Q. All right. I noticed that you brought a box there?

A. Yes, sir.

Q. Would you open the box and show the jurors what it looks like and just very briefly explain to them the process of putting a composite together?

A. This is an identi-kit, and what it is --

THE COURT: Why don't you go ahead and stand up, Detective Villa.

Q. Yes, go ahead and stand up.

A. This is an identi-kit that we use and it's composed of many foils, foils with physical features of human faces. Okay. We have foils for eyes, for chins, for hairs, and with the use -- we have a book that comes with it, and we construct according to what a witness tells us, and it's prepared taking a lot of physical facial charcteristics of many human beings, just basic facial characteristics. Now, a person will tell us, "The individual was 25 years old, five feet six inches in height, medium built." I look on the chart and this will give me a basic sketch to prepare from the information that the person gives me. I prepare the sketch, putting the foils

on this little tin plate. And then I show it to the witness and the witness looks at it and will start at, let's say, the mouth, "That's not the way the individual's mouth was." Through the use of the book here the witness will start giving me a description of what is wrong with the mouth that I have on the composite. Okay? She says, "Well, the lips were fuller," or something like this, and I will look for fuller lips, using this book here that has different lips on it. From there once she's satisfied with the shape of the lips, we'll go to the nose, the eyes, the hair, and, finally, we arrive at a picture of something that the witness feels might resemble the person or the individual involved.

Q. Okay. Do you happen to know how many possible combinations are in there?

A. No, sir, I sure don't, but there must be thousands in there, I guess.

Q. When somebody draws up a composite -- first of all, what is the purpose of the composite?

A. The composite is an investigative aid that will aid the investigator in helping us to see what we're looking for, what a person might look like. It's not a photograph of an individual. It's just something that will get us on the right track, give us an indication what the person might look like. It's not his photograph.

Q. Okay. Once you get a composite from any complaining

witness, what's the next step?

A. Okay. After you get the composite we go to Identification and Records and we have the composite photographed. After it's photographed we circulate it through various police units or through police bulletins or maybe the newspapers, trying to get information on somebody that might be familiar with an individual that might resemble this person.

Q. Can you tell the jury the procedures -- Well, once you develop a suspect and you're going to put that suspect in a photo lineup, what do you do there? What is the photo lineup?

A. Once we develop a suspect in a case, we'll meet with the victim or the complainant and advise them that we would like for them to view some photographs, and it's standard procedure that they have to know that the person that committed the offense may not necessarily be in the group. Then we'll show it to them.

Q. And, for example, I'm handing you what's been marked as State's Exhibit No. 20, which is a photo lineup that you conducted, is that correct?

A. Yes, sir.

Q. Okay. When you put the photos in there, what is your objective as far as, you know, where you put that person?

A. Well, we just place the photograph of the suspect at any place and with other photographs of other persons -- you try and get them to where they look similar.

Q. And where do you get the photos with other features? How do you find the features?

A. Well, the other photographs you just sort of -- we take our suspect and we just sort of go to our police photo file and take photographs from there that we can use with the photo lineup.

Q. Do you look for people with the same kind of features as closely as possible?

A. Well, yeah, we wouldn't put people that are, you know, totally different from him.

Q. Okay. How did you conduct the photo lineup with Dana Mocherman? Do you recall doing that?

A. Yes, I do.

Q. Okay. Did you arrest Brandon Moon?

A. Yes, sir, I did.

Q. Okay. When did you get an arrest warrant for him?

A. I believe I got the arrest warrant for Brandon Moon on April 30th after I showed Mrs. Mocherman a photo lineup and she pointed out --

MR. GARNEY: Objection, your Honor, bolstering.

THE COURT: Sustain the objection.

MR. GARNEY: I would request, your Honor, that you instruct the jury to disregard that last answer.

THE COURT: Ladies and gentlemen of the jury, disregard that last answer.

MR. GARNEY: Motion for mistrial, your Honor.

THE COURT: It will be denied.

Q. You said you got an arrest warrant on April 30th?

A. I believe it was April 30th.

Q. All right. And then when did you arrest Brandon Moon?

A. I arrested Brandon Moon, I believe, it was May 1st; I remember it was a Friday.

Q. And where did you arrest him?

A. Brandon Moon was arrested at UTEP campus Berry Hall, in the dormitory.

Q. And what time did you arrest him on Friday?

A. I don't recall the exact time, but it was around 3:00 o'clock in the morning.

Q. Okay. So you had that warrant one or two days?

A. No, sir, I believe I had it since the previous afternoon.

Q. And are you generally in the habit of arresting people at 3:00 o'clock in the morning?

A. No, sir.

Q. Why did you arrest Brandon Moon at 3:00 o'clock in the morning?

A. We arrested him at that time because I got the warrant of arrest and we learned that he was suppose to be a student at the university. Detective Dove and I went to the university and met with the campus police, and they checked through their records and verified to us that he was enrolled there.

However, in the discussions that we had with them, they told us --

MR. GARNEY: Objection, your Honor, hearsay.

THE COURT: I'm going to have to sustain the objection. Don't go in into what they told you, please.

Q. Let me ask you this. Who were you with when you arrested him?

A. I was with Sgt. Gutierrez, I believe, and Officer Carol Davis of the UTEP Police Department.

Q. Where did you arrest Mr. Moon?

A. He was arrested at his dormitory room at Berry Hall.

Q. And right before you arrested him where had you been?

A. Right before?

Q. Uh-huh.

A. Well, I had been at home.

Q. Home?

A. Yeah, at home asleep.

Q. And who called you to come to get him?

A. The police dispatcher called me and informed me that Brandon Moon had just arrived, and I got up and went to the university to arrest him.

Q. And was that done through the university police?

A. Yes, sir.

Q. Any evidence that you gather in a case, where is it placed?

A. All evidence is placed in the property office after it is marked as evidence.

Q. What about documentary evidence?

A. Well, all evidence is placed -- it's marked as evidence and placed in the property office. If you're referring to police reports or things like that, they're in ID.

Q. Okay. Did you ever receive any paper from a Mr. or Mrs. Machino?

A. Mr. or Mrs. Machino?

Q. Or a Professor Machino?

A. No, sir.

Q. Did you assist in the lineup conducted with Mrs. Mocherman?

A. Yes, sir, I did.

Q. And in that lineup, you were the officer who was with the witness, is that correct?

A. That's correct.

Q. When Mrs. Mocherman stepped into the room, what were your instructions to her regarding the lineup?

A. Well, before she viewed the lineup I gave her certain instructions. I explained to her that five men were going to be placed in a room, and she was going to be looking at the five men through a window through she would not be able to be seen. I told her that all the persons participating in the lineup were all going to be attired in the same type

clothing. Before she walked into the room all the men who were standing in the lineup were standing with their faces against the wall. I was in the viewing room when Mrs. Mocherman came in; after she came in I was standing at the window, I knocked on the wall and that was the signal for Detective Dove to instruct the lineup participants to make an about-face, and theyall turned to their left and were looking right directly at Mrs. Mocherman.

Q. Okay. And how many different positions did the participants in the lineup assumed behind the window there?

A. How many --

Q. What I'm saying, you had said they were facing the wall, and then did you have them turn sideways?

A. No; they just turned all the way around, just turned all the way around.

Q. All right. And once a person, whatever their identification is in that lineup, makes a decision in lineup, what is the procedure?

A. She was given --

Q. No, no. I'm talking, generally speaking, I'm not talking about this case. When a person make an identification, whether it is right or whether it is wrong, how is that documented?

A. It's documented by their signing of a card that has the positions marked on that card, and the person circles the

number corresponding to the position that the suspect is standing.

Q. And this is done regardless of whether the person is right or wrong, is that correct?

A. Well, if she makes an identification, she points out by marking a number on the card.

Q. I'm handing you what's been marked as State's Exhibit No. 22, can you tell me what that is?

MR. GARNEY: Excuse me. Your Honor, before he shows it to the witness I'd like to see that.

MR. LIZARRAGA: I'm sorry.

Q. Can you tell me what this is?

A. Yes. This paper has an index card --

MR. GARNEY: I have no objection to his describing the photograph to the jury, but I do object to his describing what's written on the index card. It's inadmissible and hearsay.

THE COURT: Overrule the objection.

Q. Well, let me ask this, do you recognize that card and the photograph attached to it?

A. Yes, sir, I do.

Q. Okay. And why do you recognize it?

A. I recognize it because I placed my initials on it.

Q. Okay. And what did Mrs. Mocherman have to do with that particular photograph and card?

A. Mrs. Mocherman signed it.

Q. Okay. In your presence?

A. In my presence, yes.

MR. LIZARRAGA: I would offer into evidence State's Exhibit No. 22.

THE COURT: Counsel?

MR. GARNEY: Objection, your Honor, bolstering his witness.

THE COURT: Overrule the objection, it will be received.

(WHEREUPON, State's Exhibit No. 22, previously marked for identification as SX-22, was received into evidence.)

Q. Detective Villa, the gentlemen pictured on that photograph that's attached there, have got their -- some of them have their hands folded, one has his hands down. Can you tell me what the procedure for photographing this lineup was?

A. The procedure used was that -- well, I was not in the room with the lineup participants. Okay? So the photograph was taken while I was outside in the hall.

Q. All right. Then the other question is, is that the way the participants were standing when Mrs. Mocherman was in the room for the lineup?

A. No, sir, it's not.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

MR. GARNEY: May we approach the bench, your Honor?

THE COURT: Yes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

THE COURT: Let's take a recess, ladies and gentlemen, for about 15 minutes.

(The following proceedings were had after the recess:)

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Detective Villa, my name is Norbert Garney, I am representing Mr. Moon in this matter, and I believe that we know each other from the past.

A. Yes, sir.

Q. Probably as far back when I was a prosecutor, I believe I remember you.

A. Yes, sir.

Q. I have a few questions for you, sir. When you took numerous routes on Defense Exhibit No. 1 between UTEP and Ms. Mocherman's house, I believe you explained you took at least three routes, is that right?

A. Yes, sir.

Q. Isn't it true that going down Mesa street, is approximately 6.7 miles from Ms. Mocherman's house to Berry Hall at UTEP?

A. Yes, I think it is.

Q. And by freeway, assuming that you had gone down Sunland Park from Ms. Mocherman's house, take the freeway there and zip on back to Schuster up to Berry Hall, it would be approximately 7.9 miles?

A. Yes, sir.

Q. And then if you were to leave Ms. Mocherman's house and go turn right and go up Mesa to Crossroads -- well, towards the direction of Crossroads -- catch the freeway at Mesa, turn back around and go to Schuster up to Berry Hall, would be even farther, is that right?

A. Yes, sir.

Q. All right. It's not the kind of distance one would make in 11 minutes or 15 minutes that you testified, on foot, is it?

A. No, sir.

Q. In order to make that distance one would have to be in an automobile?

A. To travel that distance in 10 minutes or 15 minutes, yeah, you would need to be on an automobile.

Q. It would require --

A. Transportation, yes.

Q. Right. Now, I believe you testified that at the time that Mr. Moon was arrested it was 3:00 a.m. in the morning.

A. It was approximately 3:00 a.m. I would have to review

my notes for an exact time, but I think 3:00 a.m. is approximately right.

Q. Did you give a statement or a report?

A. Did I make a statement?

Q. Yes.

A. Yes, I did.

MR. GARNEY: May I see that statement, please?

MR. LIZARRAGA: Yes.

Q. I believe your statement says, Detective, that it was approximately 4:10 in the morning. Would that be fair? Would you like to see the statement?

A. Yes, sir, that's correct.

Q. So, Mr. Moon was arrested at approximately 4:00 o'clock, 4:10 in the morning?

A. Right.

Q. Now, I don't want to leave the jury with the wrong --

MR. LIZARRAGA: Objection, your Honor.

THE COURT: Overrule the objection. Go ahead.

Q. I don't want to leave the jury with the wrong implications, but prior to Mr. Moon's arrest and after you obtained the arrest warrant, and I believe you testified that you obtained an arrest warrant on the 30th of April?

A. Correct.

Q. Mr. Moon was arrested on May 1 in the morning?

A. Yes.

Q. You had no information that Mr. Moon was trying to get out of the country, did you?
A. No, sir, I didn't.
Q. You had no information that Mr. Moon was trying to get out of the state, did you?
A. No, sir, I did not.
Q. You had no information that Mr. Moon was trying to get out of El Paso County, did you?
A. That's correct.
Q. You had no information that Mr. Moon was trying to get out of the city of El Paso, did you?
A. Right.
Q. In other words, you had no information whatsoever that he was trying to run away?
A. That's correct.
Q. The reason you thought it would be hard to find Mr. Moon is because you just simply did not know his schedule?
A. We did not know his schedule? Well, they provided us a schedule, but it --
Q. I'm talking about a personal schedule.
A. Well, okay, I didn't know his schedule. They provided us with his class schedule, but I didn't know his personal schedule.
Q. Right, you knew he was suppose to be in class at a certain time.

A. I knew the classes he was suppose to have and the place where he was suppose to be staying at Berry Hall.
Q. Okay. By the way, do you know his room number at Berry Hall?
A. I believe it was -- no, not right off.
Q. It was up on the 9th floor, is that correct?
A. I don't recall.
Q. It wasn't a bottom floor?
A. No, sir.
Q. Did you have to take the elevator going up?
A. Yes, sir.
Q. It wasn't like somebody just jumping out of the window and run away, because if they did they would probably kill themselves.
A. That's right.
Q. So, Mr. Moon was arrested and you proceeded your investigation?
A. Yes, sir.
Q. I believe that as far as that investigation, you obtained a search warrant of the actual room in which he was living, is that right?
A. That's right.
Q. And what is the purpose of obtaining a search warrant?
A. The purpose of obtaining a search warrant is to look for evidence pertaining to a crime.

Q. Now, why was Mr. Moon's room not searched at the time of the arrest?

A. It was not searched because I did not have a search warrant for his room. I asked Mr. Moon for permission or his consent to allow me to search his room and he did not allow me to search.

Q. Was anybody else present in his room at the time that you apprehended him?

A. I don't think there was anybody else there.

Q. At the time that you arrested Mr. Moon, did he attempt to run past you and run down the hall?

A. No, sir.

Q. Did he pull a nickel-plated revolver and pointed it at you?

A. No, sir.

Q. Now, when did you obtain a search warrant for the room that Mr. Moon had been living in?

A. I believe that I obtained the search warrant later on that morning after we brought Mr. Moon down to the County jail, sometime around 8:00 or 9:00 o'clock in the morning.

Q. And what is the reason for so quickly obtaining a search warrant?

A. Because I was wanting to see if there was any evidence, I wanted to have an opportunity to go into the room and as quickly as possible to look for it.

Q. Obviously, Detective Villa, the reason that's done is to avoid the secreting of evidence or the stashing away of evidence, is that correct?

A. That's correct.

Q. Or the destruction of evidence, or just getting rid of it, isn't that right?

A. Right.

Q. And so you immediately, as quickly as you could, got permission for a search warrant from a judge here?

A. Yes, sir.

Q. And did you execute that search warrant?

A. Yes, sir, I did.

Q. And when did you execute that search warrant?

A. I believe I executed the search warrant at 9:40 in the morning.

Q. Was that the same morning that Mr. Moon was arrested?

A. Yes, sir.

Q. Some five, five and a half hours afterwards?

A. Yes, sir.

Q. Again, to your knowledge, had Mr. Moon been able to return to his room after his arrest and prior to your search?

A. To my knowledge, after his arrest he did not go back.

Q. As a matter of fact, he was in jail at that time, isn't that right?

A. Right.

Q. Did you all seal the room, by the way?
A. No, sir.
Q. Did you post a guard?
A. No, sir.
Q. Why not?
A. Well, I don't really know why not; I was going to try to get a search warrant and get back as quickly as possible, and with the matters at hand I just took Mr. Moon down to the County jail, and as soon as the judge arrived I drew up my affidavit and obtained a search warrant and returned back to the UTEP dormitory.
Q. Okay. Was anybody in the room at the time that you showed up to execute the search warrant?
A. Yes, sir, there was a young man in the room at the time when we returned.
Q. Did you identify the young man?
A. Yes, sir.
Q. Who was that, sir?
A. I believe his name was Calvin U, or something.
Q. As in Yu.
A. Yes, sir.
Q. He's an oriental gentleman?
A. Yes, sir.
Q. Did you have any reason to believe that Mr. Yu had secreted away any belongings of Mr. Moon?

A. No, sir, I had no reason that he had done that.
Q. All right. Now, I believe you testified that at the time you arrested Mr. Moon you were assisted by some UTEP officers?
A. That's correct.
Q. I believe you identified a Mrs. Carol Ann Davis?
A. Yes.
Q. And a Sgt. Gutierrez?
A. Correct.
Q. Would that not have been Sgt. Armendariz?
A. I don't know them personally, I met them just on that occasion. I believed that his name was Gutierrez, but it may be Armendariz.
MR. GARNEY: May I approach the witness, your Honor?
THE COURT: Yes.
Q. Detective Villa, I'm going to show you a sheet just to refresh your memory. I'm not going to mark it. Please read that and tell me if your memory is not refreshed as to the name of the officers who assisted you.
A. All right.
Q. Has it been refreshed?
A. Yes, sir.
Q. And can you tell me the name of the male gentleman who assisted you?
A. Sgt. Armendariz.

Q. Okay. Not a Gutierrez?
A. No.
Q. Now getting back to the search warrant, who personally executed that search warrant?
A. The search warrant was executed by Carol Davis and myself.
Q. And Carol Davis is the same lady that we just been talking about?
A. Yes, sir, she's a UTEP police officer.
Q. Were you very thorough in your search?
A. Yes, sir, we started at one point of the room and conducted a thorough search.
Q. And that is your job as a detective, not to overlook items, when you are investigating a case?
A. Yes, sir.
Q. And did you look in the closet of Mr. Moon?
A. Yes, sir.
Q. And in the drawers?
A. Yes, sir.
Q. Under the bed?
A. Yes, sir.
Q. Did you go through his pockets of clothes that he had there?
A. Yes, sir.
Q. In other words, you went head-to-toe of the entire room

looking for things that you hoped might be evidence?

A. We searched Mr. Moon's portion of the dormitory; there are two people assigned to the dormitory, and we did not search Mr. Yu's section of the room.

Q. And you really had no reason to?

A. No, sir.

Q. As you didn't expect that he might have secreted something away?

A. Well, I don't know, we didn't search his portion of the dormitory room.

Q. Now, did you find a brown wool cap?

A. No, sir.

Q. Did you find nickel-plated short barrel snubnose revolver?

A. No, sir, I did not.

Q. Did you find any weapons whatsoever in Mr. Moon's room?

A. No, sir.

Q. Did you find a brown and beige stripped pullover shirt with horizontal stripes?

A. No, sir.

Q. One with short sleeves, as a matter of fact.

A. No.

Q. Did you find a brown, maybe chocolate colored corduroy shorts?

A. No, sir.

Q. Did you find anything in his room?

A. No, sir.
Q. Did you find any tennis shoes that were maybe two-tone light cream, white shoelaces with a blue marking of some sort?
A. No, sir.
Q. And you were looking specifically for these items, were you not?
A. Yes, sir, I was.
Q. As a matter of fact, you found no physical evidence whatsoever which had been described by the complainant in this case in the possession of Mr. Moon?
A. That's correct.
Q. And you were very thorough in your search?
A. Yes, sir.
MR. GARNEY: May I have a moment to confer with my client, your Honor.
THE COURT: Yes.
Q. Officer, did you search any other area belonging to Mr. Moon after the room search?
A. Yes, sir, I did.
Q. And what was that, sir?
A. I searched a locker that was, I believe in the Cotton Memorial Building.
Q. Is that in a different location than Berry Hall?
A. It's a different location; it's another building there on campus.

Q. And how did you find out about the existence of that locker?
A. I believe that Mr. Moon told me about it.
Q. And he gave you the location and number of his locker, did he not?
A. Yes, sir.
Q. And was it a locked locker?
A. I think it -- I'd have to look at my notes.
Q. Please do.
A. I don't show that information on my report. I really don't recall if it was locked. I presumed it was, but I don't recall.
Q. At any event, you entered that locker and --
A. Yes, I did have occasion to go to that building and search a locker.
Q. And that was upon information given you by Brandon Moon?
A. Correct.
Q. Did you search the locker in the presence of anyone else?
A. Yes, sir; I was accompanied by a young lady who I believe was a friend of Mr. Moon; she went with me and she also helped me find the location of the locker.
Q. Would that be Hapsari Kumaradjaja?
A. Correct.
Q. I believe her nickname is Lika?
A. Correct.

Q. And she assisted you in locating the locker?
A. Correct. We went to the dormitory, and then we went to the parking lot in front of the dormitory, we checked some keys and then we went to this other building, I believe it was Cotton Memorial, where Mr. Moon had pointed out he had a locker.
Q. Sir, I'm not that familiar with the UTEP campus. Approximately how far away is this building from Berry Hall?
A. I would say about a block and a half, two blocks.
Q. Walking distance?
A. Yes, sir.
Q. What kind of locker was it?
A. It's a wall locker made of wood, apparently painted over with metal paint with headlocks on it.
Q. Is it a walk-in locker?
A. No, sir, they are just wall lockers, constructed on the wall, made out of wood.
Q. Are they identified by name or number?
A. I believe they have a number on them.
Q. Is is something like a gym locker?
A. Well, sort of a gym locker, but they are not your metal professional made lockers, they are something like a carpenter would put together.
Q. Approximately how large a locker?
A. I would say about -- maybe 18 square inches.

Q. Will you show me with your hands?
A. About like this. (Indicating.)
Q. How deep, sir?
A. It would go about a foot, foot and a half.
Q. Is that locker big enough to hold a gun?
A. Sure.
Q. Big enough to hold a cap?
A. Yes, sir.
Q. Big enough to hold a pair of shorts?
A. Yes, sir.
Q. A shirt?
A. Yes, sir.
Q. Tennis shoes?
A. Yes, sir.
Q. How about all those items together?
A. Yes, sir.
Q. Why were you searching that locker for?
A. I was searching for evidence, gun, knit cap.
Q. All right. And after you searched that locker, did you find in that locker a nickel-plated snubnose revolver?
A. I did not.
Q. After you searched that locker, did you find in that locker a dark brown ski cap?
A. I did not.
Q. Did you find chocolate brown shorts?

A. No, sir.
Q. Did you find a horizontal stripped beige and brown shirt or tan shirt?
A. No, sir, I didn't.
Q. And did you find any tennis shoes which matched the description of those that were given to you by Dana Mocherman?
A. No, sir.
Q. In other words, you found nothing whatsoever of a physical nature as described by Dana Mocherman?
A. That is correct, sir.
Q. Did you search any other areas belonging to Mr. Moon?
A. No, that's all I searched.
Q. By the way, Detective Villa, is it possible to find out if an individual has bought a weapoon?
A. As far as I know we have no centralized file that we could run a check on by a person's name. If we have information, you know, where we want to check gun suppliers, something like that, they would be able to tell us, but we can't put his name into a computer and obtain that information like that.
Q. One last question, Detective. How soon after the room search did you search the locker, time-wise?
A. The room was searched on Friday and the locker was searched on Sunday.
Q. And from personal knowledge, you knew that Mr. Moon had

not had an opportunity to return to that locker after his arrest?

A. Well, as far as I know he was in jail.

MR. GARNEY: I pass the witness.

THE COURT: Counsel.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Detective Villa, why didn't you arrest Brandon Moon in class?

A. I did not arrest him in class because I learned that he was not attending class. I learned that he normally arrived very late at his room, and I left word, or the UTEP police left word, with the building manager that we were to be notified upon his arrival. I believe he arrived somewhere around 1:40 or 2:00 o'clock in the morning, and that's when I was called, and by the time I went to my station and gathered my material and went to the UTEP police station and finally to Brandon Moon's room, it was 4:10 in the morning.

Q. Okay. And how many days after the occurrence of the sexual assault were you able to get the search warrant?

A. It was four days after the assault that we searched his room.

MR. LIZARRAGA: No further questions.

THE COURT: Counsel, any further questions?

MR. GARNEY: No, sir, but I would object to him

being released.

THE COURT: You're still under subpoena, Officer.

THE WITNESS: Yes, your Honor.

THE COURT: Call your next witness.

MR. LIZARRAGA: Your Honor, if I may, I would like to take care of some preliminary matters.

THE COURT: All right.

MR. LIZARRAGA: Regarding State Exhibit No. 26, which is a medical report on Brandon Moon.

THE COURT: State's Exhibit 26, which is --

MR. LIZARRAGA: I pass on that one, your Honor. State's Exhibits 30 and 31, blood samples taken from Mrs. Mocherman's spouse and her son.

THE COURT: They have never been offered.

MR. LIZARRAGA: No, sir. And State's Exhibit No. 44.

THE COURT: That's the rape kit of the Defendant?

MR. LIZARRAGA: Yes, sir.

THE COURT: Counsel?

MR. GARNEY: No objections.

MR. LIZARRAGA: Your Honor, State's Exhibit No. 30 is the actual blood sample drawn from Reid Mocherman, Mrs. Mocherman's spouse, and we've got the analysis report on that one and it's already in evidence. And State's Exhibit 31 is the blood sample from Chris Mocherman, Mrs. Mocherman's son.

We've got the analysis in evidence.

MR. GARNEY: No objections on 30 and 31.

THE COURT: They will be received.

(WHEREUPON, State's Exhibits Nos. 30, 31, and 44, previously marked SX-30, SX-31, and SX-44 for identification, were received into evidence.

MR. LIZARRAGA: Your Honor, may I check for a moment and see if any of my witnesses are out there?

THE COURT: All right. Check out in the hallway, Mr. Bailiff.

All right. All the exhibits I want them turned over to the court reporter before you leave tonight. All the ones that have been received by the Court.

Ladies and gentlemen, we're going to take our night recess at this time. The other witnesses are not here at this time, so I'm going to recess until 8:00 o'clock tomorrow morning. Now, at this time, ladies and gentlemen, I'm going to instruct you not to view the news on TV or to read anything about this case in the newspapers. Further, you are not to discuss anything about this case with anyone, and that includes your respective spouses. So with that, ladies and gentlemen, goodnight, until tomorrow at 8:00 a.m.

(WHEREUPON, the Court was adjourned until 8:00 a.m., January 13, 1988.)

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IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

327TH JUDICIAL DISTRICT

THE STATE OF TEXAS	)	
	)	No. 50015-327
vs.	)	50032-327
	)	50033-327
BRANDON LEE MOON	)	

VOLUME III OF III

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December 28, 1987
January 11, 1988
January 12, 1988
January 13, 1988
January 14, 1988

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Margarito (Max) Venzor
Court Reporter
214 City County Building
El Paso, TX 79901

WEDNESDAY, JANUARY 13, 1988

MORNING SESSION

(The following proceedings were held before the jury:)

THE COURT: Good morning, ladies and gentlemen. Good morning, counsel. Call your next witness, Mr. Lizarraga.

MR. LIZARRAGA: The State calls Detective Portillo.

VICTOR PORTILLO,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Sir, will you state your full name, please, for the record?

A. Victor Portillo.

Q. And how are you employed?

A. I'm a police officer for the City of El Paso.

Q. And within the El Paso Police Department what are your duties?

A. I work in the Crimes Scene Unit, the ID&R Section.

Q. Okay. Is there any particular reason why you are not in uniform at this time?

A. Yes, we don't wear uniforms.

Q. Where is your office?

A. On the 4th floor of the City building.

Q. And what are your duties -- what department are you in?
A. It's the ID&R.
Q. Will you please tell the jurors what the ID&R Section is?
A. It's a unit, we call it Criminalistics Unit, we lift prints, take photographs, we do several other tests, blood tests, semen tests.
Q. And, generally speaking, if there is an incident, say, a burglary or sexual assault or something like that, and you have your patrol officers, uniformed officers that go out to the scene, are they the ones who go and normally check the prints and go take the photographs or how does the police department operate here in El Paso?
A. The uniformed officers go to scene, primarily, and then they give us a call, so we photograph the scene and then we take the fingerprints.
Q. Okay, and that's the way you try and work things out?
A. Yes, sir.
Q. Patrol officers, however, do look for prints and do take photographs as well?
A. Not photographs, usually they end up taking prints whenever they feel they can lift.
Q. Did you have any involvement in the case involving Brandon Moon for an alleged incident on April 27th, 1987?
A. Yes, sir, I was dispatched to that scene and I lifted prints.

Q. That would've been the home of Dana Mocherman?
A. Yes, sir.
Q. On Belvidere?
A. 337, I believe.
Q. All right. And when you went out there, who was at the house?
A. Officer Rodriguez form the westside patrol station.
Q. What time of day was this?
A. It was in the morning about 9:00, 9:45, something like that.
Q. And was that on the date of the incident?
A. Yes, sir.
Q. Okay. Was Officer Rodriguez the only police officer there at the house?
A. I'm not sure, sir, I believe so.
Q. Who else was there?
A. Well, myself and Officer Rodriguez, there was no complainant at that time, I believe she was at the hospital when I went to the scene.
Q. Okay. Do you know how you all got into the house?
A. It was opened.
Q. All right. When you got to the house what did you do?
A. After he explained more or less what had happened I started taking photographs of the scene of various things that I needed to take, and then I started lifting for

fingerprints.

Q. Will you tell the jurors, please, when a detective arrives at the scene to do investigative work, and the complainant is not there, how is it that you know what to do?

A. Well, depending on the explanation of what the officer gives us, where it took place, and usually the officer already knows what took place, so they relate it to us, even if an officer is standing by for another unit, which I think this was the case, where he stood by for a unit to transport the complainant to the hospital. He told me what had happened and where the incident took place.

Q. Okay. And when you arrived at the house, do you recall there being signs consistent with the story within the house?

A. Yes, sir; I believe the clothes were laying on the floor and the bedspread was messed up.

Q. Okay. And are you the individual who took photographs of those different areas of the scene?

A. Yes, sir.

MR. LIZARRAGA: May I approach the witness, your Honor?

THE COURT: Yes.

Q. I'm handing you what has already been admitted into evidence as State's Exhibits 6, 7, 8, 9, 10, and 11. I'm sorry, 10 and 12. Do you know who took those photographs?

A. Yes, sir, I did.

Q. And let me hand you what has been admitted into evidence as State's Exhibit No. 11 for identification purposes. Now, looking at State's Exhibit 12, what is that a photograph of?

A. It's a photograph of a bar of soap on the bedspread.

Q. Was the bar of soap on the bedspread when you arrived there?

A. Yes, sir.

Q. Okay. And looking at State's Exhibit No. 11, what is that?

A. Okay. I pointed it out, it's a stain of some sort on the bedspread, which I believe might have been semen.

Q. Okay. Now, the stain there and the pen pointing at the stain, was that pen there at the scene when you arrived, Officer?

A. No, sir, I placed it to show the exact location of the stain.

Q. And you placed it on the bedspread for photographic purposes?

A. Yes, sir.

Q. What happened after you took the pictures?

A. I then processed various areas which the officer indicated to me that the subject might have handled for latent fingerprints.

Q. And at that time before the complainant was there at

the house what areas were those that it was your impression he might handled?

A. There was something in the hallway which they told me the subject apparently stood there.

Q. Well, would there be prints?

A. I checked for and apparently did find a couple.

Q. Did?

A. Yes.

Q. Where was it that you found those prints?

A. I believe it was some sort of entrance way -- I'd have to look at my print card. We have small print cards where we mark exactly where we found the prints.

Q. Fair enough. Did you complete a report in this case?

A. Yes, sir.

Q. I am handing you a sheet of paper, can you tell me if that is a copy of your report?

A. Yes, sir, it is.

Q. All right. Will you please read it to refresh your memory?

A. All right. "The undersigned officer was dispatched to...." --

THE COURT: Don't read it to the jurors.

Q. Just read it to yourself to refresh your memory because I'm going to ask you some questions.

A. Okay.

Q. Do you recall now what you did?
A. Yes, sir.
Q. When did you complete that report?
A. On April 27th.
Q. On the day you did it?
A. Yes.
Q. Where did you check for prints?
A. There's a main entry where the subject supposedly handled the door leading into the house.
Q. Okay. And, incidentally, how many times a month do you go out to scenes like these?
A. This type of case? It's hard to tell. A lot.
Q. A lot? Okay. It's a good thing you write reports. Where did you check for prints?
A. On the main entry. I also checked a window in the master bedroom where the incident occurred, but I found nothing.
Q. Okay. Now, when somebody goes out to check prints what is the procedure, for example, on a door? What procedure would you use to find prints on a door?
A. Like I said, you get an idea where the subject might've handled, and then you see if there could've been anywhere else where he would've handled that wasn't described to you by the patrolman.
Q. Okay. Let's just say you figured there might be prints

on a door. What do you do next?

A. Okay. You spread powder, and depending on what kind of surface it is, you spread some powder which is made up of volcanic ash, and we have another type of powder which is made up of metal filings.

Q. What does the powder do?

A. It brings out the latent fingerprints left there by the subject.

Q. Okay. And you said you checked two surfaces, the window and the door?

A. Yes, sir.

Q. Okay. How many windows did you check? Was it one or was it two?

A. Just one on the master bedroom, because the officer had stated, apparently, that the subject might have handled it there --

MR. GARNEY: Hearsay, your Honor.

THE COURT: I'm going to sustain the objection.

MR. GARNEY: I would ask that you instructed the jury to disregard that last remark.

THE COURT: Disregard that last answer, ladies and gentlemen.

Q. You checked the two surfaces, and did you get any prints?

A. I lifted two prints from the main entry.

Q. All right. You checked a door that conceivably could be used a lot. Would it be unusual to try to get two prints?

A. No, not really, because these prints -- I only turn in prints that I figure would be of evidentiary value. A lot of times you grab some surface and they just leave smudges which are of no value to us.

Q. So you got how many prints of evidentiary value?

A. Two.

MR. LIZARRAGA: Your Honor, at this time I offer State's Exhibit No. 11 into evidence, which is a photograph identified by this witness.

THE COURT: Counsel, any objections?

MR. GARNEY: No objections, your Honor.

THE COURT: It will be received.

(WHEREUPON, State's Exhibit No. 11, previously marked as SX-11 for identification was received into evidence.)

Q. What did you do with the prints after you lifted them?

A. All the prints that we bring in we turn them in to our latent fingerprint examiner's office, and they are experts in comparing prints of, say, people that live in the house and subjects that are involved.

Q. What else did you do there at the scene?

A. Nothing else. I took the bedspread with me.

Q. And did you also take -- Did you also get a hold of the robe at one time?

A. No, sir; another officer that was working on the same day went to the hospital while I was at the scene.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel, any questions?

MR. GARNEY: No questions, your Honor.

THE COURT: You may step down. May this witness be excused?

MR. LIZARRAGA: Yes, he may, your Honor.

MR. GARNEY: No objections, your Honor.

THE COURT: You may be excused, Officer, thank you. Call your next witness.

MR. LIZARRAGA: The State calls Officer Russell.

JAMES WESLEY RUSSELL, JR.,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Will you state your full name for the record?

A. James Wesley Russell, Jr.

Q. How are you employed?

A. Police officer, City of El Paso.

Q. What are your duties as a police officer?

A. Patrol duties, take burglary reports, backup the detectives.

Q. Okay. I notice you've got two stripes on your sleeve.

What do those mean?

A. Longevity stripes.

Q. How long have you been with the Department?

A. Twelve years.

Q. Do you work a particular area of town?

A. Yes, sir.

Q. Where?

A. I work the west side.

Q. And on April 27th, 1987, what area of town were you working?

A. Working the west side.

Q. Did you have occasion to go to an address at 337 Belvidere?

A. Yes, I did.

Q. On what day?

A. On April 29th I was dispatched there.

Q. On the 29th? Okay. And for what purpose?

A. To check the house for latent prints.

Q. And what happened?

A. I was sent there to check a couple of windows and the front door area. I got a print kit, checked the two windows; I was advised that the person may have touched that area, I couldn't find anything. I checked the front door, particulary the storm door, and located some prints on the door.

Q. Okay. If someone had been there before you to lift

prints, would you have picked anything up?

A. Quite possibly.

Q. Would you have been unable to pick some up?

A. Yes.

Q. The two windows that you checked, was one of them located in the bedroom?

A. Yes, sir.

Q. The other one was located in the bathroom that adjoins the bedroom?

A. Yes, sir.

Q. Did you find anything on there?

A. No.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel?

MR. GARNEY: No questions.

THE COURT: You may step down.

MR. LIZARRAGA: May this witness be excused?

THE COURT: Counsel, any objections?

MR. GARNEY: No objections, your Honor.

THE COURT: You may be excused. Call your next witness.

MR. LIZARRAGA: Call Detective Orozco.

THE COURT: Counsel, this is not Detective Orozco. I believe this is Detective Orndorff, isn't it?

DETECTIVE ORNDORFF: Yes, sir. I am testifying

for Detective Orozco, your Honor, he's at school.

THE COURT: Was he subpoenaed?

MR. LIZARRAGA: Yes, sir.

THE COURT: He's under subpoena.

MR. LIZARRAGA: I told him yesterday to be here.

THE COURT: When did you tell him?

MR. LIZARRAGA: I called him at his house around 7:00.

THE COURT: Approach the bench, counsel.

(At this time a discussion was had at the bench off the record and out of hearing of jury.)

BRUCE ORNDORFF,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Will you please state your name for the record?

A. Bruce Orndorff.

Q. And how are you employed?

A. City of El Paso, Police Department.

Q. For how long?

A. For the last 17 years.

Q. And what do you do there?

A. I'm presently assigned to the Identification & Records Section as a latent fingerprint examiner.

Q. What does a latent fingerprint examiner do?
A. Well, we receive latent fingerprints lifted at crimes scenes by the officers in the field, and it's our duty to go ahead at the detectives' request to compare these latent fingerprints against the known fingerprint of either the victim or suspected perpetrator for the purpose of making positive identification as to who left that particular fingerprint.
Q. Okay. What is a latent fingerprint?
A. Well, a latent fingerprint is on the palm surfaces of the hand. You have raised portions of skin or what we refer to as ridges. Now, these ridges do not just form a line from one side of the hand to the other, but they tend to form different types of patterns on the tips of the fingers, and also they do not stop -- I mean, they will not run a continuous line across, they'll stop, they're biforcated on the two ridges and then they have a short ridge. Now, located on the summit are the peaks of these ridges as tiny minute sweat pours. There are just thousands of them running along the summit of these ridges, and you're constantly secreting body fluids or sweat, and what happens is this sweat will lay on these pours of these raised ridges, and when you touch something,that moisture or body fluid is transferred on to the surface. That is what we refer to as a latent fingerprint which normally means invisible.

Q. Okay. Is the leaving of fingerprints like the leaving of tracks in the mud? Are you going to get a fingerprint everytime that you touch a surface?

A. No, sir.

Q. Why not?

A. Well, it's got a lot to do with the weather condition, how much you're prespiring; a lot of people sweat quite a bit, when they touch something, instead of touching it real nice and leaving a perfect print, what will happen is that they are sweating profusely and they'll rub it or something, and what you have then is just a smudge. We don't have the ridges or the characteristics to make any type of identification.

Q. What difference does it make if somebody's hands have just been washed or dirty or whatever, is that a factor?

A. By all means. Dirt is -- you transfer the dirt and it messes up the body fluids. In other words, if you had a glass of water and put a bunch of towels in there, sooner or later it's going to suck up all the water, and then there's no way that you have anymore moisture left. It's the same way here. If somebody washes their hands right away, he goes to touch somthing, you're probably not going to get a fingerprint because there is no moisture on the hands.

Q. Do some surfaces preserve prints, fingerprints, better than others?

A. Yes, sir; a great surface would be a plain piece of

flat glass or piece of aluminum or something like that, whereas wood is very hard to leave a print because it's porous and as you touch it the wood, like paper, absorbs the moisture, therefore it's very hard to get a print off of wood.

Q. Okay. When you get prints of evidentiary value, is that what you mean by latent fingerprint, or can you distinguish those two terms?

A. Yes, the latent fingerprint of evidentiary value is rated one of two ways, either they are of evidentiary value or they're not. In other words, we have to have sufficient characteristics in the fingerprint itself between a latent and a known print to make a positive ID. In other words, to say that that person and nobody else made that particular fingerprint. If those characteristics are not there, then it's not of evidentiary value, and myself or anybody else would never make any type of ID on it. There's just not sufficient characteristics to make a positive ID.

Q. Is it unusual to get many less and have only few of evidentiary value?

A. Oh, we receive cases where they lift 200 latents and we may have 20 of them that are of evidentiary value. The officers are trained to lift anything and everything, and we determine what is of value and what is not.

Q. And is it unusual to get only two or three prints out of a particular door that may be readily used?

A. That's about normal on a door, especially, you know, sliding glass doors, the family uses it a lot, the kids, and it's just smudge over smudge, and it's very hard to -- there's a lot of stuff on there but there's no fingerprints.

Q. How many unknown lifts did you get from 337 Belvidere?

A. Well, we received, I think, it was 14 lifts.

Q. How many of them were of evidentiary value?

A. Three.

Q. Three of them?

A. Yeah.

Q. Okay. Did you compare those three prints with the prints, the known prints, of Brandon Moon?

A. Yes, sir.

Q. And what were the results of your comparisons?

A. The prints of evidentiary value were not his.

Q. And, incidentially, when I asked, "Did you compare them?" will you explain to the jury what the process is when you do that?

A. I might have mentioned before about the characteristics. What we do when we compare a print, when we have a known print, this is a print where we apply a thin layer of printer's ink to your hands and put that on towards a susceptible surface such as a white card or a piece of paper, and then we transfer it on to the paper and what we have now is a known print. In other words, we know that that is your fingerprint. Now,

what we do is we compare the characteristics which there is anywhere between 90 and 180 characteristics just in one joint of anyone's finger. When we compare the characteristics from the known print to the latent print back and forth to make sure that they occupy the same position and they are the same particular characteristic, and then we go by the amount and the count along with the pattern itself to determine, you know, that it is positively his fingerprint.

Q. Okay. So these prints that you had could not be compared to Brandon Moon. What would be the conclusion if you couldn't account for them?

A. I don't understand what you're saying.

Q. Well, what does that mean, they're not Brandon Moon's prints?

A. They're not Brandon Moon's. Brandon Moon didn't make them.

Q. All right. Did you have the known prints of all the other inhabitants of that residence?

A. Yes, sir, they submitted to us during the next 30 or 60 days; we received the known prints of all the family members.

Q. Okay. And you said 30 to 60 days later. Can you tell the jurors how it is possible to preserve this type of evidence for such a period of time?

A. Well, latent fingerprints -- when it's lifted it's

lifted by -- well, we use fingerprint tape, but you can use Scotch tape, if you want to -- once you lift it you put it in a white card or something, and unless somebody burns the card up or throws it away, it's an everlasting piece of evidence, it't never going to go away. It's there. You know, the powder is underneath the tape and there's no way that it's going to dissolve or go away or by age.

Q. Are those comparisons that you could've made today or yesterday?

A. Yes.

Q. When did you make these comparisons?

A. I made these yesterday.

Q. Okay. And are they the same card that Detective Orozco compared?

A. Yes, sir.

Q. And he was on the case originally?

A. Yes, sir.

Q. All right. You had how many known prints?

A. I think we had 14.

Q. I mean, how many of evidentiary value?

A. It was three.

Q. Have you been able to account for those prints? Do you know who they belong to?

A. Yes, sir.

Q. Will you please tell the jurors?

A. One latent print, which was lifted by Officer Russell from the inside glass of the storm door, was made by the left palm area of Amanda Mocherman.

Q. Okay.

A. Another one that was lifted from the same door, the same glass inside, was made by the left palm of Sandy Mocherman. The other latent of value, which was lifted by Officer Portillo from the door latch, was made by the left palm of Sandy Mocherman.

Q. Did you have any other prints to work with?

A. As far as latents?

Q. Yes.

A. No.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

MR. GARNEY: No questions of this witness, your Honor.

THE COURT: You may step down. May this witness be excused?

MR. LIZARRAGA: Yes, sir.

MR. GARNEY: No objections.

THE COURT: Call your next witness.

MR. LIZARRAGA: Your Honor, at this time the State rests.

THE COURT: Ladies and gentlemen of the jury, the

State has rested its case in chief and it's necessary that I take up some legal questions. We will take about a ten-minute recess at this time.

(Jury left courtroom and the following proceedings were had out of the presence of the jury:)

THE COURT: Counsel for the Defense, do you have any motions you want to make at this time?

MR. GARNEY: Yes, your Honor, I do. Comes now Brandon Lee Moon, through his attorney, myself, and make the following motion for an instructed verdict of not guilty to the jury based upon indictment numbers 50015, 50032 and 50033, based upon the State's failure to prove to each and every material element those three indictments beyond a reasonable doubt.

THE COURT: Motion will be denied.

MR. GARNEY: Thank you, your Honor.

THE COURT: Anything further?

MR. GARNEY: I believe everything is in order at this point. I do have witnesses outside and I will ask them to remain outside until they are called.

THE COURT: Yes, we are going to get started.

(Jury was brought into courtroom and the following proceedings were had in the presence of the jury:

THE COURT: You may proceed, Mr. Garney.

MR. GARNEY: May it please the Court, ladies and

gentlemen of the jury. The State has concluded its case, and now at this time the Defense has an opportunity to put on their case. We have decided to elect that option and you are going to hear testimony from a number of witnesses.

Ladies and gentlemen, from a number of witnesses you're going to hear the following story: That not only did Dana Mocherman suffer a terrible personal tragedy on April 27th, 1987, but you're going to hear evidence that Brandon Moon suffered a terrible personal tragedy on May 1, 1987. He was arrested in his dormitory room, Room 905B, Berry Hall, at 4:10 in the morning and accused of a horrible crime. That crime being aggravated sexual assault. A crime he did not commit You're going to hear evidence that the night prior to April 27th, 1987, late in the evening, that is, April 26th, a Sunday night, Brandon Moon was developing some photographs, that he was working for the year book at the Prospector office at Union Hall. Now I believe the evidence will show that the year book office and the Prospector office share the same laboratory equipment. Brandon Moon is a photographer. He had previously taken some photographs of some cheer leader trials and was working late at night, trying to get the photographs ready for publication. I believe the evidence will show that after he had worked at the Prospector office laboratory, he went home to 905B, Berry Hall. He was awaken the next morning, that is, the morning of April 27th, 1987,

at approximately 8:07 a.m. He was awaken by a phone call from his girlfriend, and that lady's name, you will find out, is Hapsari Kumaradjaja. She is an oriental lady, I believe born outside the United States. Hapsari will testify that she indeed did call her boyfriend, Brandon, at 8:07 in the morning. She called him from her phone, and she will tell you where that phone is. She will testify that she then went to her class as was her habit and custom. She went to class, and then she will testify that she's not sure, but, that the class let out early or it was on time. At either event, she will testify that if the class let out early, she was probably let out at approximately 8:40; if the class went to its normal routine, she was probably let out at about 9:30. Somewhere in there. At any event, sometime close to the times she will testify of 8:40 to 9:30, she was personally with Brandon Moon in his dormitory room; she will testify that she spent the morning with him, after which they went to a Dr. Marchino's office. Dr. Marchino will testify that she is the English professor, or was at the time of April 27th. She will testify that sometime that morning, according to her recollection, she received a note, the note was from Brandon Moon. She will testify that the purpose of the note was to drop the English class which Mr. Moon had been taking that semester. I believe the testimony will corroborate the reason he was dropping the class was because he was behind in his studies

and had not attended some of the classes and did not want to get a failing grade.

I believe the testimony will then focus on the further activities of Brandon Moon during that morning. After they left Dr. Marchino's office, Brandon and Hapsari went to the Union Hall, and I believe at that time we must be at approximately 11:00-11:30, somewhere around there. They split up. I believe that Brandon went to do some work at the lab; I believe that Hapsari went to take care of some personal or educational affair.

I would like to call my first witness, your Honor.

THE COURT: Go ahead.

MR. GARNEY: The Defense will call as its first witness, Dr. Marchino.

LOUISE ANNETTE MARCHINO,

called as a witness for the Defendant, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GARNEY:

Q. Ma'am, will you please state your full name for the record?

A. Louise Annette Marchino.

Q. Marchino would be correct.

A. Marchino.

Q. And what is your title, your academic title?

A. Assistant Professor of English, University of Texas at El Paso.

Q. And do you have certain academic qualifications?

A. I have a Ph.D in literature.

Q. And that entitles you to be called Doctor?

A. Yes.

Q. Dr. Marchino, what classes back in April of 1987 were you teaching?

A. I had two Sophomore Literature classes, English 3212, and a Junior level, 3360, and a senior level, British Literature class.

Q. Now, Doctor, do you know Brandon Lee Moon?

A. Yes, I do.

Q. Will you point to him and identify him in the courtroom?

A. Yes.

THE COURT: Point out Brandon Moon.

Q. You don't remember what he looks like?

A. I guess not.

MR. GARNEY: Let the record reflect that I'll point him out, your Honor.

Q. Now, ma'am, does that refresh your memory? Doctor, that's Mr. Moon sitting over there.

A. Oh, yes.

Q. Is your memory refreshed?

A. Yes, it is.

Q. Okay. And do you indeed remember if that's Mr. Moon or not?

Q. I remember him coming to class in a uniform, maybe that is the difference.

Q. Okay. Do you remember what type of uniform it was?

A. Army uniform.

Q. Okay. What class was Mr. Moon in?

A. 3112 British Literature.

Q. And that was in the spring semester of 1987?

A. Yes.

Q. Doctor, do you remember the week of April 27th, 1987?

A. Yes, I do.

Q. And did you receive any communication from Mr. Moon during that week?

A. I received a note signed "Brandon Moon," on my office floor that had been shoved under the door early that week, I think probably on Monday. I'm not absolutely sure of that, but I think it was Monday.

Q. What was the purpose of that note?

A. He asked me to drop him from the class.

Q. Do you know why?

A. His attendance had been quite poor.

Q. And why would that particular day or week would that note have been given to you?

A. I remember it was that week, and probably Monday because

I remember thinking that it was already too late for me to be able to drop him. The University has a rule, and that semester it was April 24th the last day professors are able to drop a student from the class roll.

Q. And April 24th was the --

A. Friday before.

Q. All right. Were you able to drop Mr. Moon from your class?

A. No.

Q. And as a result of your inability to drop Mr. Moon from that class, did Mr. Moon receive a particular grade in that class?

A. He received a failing grade.

Q. Is that like a W-F or something?

A. No, it's just an F.

Q. Now, Doctor, did you personally take that note?

A. No, I found it on my office door underneath the door on the floor.

Q. After you found the note, did you personally take it and give it to someone?

A. I just shoved it inside of my desk because there was nothing I could do about it at that point, and a couple of weeks later a police officer from the UTEP campus police came asking if I had Brandon Moon's class, and I said he had been enrolled in the class, but hadn't been attending and, in fact,

I had recently received a note from him asking to be dropped.

Q. And did you give that note to the police officer?

A. Yes, he asked if he could have it and I gave it to him.

Q. And you have not seen the note since?

A. No.

Q. Do you remember approximately when you gave that note to the police?

A. At least a week and probably two weeks after I received it.

Q. Now, Doctor, you testified that Mr. Moon generally wore a military uniform to class?

A. Yes.

Q. What time was the class in the morning?

A. It was 9:30 to 10:20 on Mondays, Wednesdays and Fridays.

Q. And for the record, Doctor, what is your particular relationship to Mr. Moon?

A. Nothing other than the times he was in class.

Q. Had he ever taken other classes previously from you?

A. No.

Q. You don't have a social relationship with him?

A. No.

MR. GARNEY: I pass the witness at this time, your Honor.

THE COURT: Counsel.

MR. LIZARRAGA: Yes, sir.

CROSS-EXAMINATION

BY MR. LIZARRAGA:

Q. Dr. Marchino, my name is Marcos Lizarraga; I'm from the District Attorney's office. I believe we spoke on the phone last week?

A. Yes.

Q. We have never met before this?

A. No.

Q. Not even out in the hallway?

A. No.

Q. Doctor, do you remember the exact number of times you saw Mr. Moon.

A. No, but he did not attend class very regularly.

Q. Okay. Do you have an approximation of how many times you saw him?

A. No.

Q. How many people were in the class?

A. 30.

Q. Do you remember where he sat?

A. No.

Q. How many students were you teaching that semester?

A. I had four classes, the regular load for this department, and they averaged about 30 per class, so that would be 120.

Q. Do you remember ever talking with him?

A. No.
Q. You had a class Monday, Wednesday and Friday at 9:30 to 10:20; that was the class that Brandon Moon was in?
A. Yes.
Q. Did you have any other classes on Monday, Wednesday and Friday?
A. Yes; I had one immediately following that from 10:30 to 11:20.
Q. So, would it be unusual for you on class day, on a Monday, Wednesday or Friday, to go into your office in between the 10:20 and the 10:30 class?
A. No, sir.
Q. You would not?
A. I would not.
Q. So it would be unusual?
A. Oh, I'm sorry, it would be unusual.
Q. Okay. And would it be unusual for you not to go to your office before class? That's pretty bad English, isn't it?
A. Yes, I would go to class to my office before the 9:30 class.
Q. Okay. What time did you normally leave your office?
A. 20 after 9:00.
Q. And after you would leave your office, how far was your office from your class?
A. Two buildings away, usually took five minutes.

Q. Five minutes? Okay. And was your second class that day the one between 10:30 and 11:20 also in the same building that your first class was in?

A. Yes, it was.

Q. Tell me about your classes on Tuesdays and Thursdays, please? What times are those?

A. Those are also in the morning; I think one from 9:00 to 10:20, another one after a break in the middle.

Q. What time would that be?

A. 12:00 to 1:30.

Q. At the time we had our telephone conversation, you mentioned that you do distinctly recall that you found the note after it was too late to drop him?

A. Yes, sir.

Q. The week after?

A. Yes.

Q. Is that correct? That's your testimony?

A. Yes.

Q. You also told me that you really didn't know whether it was a Monday, a Tuesday, a Wednesday, a Thursday, or a Friday?

A. No, it was sometime during that week. The only reason I remember that is that I was thinking, well, too bad, the drop deadline was last week on Friday.

Q. And I know that, for example, you have talked to Mr.

Garney about this case, haven't you?

A. Yes, sir, on the phone.

Q. Okay. And, normally, when lawyers talk to witnesses, did he tell you something like, you know, I anticipate, or your testimony is that it was on a Monday, and you probably told him, well, it could've been a Monday, but it also could've been a Tuesday, Wednesday, Thursday, or Friday?

A. No, he didn't say that.

Q. All right. You sounded very certain, you know, when he was asking you a question that it was on Monday. I guess what I'm trying to get at, it could've been another day?

A. It could've been another day.

Q. Okay. Does that mean that you are more certain that it was on a Monday or is your testimony that it just could've been any other day?

A. My testimony is that it could've been another day; I suspect that it was on Monday because I particularly remember thinking that it was just after the deadline. So I'm sure it was early in that week.

Q. Okay. Fair enough. In our conversation on the phone, you remember thinking that the week before had been the week to drop?

A. Right.

Q. Do you remember the officer that you gave the note to?

A. No, I don't.

Q. Okay. Do you remember him identifying himself to you?
A. No, I don't believe he did.
Q. And, in fact, that note that you told me had been on your desk and you had just discarded that very day and put it in the trash can, and the officer came by and fished it out.
A. No, I fished it out.
Q. Is there any particular reason why you were saving the note?
A. No.
Q. Were you aware of the charges that were pending against Brandon Moon?
A. No.
Q. Up to that time that the officer talked to you?
A. The officer did not tell me.
Q. Did he say anything about it?
A. No.
Q. So you don't know what he was investigating when he went talk to you?
A. No.
Q. And you don't know who he was?
A. No.
Q. When was the last week to drop at the University?
A. For spring semester it was Friday, April 24th.
Q. Is that common knowledge at the University what the date is?

A. Yes, it is; it's listed in the schedule of classes for the semester.

Q. You said that -- What are the rules?

A. For the first few weeks in the semester the student may drop on his or her own initiative for the next several weeks; if it's up to the professor, the professor at his own discretion may drop the student either withdrawing passing or withdrawing failing. After a certain deadline, that would be April 24th, the professor can no longer drop a student.

Q. Did you ever see Mr. Moon in the company of any female student?

A. No.

Q. And on April 27th do you recall seeing him at all?

A. No.

Q. Do you recall seeing him all that week?

A. No.

Q. When is your last recollection of seeing Mr. Moon?

A. I checked in my grade book, and although I don't keep exact absences, it would've been probably three or four weeks prior to that week that I last saw him.

Q. Did you see him often at the beginning of the semester?

A. His attendance was better at the beginning of the semester, yes.

MR. LIZARRAGA: Thank you very much. Pass the witness.

THE COURT: Counsel, any further questions?

MR. GARNEY: No, your Honor.

THE COURT: You may step down, ma'am. May this witness be excused?

MR. LIZARRAGA: Yes, your Honor.

MR. GARNEY: No objections, your Honor.

THE COURT: You may be excused, ma'am, thank you. Call your next witness.

MR. GARNEY: The Defense calls Brandon Moon.

BRANDON LEE MOON,

the Defendant, called as a witness, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GARNEY:

Q. Will you state your name for the record, please?

A. Brandon Lee Moon.

Q. How old are you?

A. I'm 26.

Q. What is your date of birth?

A. 28 August 61.

Q. Back in April of 1987, what were you doing?

A. I was a student at the University of Texas at El Paso.

Q. And where do your parents live?

A. They live at 4620 Cupid in El Paso.

Q. Now, did you live on campus?

Q. And where do you live, sir?
A. I live at 905B, Berry Hall.
Q. Would I be correct in assuming that the 9th floor of Berry Hall is where you were living?
A. Yes, sir.
Q. Is that a dormitory?
A. Yes, sir.
Q. Is that coed?
A. Yes, sir.
Q. Do you have a roommate, sir?
A. Yes, I do.
Q. And who is that, please?
A. I call him Yu; I believe his full name is Seklan Yu, and he goes by Calvin.
Q. Is he an oriental?
A. Yes.
Q. Now, Brandon, at the time of April 27th, 1987, were you involved in any particular student activities?
A. Yes, sir.
Q. What was that?
A. I was the photo editor for the yearbook and I was in ROTC.
Q. Is that why you would wear a uniform to class at times?
A. On Mondays and Wednesdays.
Q. Why is that?

A. Basically, it's required for all POC's, but the other reason for it was advertising, more or less, to get people to join the corps.

Q. Now, Brandon, please tell these ladies and gentlemen what POC is?

A. POC is the Professional Officer Course. That's the last two years of Air Force ROTC.

Q. How long had you been in the ROTC?

A. I think that is my fourth semester.

Q. Now, what was your particular classification at UTEP University back in April of 1987?

A. I believe I was still a Sophomore.

Q. Brandon, let's talk about the night of April 26th of 1987. Did you have dinner that evening?

A. Yes, I did.

Q. And where did you eat?

A. I ate at Commons.

Q. Please tell the ladies and gentlemen what the Commons is?

A. The Commons is the dining facilities of the dorms.

Q. Is that part of Berry Hall?

A. It's a separate building.

Q. How far way is it from Berry Hall?

A. Within a hundred yards.

Q. It's walking distance?

A. Yes.
Q. After having dinner at the Commons, where did you go?
A. I went back to my room and picked up my photo equipment and went over to the Union Building.
Q. How long had you been a photographer at that time?
A. Four or five years.
Q. And what was your purpose of going to the Union Building?
A. I had film to process and prints to print.
Q. Can you just very briefly tell the jury what that entails?
A. With the film on processing, you first load it into your processing drums, then you wait until the proper time, dump the developer and the fixure in, wait a certain length of time, dump that out, and then wash the film with running water, then you hang up the film to dry, and once it's dried you cut it into strips. Then for printing you put the negative into the enlarger, you focus it on your plane, you enlarge it to the size that you want it, you expose a piece of paper and you process it. Pretty much the same as you do film.
Q. And why were you developing film that particular evening?
A. Sundays was the evening that I usually worked for processing film.
Q. Why is that?
A. During the week, especially Mondays and Wednesdays, the

Prospector office is -- well, I should say, the Prospector -- is using the photo lab, so it's pretty crowded as they had a deadline to make and I didn't have a deadline. So I couldn't use the lab on those two days. Sundays was the least crowded, I could be in there by myself, not have to bother with, you know, working around other people. That was pretty much the reason I worked that evening.

Q. Were you alone that evening?

A. There was other people from the Prospector office, but I was the only one in the lab, in the darkroom.

Q. And I assume when you are working in the lab, the darkroom, the door is closed?

A. Yes, it is.

Q. Why is that?

A. If the door is not closed light will leak in and expose the paper or film.

Q. And would that ruin the film?

A. Yes, sir.

Q. Now, were you working on any particular photographs on the evening of April 26th, 1987?

A. Yes, I was.

Q. What photographs were those?

A. Cheerleader trials that had taken place on Saturday.

Q. Was this Saturday the 25th?

A. Yes.

Q. Where had these cheerleader trials taken place?
A. They were at Memorial Gym at UTEP.
Q. These were college trials?
A. Yes, sir.
Q. And did you finish developing your film that evening?
A. Yes, sir.
Q. Approximately what time?
A. I remember I got done right around 11:00 to 11:30.
Q. That would be at night?
A. Yes, sir.
Q. Was it dark?
A. Yes, sir.
Q. Where did you go from the lab?
A. From there I went over to my girlfriend's house for about an hour.
Q. Did you walk?
A. Yes, sir.
Q. By the way, do you own an automobile?
A. No, sir.
Q. When is the last time you owned an automobile?
A. That I actually owned one would be in '82.
Q. What type of automobile was that?
A. I had a Fiat Spider.
Q. What color?
A. Orange.

Q. You have not owned an automobile since then?
A. That's correct.
Q. Did you own an automobile in April of '87?
A. No, sir.
Q. You presently own an automobile?
A. No, sir.
Q. Now, you just testified you went to your girlfriend's house. What's your girlfriend's name?
A. Lika Hapsari Kumaradjaja.
Q. Is Lika a nickname?
A. Yes, sir.
Q. Where does Lika live?
A. At that time she lived at 1617 Randolph, Apt. 25.
Q. Does she still live there?
A. No, sir.
Q. Where does she live now?
A. 1503 Randolph.
Q. Is that just a short distance from where she used to live?
A. Yes, sir.
Q. Does she live with anybody there?
A. There's a family that lives there.
Q. Is that the Curran family?
A. Yes, sir.
Q. Approximately what time did you arrive at Lika's house

on the evening of April 26th of 1987?

A. It was a little before 11:30.

Q. And what did you do after you got there?

A. We sat around and talked, watched a little TV; I showed her some of the photographs that I had processed and printed.

MR. GARNEY: May I have a moment, your Honor.

THE COURT: Yes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

Q. I'm going to show you what I have marked at D-2 and I would ask you to identify the upper right-hand portion to the jury, please.

A. That's one of the photographs that I took, the cheerleader trials.

Q. That was on Saturday, April 25th?

A. Yes, sir.

Q. How many photographs did you take that day, do you recall?

A. As I recall, two rolls of film, possibly three, so that that be -- there's 36 frames in each -- a little bit over a hundred pictures.

Q. Now, the photograph that is shown on D-2, that's a Xerox, is it not?

A. Yes, it is.

Q. Is that a true and accurate portrayal of the original

photograph?

A. Yes, sir.

Q. Do you know what happened to the original photograph?

A. The original photograph should be on file at the Prospector office.

Q. You no longer have it in your possession?

A. No, sir.

MR. GARNEY: Your Honor, at this time I would offer D-2 into evidence.

THE COURT: Counsel?

MR. LIZARRAGA: No objection.

THE COURT: It will be received.

(WHEREUPON, Defendant's Exhibit No. 2, previously marked as DX-2 for identification was received into evidence.)

Q. Now, there are -- Why is that photograph appearing on D-2? I mean, is that a full sheet, is it not?

A. Yes, sir.

Q. Okay. What kind of sheet is that?

A. This is a Xerox copy of the sports page of the Prospector for April 28th, 1987.

Q. And that would've been Wednesday?

A. Tuesday.

Q. Tuesday? Okay. Now, were you working for the Prospector at that time?

A. No, I was not.

Q. Why would your photographs be published in the Prospector?
A. I was the only person who was taking pictures of the cheerleader trials. The staff photographers for the Prospector didn't go.
Q. Was that an assignment that you did?
A. No, sir.
Q. It was kind of --
A. Well, as the editor for the yearbook I basically decide what, you know, is worthy of going into the yearbook and what isn't, and I thought that the cheerleader trials were relatively important as an event for the campus. So I took it upon myself to go to the trials and photograph them.
Q. Brandon, what time did you leave Hapsari's home on Monday night of April 26th, 1987?
A. Right around 12:15 or so.
Q. Where did you go from there?
A. I went to my room at the dorms.
Q. Do you recall what you were wearing?
A. If I remember right, I was wearing a brown desert camouflage pants; I don't recall what shirt I was wearing, but it probably would have been a T-shirt.
Q. The brown pants, were they short or long?
A. They were long.
Q. Military issue-type pants?
A. Yes.

A. Yes, sir.
Q. The T-shirt that you were wearing. Do you recall what color it was?
A. It would've been white with some, I believe, red and blue short sleeves.
Q. What kind of shoes were you wearing?
A. I would've been wearing tennis shoes.
Q. What color, sir?
A. Silver and blue.
Q. What kind of tennis shoes were they?
A. I think they're Pluma. I don't recall whether they are Pluma or another brand, but I believe they are Pluma.
Q. Brandon, what time did you arrive at your dorm the night of April 26th of 1987?
A. Within five minutes, from the time I left -- approximately 12:15.
Q. And is the bottom door locked when one goes into a dormitory at that time of the evening?
A. There's four doors; one of the doors is opened at the main entrance, the other three doors are locked at, I think, 5:00 or 6:00 o'clock p.m.
Q. You must go into the main entrance?
A. Yes, sir.
Q. Do you have to sign in or out when you --
A. No, sir.

Q. You don't check with anybody?
A. No, sir.
Q. When you entered the lobby, what did you do?
A. I went over, pressed a button for the elevator and waited for it.
Q. You didn't take the stairs?
A. No.
Q. You got the elevator, and then where did you go?
A. I went to the 9th floor and went to my room.
Q. When you arrived at your room, what did you do?
A. I went to bed.
Q. How soon after arriving at your room?
A. Maybe 15 minutes or so; I called my girlfriend before I went to bed.
Q. That would be Hapsari?
A. Yes, sir.
Q. What time did you call Hapsari?
A. Right around 12:20.
Q. Why did you call her?
A. We do that all the time; anytime after I leave her house I call her, basically, to wish her goodnight.
Q. And did you speak to Hapsari on the morning of the 27th?
A. Yes, I did.
Q. How long did you speak to her?
A. Probably not more than five minutes.

Q. You told her goodnight?
A. Yes, sir.
Q. And then you went to sleep?
A. Yes, sir.
Q. When did you wake up next on the morning of April 27th of 1987?
A. As I recall it was between 8:00 and 8:15.
Q. Why do you have that recollection?
A. My girlfriend calls me every Monday, Wednesday and Friday between that hour. I mean, between that time.
Q. For what purpose?
A. To wake me up.
Q. You can't wake up by yourself?
A. I tend to sleep through my alarm clock.
Q. How long did you speak on the phone with Hapsari when she called you on the morning of April 27th, 1987?
A. Just a few minutes.
Q. What did you do after you hung up?
A. I'm not absolutely positive; I either went back to sleep or got up and started working on a model that I was working on. I believe that's what I did, was started working on a model.
Q. Did you leave your room at any time that morning?
A. Not until close to 10:30.
Q. You remained inside your room?

A. Yes, sir.
Q. What kind of model were you working on?
A. I was working on a plastic model that's a replica of the C-130 transport, that's a cargo aircraft.
Q. Do you have a particular interest in aircraft?
A. Yes, I desire to be a pilot.
Q. You still have that model?
A. I don't know where it's at, but I do believe it would be at my parents' house.
Q. Did you ever have occasion to finish working on that model?
A. No, sir.
Q. How long did you work on your model?
A. I think I had been working on it, on that particular model, close to three weeks.
Q. And how long did you work on it on the morning of April 27th, 1987?
A. A couple of hours. About an hour, I would say.
Q. That's just a plastic model that you glue together?
A. Yes, sir.
Q. When you finished working on your model, what happened next?
A. Me and my girlfriend went over to the English Department to find out where my professor's office was, as I had never gone to her office, so I had to find out where it was at.

Q. Now, let's back up a little, Brandon. Prior to you leaving with your girlfriend, did she arrive at your room?

A. Yes.

Q. Now, was she a visitor at that time?

A. Pardon?

Q. She was a visitor at that time there at Berry Hall?

A. Yes, she was.

Q. She didn't live at Berry Hall, did she?

A. Oh, no, sir.

Q. What time did she arrive at your room?

A. I'm really not certain; I know that one day during the week she came a little bit before 9:00, right around 8:50, and the other day during the week, she came right at -- well, to be exact, it was 9:27.

Q. Why do you know the exact time was 9:27?

A. I looked at my clock. When my girlfriend came in the room she said, "So you missed breakfast again." And I looked at the clock and I said, "No, we still have a few minutes left, we can go eat if you want." And she said, "No, that's okay."

Q. So, Lika arrived at your dorm room?

A. Yes, sir.

Q. Do you remember what you were wearing that morning?

A. I would've been wearing the same pants as the night before, the desert camouflage.

Q. Long brown pants?
A. Yes.
Q. Now, where did you and Lika go after you left your room?
A. We went over to the English Department.
Q. And where is that located?
A. I don't know the name of the building; it's approximately 150 yards away from the dorm.
Q. Is that on campus?
A. Yes, it is.
Q. Why did you go to the English Department?
A. Pardon?
Q. Why did you go to the English Department?
A. I wanted to drop a class, my English class.
Q. And who is the professor of that English class?
A. Dr. Marchino.
Q. Is that the lady that just testified?
A. Yes, sir.
Q. And what was the name of that class?
A. English literature from a certain period to present.
Q. Why did you want to drop that class?
A. I was doing very poorly in it and I hadn't been going to the class.
Q. Why was that?
A. Basically, I'd been suffering from depression and I couldn't get out of bed.

Q. Now, Brandon, do you know what time you arrived at Dr. Marchino's office?
A. It was after 10:30, but, the exact time I can't -- I'm sorry, after -- yes, it was after 10:30.
Q. Did you see Dr. Marchino that morning?
A. No.
Q. Do you know why?
A. She had another class.
Q. What did you do then?
A. Well, since she wasn't there I decided to leave a note, so I borrowed a sheet of paper from my girlfriend, borrowed a pen, wrote a note and put it under the door.
Q. And what was the purpose of that note?
A. I asked her to drop me from the course; I wanted to get a W in the course instead of an F.
Q. And why is that?
A. To salvage my GPA.
Q. Were you aware of the official drop date at that time?
A. No, I knew it was coming, but I didn't know exactly when it was.
Q. Have you subsequently learned you missed the date?
A. Yes.
Q. How did you find that out?
A. I got an F on my report card.
Q. Did you complain to Dr. Marchino about it at any time?

A. No, sir.
Q. When you wrote the note what kind of a paper did you write it on?
A. Note book filler paper, three-hole white-lined paper.
Q. You just wrote her a short note?
A. Yes.
Q. Now, how did you get the note to Dr. Marchino?
A. I put it under her door.
Q. There was enough space to slip it through?
A. Yes, sir.
Q. Have you ever seen that note again?
A. No, sir.
Q. After you left the note with Dr. Marchino, where did you go?
A. I went to the Prospector office and the Union Building.
Q. By the way, is Dr. Marchino's office located on the UTEP campus?
A. Yes, sir.
Q. At the Prospector office, what did you do there?
A. First, I went into the yearbook office; it's all in the same area of the Union Building; I have to go through the Prospector office to get to my office. I picked up some of the negatives that I had printed the night before, and then went into the darkroom to print.
Q. The same kind of prints as in D-2?

A. Yes, sir; the ones from the night before I wasn't satisfied with them, so I went in and reprinted the photograph for publication.

Q. By reprinting photographs, can you attain better or lesser quality prints?

A. Well, yes, you can improve the quality. If you don't have a good print the first time, you set it up again and reprint it.

Q. Approximately what time is this now that you're in the lab?

A. A quarter till 11:00.

Q. Now, was Hapsari with you?

A. She came into the office, first.

Q. Which office is that?

A. My office, the yearbook office within the Prospector office; she came in there, first, and we talked for a little bit, and then she went over to -- well, she said that she was going to go to the book store.

Q. When is the next time that you met up with Hapsari?

A. I believe it was about 1:00 o'clock

Q. Is this in the afternoon?

A. Yes, sir.

Q. And where did you meet Hapsari?

A. I went to her apartment.

Q. Now, sometimes I used the name Lika and sometimes I

use Hapsari. They're all and the same person, right?

A. Yes, sir.

Q. How did you get to Hapsari's apartment?

A. I walked.

Q. And do you know what time you arrived there?

A. It was approximately 1:00, 1:30. I really wasn't paying attention to what time it was.

Q. How much time did you spend with Hapsari in her apartment?

A. We spent the rest of the day together; I don't know how much time we spent in her apartment, probably the whole afternoon, that was my normal schedule.

Q. Did you go to dinner together?

A. Yes, we did.

Q. Do you remember where you ate?

A. We ate at the Commons.

Q. Is that the normal place students eat, the UTEP campus?

A. For the students who are living in the dorms, yes.

Q. Are there other eating areas around?

A. There is a cafeteria in the Union Building.

Q. Brandon, how did your day begin on April 27th, 1987?

A. I would've spent the evening at Lika's house and gone home sometime soon after 12:00 probably, and when I got to my room I would've called her, talked to her for a while, and then gone to bed.

Q. At anytime on April 27th, 1987, did you borrow anyone's car?
A. No.
Q. Did you steal anyone's car?
A. No, sir.
Q. Did you ask anyone to drive you anywhere?
A. No, sir.
Q. Anybody offer you their car?
A. No, sir.
Q. How did you get around all day that day on April 27th, 1987?
A. I walked.
Q. Did you ever leave the confines of the campus on April 27th, 1987?
A. Not that I recall.
Q. Now, let's move on to April 28th, the very next day. What time did you wake up in the morning?
A. On Tuesdays my girlfriend usually calls me just before 9:00 o'clock, I believe, if her class is at 9:00.
Q. And why is that?
A. To wake me up.
Q. And did you have a normal day Tuesday?
A. Yes, sir.
Q. What kind of things did you do?
A. I probably slept most of the day, until noon, and then

my girlfriend would call me or come to my room and then we would've gone to the Commons to eat.

Q. All right. You didn't try to leave the country Monday or Tuesday, did you?

A. No, sir.

Q. Did you try to fly out of the county or go anywhere?

A. No, sir.

Q. Or out of state?

A. No, sir.

Q. Did you feel you had any reason to?

A. No.

Q. Now, Brandon, let me ask you a series of questions here that may be somewhat painful. On the morning of April 27th, 1987 at approximately 9:00 a.m. in the morning, did you go to the address of 337 Belvidere?

A. No.

Q. Do you know a lady by the name of Dana Mocherman?

A. No.

Q. Have you ever met that lady previous to yesterday in your entire life?

A. No.

Q. Brandon, did you go in the home of Dana Mocherman?

A. No.

Q. On April 27th of 1987?

A. No, sir.

Q. You know anything about that house?
A. No, sir.
Q. Do you know where it's located?
A. Vaguely.
Q. How is that, sir?
A. My girlfriend works out on Mesa street just past the K Mart, so I've been out in that area, I know where Resler is at, and I have a vague idea of where Belvidere is at.
Q. Brandon, do you own a gun?
A. No, sir.
Q. Specifically, on April 27th, 1987, did you have in your possession a nickel-plated snubnose revolver?
A. No, sir.
Q. Have you ever had in your possession a nickle-plated snubnose revolver?
A. No, sir.
Q. Have you ever fired a gun?
A. Yes, sir.
Q. In what capacity?
A. Combination of, you know, just for fun, and with the military as well.
Q. Have you received training in weaponry?
A. In marksmanship, yes.
Q. That's different from weaponry?
A. For the military, technically, yes, it would be.

Q. Brandon, on the morning of April 27th of 1987, did you point a gun at Dana Mocherman?

A. No, sir.

Q. On the morning of April 27th of 1987, did you sexually assault Dana Mocherman?

A. No, sir.

Q. On that same morning, did you place your finger inside her vagina?

A. No, sir.

Q. On that same morning, did you place your penis inside her vagina?

A. No, sir.

Q. And on that same morning, did you cause your sexual organ to touch the sexual organ of Dana Mocherman?

A. No, sir.

Q. Do you know anything at all about what happened to Dana Mocherman?

A. Only what's been brought up here.

Q. And that's what has been presented here in the court-room the last two days?

A. Yes, sir.

Q. Now, Brandon, do you own a brown ski cap?

A. I had bought one back in -- I think it was in '82, but I haven't worn it since I left Korea, which is in '82, so I don't know if it's still in my possession or not.

Q. Did you wear it in Korea?
A. Yes, sir.
Q. What were you doing in Korea?
A. I was stationed there with the Army.
Q. You haven't seen that cap since '82?
A. I don't recall seeing it.
Q. Were you wearing your brown cap at any time on April 27th of 1987?
A. No, sir.
Q. On April 27th of 1987, were you wearing a light brown shirt, maybe another color thrown in there with horizontal stripes?
A. No, sir.
Q. Short sleeves.
A. No, sir.
Q. On the morning of April 27th of 1987, were you wearing a chocolate brown corduroy pants?
A. No, sir.
Q. At any time?
A. No, sir.
Q. You own a pair of chocolate brown corduroy pants?
A. No, sir.
Q. Have you ever own a pair of chocolate brown corduroy pants?
A. No, sir. Are you talking about shorts?

Q. Short pants, yes.

A. No, sir, I have not.

Q. Brandon, I noticed when you were hearing the testimony of Dana Mocherman when she was sitting there that you had some tears in your eyes.

A. Yes.

Q. Can you tell the jury why?

A. (Answer was inaudible.)

Q. Did you rape that lady?

A. No, sir.

Q. Did you ever threaten her in any way?

A. No, sir.

Q. Did you ever put your hands up her T-shirt or sweat shirt and feel her breasts?

A. No, sir.

Q. What color are your eyes?

A. They're blue.

Q. On the morning of April 27th of 1987, were you wearing a mustache or not?

A. I don't know.

Q. You recall if you were clean shaven or not?

A. I probably wasn't.

Q. Do you recall how long your hair was?

A. It was short, very short.

Q. Shorter or longer than it is now?

A. Much shorter.

Q. Other than the length of your hair, has your physical features changed that much from today?

A. I have gained about ten pounds, basically, and I think it shows in my face, my face is a little bit bigger, but I don't think that much.

MR. GARNEY: I pass the witness, your Honor.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. LIZARRAGA:

Q. Mr. Moon, how long have you been at the University?

A. I started attending in the fall of '84.

Q. Back in the summer of '87 you were a sophomore?

A. I believe so.

Q. Mr. Moon, you testified something about your grades and the depression that you had. It is true, isn't it, that your grades probably don't indicate perhaps how smart you really are?

A. Yes, sir.

Q. And, in fact, for example, probably your standarized scores on national tests can be higher than what your grades reflect?

A. Yes, sir.

Q. And other people have considered you a bright person, is that right?

Q. You've got a couple of brothers and sisters, Brad Moon, a sister, Sherilan.
A. Yes, sir,
Q. Where do they live?
A. Brad lives at, I think the street address is 2500 McCombs.
Q. Here in El Paso?
A. Yes, both of them.
Q. How old is he?
A. Brad is 24, I think.
Q. What does he do?
A. He works in a pizza delivery.
Q. And Sherilan is how old?
A. 28, I think.
Q. What about Shelley?
A. Shelley would be about 27.
Q. Can you tell me a little bit about this depressive condition that you're talking about? Is it that you just haven't been going to class?
A. No, it's affected me in more ways than one.
Q. All right. Is this English class the only one that you didn't go to?
A. No, sir.
Q. Did you get any credits at all for the spring semester?
A. Yes, I did.
Q. And you've been involved with the yearbook for how long?

A. I was hired the semester prior to that, so I think I actually got the position in November, but it could've been as late as the first of December.

Q. And you've been involved with ROTC since you've been going to school for two and a half years?

A. I think it's something like that.

Q. Have you dropped classes before?

A. Yes, I have.

Q. You weren't aware of the dates, especially towards the end of the semester coming up at the end of April?

A. It's not something that I --

Q. Yes or no.

A. No, sir.

Q. Your room is on the 9th floor of Kelly Hall?

A. Yes, sir.

Q. There were two bunks, is that correct?

A. There's two beds.

Q. Okay. One of them was towards the window, the other one towards the door?

A. That's correct.

Q. You had the one towards the window?

A. Yes, sir.

Q. And Kelly Hall is basically right next to the freeway, would that be correct? There's a parking lot between Kelly Hall and the freeway?

A. Well, both Berry and Kelly Hall.
Q. I'm sorry, where do you reside?
A. I was in Berry Hall.
Q. I'm sorry, Berry Hall. Your window actually faces the freeway and right below it is the parking lot that separates Berry Hall from the freeway.
A. My window faces south.
A. And, in fact, anyone that lives in Berry Hall is one of the closest habitations to the Schuster entrance and exit on the freeway, is that correct?
A. Yes.
Q. Living there with a roommate, sometimes it's a little difficult to get a little privacy?
A. Yes, it is.
Q. In fact, just like normal students living together, this particular room has a bunch of storage cabinets?
A. Yes.
Q. A couple of closets?
A. Yes.
Q. Maybe a mirror?
A. Yes.
Q. But all of that was accessible to somebody else, wasn't it?
A. My roommate, yes, sir.
Q. Now, this ROTC, what's your status with the program?

A. I was a cadet second lieutenant, special student status.
Q. Okay. But you hadn't been really accepted into the program where you would eventually get to be a commissioned officer, had you?
A. I hadn't sign a contract; the GMC Program which is the enlisted portion of it is strictly voluntary, it's like taking any other class. The POC you have to have a contract with them, and at that point I had not contracted with them.
Q. In fact, you couldn't contract with them, could you?
A. I was trying to get a contract with them.
Q. But they couldn't accept you at that moment, isn't that right.
A. I was eligible, yes, sir.
Q. Your testimony is that you are eligible for a contract?
A. Yes, sir.
Q. There was nothing impeding you from getting a contract?
A. My age.
Q. What about your prior service record?
A. No, sir. Not to my knowledge.
Q. Didn't Lt. Col. Johnson tell you that there might be problems about your record?
A. We had discussed some problems that I would require waivers for, yes, sir.
Q. Without those problems being set aside you couldn't get into the program?

A. I would have to have waivers.
Q. And you didn't have those waivers --
A. We hadn't gotten them yet, we'd sent out for them.
Q. So, Mr. Moon, you couldn't sign the contract, could you?
A. At that moment, no, sir.
Q. Did you prepare for your testimony in any way by reading up on anything?
A. I looked over this, over the papers, that's it.
Q. Okay. Did you write any notes regarding this incident at all?

MR. GARNEY: Objection, your Honor, I believe he's getting into areas that --

THE COURT: I'm going to have to sustain the objection, counsel, unless you lay a proper predicate as to time, dates. What are you talking about?

Q. You haven't used any writings to prepare for your testimony?

MR. GARNEY: Same objection.

THE COURT: Sustain the objection. Lay a proper predicate. What are you talking about, Mr. Lizarraga?

MR. LIZARRAGA: I'm talking about --

MR. GARNEY: Your Honor, can we take this in front of the bench? I don't think this should be discussed in front of the jury.

THE COURT: I want to see what he's talking about.

He's on a fishing expedition. Do you have specifics?

MR. LIZARRAGA: No, sir, but, --

THE COURT: Then I will sustain the objection. Let's not go into fishing expeditions.

MR. LIZARRAGA: If I do have a specific, your Honor, I will take it before the bench.

THE COURT: All right.

MR. LIZARRAGA: May we go before the bench?

THE COURT: Yes, sir.

(At this time a discussion off the record was had at the bench and out of hearing of the jury.)

Q. Mr. Moon, how long have you lived in El Paso?

A. Off and on since about '76.

Q. El Paso is a town that you can't get around very easily if you don't have a car, isn't that right?

A. Correct.

Q. Prior to you being arrested, had you used a car that week?

A. During the week?

Q. Uh-huh.

A. Yes, sir.

Q. You did use a car?

A. Yes, sir.

Q. And, for example, did you ever -- How long have you known Ms. -- What's her name?

A. Hapsari Kumaradjaja.

Q. How long have you known her?

A. It's almost two years now.

Q. And you had been dating -- When you were arrested you had been dating her at that time?

A. Yes, sir.

Q. Have you ever gone out on a car date with her?

A. With these friends of hers, yeah, they were driving.

Q. Okay. Have you ever gone out on a car date where you drive?

A. No, not a date.

Q. Okay. Have you ever gone anywhere with her when you're driving?

A. I've taken her to her work, picked her up from her work, and sometimes we've gone shopping. Maybe twice.

Q. Okay. And that was in the course of a year that you remember?

A. Yes.

Q. It could've been in '86 as well?

A. Yes.

Q. And whose car were you using when that happened?

A. She had two roommates, and on occasions we borrowed their cars; she was the one that borrowed them, actually, and I would drive.

Q. Did you ever borrow anybody else's car?

A. One time in '86, yes.
Q. Whose car?
A. A guy who lived in the dorms; he was a friend of mine.
Q. All right. Did you ever borrow anybody's car in '87?
A. Lika's roommate.
Q. Is she the only one?
A. Oh, my sister's as well.
Q. Okay. How regularly did you borrow your sister's car?
A. Only once.
Q. Only once? And this just happened to be around the week when this occurred, didn't it?
A. I got it on Thursday.
Q. In fact, it was parked out in Berry Hall shortly after you were arrested?
A. Yes, it was.
Q. Your sister never lent you the car before that?
A. No, she hadn't.
Q. What is the status of your relationship with Ms. Kumaradjaja?
A. She's my girlfriend.
Q. Okay. You all have plans of getting married?
A. We have discussed marriage, but we aren't planning on it, no, sir.
Q. Are there any impediments to marriage?
MR. GARNEY: Your Honor, may we approach the bench?

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

Q. Mr. Moon, are there any impediments to your marrying your girlfriend?

A. You mean like right now?

Q. Yes, sir.

A. Yes, there is.

Q. And back in April of '87 as well?

A. Yes, sir.

Q. What is that impediment?

A. I'm divorced -- Well, I'm in the process of getting a divorce.

Q. How long has the divorce been in process?

A. I separated from my wife almost two years ago.

Q. Do you have kids from her?

A. I have a son.

Q. Mr. Moon, do you have sexual fantasies?

MR. GARNEY: Objection, your Honor. That's highly prejudicial.

THE COURT: I am going to have to sustain the objection.

MR. GARNEY: I would ask you to instruct the jury to disregard that question.

THE COURT: Disregard that question, ladies and gentlemen.

MR. GARNEY: Motion for a mistrial, your Honor.

THE COURT: Denied.

MR. GARNEY: Thank you, your Honor.

Q. Mr. Moon, you were testifying that there were occasions when there appeared to be some certain gaps -- you're not really exactly sure, for example, which day it was that your girlfriend called you at the dormitory and what, is that correct?

A. She called me every day; the precise time of when she called me, when she called, no, I couldn't say.

Q. And you found out about these accusations on Friday, is that correct?

A. I found out -- I was arrested on Friday; I didn't find out what was going on for about a week.

Q. You didn't get a warrant?

A. I got a warrant, yes, sir, I knew what I was charged with.

Q. Didn't you have an idea from the warrant what particular times they were referring to?

A. No, sir, I had no idea.

Q. It wasn't spelled out?

A. No, sir. I didn't see a warrant; the officer who arrested me showed me the warrant, but I did not read it.

Q. You also were told what the charges were against you regarding that particular day, weren't you?

A. Yes, I was.
Q. So, you had an opportunity on Friday, since you were arrested on Friday morning, is that correct?
A. Yes, sir.
Q. To think back to everything that you did that following Monday?
A. I didn't know what date the offense was for another week.
Q. That wasn't on your warrant?
A. I don't know.
Q. At the time of April 27th were you a full-time student?
A. Yes, I was.
Q. When you went over to the Prospector office on Monday, did you see anyone there?
A. The normal staff, yes, sir.
Q. Can you give me the names of the people who saw you there at that hour?
A. I don't know who would've seen me, who would've paid attention to me; I don't pay much attention to who was actually in the office.
Q. My question was, can you give me the names of who may have been there?
A. I don't know who was in the office.
Q. But you are familiar with some of the staff, aren't you?
A. Yes, I am.
Q. Have you had an opportunity to talk to your girlfriend

regarding this incident?

A. A little, yes.

Q. On how many occasions?

A. I couldn't say. I don't know.

Q. More than one?

A. Yes.

Q. More than five?

A. I would assume so, yes.

Q. Probably lately you talked about when you would be going to trial, is that right?

A. Well,I told her when the trial was, that sort of thing, yes.

Q. You are telling the jurors that you haven't talked about what happened on that day?

A. On that morning? No. I asked her if she remembered what happened.

Q. My question is, you have talked about what happened that morning, haven't you?

A. Yeah, I guess.

Q. Okay. In fact, you talked to her on the phone before she started visiting you, you talked about what happened, didn't you?

A. I asked her some questions, yes.

Q. You talked about what happened and she told you some things about what happened on April 27th, didn't she?

A. Some, yes.
Q. You discussed what happened on April 27th?
A. I said that we had before.
Q. All right. That's what you said originally?
A. Yes, sir; originally I said --
MR. GARNEY: Your Honor, I'm going to object.
THE COURT: I'm going to sustain the objection. Don't argue with the witness.
MR. LIZARRAGA: Yes, your Honor.
Q. You didn't go to the Commons that morning of April 27th, did you?
A. No.
Q. And you testified that you didn't eat any breakfast?
A. That's correct.
Q. Is your girlfriend here in the courtroom today?
A. She's been subpoenaed to be here.
Q. And she's sitting right outside the courtroom?
A. I believe so.
Q. Sir, don't you know that? Didn't you receive a letter from her just couple of minutes ago?
A. Yes.
Q. Well, then you know that she is sitting outside, don't you?
A. Yes. Well, she was when I came in.
Q. Did she say anything about the case in the letter?

138 -0075

A. I haven't read it yet.

MR. GARNEY: Objection, your Honor, irrelevant and calls for a hearsay statement.

THE COURT: Sustain the objection.

Q. Your testimony is that you may have had a mustache on April 27th, but you don't know if you had one or not?

A. That's correct, I don't know if I had one or not.

Q. How often do you grow and shave your mustache?

A. Whenever the mood, you know, whatever mood.

Q. When you were arrested, did you have a mustache?

A. I don't know.

Q. When was the last time you grew a mustache?

A. This.

Q. When?

A. About two weeks ago.

Q. And before that when was the last time you had shaved it off?

A. I don't recall.

Q. You do it erratic?

A. Yes.

MR. LIZARRAGA: No further questions.

THE COURT: Counsel, any redirect?

MR. GARNEY: May I have a moment to confer with my client?

138 -0076

THE COURT: Yes.

MR. GARNEY: I have no more questions of Mr. Moon at this time, your Honor.

THE COURT: You may step down. Call your next witness.

MR. GARNEY: Your Honor, the Defense calls Hapsari Kumaradjaja.

THE COURT: Mr. Garney, can you spell her name for the court reporter?

MR. GARNEY: She'll be taking the stand. Could I have her --

THE COURT: Yes, that will be fine.

HAPSARI KUMARADJAJA,

called as a witness for the Defendant, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GARNEY:

Q. Ma'am, will you state your name for the record?

A. Hapsari Kumaradjaja.

Q. And will you, please, for the benefit of the court reporter, spell both names?

A. Hapsari, H-a-p-s-a-r-i, Kumaradjaja, K-u-m-a-r-a-d-j-a-j-a.

Q. And, Hapsari, what kind of name is that?

A. Indonesian.

Q. Were you born in Indonesia?

A. Yes.

138 -0077

Q. Do you have another name?
A. I have a nickname.
Q. And what is that?
A. Lika.
Q. May I call you Lika?
A. Yes.
Q. Lika, do you know Brandon Lee Moon?
A. Yes.
Q. And how is that you known Brandon Lee Moon?
A. I met him in a dorm.
Q. Do you know where?
A. UTEP.
Q. Approximately when did you meet Brandon?
A. Spring of '86.
Q. Did you start dating him?
A. Yeah.
Q. Lika, I'd like to refer your attention to the evening of April 26th of 1987, a Sunday evening. Do you remember that evening?
A. So so.
Q. Can you speak up just a little bit so that the ladies and gentlemen of the jury can hear you?
A. Yeah, more or less.
Q. What is that you remember about that particular evening?
A. I don't think that something unusual --

Q. Did you speak at any time with Brandon on that evening?
A. Yeah.
Q. When was that, ma'am?
A. At night.
Q. Do you know approximately what time?
A. I think it's around midnight, something like that.
Q. Did you look at your clock at the time you were with Brandon that night?
A. No.
Q. What did you all do?
A. Watching TV, whatever.
Q. Where were you with Brandon that evening?
A. At my apartment.
Q. Where is that located?
A. 1617 Randolph, Apt. 25.
Q. Do you still live there?
A. No, I moved out.
Q. Why did you move?
A. I didn't get along with my roommate.
Q. Where do you live now?
A. 1403 Hawthorne?
Q. Is that with the Kern family?
A. Yes.
Q. How long have you lived with the Kern family?
A. Since November of '87.

Q. So it's been three months, perhaps?
A. Yeah.
Q. Do you recall approximately what time Brandon left your apartment on Sunday night, April 26th, 1987?
A. It was eleven something, 11:30, something like that.
Q. You're not sure?
A. No.
Q. What did you do after Brandon left?
A. What did I do?
Q. Yes, ma'am.
A. Go to bed.
Q. Do you know what Brandon did after he left?
A. No.
Q. Did you hear from him at all that evening?
A. Yeah, I called him.
Q. And where did you call him?
A. I just -- I always call him before we go to sleep.
Q. Did you call him or did he call you?
A. Usually I call him.
Q. And did you all speak that evening for sometime?
A. Yeah.
Q. How long?
A. Oh, it's not always the same, sometimes it gets long, sometimes it's not.
Q. You don't remember?

A. I don't remember the time.

Q. When is the next time that you spoke to Brandon?

A. The next morning.

Q. And do you know approximately what time that was?

A. 8:07.

Q. How is that you know you talked to Brandon at 8:07 in the morning?

A. I kept track of it.

MR. GARNEY: May I approach the witness, your Honor?

THE COURT: Yes.

(At this time counsel handed an item to court reporter, consisting of a calendar, to be marked as DX-3 for identification.)

Q. Hapsari, I'm going to show you what has been marked as D-3 and ask you to just generally tell the jury what that item is.

A. It's a calendar from UTEP.

Q. Who does that calendar belong to?

A. Me.

Q. How did I get it?

A. I gave it to you.

Q. Personally?

A. Yeah.

Q. When did you first receive that calendar? 138 -0081

A. I think the beginning of the school year of '86; that

would be fall of '86.

Q. And do you write down certain events in that calendar?

A. Yeah.

Q. Was that in your own handwriting?

A. Yeah.

Q. Please open the calendar, take a look at it and verify that it's your handwriting.

A. Yes.

Q. What kind of entries were you in the habit of putting in that calendar?

A. Oh, things like, you know, wherever you go, something like that, and hours.

Q. Were the entries made in the calendar at or near the time of the events which occurred?

A. Yeah.

Q. And were they made in your own handwriting?

A. Yeah.

Q. And at the time that you made those entries, did you have personal knowledge of the entries themselves?

A. Yeah.

Q. And was the matter fresh in your memory at the time that you made those entries?

138 -0082

A. Yeah.

Q. I would ask you turn to what I've clipped with a paper clip. I believe it refers to the month of April. Are

you at that position?

A. Yeah.

Q. Does it reflect April 27th on that page?

A. Yes.

Q. Now, let's go to the events of April 27th. What time did you awaken on the morning of April 27th, 1987?

A. I usually wake around 7:00, 7:30.

Q. Why is that?

A. Because I have a class at 8:30.

Q. What kind of a class is that?

A. Economy.

Q. Are you an economy major?

A. No.

Q. What kind of major are you, by the way?

A. Business, with a computer science option.

Q. On the morning of April 27th, 1987, did the calendar reflect at what time you awoke?

A. No, not awake.

Q. What did you do after you awoke?

A. Take a shower, prepare for school.

Q. At anytime that morning did you call Brandon?

A. Yes.

Q. What time was that?

A. 8:07.

Q. Now, how do you know it was 8:07?

A. Because I see it on the clock.
Q. You look at your own clock?
A. Yeah.
Q. Any reason to believe that your clock was inaccurate?
A. No.
Q. Did you talk to Brandon?
A. Yes.
Q. And where did you call him?
A. Like I say, you know, I always call him in the mornings.
Q. My question was, where did you call him?
A. Where?
Q. Yes, ma'am.
A. His room, at the dorm.
Q. Are you familiar with Brandon's voice?
A. Yes.
Q. And had you spoken with him on many occasions at home?
A. Yes.
Q. Did you recognize the voice of the gentleman that answered the phone that morning?
A. Yes.
Q. Whose voice was that?
A. Brandon.
Q. Did you all talk for a while?
A. More or less. We talked for five-ten minutes.
Q. And why was the conversation kept that short?

A. In the morning we don't usually talk that much, I was just waking up.
Q. Why do you wake him up?
A. I think he usually has classes, I don't know what time, but he usually wants me to wake him up because he can't wake up by himself.
Q. After you woke him up, what did you do?
A. Go to school.
Q. Which class did you go to?
A. Economy.
Q. Is that on the UTEP campus?
A. Yes.
Q. Which building, ma'am?
A. Liberal Arts.
Q. How do you get from your residence at that time to the Liberal Arts building?
A. Walking.
Q. Did you own a car back in April of 1987?
A. No.
Q. Have you ever owned an automobile?
A. No.
Q. Do you currently own an automobile?
A. No.
Q. How long does it take you to walk from your then apartment, No. 25, to the Liberal Arts building?

138 -0085

A. Five-ten minutes.
Q. Did you walk there alone or with someone?
A. Alone.
Q. You know approximately what time you arrived at your first class?
A. Probably five-ten minutes before.
Q. When is that class suppose to start?
A. 8:30.
Q. Did it start on time?
A. Yes, usually is.
Q. Who is your professor?
A. Robert Heider.
Q. Can you spell his name for the court reporter?
A. H-e-i-d-e-r.
Q. Now, when you arrived in class, what happened?
A. We had class.
Q. Did you go directly to your class?
A. Yes.
Q. You recall on the morning of April 27th, 1987, what time you were released from the classroom?
A. I think around 9:15; usually he always let's us go about five-ten minutes before the actual finish time.
Q. After you were released from the class, where did you go?
A. Berry Hall.
Q. Do you know the room number?

A. 915, I think.
Q. It could've been 905?
A. I don't know, I don't remember, it's 9 something.
Q. Would that correspond floor level?
A. Yes.
Q. So it would be the ninth floor?
A. Yeah.
Q. How far away is the Liberal Arts building from Berry Hall?
A. Not very far.
Q. If you're walking at a normal pace, how long would it take you to get there?
A. Approximately five minutes.
Q. Did you walk that morning?
A. Yes.
Q. Did you drive to the Liberal Arts building that morning and then to Berry Hall?
A. No.
Q. Did you enter Berry Hall?
A. Yes.
Q. And did you see Brandon?
A. Yes.
Q. Do you recall what he was wearing that morning?
A. I don't remember.
Q. Do you recall how he was acting that morning?

138 -0087

A. Normal.
Q. Did he seem out of breath, like he had been running very fast?
A. No.
Q. Did he seem frightened?
A. Huh-huh.
Q. Anything unusual at all about his demeanor? Do you know what I mean by the word "demeanor"?
A. No.
Q. His presence.
A. No, huh-huh.
Q. What did you do when you got to 905 Berry Hall?
A. I talked a little bit to him and then I took a nap.
Q. Were you tired?
A. No, I was sleepy.
Q. How long did you sleep?
A. Around 45 minutes, something like that.
Q. What did you do when you woke up?
A. We went to Huspeth Hall.
Q. Will you repeat that, please?
A. We went to Huspeth Hall.
Q. Will you spell that for me, please?
A. H-u-s-p-e-t-h.
Q. Oh, Huspeth Hall. Why did you go to Huspeth Hall?
A. Because he wanted to see his English teacher.

138 -0088

Q. And do you know why he wanted to see his English teacher?
A. I think he wanted to speak with her about something, he was having trouble with the class.
Q. Did you accompany him to Huspeth Hall?
A. Yeah.
Q. How did you all get from Berry Hall to Huspeth Hall?
A. Walking.
Q. Is Huspeth Hall located on the UTEP campus?
A. Yes.
Q. Do you know approximately what time you left Brandon's room to walk to Huspeth Hall?
A. 10:30, something like that, 10:35.
Q. When you arrived at Huspeth Hall, what did you do?
A. Well, we tried to locate his teacher, but she was not there.
Q. You never saw her?
A. No.
Q. Since you couldn't locate the teacher, what happened?
A. Well, he just kind of signed a note and slipped it through the door, his teacher's door, and then we went to Union building.
Q. Is the Union building located on the UTEP campus?
A. Yes.
Q. How far away is that from Huspeth Hall?
A. Not very far.

Q. How did you get from Huspeth Hall to the Union building?
A. Walking.
Q. Did you all walk together?
A. Yes.
Q. You know approximately what time you arrived at Union Hall?
A. I will assume around 10:45, something like that, but I'm not sure.
Q. You never looked at your watch?
A. No.
Q. What did you do once you arrived at Union Hall?
A. We went to the Prospector office.
Q. What is that?
A. That's the school newspaper.
Q. Did you ever work for the Prospector?
A. No.
Q. Are you a photographer?
A. No.
Q. What did you do at the Prospector office?
A. We went in, you know, to check on something about a picture that he had to make, I think, about cheerleader try-outs, or something like that, and then he stayed there and I went on.

138 -0390

Q. Do you know anything about the process of making prints and developing photographs and negatives and things like that?

A. I saw it once or twice, but I don't really know how to make it.

Q. And I believe you just testified that you left Brandon at the print shop or whatever?

A. Yes.

Q. Where did you go?

A. To the Liberal Arts.

Q. And why did you do that?

A. Because I had another class at 11:30.

Q. Did you attend that class?

A. Yes.

Q. What kind of a class was that?

A. Portuguese.

Q. Are you bilingual? You know what I mean by that?

A. Bilingual?

Q. Yes. How many languages do you speak?

A. Three.

Q. I guess you're trilingual.

A. Yes.

Q. What three languages do you speak?

A. Portuguese, Indonesian, English.

Q. All right. After you left Brandon and left, when did you next see him?

A. I saw him in the afternoon and at night.

Q. Are there any other times reported on your calendar

that are of significance to you on April 27th, 1987? Please look at it.

A. The last time I talked to him was at night.

Q. What time was that?

A. 12:30.

Q. And what was the purpose of that conversation?

A. Just to say good night.

Q. Just to say good night?

A. Before I went to sleep.

Q. Did anything unusual whatsoever happened on April 27th of 1987 when you were with Brandon?

A. No.

Q. Lika, have you ever known Brandon to own a snubnose nickel-plated revolver?

A. No.

Q. Have you ever known Brandon to own a brown ski cap while you have dated him?

A. No.

MR. GARNEY: Pass the witness.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. LIZARRAGA:

138 -0392

Q. Ma'am, do you mind if I call you Hapsari?

A. No, I don't mind.

Q. Hapsari, my name is Marcos Lizarraga; I'm an Assistant

District Attorney. We've never met before, have we?

A. No.

Q. Did you get a subpoena in this case?

A. No.

Q. You just came down here?

A. Yes.

Q. What is a snubnose nickel-plated revolver?

A. I don't know, but it must be a revolver.

Q. Do you know what the word "alibi" means?

A. Yes.

Q. I know that your vocabulary is very good, even though you're obviously not a native speaker, but did you know what that word meant back on April 27th, 1987?

A. Yes.

Q. You've been here in the United States for a little over two years, is that correct?

A. Yes.

Q. And you were gone for some time over the summer?

A. Yes.

Q. And you were in Brazil?

A. Yes.

Q. And how long were you in Brazil?

138 -0093

A. Almost two months.

Q. When did you leave?

A. In May 27th, I believe.

Q. May 27th?
A. Yes.
Q. How do you remember that date? Is it on your calendar?
A. No, I have my ticket.
Q. Did you look at your ticket?
A. I don't really remember.
Q. When did you get back?
A. June -- no, July.
Q. When in July?
A. 9th of July. I don't know, I don't really remember.
Q. Hapsari, you've been at UTEP since the spring of '86, is that right?
A. Yes.
Q. And that was the semester that you met Brandon Moon?
A. Yeah.
Q. Well, where did you come from when you arrived here?
A. Brazil.
Q. And Mr. Moon is your first boyfriend here in the United States?
A. Yeah.
Q. How old are you?
A. 23.
Q. And are you from Indonesia or from Brazil?
A. I was born in Indonesia, but I was living in Brazil when I came here.

138 -0094

Q. Okay. You met him at a dorm?
A. Yes.
Q. But at the time on April 27th, you didn't live in the dormitory?
A. No.
Q. Now, what is your relationship, what is the nature of your relationship with Brandon Moon?
A. First, we were just friends, then we started dating.
Q. And you've been boyfriend-girlfriend for over a year, is that right?
A. Yes.
Q. Have you ever discussed marriage?
A. No.
Q. Any particular reason why you have never discussed marriage?
A. Well, we discussed it, I don't want it.
Q. So you've talked about it?
A. Yes.
Q. Where do you work?
A. At Mandarin Garden.
Q. Mandarin Garden?
A. Yes.
Q. Is that a restaurant?
A. Yes.
Q. All right. And how long have you worked there?

A. I think since August of last year -- not last year, '86.
Q. And that's approximately -- in the Coronado part of town?
A. Yes.
Q. Has Brandon Moon ever taken you to work?
A. No. He picked me up, yes, but not take me.
Q. Did he ever pick you up at work in '86?
A. I don't know. I don't think so. He started to pick me up late, you know. It might be late '86, it might be, I'm not sure.
Q. Whose car was he using when he picked you up?
A. My roommate.
Q. Who was he with?
A. Alone.
Q. So you do recall seeing Brandon Moon driving in '86, is that correct?
A. Yeah. I'm not sure about the dates, but, yeah, he picked me up.
Q. That was just one time?
A. Once or twice, I don't remember.
Q. Okay. And when was the last time that he picked you up at work or drop you off? Did he drop you off at work?
A. No.
Q. Did he ever take you anywhere in a car?
A. I beg your pardon?

Q. Did he ever take you anywhere in a car?
A. Yes.
Q. When was the last time he did that prior to April 27th of 1987?
A. The last time?
Q. Yeah, before he was arrested.
A. I don't remember the last time; I think it was to Cielo Vista.
Q. Was it before -- Do you remember the month?
A. I think it's on April 18th.
Q. April 18th?
A. Yeah. But I'm not sure if this is the one. I think it is.
Q. Okay. So you have on there that he drove you?
A. No, but I remember that we went to Cielo Vista. That's why I'm not sure that this is the one, because several times I go to Cielo Vista.
Q. Okay. Did you ever go out on a date driving?
A. No.
Q. Now, the week that Brandon was arrested, you're the one who made sure that the car was returned to the sister, is that right?
A. Yes.
Q. On April 27th, you had an opportunity, approximately a week later, to recall the events, is that correct?

138 -0097

A. Yes.
Q. And to kind of fix your memory on what occurred that day, is that correct?
A. Yes.
Q. And I noticed -- May I see your calendar?
A. Uh-huh.
Q. This is a pretty detailed calendar as far as January through April. Would you agree with me that it's a pretty detailed calendar from January through April?
A. Yes, I guess.
Q. You didn't start making notations on your times until March, is that correct?
A. I beg your pardon?
Q. You didn't start making notations about the hours that you called Brandon Moon until March, is that correct?
A. Yes.
Q. Now, you remember distinctly going to sleep in Brandon Moon's room in his dormitory when you went to visit him on April 27th?
A. Yeah.
Q. Did you always fall asleep in his dormitory?
A. Sometimes. I didn't actually fall asleep, just taking a nap, something like that.
Q. The police did talk to you about this incident, didn't they?

138 -0098

A. Yes.
Q. And you never told them that you fell asleep at that time, did you?
A. I don't remember.
Q. Okay. Do you remember talking to Mr. Heider about this incident?
A. Yes.
Q. You went over to him a couple of days later and asked him to remember what happened on April 27th, is that correct?
A. Yes.
Q. And at that time, he -- well, some weeks or days later, he asked you to --

MR. GARNEY: Objection, your Honor, counsel is going into hearsay.

THE COURT: Overrule the objection.

MR. GARNEY: Thank you, your Honor.

Q. Some days or weeks later he asked you if this incident involved your boyfriend, didn't he?
A. No, he didn't really asked me if it involved my boyfriend; he asked me what happened, what it is, because I don't really say it to him what, you know, why I want to know what I asked him.
Q. All right. During the conversation you told him why it was important that he remember the times of April 27th, isn't that right?

A. Yes.

Q. Okay. And in the course of the conversation, he asked you if you thought that Brandon Moon had committed that act, didn't he?

MR. GARNEY: Objection, your Honor, it's irrelevant and it's hearsay.

THE COURT: I'm going to have to sustain the objection.

MR. GARNEY: Your Honor, I would ask you to instruct the jury to disregard that question.

THE COURT: Ladies and gentlemen of the jury, disregard the question, please.

MR. GARNEY: Thank you very much, your Honor.

MR. LIZARRAGA: Your Honor, may we approach the bench?

THE COURT: Yes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

Q. When you went on to the Prospector's office, is there anybody that saw you over there? Did you see anybody?

A. Yes, there was a lot of people.

Q. And you knew some of those people?

A. Not really.

Q. You had taken some photographs with Brandon Moon on various occasions, hadn't you?

A. I beg your pardon?
Q. It wasn't unusual for you to go with Brandon Moon to sporting events or to other activities to take photographs?
A. Yes. I mean, it's not uncommon.
Q. And, in fact, you would go as a couple?
A. Yes.
Q. And in doing that you would meet other people who are photographers, you would meet some of the people from the Prospector, isn't that right?
A. Yes.
Q. And some people from the yearbook?
A. Yes.
Q. Okay. So, when you say that you don't really know those people, you do know some people that were with the Prospector or with the yearbook, didn't you?
A. Yes.
Q. And is it your testimony that of all the people that you saw in approximately a week after April 27th, 1987, you had an opportunity to think back, you couldn't think of one person who saw you or that you saw on April 27th, 1987?
A. Well, I know that --
Q. Yes, or no.
A. Well, I --
MR. GARNEY: Objection, your Honor, counsel cannot instruct the witness how to answer a question.

THE COURT: Let her answer the question, counsel.

Q. Yes, or no.

MR. GARNEY: Objection, your Honor, same objection.

THE COURT: Counsel, let her answer the question. You're not entitled to just a yes or no. She's entitled to answer the question whichever way she wants to. You're not going to instruct her. You're not the witness, unless you want me to put you under oath.

Go ahead and answer the question. Do you remember the question?

THE WITNESS: Yes, he was asking me if I know the people.

THE COURT: Go ahead and answer.

THE WITNESS: Yes, I know the lady that always stayed there in the front, the secretary or whatever, she was always in the front of the office, but, you know, I know the people by sight, but not really, I don't know their names.

Q. Okay. But you did go to Mr. Heider and talk to him about that event shortly after it occurred, didn't you, and asked him to remember the times, right?

A. Yes.

Q. Did you go to anybody else and ask them to remember the times?

A. No.

Q. Did you do any other investigations, trying to find out

who might have seen you or you remember seeing?

A. No.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel?

MR. GARNEY: I have no further questions.

THE COURT: You may step down. At this time we are going to take our morning recess, ladies and gentlemen, for about 10-15 minutes.

(Recess was taken at this time.)

(The following proceedings were had after the recess:)

THE COURT: You may proceed, counsel.

MR. GARNEY: Your Honor, at this time I would like to offer Defense Exhibit No. 3 into evidence.

THE COURT: Counsel?

MR. LIZARRAGA: No objections.

THE COURT: It will be received.

(WHEREUPON, Defendant's Exhibit No. 3, previously marked as DX-3 for identification, was received into evidence.)

MR. GARNEY: With that, your Honor, Defense rests.

MR. LIZARRAGA: Your Honor, at this time, the State would offer State's Exhibit No. 26.

THE COURT: What was 26?

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MR. LIZARRAGA: State's Exhibit 26 is the medical report on Brandon Moon where the blood had been drawn.

MR. GARNEY: No objections, your Honor.

THE COURT: It will be received.

MR. LIZARRAGA: Your Honor, the State would also offer State's Exhibit 42, the poster that was prepared here in Court of the analysis.

THE COURT: Counsel?

MR. GARNEY: Your Honor, I do have several objections to the offer of State's Exhibit No. 42. My first objection is based upon the holding of Long v. State, 649 SW 2d 363; I object based on the holding of Zuniga v. State, 635 SW 2d 780.

Further, your Honor, I object on the basis that it's hearsay, it was prepared for the purpose of litigation, and I further object on bolstering. And my last objection, your Honor, and the most important, by the way, is that it allows the testimony as heard by the jury today and allowing it to be reviewed again in the jury room in chart form. The jury must normally rely on its collective deliberation in memory of evidence, and I believe that it sets apart and brings forth certain evidence testimony-wise over other evidence. I object on all those grounds, your Honor.

THE COURT: Objection will be sustained.

(At this time, State's Exhibit No. 26, previously marked as SX-26 for identification, was received into evidence.)

MR. LIZARRAGA: May I take up something out of the

presence of the jury?

THE COURT: Yes, take them outside.

(Jury left courtroom and the following proceedings were had out of the presence of the jury:)

MR. LIZARRAGA: Your Honor, I have two witnesses since the alibi has been raised by the Defense. I have two witnesses of extraneous offenses that I'd like the Court to consider for the purpose of admitting them before the jury.

THE COURT: All right, put them on.

MR. LIZARRAGA: The State would call Kyta Najera.

THE COURT: Let the record show, Mr. Reporter, these two witnesses' testimony will be taken outside the presence of the jury for the purpose of determining the admissibility of their testimony.

CARMELA ALICIA NAJERA,

called as a witness outside the presence of the jury, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. State your name for the record, please.

A. My legal name is Carmela Alicia Najera; I go by Kyta Najera.

Q. Okay. And are you married?

A. Yes.

Q. What is your maiden name, please?

A. Valdez.
Q. And how old are you?
A. I am 33.
Q. What is your occupation?
A. I'm employed by the El Paso Independent School District, I teach first grade at Crockett.
Q. At Crockett?
A. Crockett.
Q. Okay. And how long have you been working for the School District?
A. This is my first year teaching.
Q. When did you get your degree as a teacher?
A. I graduated this past week from UTEP.
Q. This past week?
A. Last May, I'm sorry.
Q. 1987 in the fall was your first semester?
A. Yes.
Q. And prior to 1987 in the fall, what was your occupation?
A. I was a full-time student at UTEP.
Q. Okay. So you were a full-time student at UTEP in November of '85?
A. Yes.
Q. All right. Where do you live right now?
A. At 668 Mary Stuart.
Q. And where did you live on November 25, 1985?

138 -0136

A. 668 Mary Stuart.

Q. And where approximately is -- Can you please approach the -- May she, your Honor?

THE COURT: Yes. Bring it up here, counsel, there is no jury.

Q. Please familiarize yourself with Defense Exhibit 1 -- You may stand up -- and show the Judge approximately where your house is.

A. Right here, Mary Stuart street is right here. (Indicating.)

Q. All right. And what would be the closest to the Safeway store to you?

A. The Safeway on Belvidere.

Q. Okay. Would it up in this area? (Indicating.)

A. Yes.

Q. Belvidere and Westwind?

A. Uh-huh.

Q. Okay. Thank you. In November of 1985, how long had you been in your house?

A. Approximately -- I don't even think it had been a year yet; it was a brand new area.

Q. All right. And that time -- Do you have any children now?

A. Yes, I have two children. 138 -0107

Q. How old are they?

A. I have a 13-year-old son and my daughter, six years old.
Q. Back in November of 1985, who was taking care of your six-year-old daughter?
A. She was at Western Hills Methodist School and after school I would pick her up.
Q. Okay. And your 13-year-old was younger then?
A. Yes, he was at Western Hills Elementary.
Q. Okay. Did anything unusual happen on November 25th, 1985?
A. Yes.
Q. Do you recall what day of the week it was?
A. It was a Monday.
Q. Do you recall approximately what time this unusual event occurred?
A. It occurred about 11:00 o'clock in the morning.
Q. And prior to 11:00 o'clock in the morning, where had you been?
A. I had been in the school in the morning, and then I came home for a few minutes as I thought I would have some time to study for a final, I was getting ready to take the finals at UTEP.
Q. Was that UTEP, the University of Texas at El Paso?
A. Yes.
Q. How did you get to your house from UTEP?
A. I drove.

Q. Did you drive by yourself?
A. Yes.
Q. And as you approached your house was there suppose to be -- Did you have any impression whether there was anybody in the house or not?
A. No one was at my house.
Q. No one was suppose to be in your house.
A. No one.
Q. All right. Do you remember parking your car?
A. I pulled into my driveway.
Q. Okay. And then what did you do?
A. And then I got out, went towards my front door and I unlocked my front door, but before when I was walking from my car, I turned and I saw a car driving up on Mary Stuart street very very slow, and I though it was going to pull into my driveway, so I turned around and I looked at the car and it was like a putty-colored --
Q. Like what?
A. The color of putty, like a --
THE COURT: Putty?
THE WITNESS: Like a pinkish color, and it was like a Gremlin, it had a hatch-back, it was a Gremlin or a Volkwagen Rabbit, and I remember the car driving by slow, but the windows were kind of tinted and I couldn't get a full picture of who was in the car.

Q. Could you tell if it was a male or a female?
A. I couldn't tell. I saw that the person had a hat on.
Q. So the only unusual thing about -- What do you mean the person had a hat?
A. Like his head was covered.
Q. Did you see a rim?
A. No.
Q. And the thing that caught your attention to it was --
MR. GARNEY: Objection, leading, your Honor.
THE COURT: Overrule the objection.
Q. The thing that caught your attention was that it was driving slow.
A. Yes, like if someone was going to pull into your driveway.
Q. Okay. Do you recall if the individual in the car -- Could you tell in what direction his face turned or whether it turned at all?
A. His head tilted towards me just a little bit, but I didn't think anything of it.
Q. And then what happened next?
A. Next I went into the house. That morning before I left I had put a load of clothes to be washed. I put my books down on the table, I locked the door, and then I went to the garage to get my clothes and put them in the dryer.
Q. All right. And then what happened?

A. The doorbell rang. At that time it was close to Christmas and I was receiving packages for my neighbor, so I thought that it was maybe the UPS again.

Q. Do you have one of those little peepholes

A. No, I didn't at that time.

Q. Okay. The doorbell rang. Was there any way for you to tell who was outside?

A. No.

Q. Did you have a latch on?

A. No.

Q. You opened the door and what happened?

A. I opened the door and there was a man standing there at the door and he had a gun in his hand. Immediately what flashed in my mind at that point was, prior, many years ago, an old man with a hat with Alzheimer's disease had tried to come into the door thinking it was his house, and automatically in my mind I thought about that old man with Alzheimer's disease.

Q. All right. Now, did you see the gun?

A. Yes.

Q. How was he carrying the gun? Will you please stand and show the Judge?

A. He had a gun and he had on a jacket and he was like trying to hide the gun in the jacket, like this. (Witness indicated.)

Q. Okay. You recall what he was wearing?
A. I remember, I think it was a Levis jacket. I cannot be sure.
Q. Okay. And do you recall what kind of pants he was wearing?
A. Levis.
Q. And then what happened -- Did you say anything when you opened the door?
A. Right away I opened the door and I looked up and, first, I looked at his face, then I looked down and I saw the gun, then I looked back at his face, and he pushed the door and pushed me back.
Q. Okay.
A. And then he came in through the door and he said, "Do what I say and I won't hurt you." I just said, "Oh, my God."
Q. Did you say that out loud?
A. Yes.
Q. All right. Did he say anything else to you -- He pushed you, do you have an entry way?
A. Yes.
Q. Okay. Did he say anything else to you there at the entry way?
A. Then he said, "Turn around and get down." I just kept saying, "Please don't hurt me."
Q. Okay. When he told you to turn around and get down,

had he laid a hand on you at that point?

A. When he told me to get down on the ground he had already put the gun back here on the back of my neck and he said, "If you scream or if you make any kind of noise I'll blow you away." And then he put the gun to my left temple, and he said, "You see, I have a gun." And I just kept saying, "I'll do what you say, just please don't hurt me."

Q. All right. Were you laying on the ground or were you on fours or what?

A. I was first on all fours and then he made me get down all the way down.

Q. How did he make you get down all the way down?

A. With the gun he was pushing me down like that.

Q. Okay. Did he have you spread-eagle or were your legs together or what?

A. My legs were kind of apart. As a matter of fact, I remember him pushing my legs with his foot.

Q. Okay. Mrs. Najera, what were you wearing that day?

A. I was wearing Levis, my tennis shoes, my sweater.

Q. And what happened after he put the gun and made you lay down flat?

A. After he made me lay down flat he said, "Where do you have your money?" And I said, "I don't have any money." Then he said, "Where's your purse." And I said, "My purse is in the kitchen." He said, "You can scoot over there,

get it. Do what I say and if you don't do what I say or if you look up, I'll blow your head away." And then he kept calling me names.

Q. What names?

A. "You fucking bitch, do what I say or I'll blow you away."

Q. Going back to when you first saw him, you did look at his face then?

A. When I first saw him --

Q. Once you were down on the ground you didn't have any chance to see him, is that right?

A. No.

Q. Going back to when you first saw him. About how much time did you have to observe him?

A. Between 10 and 15 seconds.

Q. Okay. And what was he wearing? Was he wearing anything on his head?

A. Yes. He had on a hat.

Q. Can you describe the hat, please?

A. Yes; it was like a ski hat, it was a knitted hat, dark dark blue, and it was like the old type of ski hat, round, and he had it pulled right there to his eyebrows.

Q. Okay. Just to show you --

A. Like that.

Q. It was similar to this hat. Okay. And that's what you

mean by the old type ski hat?

A. Yes.

Q. Do you recall whether the side of the ski hat was folded up or --

A. It was folded up.

Q. Okay.

A. The whole thing around was folded up.

Q. And how far down on his head was that ski hat pulled?

A. Covering his eyebrows.

Q. Covering his eyebrows. Okay. And what else did you notice about his face?

A. He had blue blue eyes. I just remember those blue eyes and his white skin. I remember thinking, underneath maybe he was a redhead; I thought, maybe it's the type of skin that a redhead would have, that white white skin.

Q. Okay. Was there anything else about the skin or the complexion that struck you as being out of the ordinary?

A. No, just that it was so white.

Q. Okay. What else do you recall having seen or noticed that you thought was unusual?

A. When he came in he was gritting his teeth at me; he was like -- I remember his lip was up and he was like, "Do what I say." And I just remember seeing his teeth.

Q. Okay. Do you remember his nose?

A. His nose? Later on I picked it out as best as I could

on the sketch.

Q. Okay, we'll get to that later on. Do you remember anything else about him?

A. Yes, I remember that he talked funny, and by funny I remember thinking that perhaps this man was retarded. That's what I thought.

Q. All right. That manner of speech, was it something that you thought was a natural part of him or did you --

A. I didn't know, I thought maybe he was on drugs, maybe that's why he talked like that, I had no idea.

Q. All right. And, in your mind, can you see that person the way he looked on the day that that happened?

A. Yes.

Q. Going back to when you were down on the floor. What happened once he had you down on the floor?

A. Once he had me down on the floor he kept saying, "You're going to crawl to your purse," and I really wasn't crawling, I was scooting, and he started to pushing me with his feet, "Faster, faster, faster," and he kept saying, "If you don't do what I say I'll blow you away, you fucking bitch." He kept calling me that.

Q. All right. Did you get your purse?

A. I got to the table, my purse was sitting on the table, I got to my purse on the table, and he opened up my purse and he pulled out what, I guess, he thought was money, and it

wasn't money he pulled out, it was my credit cards wallet; he threw it down on the ground and told me to get the money. I said, "I do not have any money."

Q. And then what happened?

A. And that's when he started -- right after that -- he was real jumpy, the whole time, just jumpy, jumpy, I could hear him behind me, all the time.

Q. Okay. Was he kind of hyper?

A. Yes; it was like he was real jumpy, jumpy, jumpy, and I could hear that he was somewhere in that room, I could hear.

Q. Okay. After he checked the money and there was nothing there, what did he do?

A. After that he got down and I was laying down, he had the gun at my head; I thought he was going to get a knife from the kitchen, that's what I was thinking at that time.

Q. All right. And what happened?

A. That's when he started putting his hand under my sweater, started feeling me all over.

Q. Okay. Up until that time, did he say anything?

A. He said, "Just do what I say and I won't hurt you. If you don't do what I say I'll blow you away, I'll just blow you away."

Q. And up until that moment had he said anything about what he was going to do to you?

A. He said, "I'm not going to hurt you, just do what I say."

Q. Okay. Did he say anything about touching your breasts?
A. He said, "I just want to feel you."
Q. You said he was putting his hands up your sweater, and then what happened next?
A. And then he tried to undo my bra, he pulled my sweater up, and then I was laying down there with my face down, and he couldn't undo my bra; it made him mad, he told me to get my bra off and to hurry up and get it off. He then tried to get my pants off; he got upset because I had the type of Levis that have the zipper at the cuff, and he told me to take my pants off, and I was laying on the --

THE COURT: Just a moment. Where were you all this time, in the hallway, entry, where were you?

THE WITNESS: By the -- the kitchen is right here, it's a George Thomas home, and --

THE COURT: I don't know what a George Thomas home is, ma'am, where were you, that's what I want to know.

THE WITNESS: On the floor, on the rug, face down.

THE COURT: In what area of the house?

THE WITNESS: It was in between the kitchen and the dining area.

THE COURT: All right, go ahead.

Q. Was there a rug?
A. Yes.
Q. Was there a rug in the entry way?

A. No.
Q. All right. So, he was trying to get your pants off.
A. He couldn't get them off, so he had me unzip my pants, and then I took my tennis shoes off, and that's when I could feel him on my back.
Q. Okay. When you say you could feel him on your back, what do you mean?
A. I could hear him unzip his pants, I thought he was going to rape me, I could feel him on my back, that's when he put his hand and put his fingers in me.
Q. Where was the gun during this time?
A. On the back of my neck.
Q. Still?
A. Yes.
Q. Okay. How long did he have his fingers in you?
A. It must have been about three to five minutes.
Q. All right. During that time did he say anything to you?
A. I kept saying to him, "Please don't hurt me, please don't hurt me." I said, "I am sick, I am so sick." That's when he turned around and he said, "What do you have?" I said, "I've got hepatitis." I don't know what made me say that, because I had been sick previously years before with hepatitis, and why he believed that I had hepatitis, I don't know, but he did.
Q. How do you know he believed you?

A. Well, because he was asking me questions, like, "Where is your boyfriend?" I said, "I don't have a boyfriend, I have a husband." He said, "You're not fucking married." And I said, "This is my wedding ring." And he picked up my hand like this, and I said, "That's my wedding ring." He said, "You're not fucking married," and he put my hand down.

Q. Is there anything up until that time that you left out that you can recall that he said to you? Did he say anything about what he was doing to you?

A. No, he said, "I'm not going to hurt you, just do what I say."

Q. Okay. When he had his fingers in you, did he say anything?

A. He just said, "I want you to come."

Q. Okay.

A. And I said, "I can't, I can't, please don't hurt me, please don't hurt me."

Q. Okay. Did he ever make you do anything?

A. Yes.

Q. Was that before or after he put his fingers in you?

A. After.

Q. Now, the conversation about you being sick occurred while he had his fingers in you?

A. Right before.

Q. Then he placed his fingers in you. And then when he

said he wanted you to come that's while he had his fingers in you?

A. Yes.

Q. And then what happened?

A. And then he kept saying, "You know you like it, you whore, you know you like it." I kept crying, and he kept telling me to shut up.

Q. And then?

A. And then after that I said -- he got my hand and he told me to put my fingers on my own self.

Q. Okay. And what happened after that?

A. And then he said, "You know you like it, you know you like it, I want you to come, I want you to come now." And I kept saying, "I can't, I can't." And then after that is when he got off of me.

Q. Okay. Had you cried up to that moment?

A. Yes, I cried the whole time.

Q. Okay. And when you say that he got off of you, are you saying that when he made you touch yourself, where was he?

A. On my back.

Q. And then what happened?

A. And then he got off of me and he said, "I'm not leaving, you might think I'm leaving, but I'm really not leaving. You are going to hear the door slam, but that doesn't mean that

I'm leaving, I, just going to go, I'm going to open the door, but I'm not really really leaving. If you get up, if you make any move when you hear the door slam, I'm going to blow you away."

Q. All right. And what happened right after that?

A. I then heard the door slam, I thought he was still there; I laid there for a while, I didn't get up for a while; I don't know how long I laid there. Then I got up, I went to the phone, and I said, "He unplugged my phone."

Q. Did you ever see him unplug the phone?

A. No.

Q. Now, was he ever outside that room while you were still there?

A. No.

Q. He never left the room?

A. No; he might've been close to the hallway, but I could hear his feet.

Q. Okay. Did he ever take any of your money or anything from your purse?

A. No, nothing was missing.

Q. He didn't take anything from the house?

A. No.

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Q. Okay, you said you were laying on the ground for a while, what happened?

A. I finally got up, went to the phone, it was unplugged,

then I dialed 911, but they couldn't understand me, I was crying. Then I started putting my clothes on, and then the lady at the phone said they were going to send someone; she got my address and she said they would send someone. Then I called my husband at his work, the supervisor answered the phone, and they couldn't understand me either.

Q. Okay. Now, how long were you down before you got up?

A. I don't know.

Q. Was it more than five minutes?

A. No.

Q. And when you did get up and you said you used the telephone, did you look outside the house?

A. Yes, I did, I looked around to see if he was there, I thought he might still be there; the garage door was opened and I thought he might be in there.

Q. Okay. Did you see him again that day?

A. No.

Q. Do you remember what kind of shoes he was wearing?

A. No.

Q. This was in November 25 of 1985. After that incident did you report it to the police?

A. Yes; the police came to my house right there.

Q. Okay. Did you go down to the police station?

A. Right there the police took a report at my house. After that I went to the hospital. They wanted to call an

ambulance, but I said no, my husband arrived and he took me to Sierra Medical.

Q. Okay. And then what happened?

A. Well, when the police got there I thought it was him, I still couldn't see through the door since I don't have a peephole.

Q. Were you by yourself?

A. Yes.

Q. Okay. And then what happened?

A. And my sister Gloria drove up just as the policeman got there, and I wouldn't let in the policeman, and Gloria said, "It's me, it's me, it really is me." Finally I opened the door and let them in.

Q. All right. After they took the report at your house, what was your next contact you had with the police?

A. The police came to Sierra Medical, and then later on I came and I did a sketch with Detective Dove, and my husband came with me and we went over everything again and I did the sketch.

Q. You're talking about a composite?

A. Yes.

Q. And after you made that composite, were you contacted by the police again?

A. Yes.

Q. When?

A. In May -- To come down for a lineup?
Q. Uh-huh.
A. Yes. In May.
Q. May of what?
A. It was May of 1987.
Q. So it was over a year --
A. Yes.
Q. All right. And when you came down for the lineup, what were your instructions?
A. To see if I could pick out, if I could identify the person who attacked me.
Q. Did they tell you that you had to identify somebody?
A. No.
Q. What were your instructions regarding that?
A. If I could, to be sure if I could identify him, if I could.
Q. Do you remember going into the lineup?
A. Yes.
Q. Do you remember how many men were in the lineup?
A. It was five or six.
Q. Did you view the entire lineup?
A. Yes.
Q. What happened when you stepped into the room?
A. As soon as I stepped into the room I picked him out, I looked at him and I picked him out right away.

Q. What made you pick him out right away?
A. It was the same face, the same skin, the same eyes; I could see him, I see him all the time in my head.
Q. Okay. Did you observe him with a cap?
A. No, I don't think he had a cap. I just remember it was his eyes, I looked from here down, that is how I identified him.
Q. You didn't request that they put a cap on him?
A. No.
Q. Okay. Do you remember -- What happened when you saw him?
A. I fell apart, I cried in the lineup, because, look, I know he can't see, but it looks like he can see you, he looks like he's staring at you again, and so everything flashed back again. I started crying. Later the detective told me that after I picked him out he could hear me crying, that it upset him and that he was upset.
Q. If you saw that man again, you think you could identify him?
A. Yes.
Q. I want you to recall the man that you saw at your door on November 25th, 1985, and I want you to look around the courtroom and tell me if you see the same man sitting here in the courtroom.
Q. That's him. I know that's him. (Witness indicated

by pointing at Defendant.)

Q. Is there anything about this person or any characteristics that you could look at right now and confirm his identity?

A. It's the same skin. He didn't have a mustache, but it's the same skin, the same eyes. I can't see his eyes right now, but his --

THE COURT: His eyes are blue.

THE WITNESS: That's him. That is him.

(At this time counsel handed two documents to mark as SX-45 and SX-46 for identification.)

Q. Mrs. Najera, I'm handing you what has been marked as State's Exhibit No. 45 for purposes of this hearing outside the presence of the jury. Will you please study this sheet carefully and tell me if you recognize it?

A. Yes, this is the sheet that they showed me when I came to do the sketch to see if I could pick out the gun that I thought he was holding.

Q. Okay. That appears to be a photocopy of a book or something. Did you see the book or did you see a sheet like that?

A. I think it was a book.

Q. Okay. Will you please look and see if you signed anywhere on there?

A. Yes, I signed right here.

Q. And why did you sign there?

A. Because that's the way the gun looked.

Q. I'm handing you what's been marked as State's Exhibit 46. Can you tell me what that is?

A. It's the composite that we put together.

Q. And who did you put that composite together with?

A. Detective Dove.

Q. And how soon after this event did you put together that composite?

A. It was -- the incident happened in November, and they asked me to come down and I went right after finals, so it was -- I can't be sure.

Q. Okay. Was it in 1986? I'm sorry, in 1985?

A. Yes.

MR. LIZARRAGA: Your Honor, for the purposes of this hearing, I would like to offer State Exhibits 45 and 46.

THE COURT: Counsel?

MR. GARNEY: Your Honor, I have no objection as to the introduction of 45 and 46 for the purposes of this hearing, however, I would reserve any objections that I might have as far as introducing into evidence.

THE COURT: I'm not going to rule on them at this time.

MR. GARNEY: Thank you, Judge.

MR. LIZARRAGA: Your Honor, since you're the trier of facts --

THE COURT: I'm not ruling on them, counsel, those two exhibits to me mean nothing at this point.

MR. LIZARRAGA: Okay.

Q. (By Mr. Lizarraga) Mrs. Najera, at any time during this sexual assault that occurred at your house, were you at any time under the impression that this man had penetrated your vagina?

A. No.

Q. With anything other than his fingers?

A. No, just his fingers.

Q. Okay.

MR. LIZARRAGA: Your Honor, would the record reflect that a few minutes earlier when I asked Mrs. Najera if she could identify the person who did this, she did point out the Defendant.

THE COURT: Yes.

(At this time counsel handed document to reporter to mark SX-47 for identification.)

Q. Mrs. Najera, I am handing you what has been marked as State's Exhibit No. 47, which is a photograph. Can you tell me what that is a photograph of?

A. It's a photograph of the lineup on that day.

Q. And is that a lineup that was conducted in May of this year?

A. Yes.

Q. And you recall what day of the week that lineup was?
A. May 2nd.
Q. Of 1987?
A. Yes.
Q. And is that the view of the lineup that you had?
A. Yes.
Q. And in that picture, were you able to identify any of those people as the person who did this to you?
A. Yes; the one in the middle.
Q. Okay. The third person?
A. Uh-huh.

MR. LIZARRAGA: We'd like to offer State's Exhibit No. 47 into evidence.

THE COURT: I won't rule on that at this time.

Q. Mrs. Najera, the person that did this to you -- I know it sounds like a silly question -- was it your spouse, the one you are married to?
A. No.
Q. You've never seen him?
A. I've never seen him.
Q. Okay. And the person that did this to you, did he have your permission?
A. No.
Q. And did this occur in El Paso County, Texas?
A. Yes.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR GARNEY:

Q. Mrs. Najera, my name is Norbert Garney, I represent Mr. Moon in this case. Have we met previously?

A. No.

Q. And I don't believe we have ever discussed this case between you and I?

A. No.

Q. You understand that at this time it is necessary for me to ask you certain amount of questions, and please also understand at this time that I have no intention of embarrassing you.

A. I understand.

Q. And I will avoid that to the best of my ability. Mrs. Najera, did you give a statement to the police regarding this incident?

A. Yes, I did.

MR. GARNEY: May I have a moment, your Honor, to review the statement?

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THE COURT: Yes.

Q. Let's go over some of your testimony here. I believe you testified that this occurred on the morning of November 25th of 1985, is that correct?

A. That's correct.
Q. And this was approximately at 11:00 a.m.?
A. That's correct.
Q. It wasn't at 9:00 in the morning, was it?
A. No, it was not.
Q. It was closer to lunch time?
A. Yes.
Q. And I believe you also testified that prior to entering your home you had seen a putty-colored car driving in front of your home?
A. Yes.
Q. You never saw the occupant of that vehicle, did you?
A. No.
Q. No, I could see a shadow, but I could not tell if it was a man or if it was a woman, you know, there was a person driving the car, he tilted his head and looked at me as he was driving slowly by.
Q. You are saying that he tilted his head, but you don't know whether it was a man or a woman?
A. That's correct.
Q. And when that particular individual tilted that person's head toward you, you still could not see that person's face at all?

A. No.
Q. And that is because the windows were tinted?

A. Uh-huh.
Q. So there's no way in the world that you could possibly identify whomever that was that was in that automobile?
A. That's correct.
Q. Now, did this automobile stop in front of your home?
A. I didn't see it stop.
Q. It continued down the street?
A. I don't know. I turned around, I don't know if it stopped nextdoor, I don't know if it went on, I didn't think very much of it at that time when I saw it coming. I thought someone was coming and was going to drive in my driveway, you know, I thought they were coming to visit me. That's why I turned around, that's why I noticed it, but then when it went passed me I didn't notice it, I had no reason to think anything about that car.
Q. So the automobile went past you?
A. Yes.
Q. And which direction, by the way, was it going in?
A. It was going up Mary Stuart coming from Belvidere street.
Q. So, it was driving away from Belvidere?
A. Yes, away from Belvidere, up Mary Stuart.
Q. And at that time, after the car passed your home, you entered your own home?
A. Yes.
Q. And did you open the door with a key?

A. Yes.
Q. And did you lock the door behind you?
A. Yes.
Q. And you took care of whatever business that you had that morning?
A. Uh-huh.
Q. How long had you been in your home before the doorbell rang?
A. It was a matter of minutes; I just put my purse down and my books and I went to go take a load of wash out of the wash and put it in the dryer; I hadn't even finished doing that when the doorbell rang.
Q. And at the time that the doorbell rang, were any windows in your living room opened where you could see out into your driveway?
A. No; there is only one window that shows out good to my driveway, and it is my daughter's window in the front of the house, and we keep that curtain closed.
Q. The doorbell rang and you answered the door?
A. Yes.
Q. Did you ask who it was through the door?
A. No.
Q. You simply opened the door as you normally would for a visitor?
A. Uh-huh.

Q. And what's the very first thing you saw, Mrs. Najera, when you opened the door?
A. I saw his face.
Q. And I believe you testified that you got approximately 10 to 15 seconds to view that person's --
A. Then I saw the gun.
Q. After that initial 10 to 15 seconds of viewing that person's face, did you ever see his face again?
A. I saw it right there, and then when I was pushing in I was still turned towards him and he made me turn around.
Q. How long did that entire transaction take, from the moment you first saw this man until the time that you were turned around?
A. Probably no more than 20 seconds.
Q. And once you turned around I suppose he kept his face away from you?
A. Yes, he was behind me.
Q. And this was during the entire incident for the rest of the morning?
A. Yes.
Q. You never saw his face again?
A. I never saw his face again.
Q. And it would be fair to say that you never saw his entire face again?
A. Just from right here.

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Q. So on no occasion whatsoever did you ever see his entire face again, such as mine now?
A. At the lineup.
Q. I'm talking about at that time.
A. No.
Q. Ma'am, I believe you testified that you immediately noticed a gun?
A. Uh-huh.
Q. What kind of gun was it?
A. I don't know a lot about guns. What I picked out from the gun is what it looked like. I can't tell you numbers, is that what you want me to say?
A. No, ma'am, not numbers. Do you know the difference between basic colors?
A. Yes.
Q. Such as the difference between --
A. It was black gun.
Q. Black and silver, would you say?
A. All I know it was a black gun.
Q. It was not a silver gun?
A. I don't know if it had silver on it; the part that I saw was black.
Q. And what part was it that you saw? 138 -0135
A. I saw a gun being held like this. (Indicating.) He had his hand on part of the gun. I don't know if it was all

black, the part I saw was black.

Q. But what part did you see?

A. The whole gun except for what he had on his gun.

Q. Okay, the grip?

A. Yeah, yeah.

Q. Let's say this is the gun and this is the grip. He had it like this and you saw everything except the grip?

A. Uh-huh.

Q. All right, and that is all black?

A. Yes, all black.

Q. All right. It wasn't silver?

A. It wasn't silver.

Q. Or nickel-plated?

A. Black.

Q. Do you know how long that barrel was?

A. No.

Q. Did it appear very long?

A. Yes, it did; I could see when he had it, I could see black.

Q. Okay. Fair enough. What part of your head was the gun pointed toward? Initially, the very first time it was pointed at you.

A. When I was facing, he had the gun right here. Then he turned me around and when he turned me around it was in the back of my neck.

Q. Do you recall which hand the gun was in?
A. I don't know.
Q. I believe you testified that it was pointed to your left temple at one time.
A. Uh-huh. After I was down on the ground.
Q. So, it would be fair to say, I assume, this is the gun, and you're not facing me, it was in his left hand?
A. I don't know about guns, Mr. Garney, and I don't know if you have to hold it high you hold the gun a certain way, anything like that.
Q. It was not pointed at your right temple?
A. He had it at my head and at my left temple.
Q. I believe you testified, Mrs. Najera, that he used quite a lot of profanity towards you.
A. Yes.
Q. Words such as quote fucking bitch close quote. Things like that.
A. Uh-huh.
Q. And used that quite frequently?
A. Especially, "I'll blow you away."
Q. Well, that's not really profanity, to be fair. Now, when this person had turned you around, he gave you certain instructions initially, is that correct?
A. Uh-huh. "Get down on all fours."
Q. Okay. And get down where?

A. On the -- my entry is right in front of my closet, that's where I laid down, on the carpet.
Q. And this was on the floor of your home?
A. Yes.
Q. Were you ever instructed or forced to get upon your bed or anyone else's bed?
A. No, the whole incident took place right there in that room.
Q. As far as you know, did this person ever enter your master bedroom?
A. I don't know, I don't know; I could hear that jumping, jumping, jumping, I don't know -- the hall is very short, and I don't know if he looked in the master bedroom or not.
Q. That's fair. You were never forced into your own master bedroom?
A. No.
Q. Or any of the bedrooms?
A. No.
Q. Or placed upon a bed facing down?
A. No.
Q. Now, Mrs. Najera, the person who was in your home, and I'm sorry for the embarrassment, but I need to ask you this. Did he ever enter you in your vaginal area with his penis?
A. No.
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Q. Now, this hat which you described. It wasn't a brown

hat, was it?

A. No.

Q. It was a blue hat?

A. It was a dark dark blue hat.

Q. Much like the one that Mr. Lizarraga had shown you previously?

A. Uh-huh.

Q. You are very certain it was not a brown hat?

A. It was not a brown hat, no.

Q. You got a good look at the hat?

A. Yes, I did.

Q. And the type of clothing that this person was wearing. I believe he was wearing a Levis jacket?

A. Uh-huh. I'm pretty sure it was a Levis jacket.

Q. By Levis you mean, you know, like denim jacket?

A. Yes, that's right.

Q. Just a regular jacket that buttons up?

A. Yes.

Q. It was not a pullover shirt?

A. No.

Q. He had on a jacket, that's how he was holding the gun, like in the jacket, when I came to the door.

Q. Yes, ma'am, okay. And the pants that this person was wearing. They were also Levis?

A. Yes.

Q. And again, using the term generically, does that mean denim?
A. Yes.
Q. Were they long pants or short pants?
A. They were long pants.
Q. And you never saw that person's shoes?
A. No, I don't remember his shoes.
Q. Now, this person that was in your home, you remember him gritting his teeth a lot?
A. Yes.
Q. You did get a good look at his teeth?
A. When I first opened the door, he told me to move back, that's when I could see that he was gritting his teeth, like this, "Move back, do what I say."
Q. And so his lips were back in a snarl, where you could actually see the teeth very well.
A. I could see the teeth because he was gritting his teeth at me.
Q. He seemed very hyper at the time?
A. Yes.
Q. I'll ask you to look at the exhibits before you and tell me the name, or the number, rather, of that composite.
A. The S-46?

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Q. Yes. State's 46, and tell me, that is the composite which you had helped the police officers put together?

A. Yes.
Q. And I suppose that at the time that the composite was made I'm sure you paid particular attention to the type of teeth you chose for this --
A. I never felt happy about the teeth I chose. I wanted a set of teeth that showed someone kind of gritting their teeth, like this. Detective Dove asked me. "Do you feel good about the teeth?" And I said, "No, I do not feel good about the teeth." I felt very good about the eyes, the nose, pretty sure about the nose, but the teeth, I wasn't too sure about the teeth.
Q. All right. At any event, those teeth are in some state of disrepair, aren't they?
A. Uh-huh.
Q. Were the person's teeth that you had seen that morning in your home, bad teeth or good teeth?
A. I just remember big teeth, because he was gritting at me, and I saw those blue blue eyes and the teeth.
Q. They were big teeth sticking out?
A. Yes.
Q. Were they something like buck teeth or --
A. No, they weren't buck teeth.
Q. Okay. You also testified that this person in your home talked funny?
A. Yes.

Q. Could you tell me a little bit more about that, please? What do you mean by talking funny?

A. I was crying at the time and I could hear that he talked like maybe someone -- it was like hearing a retarded person. I've worked around retarded children, and it was like a drawl, it was like -- I can't explain it. It just didn't sound right, like if he was maybe on something; it just didn't sound normal.

Q. Was it slurred?

A. Not so much slurred.

Q. Talking slow, perhaps.

A. I can't say. It just seemed that he was so hyped up that his speech was funny.

Q. Maybe his speech didn't seem to keep up with his physical tightness, it lagged behind type of thing?

A. I can't say that for sure.

Q. Did you notice anything peculiar about this man's hands?

A. No.

Q. Did you see his hands?

A. No. I saw when he was holding the gun; I don't remember seeing his hands.

Q. Was he wearing gloves?

A. No.

Q. I believe that this person in your home also asked you to masturbate yourself?

A. Yes.

Q. And you told the police that?
A. Yes.
Q. I believe that at the time that you testified you felt that this individual should've had red hair?
A. Yes.
Q. Because of the color of his skin.
A. Yes, because of his white skin he seemed like the type that would have red hair.
Q. Did you notice if he had any facial hair?
A. He didn't have much.
Q. Was he cleanshaven?
A. Yes.
Q. He didn't have a mustache?
A. No.
Q. You didn't give a description to the police that this person had light brown or blonde hair at the time, did you?
A. No, I said it was possibly a redhead.
Q. This revolver -- Let me ask you this question, Mrs. Najera, do you know the difference between an automatic and a revolver?
A. No.
MR. GARNEY: May I approach the witness, your Honor?
THE COURT: Yes.
Q. Ma'am, I refer your attention to what has been marked

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as State's 45 and ask you -- I believe you picked out the type of gun, and it's highlighted in yellow, and it's styled B10. Now, is that what the gun had looked like, and you're pretty doggone sure about that?

A. Yes.

Q. Would it surprise you if I told you that that is an automatic?

A. I don't even know what that means.

Q. Okay. But that is the gun that you picked out?

A. Yes.

Q. The composite was put together by yourself and the detective some days after this event?

A. Uh-huh.

Q. When is the first time that you were asked to come down for the lineup, either photo or physical?

A. On May 2nd to come down to the lineup.

Q. May 2nd of what year?

A. 1987.

Q. And this attack occurred in '85?

A. That's right.

Q. So it would be approximately a year and a half later?

A. Yes.

Q. You were never forced to be completely nude in your home, were you?

A. I had everything off, yes.

Q. You had --

A. Yes.

Q. And then you called 911, and then after that you dressed yourself?

A. Yes.

MR. GARNEY: Pass the witness, your Honor.

THE COURT: I don't need anymore, counsel, this is just the legal, and I'm not going to determine it. Let's not get into redirect and recross. I'm just being called upon not to pass on the credibility of the witness or the believability of the testimony; I'm being called on to pass on a legal principle whether this extraneous offense is admissible.

MR. LIZARRAGA: All right, your Honor.

THE COURT: And I assume, Mr. Garney, that you are objecting to the introduction of the testimony of Mrs. Najera?

MR. GARNEY: Very much so, your Honor.

THE COURT: All right, sir, tell me what your objection is.

MR. GARNEY: Your Honor, at this time I would object to the introduction of Mrs. Najera's testimony upon two grounds: One, Mr. Moon has a constitutional right and guaranteed both through the United States Constitution and the Constitution of the State of Texas to be tried for one offense at a time. Two, even if -- I'm not conceding that point -- but even if the door has been opened for an extraneous

offense, that is, putting the identity of the issue in a two-step analysis for the commission of an extraneous offense. The two-step analysis is as follows: Number one, you have to put something into issue, identity; number two, even though that particular element may be an issue, in order of an extraneous to be admissible, it has to be a signature to be extraneous. I can offer the Court at least two cases, one is _____ v. State, which came out last year, maybe in 1985, I can't remember. I have a copy for the Court's perusal. And more recently there is a criminal Court of Appeals' case which came out, _____ v. State. I also have copies of that opinion for the Court's perusal. Essentially, what the Court of Appeals had indicated is that there is a distinction to be made between extraneous offenses which bear a signature and extraneous offenses which by their very nature have more or less the same mold of being committed, such as, to over-simplify, a robbery is a robbery is a robbery. Normally, there is, number one, money taken from a victim and a weapon. Now, those kind of components do not constitute a signature because all robberies have to have those kind of components.

What we have here, your Honor, is another alleged sexual assault, however, the factual differences we have here are very very much different with what happened to Ms. Mocherman. The Court heard the evidence, I don't need to enumerate all the factual differences, but suffice it to say that there is

no signature whatsoever that could be attributed to these two offenses. I would object on those two grounds.

THE COURT: There's only one problem, counsel. You focused just on identity. What about intent? Scheme? Your man has taken the stand. Now if he hadn't taken the stand you could probably raise the question, but he has taken the stand and denied ever having committed the offense.

MR. GARNEY: I understand, your Honor. The same analysis goes to intent or scheme, it still has to be a signature offense.

THE COURT: I'm going to let it in. She's going to testify before the jury.

Okay, you may step down, Mrs. Najera. You have another witness?

MR. LIZARRAGA: No, sir.

THE COURT: Just one?

MR. LIZARRAGA: Yes, sir.

THE COURT: All right. Then we'll start at 1:00. The jury will be sent to eat.

MR. GARNEY: Your Honor, may I put another objection on the record?

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THE COURT: Yes.

MR. GARNEY: My third objection to the introduction of the extraneous offense would be the remoteness in time would cause such prejudice to the Defendant that it would

cause such prejudice to the Defendant that it would outweigh any probative value.

THE COURT: All right, your objection will be noted on the record.

(Lunch recess was taken at this time.)

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AFTERNOON SESSION

WEDNESDAY, JANUARY 13, 1988

(The following proceedings were had in the presence of the jury:)

MR. GARNEY: Your Honor, may we approach the bench?

THE COURT: Yes.

(At this time a discussion was at the bench on the record and out of hearing of the jury:)

THE COURT: Let the record reflect that we're taking an objection on the part of Defense counsel, Mr. Garney, as to the evidence that has been offered by the State, and the Court has overruled Mr. Garney's objections to the introduction of the same.

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Let the record further show that the Court will give Defense counsel a running objection on all the testimony of the witness, Carmela Alicia Najera.

MR. GARNEY: Thank you very much, your Honor.

THE COURT: Counsel for the State, you may proceed.

MR. LIZARRAGA: The State calls Officer Hand.

LARRY HAND,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Sir, will you please state your name for the record?

A. Larry Hand.

Q. And what is your occupation?

A. I'm a police officer for the City of El Paso.

Q. I notice that you're wearing your uniform today. Are you on duty?

A. Yes, sir.

Q. Officer Hand, how long have you been with the police department?

A. Five years.

Q. And what are your duties as a policeman?

A. I work the patrol division.

Q. And in April of 1987, what were your duties with the police department?

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A. I was with the patrol division at that time.

Q. Back in April of 1987, what area of town did you patrol?

A. I patrolled the west side, the Coronado area.

Q. All right. Did you have occasion on April 27th, 1987,

to receive a call regarding a sexual assault?

A. Yes, I did.

Q. In the Coronado area?

A. Yes, I did.

Q. And were you called to go to the Circle K store?

A. Yes, the Circle K located at 7300 North Mesa.

Q. Okay. Whenever you receive a call like that, what is your normal habit as far as recording these times or these events on your follow-up report?

A. We document all times of dispatch and arrival.

Q. Okay. And whenever you receive a dispatch, who is that dispatch received from?

A. The dispatch office.

Q. And did you receive a dispatch to go to the Circle K store?

A. Yes, I did.

Q. When you got to the Circle K store, did you meet with any particular person who was complaining about an alleged sexual assault?

A. Yes, I did.

Q. What was the name of the person? 138 -0150

A. Her name was Dana Mocherman.

Q. All right. What time were you dispatched to that Circle K store?

A. At 9:29 a.m.

Q. 9:29 a.m. Okay. And that was on April 27th, 1987?
A. Yes, sir.
Q. And what time did you arrive at the Circle K?
A. I arrived at 9:35 a.m.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

MR. GARNEY: No questions, your Honor.

THE COURT: May this officer be excused?

MR. LIZARRAGA: Yes, sir.

MR. GARNEY: No objections.

THE COURT: You may be excused, Officer, thank you. Call your next witness.

MR. LIZARRAGA: The State will call Mrs. Najera.

CARMELA ALICIA NAJERA,

called as a witness for the State, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Ma'am, will you please state your name for the record?
A. My name is Carmela Alicia Najera, but I go by Kyta Najera.
Q. And how old are you?
A. 33.
Q. Are you married?
A. Yes.

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Q. Do you have any children?
A. I have two children.
Q. How old are they?
A. My son is 13 and my daughter is 6.
Q. Okay. Where do you live?
A. I live at 668 Mary Stuart.
Q. Okay. I'm going to ask you to approach this particular map, please.

(Witness left stand and approached map.)

Looking at the map, I want you to please locate the approximate area where the Safeway on Belvidere and Westwind is located.
A. Right here. (Indicating.)
Q. And is there a green "S" with a circle around it?
A. Yes.
Q. Is that the Safeway where you shop?
A. Yes.
Q. Okay. Relative to the Safeway store with the green "S" in a circle, will you please locate on the map the approximate intersection that you live by?
A. Right here on Mary Stuart. (Indicating.)
Q. Mary Stuart? Okay. And would you say that you located a position that is above but almost halfway between the green Circle K and the green "S" on the map?
A. Yes.

Q. And Mary Stuart is right above a yellow street that is marked "Belvidere"?

A. Yes.

Q. Okay, thank you. Please have your seat.

(Witness took witness stand.)

Mrs. Najera, how long have you lived at 668 Mary Stuart?

A. About two years.

Q. And is that house located in El Paso County, Texas?

A. Yes, it is.

Q. What is your present occupation?

A. I'm employed by the El Paso Independent School District; I'm a first grade teacher at Crockett.

Q. How long have you been a first grade teacher?

A. This is my first year at teaching.

Q. When were you licensed to teach?

A. I graduated from UTEP on May 19th, 1987.

Q. Okay. And prior to being a teacher, was being a student your full-time occupation?

A. Yes.

Q. Back in 1985, were you a UTEP student?

A. Yes.

Q. And where were you living on November 25 of 1985?

A. Same address, 668 Mary Stuart.

Q. On November 25, 1985, do you recall what day that was?

A. It was a Monday.

Q. Did anything unusual happen that day to you?
A. Yes.
Q. Will you please tell the jurors what you did that morning?
A. Okay. I had gone to the school that morning, I had dropped my little girl, she was going to Western Hills Methodist.
Q. She was four years old at the time?
A. Yes. I dropped her off at school and I went ahead and went to my classes at UTEP.
Q. And what happened after you went to your classes at UTEP?
A. I came home, I drove home, and drove into my driveway.
Q. And approximately what time was it when you drove home?
A. It was about 11:00, around 11:00 o'clock.
Q. And what were your intentions when you drove home?
A. I pick up my daughter close to 11:30 from Western Hills Methodist. I was getting ready for a math final with Dr. Hernandez, I had a math final coming up and I wanted to study for a little while before I went to pick her up.
Q. And looking back on that date, how did you get to your house?
A. I drove.
Q. Okay. And did you drive alone?
A. Yes.
Q. And where did you park the car?

A. In my driveway.

Q. And looking back on that date, did anything unusual happened up to that moment?

A. No. Except that when I got out of my car I went to the front door and I noticed that there was a car driving by. It was coming up Mary Stuart from Belvidere, it was like a putty-colored car.

Q. What drew your attention to this car?

A. It was going slow.

Q. All right. And what did you notice?

A. I thought he was going to pull into my driveway, so I turned around and I noticed that it had like tinted windows, so I couldn't make out who was inside.

Q. Okay. Could you tell whether it was a man or a woman?

A. No.

Q. What could you tell about the person --

A. I could tell that the person was wearing a hat.

Q. And when you say "a hat," are you talking about a hat with a rim?

A. No. I'm talking about like a knit cap.

Q. Okay. You could see that it was a knit cap at that moment?

A. Yes; I wasn't sure if it was knit, but I could tell it was a cloth cap.

Q. Okay. Did you pay any other attention to that?

A. No.

Q. What happened next?

A. Next I unlocked the door and I went inside; I went and put my books and my purse away on the kitchen table.

Q. Will you please approach this blackboard and draw a rough diagram from the entrance to your house?

(Witness left stand and approached the blackboard.)

Will you indicate where the front door is?

A. It's right here (indicating); the entryway comes out like this. (Indicating.)

Q. All right. Can you draw like a square and then indicate the entrance to your house?

A. Over here is the garage, the garage area, and then it has an entry, and the entry is kind of like two walls that come out right here (indicating), and then it's kind of like a hidden entry, and if you're standing at the door you can't -- you know.

Q. Is it carpeted?

A. You mean -- this is --

Q. Is it outdoors?

A. Yes, this is outdoors.

Q. Will you please draw there indicating where the door is?

A. Yes. (Indicating.)

Q. You showed me the front of the house. Okay. What I

want you to do is draw a schematic of that house.

A. This right here would be the door. When you go into the house the very very narrow entry right here and it's very small, too. (Indicating.)

Q. Okay. And that's an entryway?

A. Yes.

Q. Do you have a dining room?

A. Yes. Just a square.

Q. All right. You have a dining room.

A. It's like a kitchen or dining room. As you walk from the entry right here, then you hit carpet; on this carpet right here it goes up like this and then here is like a den over -- there's a couch here, and then over here is where the kitchen table is. Over here is a small kitchen. (Indicating.)

Q. Okay. Let me stop you there real quick. Was there a table that you put your things on?

A. Right here. (Indicating.)

Q. Will you please mark it with an "X"? And will you please mark with an "E" the area that you enter through?

A. Right here. (Indicating.)

Q. All right. And where was your purse?

A. It was right here on the table. (Indicating.)

Q. All right. Go ahead and take your seat.

(Witness took witness stand.)

What happened after you locked the door?

A. After I locked the door I went and I put my purse down on the table and my books; then I went to the garage where the wash and dryer are, and I had started a load of clothes in the morning, so I was going to take them out of the wash and put them in the dryer.

Q. Okay. Please continue.

A. Before I had finished even putting the clothes into the dryer, the doorbell rang.

Q. Now, were you expecting anybody at that time?

A. No; at that time it was getting close to Christmas and I was collecting packages from UPS for my neighbor.

Q. Was there anybody in your house at that time?

A. No.

Q. Do you have a peephole in your door?

A. No.

Q. Do you have any glass that would allow you to look out to the front porch?

A. No, you cannot see.

Q. So, what happened when you got to the door?

A. The doorbell rang, I went and answered the door, I unlocked the door and there was a man standing there. At that moment, what flashed through my mind at the moment was that some years ago, an old man that had Alzheimer's disease, when we were living at another address, had tried to open the door. That thought flashed through my mind, and I thought, maybe

this person has Alzheimer's disease.

Q. Was there anything about the person at that moment that made you think he might have Alzheimer's disease other than the fact that he was in your front porch?

A. He had a strange look on his face. I looked at him, and then I saw the gun he was holding right here. (Indicating.)

Q. All right. Let me stop you right there. How was this man dressed when you opened the door? What did you see as far as his head?

A. Okay. As soon as I saw him I looked and I saw that he had on a hat, he had on a hat that was covering right to his eyebrows, his eyebrows were covered.

Q. And what kind of a hat was this?

A. It was like the old -- it was like the old type ski cap; it's not like the square ski cap that you see now. It's round.

Q. Okay. Let me show you an example of that. Would it be consistent with this particular hat?

A. Yes.

Q. And this hat, you never recovered anything, there's no --

A. No.

Q. Okay. And this is what you mean by an old ski hat?

A. Uh-huh.

Q. You said that he had it over his --

A. Over his eyebrows.
Q. Was the lip of the hat up?
A. Yes, it was folded, like that, over his eyebrows.
Q. Okay. How long of a period did you look at him?
A. I would say about ten seconds.
Q. How long was he standing outside your doorway?
A. Not very long at all; he immediately pushed the door opened and pushed me.
Q. Okay. And what happened next?
A. He pushed me and then he had a gun like this, and I was just looking at him, and then he said, "Turn around, I'm not going to hurt you, you do what I say, turn around."
Q. Okay. And at this time where were you?
A. I was still at the entrance, right there by the door.
Q. Where was he?
A. He was right there standing facing me.
Q. Was he inside your house at that point?
A. Yes. And the door was closed.
Q. Okay. Then what happened?
A. Then he told me, he said -- I looked at him when I opened the door, I looked at his eyes, I looked down and saw the gun, then I looked back at him. Then he told me to get down,to squat down on all fours.
Q. Okay. Let me stop you there. After that moment, did you get another look at his face?

A. I was still facing him when he was at the door, yes, I could see the gun.
Q. When you were squatting down, did you see the pistol?
A. No.
Q. And after that initial part of this whole episode, were you able to see his face?
A. No.
Q. Okay. So going back to the moment when the door was opened and you observed him, can you tell us, can you give us some description of what stood out in your mind as you saw his face?
A. Okay. When I saw his face, the thing that caught me was his blue blue eyes, he had blue blue eyes, and he had skin that was white white white. When I described it I described it as white-pasty. I didn't see what his hair looked like, I didn't get a picture, but I would describe it as the type of skin that you could see on a redhead.
Q. Okay. Could you see any of his hair?
A. No.
Q. Was there anything else about that face that you saw that you recall?
A. He was gritting his teeth like this, and when I looked up I saw the eyes and then I saw the teeth, it was just, "Do what I say, turn around, just do what I say." He was just gritting his teeth.

Q. What was running through your mind at that moment?
A. That I was going to die.
Q. Why?
A. I saw the gun, I thought he was going to kill me.
Q. Did you ever tell him anything before he told you to get down?
A. I said, "Please don't hurt me, please don't hurt me."
Q. You recall how many times you said that?
A. I said it quite a few times during the whole ordeal.
Q. Did you say anything else to him before he told you to get down?
A. "I'll do what you say, just please don't hurt me." That's when he told me to get down on all fours. Then he had the gun --
Q. Let me stop you right there. Go ahead about the gun.
A. That's when I felt the gun at the back of my neck.
Q. Okay. Did you feel the gun at the back of your neck before he made you get down or afterwards?
A. No. When I was getting down I could feel the gun, and then when I was down he put the gun at the back of my neck.
Q. When was the first time that he laid a hand on you?
A. When I was getting down -- I think he put his hand to push me down, to get me down; I think it was the gun that was making me get down, giving instructions.
Q. Okay. Did you turn away from him or did he have to

turn you away from him?
A. He turned me around.
Q. Now, your hallway is not carpeted, your entryway?
A. No.
Q. And it's small?
A. Uh-huh.
Q. Would you say it's about as small as the area that you are sitting in, including the desk?
A. It's about that.
Q. And then your room adjoins that little entryway?
A. Uh-huh.
Q. And that's where the carpet begins?
A. Uh-huh.
Q. How far into that room where the carpet begins were you when you got down?
A. Right there.
Q. All right.
A. Right there where the carpet begins.
Q. Did you get down on your own or did he assist you?
A. I think the gun was pushing me; he kept saying, "Get down, do what I say."
Q. Did he tell you how to get down?
A. He said, "Get on all fours."
Q. And what did you do?
A. I got down on all fours, but then he said, "Put your

head down, I want your head down." I had to put my hands out, and then I remember him pushing my legs to get my legs apart.

Q. Okay. And then what happened?

A. Then he said, "Where is your money, I want your money, tell me where your money is." And then I said, "I don't have any money." And then he said, "Where's your purse?" And I said, "My purse is on the kitchen table but I don't have any money. Please don't hurt me, please don't hurt me." And I remember I could see a marble statue that I have, and I kept thinking, "If I could reach that marble statue." The gun was at the back of my neck the whole time.

Q. What happened after you told him you didn't have any money?

A. Then he said -- he made me crawl; he said for me to crawl to where the table was, so then I started crawling to where the table is in the kitchen, and he kept kicking me and telling me to go faster, go faster, and then he kept telling me things like, "Go faster, you whore." Things like that.

Q. And I know that it's not pleasant to relive this, but, what other names had he call you up to that moment?

A. He had kept telling me, "I'll blow you away." I was crying, he would say, "Shut up, or I'll blow you away. If you scream or say anything I'll blow you away, you fucking whore." He kept calling me a fucking whore, called me a bitch.

Q. Mrs. Najera, what were you wearing that day?
A. I was wearing Levis and a sweater and tennis shoes.
Q. Did you ever make it to the table?
A. Yes, I was there, I got to a chair of the table and I was right next to it.
Q. Okay. And was your purse visible from the spot that you began to crawl?
A. Yes.
Q. Could the individual have walked over there and gotten the purse without making you crawl?
A. Yes.
Q. When do you recall the gun being on the back of your head as you were crawling toward the purse?
A. You mean when I was crawling?
Q. Yes.
A. The whole time, the whole time. I could feel the gun.
Q. Did you ever reach for your purse?
A. No, he did.
Q. What happened?
A. He opened my purse and he got what he thought, I guess, was the money, where I kept the money; he pulled out the long thing where I keep my credit cards and he threw it down on the ground and told me to get the money out.
Q. What did you tell him?
A. That I did not have any money.

Q. What happened after that?
A. After I told him that I didn't have any money I thought he was going to get a knife from the kitchen.
Q. All right. Did you ever reach for the purse or your wallet?
A. No. I could see it, he threw it down.
Q. All right. Your dining room table is close to your kitchen?
A. Yes; there was a knife in there.
Q. When you say that there was a knife in there, how far from the table was --
A. Oh, he could've reached it with his hands.
Q. Did you have a telephone in the immediate vicinity?
A. Right there in the counter to the kitchen.
Q. What happened after he threw the wallet down?
A. He was real jumpy, the whole time he was there he was like -- he was real real real jumpy, and when he would talk I noticed that his speech was not exactly -- there was something that was different about his speech -- it was like he was real nervous, like someone that was on drugs, like real hyper.
Q. And you have described as perhaps retarded speech as well?
A. Yes.
Q. Let me just ask you what you mean by that. Was his

speech continuously defective in the manner that you have described?

A. No. I've worked with mentally retarded children, and the Down's children have very very big tongues, and his speech, once in a while, would be like a word wasn't clear. That's what made me think he was on drugs or something, or might have possibly been retarded, and his eyes.

Q. All right. You haven't seen the eyes until now, since he come in?

A. No. I never saw his face after that.

Q All right. Can you still picture his face in your mind right now?

A. Yes, I can.

Q. Let's go back to the time that you're on the floor and you're near the table, and all your clothes are on, then what happened?

A. That's when he said, "I'm just going to feel you. Just do what I say and I won't hurt you. I'm not going to hurt you, just do what I say." I kept crying, he kept telling me to shut up.

Q. And what position were you in at that time?

A. I was still faced down. After he had his hands under my sweater, he started taking off my bra; he pulled my sweater off of my head and my arm, but he couldn't undo my bra. That's when he told me to take it off.

Q. What was his demeanor at this time? How was he acting?
A. He was still jumpy, the whole time he was jumpy.
Q. Was he calmed or angry?
A. Angry, very angry.
Q. Then what happend?
A. After that he tried to take off my pants --
Q. Did he take your sweater off?
A. Yes.
Q. Did you have a blouse underneath?
A. No, it was just a sweater and I had a brassiere.
Q. Did he take that off?
A. No, I had to, he couldn't unhook it.
Q. So he told you to take it off?
A. Yes.
Q. Then what happened?
A. Then he started taking off my pants, but he got very very upset because my pants were the kind that have like a zipper at the cuff, and he couldn't get my pants off because of my tennis shoes, so he took my shoes off, and then he couldn't get my pants off because they're real narrow, so he made me help him take my pants off. I didn't have anything on.
Q. What happened next?
A. Then after that I could hear him unzip his pants, I was crying, I kept saying, "Please don't hurt me, please don't hurt me."

Q. And what had he said up to that moment?
A. He had said, "I'm not going to hurt you, just do what I say."
Q. And where was the gun during all this time?
A. It was at the back of my head. Okay. Then after he put his hands around me, I said, "Please don't hurt me, I'm so sick." I don't know why I said that. I told him I had hepatitis. I had had hepatitis in the past, and I had been very ill, and I was crying, and I guess he must have believed me.
Q. Okay. Let me ask you this. Did you hear the zipper before you told him about the hepatitis or afterwards?
A. After. Wait, wait, I said it and -- I told him before he unzipped his pants, before, and then I told him about the hepatitis.
Q. And at this time what articles of clothing did you have on?
A. At that time I was laying there with nothing on. I think I might have had my socks on.
Q. And then what happened?
A. Then he asked me what I had, and I told him I had hepatitis, and then he asked me where my boyfriend was, I told him I was married; he said, "You're not fucking married." I said, "Here's my wedding ring." I showed him my wedding ring, he lifted my hand, and he said, "You're not fucking married." And then he got on my back.

Q. Okay. Mrs. Najera, how long have you been married?
A. I've been married 16 years in August.
Q. How old are you?
A. I am 33.
Q. Married to the same man?
A. Yes.
Q. What happened after that?
A. Okay. He was laying on top of me, that's when he said, "I'm not going to hurt you, just do what I say." Then after he felt me all over he got his hand and he put his hand inside of me.
Q. Okay. I'm sorry to have to make you describe this, but when you said he felt you all over, what did he do?
A. He felt me all over, he felt my -- everything -- he had his hands all over me.
Q. Would that have included your breasts?
A. Yes.
Q. And then you said that he put his hand inside of you?
A. Yes.
Q. And when you say that you mean inside of your vagina?
A. Yes.
Q. And what posture were you in at that time?
A. I was still laying, the gun was still in back of my neck, I was still laying there with my face down.
Q. Was it his fingers that he put in?

A. Yes.
Q. Do you know how long he had them in there?
A. About five minutes.
Q. Did he say anything to you during this time?
A. He said, "I want you to come, I want you to come now." I said, "I can't, I can't. Please don't hurt me."
Q. You were still crying?
A. Yes.
Q. Did you say anything else to him besides, you know, besides telling him not to hurt you?
A. I said, "I'll do whatever you say, just please don't hurt me." I thought he was going to kill me.
Q. And then what happened?
A. And then after that he said -- he took my hand down there, down there, and then what he did he made me masturbate.
Q. He told you do what?
A. He said, "I want you to come. I know you like it. I want you to come, I want you to come now."
Q. Were you still crying during that time?
A. Uh-huh.
Q. How long did he make you do that?
A. Maybe five minutes. I don't know.
Q. Did he say anything else that you can recall during that time?
A. No. He just kept telling me, "I'm going to blow you

away. If you don't do what I say, I'll blow you away."
Q. Then what happened?
A. Then after that he said, "You're going to think I'm leaving, but I'm really not leaving. You can hear your door slam, but I'm not really going to leave. So if you get up, if you move, if you scream, I'm going to blow you away. I'll be standing right there."
Q. When he said that where was the gun?
A. I couldn't turn around, but I believe he stood up, and I didn't feel the gun anymore.
Q. When was this that you didn't feel the gun anymore?
A. Shortly after -- I guess after he had made me do that, then after that is when I felt the gun go off, I think he was zipping his pants.
Q. And what happened after he told you that he was leaving?
A. Then I just laid there, I thought he was still there, he was still in the house and I was afraid to get up, so I laid there for a while. I finally heard the door slam, I got up and looked around; I went to the phone, I also started dressing, I was pretty hysterical at that time. I tried to call 911 on the telephone, but they couldn't understand me, because I was crying so hard. She kept telling me to hold on, to hold on, that she couldn't understand me; finally, she understood my address.
Q. And then what happened after that?

A. I called my husband's office and his supervisor answered and he didn't understand what I was saying, I just kept saying that I was hurt, so he related that something was wrong with Kyta. After that I didn't think, I thought he might still be there, I finally looked to see if he was there and I noticed that the garage was opened, I thought maybe he could be in the garage. I called my mother's house where my sister was; Gloria answered the phone and I screamed, and the next thing I know the doorbell rang, I was just stitting on the couch, I was just shaking, I thought it was him, I thought he had come back, that he had gotten into the garage, that he had come back around the front of the house. I didn't know who it was. They kept saying to let them in. I wouldn't open the door, I was scared, I thought that it was him. About that time my sister Gloria drove up, came up to the door, and kept saying to open the door.

Q. Did you find anything missing in your house?

A. No, nothing was missing.

Q. Were there any other indications of him having anything in your house?

A. No. When the police officer came, I asked him if they could get fingerprints off my purse or from the door or anything, but he said things like that have been touched by too many fingerprints and that they couldn't do that.

Q. Was there anything particular about your phone when you

used it to call --

A. When I went to use the phone it was unplugged, he had unplugged it.

Q. How do you know he had unplugged it?

A. I didn't unplug my phone, I keep my phone plugged in.

Q. Did the police ever arrive?

A. Yes, they did.

Q. Did you give them a description of the man who did this to you?

A. Yes.

Q. Whom did you speak with at the police department?

A. I believe his name was Eaton, something like that.

Q. Was it that day?

A. Yes, right after it happened.

Q. And did you have another opportunity to assist the police in attempting to describe the man?

A. Yes, when I did a sketch, a composite.

Q. And you recall when you did that composite?

A. I came down on May 2nd of -- I can't remember.

Q. This composite that you drew up. Do you know what a composite is?

A. Yes.

Q. How soon after the offense did you compose a composite?

A. A few weeks later.

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Q. So it would've been in 1985?

A. Yes.
Q. Did you also assist the police in attempting to describe the gun?
A. Yes. He showed me some pictures and I picked out which one I believed was the gun that he had.
Q. Can you at this moment picture the face that you saw at your front door on November 25, 1985?
A. Yes.
Q. I'm going to ask you please look around the courtroom and see if there's anyone here that looks like that person.
A. That's the man that attacked me right there. (Witness indicated by pointing at the Defendant.)
Q. What is it about this man that makes you say that?
A. When he looks at me -- he won't look at me -- when he looks at me those are his eyes; he didn't have that mustache, he had a hat like this, but, that's him, that's the man that attacked me.
Q. Okay. I'm going to hand you what's marked as State's Exhibit No. 45 and 46. Looking at State's Exhibit No. 45, can you tell me what that is?
A. This is when I did the -- when I picked out the gun, he showed me the pictures and this is a picture of what I thought was the gun that he used.
Q. Okay. And did you identify that by placing your signature anywhere on there?

A. Yes.
Q. Do you know anything about guns?
A. No.
Q. And what is State's Exhibit No. 46?
A. This is what the composite is that I put together with Detective Dove.
Q. And that was sometime after the incident before the end of the year?
A. Uh-huh.
Q. Did you have an occasion to hear from the police regarding they developing a suspect in your particular case at anytime after you composed that composite?
A. Yes.
Q. When was that?
A. That was in May.
Q. Of what year?
A. Of 1987.
Q. All right.
A. I got a phone call that they had found someone that might fit the description and would I come down to identify someone in a lineup.
Q. Did you go to a lineup?
A. Yes, I did.
Q. And would that have been around May 2nd, 1987?
A. Uh-huh, yes.

MR. LIZARRAGA: May I approach the witness?

THE COURT: Yes.

Q. I'm handing you a photograph that has been marked as State's Exhibit No. 47. Can you tell me what that is a photograph of?

A. This is a picture of when I came to the lineup.

Q. Okay. And when you went to the lineup, did they tell you that you had to pick somebody?

A. No, I didn't have to pick anybody.

Q. Okay. Tell the jury what happened when you walked into the room to view this lineup?

A. I walked into the room where the lineup was, and I immediately looked at all the different faces there, and I immediately picked him out. I started crying. They had told me that he wouldn't be able to see me, but when you're standing there and he's staring at you right through that thing, it looks like he's standing there staring at you, it looked like he was staring at me again. I fell apart.

Q. Okay. And at the time that you picked him out -- Will you please get the red marker there, and on that exhibit that I prepared, will you please circle the individual that you picked.

(Witness followed instructions from counsel and indicated on exhibit.)

And in what position is he among the five individuals

on here?

A. He's the third one.

Q. And were you satisfied at that time that that was the person that you saw on November 25th, 1985, at your house?

A. Yes, yes.

MR. LIZARRAGA: I would like to offer State's Exhibit 47.

THE COURT: Counsel?

MR. GARNEY: Same objection, your Honor, as was discussed previously.

THE COURT: All right. Objection will be overruled and it will be admitted.

(WHEREUPON, State's Exhibit No. 47, previously marked as SX-47 for identification, was received into evidence.)

MR. LIZARRAGA: Your Honor, I would now like to offer State's Exhibits 45 and 46.

THE COURT: Counsel, any objections?

MR. GARNEY: Same objection.

THE COURT: It will be overruled.

(WHEREUPON, State's Exhibits Nos. 45 and 46, previously marked as SX-45 and SX-46 for identification, were received into evidence.)

Q. Mrs. Najera, the man that was in your house on November 25th, 1985, who you identified as Brandon Moon, had you ever seen him before that date?

138 -0178

A. Never seen him before.

Q. And I know this sounds like a silly question, but were you, perhaps, married to him?

A. No.

Q. And did you give him permission to do the things that he did to you?

A. No.

MR. LIZARRAGA: Pass the witness.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. GARNEY:

Q. Mrs. Najera, I believe I introduced myself to you as Norbert Garney approximately an hour and a half ago?

A. Yes.

Q. And, ma'am, I believe the first time -- that first time is the first time that we had really met each other, right?

A. Yes, sir.

Q. And I believe that's also the first time that we have spoken to each other?

A. That's correct.

Q. Did you give a statement in this case, ma'am?

A. Yes.

MR. GARNEY: May I see that statement, please?

MR. LIZARRAGA: Yes.

138 -0179

Q. All right, Mrs. Najera, let's go over some of your

testimony again. Now, on the morning of November 25th, 1985, that was a Monday morning?

A. Yes, it was.

Q. And at the time when you arrived home from school, that would have been approximately 11:00 a.m.?

A. Yes.

Q. Going on lunch time?

A. Yes.

Q. It was not around 9:00 o'clock in the morning?

A. No.

Q. And when you did arrive home, going up to your door, you saw an automobile pass by your house, is that correct?

A. That's correct.

Q. And in which direction was that automobile traveling?

A. It was going up from Belvidere on to Mary Stuart street up.

Q. Okay. Is that like towards the mountain?

A. Yes.

Q. Would it be fair to say that's in an easterly direction?

A. I can't say for sure.

Q. Toward the mountain, anyway?

A. Yes.

Q. You live on the westside?

A. Yes

Q. So, just generally speaking, somewhere toward the east?

A. Uh-huh.
Q. And I believe your testimony was that you saw an individual in that automobile?
A. Yes.
Q. A putty-colored hatchback type automobile?
A. Yes.
Q. Possibly a Rabbit or a Gremlin?
A. That's right.
Q. Windows tinted?
A. Uh-huh.
Q. Now, it is your testimony, is it not, that you could not identify whether the individual in that particular automobile was male or female?
A. That's correct.
Q. As a matter of fact, I believe you testified that you felt or you saw someone turn towards you from that automobile?
A. I did see an image, but I couldn't tell you if it was a man or a woman.
Q. But, you could pick out this kind of hat, as you described it?
A. At that point I knew he had a hat, I can't tell you what the hat was like until -- I mean, if that was him, I don't know if it was or it wasn't later when I saw the hat.
Q. You've used the pronoun "he"; is that just out of habit?
A. Just out of habit.

Q. Okay. And you never saw that person again?
A. Never.
Q. Did you ever see that automobile again?
A. Never.
Q. You didn't catch a license plate or anything?
A. I wasn't thinking, I didn't think anything of the car going down past my house; I thought someone was coming to visit us. You know that sound that a car makes when it's just driving by and it slows down like it's going to go into the driveway, that's the sound it made. I mean, I didn't even think of getting the license.
Q. At any event, the car never stopped at your driveway?
A. No; it went past my house.
Q. You never saw the car stop anywhere?
A. No.
Q. As a matter of fact, once this terrible ordeal was over, did you hear an engine start up and drive away.
A. I couldn't hear anything. I was crying, I was hysterical. I wanted to go to the window, but I thought he was in the garage.
Q. You didn't hear anybody drive away?
A. No.
Q. Now, I believe you testified that you entered your door to your home and closed it behind you. Did you lock it?
A. Yes, I did.

Q. And then you started to drop off your purse and your books, and started removing some clothes from the washer and placing them on the dryer?

A. Yes.

Q. And it was during that time that the doorbell rang?

A. Yes.

Q. What did you do when you heard the doorbell ring?

A. I put the clothes down, I went to answer the door, I thought it was UPS.

Q. And did you open your door?

A. Yes.

Q. And what is the very first thing that you saw when you opened the door?

A. I saw a man standing there; at first I looked at his face, I saw his eyes, then I looked down and I saw his gun, and then I looked back to his eyes, his teeth that were gritting at me.

Q. Was the man wearing a cap?

A. Yes.

Q. What kind of cap was it?

A. It was like a blue ski hat, the old type ski hat, a dark navy blue hat, right to his eyebrows.

Q. Right to his eyebrows? Were his eyebrows covered?

A. Yes, right there.

Q. So, you never saw his eyebrows?

138 -0183

A. Not really.
Q. In any event, the cap was not brown, was it?
A. No, it was dark blue.
Q. And what was this man wearing?
A. He had on -- he had a jacket -- I can't be sure if it was a Levis jacket, I think it was a Levis jacket, like denim.
Q. You are using the term generically?
A. Yes; that's where he had the gun, he was holding it, he was hiding it when he came in underneath his jacket.
Q. It was kind of a denim jacket. Was it new?
A. No, it was old.
Q. Was it as is commonly known as "brush" denim, it looks like a velvet, or was it just like an old denim jacket?
A. I can't be sure; I just remember it was like a Levis jacket.
Q. You know how you get a new denim jacket and you wash it a million times and it gets all wrinkled and faded, that's what I'm asking you, kind of a wrinkled old faded jacket.
A. I can't be sure.
Q. All right. At any event, this person was wearing a Levis type jacket?
A. Yes.
Q. You never saw the word "Levis" on the jacket?
A. No.

138 -0184

Q. Did you notice any sort of decals or patches on the

jacket?

A. No.

Q. Any sort of embroidery?

A. No.

Q. Just a plain jacket?

A. That's what I remember.

Q. How long a time did you have to look at this person when you first opened the door?

A. When I first -- before he stepped in the house?

Q. Yes, ma'am.

A. It was like about ten seconds.

Q. And what happened then?

A. What happened after he came into the house?

Q. Yes, ma'am; after the few seconds elapsed, what happened?

A. He pushed the door, he pushed his way into the house and he pushed me back.

Q. Did he turn you around right away?

A. No, I stared at him a little bit longer; after the door was closed I was still, for a few minutes, before he turned me around, I still could see his face and I could see the gun.

Q. Now, how much longer did you see this person's face?

A. I would say the whole time I saw him was probably 20 seconds.

138 -0185

Q. Total from the very first time this person opened the door, barged in and turned you around?

Q. The maximum length of time you possibly could have seen this person, this person's face, was 20 seconds?
A. That's correct.
Q. And after that you never saw his face again?
A. I never did.
Q. Because he turned you around --
A. And he had a gun.
Q. Now, what kind of pants was this person wearing?
A. Levis.
Q. Again, you determined generically denim pants?
A. Uh-huh.
Q. They could've been Wranglers or whichever brand?
A. Yes.
Q. Did they match the jacket? By that, I mean, did they seem newer than the jacket or older?
A. I don't know; I was looking at the gun and his eyes and his face. I wasn't paying that close attention to the clothes he had on.
Q. You testified that you don't know much about guns, is that right?
A. I don't know anything about guns at all.
Q. Have you ever fired a pistol?
A. No.
Q. You do know, however, the difference between your basic colors, do you not?

138 -0186

A. Yes.
Q. What was the color of this gun?
A. It was black.
Q. How much of the gun did you actually see? Did you see the barrel?
A. I saw all of the gun except where he had his hand over it.
Q. And assume for the moment my hand is a gun, this is the barrel, and then what's normally called the grip, that's where you hold the gun. Was the gun being held by the grip?
A. Yes.
Q. So you would've seen the barrel and the upper mechanism?
A. Yes.
Q. And that was all black?
A. Yes, it was all black.
Q. You don't know the difference between a revolver and an automatic, do you?
A. No, I don't.
Q. I believe on one of the exhibits you did circle in yellow a particular gun, did you not? And that was a black gun?
A. Yes, it was.
Q. And I believe that the exhibit will show that it's an automatic-type weapon?
A. Uh-huh.

Q. Even though you don't really know that, do you?
A. I don't --
MR. LIZARRAGA: I object to the attorney testifying.
THE COURT: Overrule the objection.
Q. Now, you're pretty doggone sure that's the type of gun that was used that day?
A. I don't know anything about guns. I cannot tell you anything about guns. You give me the name of a gun, I don't know, I really don't know. I hate guns.
Q. I'm not talking about makes. I'm sorry. I'm talking about the shape --
A. What I picked out here is what I picked looking at the pictures, what I can remember what the gun looked like when it happened to me.
Q. Did it appear to be a large gun to you at the time?
A. It was a heavy gun, and the reason I say a heavy gun is that I could feel the gun in the back of my neck. I could see it when he had it my left temple. I could see right here, I could see the black gun.
Q. Let's talk about that just for a second. When you were on all fours on the floor, you felt the gun at your left temple?
A. Yes.
Q. Was this person standing directly behind you or to one side?

A. He was behind me -- he had the gun at the back of my neck, he kept telling me to get my legs apart, "Get them apart, get them apart." He was right against, like, centered, in back of me. When he had the gun he must've been standing closer to the side of me to have the gun there.

Q. You don't know whether he was holding the gun in his left hand or in his right hand?

A. I don't know that.

Q. Did you ever noticed his hands at all?

A. No, I didn't.

Q. Were they peculiar in any way?

A. I didn't notice.

Q. Was this person wearing gloves?

A. No.

Q. You didn't notice if this person had pointy fingers or anything like that?

A. No.

Q. Ma'am, I believe you testified that during the course of this ordeal, this person used an enormous amount of profane language.

A. Yes.

Q. Things like quote whore unquote, things like that.

A. Yes.

Q. And that language was directed towards you?

A. Yes.

Q. And I believe he also said things like quote fucking bitch close quote.
A. Yes.
Q. Was that used consistently throughout the entire episode?
A. Yes.
Q. Now, talking about this person's eyes. You testified that he had blue blue eyes.
A. That's right.
Q. That must have really impressed you, the deep color of the blue in his eyes?
A. Yeah.
Q. A very distinctive type blue.
A. Yes. With the cap his blue blue eyes just stood out; I couldn't see his hair.
Q. No hair whatsoever?
A. No.
Q. As a matter of fact, I believe you even indicated it might be the type of person who had red hair.
A. That's right; he had that real fair skin like a redhead.
Q. How about freckles like a redhead?
A. No.
Q. The eyes, however, were a deep deep or blue blue?
A. That's correct.
Q. You testified that he was gritting his teeth a lot.
A. Yes.

Q. Was he making grinding noises? Did you notice?
A. He was just like -- when I opened the door, his teeth were like this, "Do as I say." I remember his teeth were staring right at me.
Q. Now, this person never did make you go to your bedroom, did he?
A. No.
Q. Do you have a master bedroom in your home?
A. Yes.
Q. I believe you testified that this person was real jumpy?
A. Yes
Q. Can you just tell me a little bit about that? What do you mean by the words "real jumpy"?
A. The whole time he was just jumping, jumping, jumping; even when I was crawling I could hear him, he was jumping, kept jumping, he was nervous; like I said, maybe he was on something, I don't know.
Q. Was he literally bouncing around?
A. Yes, uh-huh, he was like very very very nervous, jumpy.
Q. I believe you even testified that his speech was not right?
A. Uh-huh.
Q. Can you explain that a little bit more to me, what you mean by those words?
A. It's very very hard to explain what I mean. The words

were not right, they just didn't sound right.

Q. Are there any particular words that you can recall that were mispronounced?

A. No.

Q. I believe you testified that he had a certain type of drawl or accent?

A. I never said that, drawl or accent. I said that sometimes, like, they were not pronounced right.

Q. You testified that perhaps like a big tongue?

A. Yes.

Q. Like a Down's syndrome type of speech?

A. No, not like that all the time; I said like a Down's syndrome child had a big tongue, and when the tongue is too thick, once in a while you would hear -- he wasn't saying it right. And it wasn't the whole time. Like some of the words were okay, but it was like something was wrong with his voice.

Q. Like pronouncing TH sounds or something like that?

A. I don't know for sure.

Q. But, anyway, it was quite noticeable to you?

A. I remember that.

Q. It would be fair to say, Mrs. Najera, that at the very max, you could've seen the face of that person for 20 seconds?

A. That's fair.

Q. And during that 20-second period that you looked at that person, the most you could've seen of that person would

be from the eyebrows on down, not including the eyebrows?
A. Yes.
Q. You couldn't have seen that person as you're looking at me and you can see my hair and I have nothing on my head?
A. He had a hat.
Q. What I'm saying, as you're viewing me I don't have a hat, do I?
A. No.
Q. During that 20-second period you never saw his head uncovered?
A. That's right, I didn't.
Q. One last question, Mrs. Najera, the person that was in your house that day, he did not enter you with his penis, did he?
A. No.

MR. GARNEY: I pass the witness.

THE COURT: Counsel.

REDIRECT EXAMINATION

BY MR. LIZARRAGA:

Q. Mrs. Najera, just a few last questions. Do you recall the hand that this man touched you with?
A. When he turned me around or when?
Q. When he had you down on the floor.
A. No.
Q. Do you recall the hand that he was holding the gun with?

138 -0193

A. No.

Q. Were the police or you able to find any stains, like semen, or anything like that?

A. No.

Q. Did you go to Sierra Hospital?

A. Yes. They wanted to call the ambulance, but then my husband drove up and my husband took me to Sierra Medical, and at Sierra Medical they kept my clothes, tennis shoes, everything.

Q. But they never found any evidence of him, is that right?

A. No.

Q. Was there anything taken or missing from your house?

A. No.

MR. LIZARRAGA: That's all, your Honor.

THE COURT: Counsel, anything further?

MR. GARNEY: No, sir.

THE COURT: You may step down. Counsel for the State, call your next witness.

MR. LIZARRAGA: Your Honor, we rest.

THE COURT: Counsel for Defense?

MR. GARNEY: May we have a moment, your Honor?

THE COURT: Yes.

MR. GARNEY: Your Honor, the Defense calls Brandon Lee Moon.

138 -0194

THE COURT: Mr. Moon, take the stand.

BRANDON LEE MOON,

the Defendant, recalled as a witness, having been previously sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GARNEY:

Q. Mr. Moon, I'd like to refer your attention back to November 25 of 1985, at approximately 11:00 o'clock in the morning. Where were you?

A. I don't really recall.

Q. That was some two years ago, is that correct?

A. Yes.

Q. A little over two years ago. Okay. And you have no idea where you were?

A. I could've either been at school or at my house, my parents' house.

Q. Back in 1985, where were you living?

A. I was living at 10500 McCombs.

Q. Generally, sir, where is that in the city?

A. That's the very end of the northeast.

Q. Is that near Fort Bliss?

A. It's past that.

Q. Back in 1985, the month of November, the 25th, did you own an automobile?

A. No, sir.

Q. Specifically, did you ever drive a putty-colored Gremlin

or a Volkswagen?

A. No, sir.

Q. How did you get around?

A. I would take the SCAT bus.

Q. Now, this address that you gave in the northeast, what kind of place was that?

A. It was an apartment.

Q. Were you living with anyone at the time?

A. Yes, sir.

Q. Who was that?

A. My wife.

Q. Where is your wife today?

A. She lives in Virginia.

Q. Are you frightened right now?

A. (No answer.)

Q. Generally, back in the fall of 1985, what was your occupation?

A. I was a student and a photographer.

Q. And where was that?

A. I was a student at UTEP and I was working as a copy-camera artist or photographer on campus. I was doing free-lance work.

Q. Will you explain very briefly what that means?

A. In the production of newspapers, what they do is that they have a printout, kind of like typing on a sheet of paper,

and then there would be columns as the newspapers put out, they paste that on to a piece of paper that's approximately the size of a newspaper. That's how they figure out how to layout the paper. Part of my duties as a copy-camera photographer was -- I photographed pictures that they put into the newspaper, as well as stuff that they call lineshots; that would be like cartoons, the heading of the newspaper where it says "Prospector," any kind of graphic art, which I photographed, and also that they can paste that on to the page. The ones that finish laying out the page, when they are finished doing that I take the layouts to the darkroom and I photograph those on to lithograph film. Then I develop the film for that.

Q. Brandon, have you ever been diagnosed as having a speech impediment?

A. No, sir. Wait, I'm sorry. When I was in kindergarten I couldn't pronounce my S's.

Q. And has that problem been resolved?

A. Yes, sir.

Q. When has it been resolved?

A. Before I went into first grade.

Q. Back when you were a little child?

A. Yes.

Q. Since then have you had any speech impediment?

A. No, sir.

Q. Have you ever received any therapy for speech?
A. No.
Q. Now, back in November of 1985, were you taking any kind of drugs?
A. No.
Q. In November of 1985 were you a full-time student at UTEP?
A. I was full-time.
Q. How did you get from the northeast to UTEP?
A. I think I took number 51 bus from my apartment in the northeast to the UTEP campus. I mean, to downtown, and then from there I would catch another bus up to campus.
Q. Brandon, back in November of 1985, did you own a large black automatic pistol?
A. No, sir.
Q. Did you have one in your possession at any time during that month?
A. No, sir.
Q. Did you own a large blue knit cap?
A. No, sir.
Q. Have you ever own a denim-type jacket?
A. Yes, I did.
Q. Will you describe that denim-type jacket to the jury?
A. It was kind of like the regular denim jacket; on the back of the jacket I had embroidered a wolf, and on the front of it I had embroidered something else, but I can't recall

what it was.

Q. Do you recall the color of the stitches?

A. Red and white.

Q. Was it very noticeable?

A. Definitely.

Q. When was the last time you wore that jacket?

A. Probably in my junior year in high school; possibly my senior year.

Q. Did you wear it while you were a student at UTEP?

A. Never.

Q. Where is that jacket now?

A. As far as I know it's in the attic of my parents' house, but I don't know if they've thrown it away or put it in a Goodwill box. I really don't know.

Q. You haven't worn a Levis jacket since junior or senior high school?

A. Yes, sir.

Q. What year would that have been?

A. I graduated in '79, so it would've been in '77-'78.

Q. So seven years prior to 1985?

A. Yes, sir.

MR. GARNEY: Your Honor, at this time I would ask permission to allow Brandon to publish his eyes to the jury up close.

THE COURT: Yes, sir.

138 -0199

Q. Brandon, step down, and I would ask you to look at each juror and let them see the color of your eyes.

(At this time the witness left stand and proceeded to follow the instructions of counsel.)

Q. Brandon, what is the color of your eyes?

A. They are blue.

Q. They are blue?

A. Yes, sir.

Q. Have they ever been described as a blue blue?

A. No, not that I know of.

Q. Now, Brandon, let me direct your attention, specifically, to November 25, 1985, at approximately 11:00 o'clock in the morning. Back at that time and date did you go to the address of 668 Mary Stuart?

A. No, sir.

Q. Do you know where that is?

A. No, sir. I have a vague idea from the map which she described, but that's it.

Q. And that information you picked up during the course of this trial?

A. Yes, sir.

Q. Did you enter the home of Kyta Najera on the morning of November 25, 1985, at approximately 11:00 o'clock?

A. No, sir.

138 -0200

Q. Did you point a gun to her left temple on that morning?

A. No, sir.
Q. Did you drive a putty-colored Volkswagen or a Gremlin automobile?
A. No, sir.
Q. Something like a hatchback?
A. No, sir.
Q. Did you insert your finger inside the vagina of Kyta Najera?
A. No, sir.
Q. Did you ever threaten her life that morning?
A. No, sir.
Q. When is the first time you have ever seen the lady?
A. Here.
Q. Today?
A. Yes, sir.
Q. Did you ever call that young lady a fucking bitch?
A. No, sir.
Q. Or a whore?
A. No, sir.
Q. Is that the kind of language you normally use?
A. No, sir.
Q. Did you make Kyta Najera masturbate?
A. No, sir.
Q. Did you ever touch her with your hands?
A. No, sir.

MR. GARNEY: Pass the witness, your Honor.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. LIZARRAGA:

Q. Mr. Moon, are you under any medication right now?

A. Yes, I am.

Q. What is that?

A. Elavil.

Q. Is that kind of a depression-relaxant?

A. It's an antidepressant.

Q. Isn't it true that you have been disagnosed as being hyperactive since you were in the third grade, I believe?

A. Yes, I was.

Q. Hyperactive?

A. Yes, sir.

MR. LIZARRAGA: No further questions, your Honor.

THE COURT: Anything further, counsel?

MR. GARNEY: May I have a minute, your Honor?

THE COURT: Yes.

MR. GARNEY: Yes, I do have some more questions, your Honor.

REDIRECT EXAMINATION

BY MR. GARNEY:

138 -0202

Q. Brandon, if you would step down and take this red pen here on the table and draw a "B" with a circle for Brandon,

for your address where you were living on November 25 of 1985, as it appears on this map.

A. I can't.

Q. And why can't you draw a circle on this map?

A. In relation to my house --

MR. LIZARRAGA: Your Honor, I will object to any markings made on the exhibit. It's already in evidence.

THE COURT: It's still an exhibit, counsel.

Q. Go ahead, Brandon.

A. I believe this is Trans Mountain Road, and it comes across the mountain, so my house would probably be about here. (Indicating.)

Q. Okay. Brandon, when were you diagnosed as being hyperactive?

A. I believe when I was in the second or third grade.

Q. How old were you?

A. I was seven, somewhere around in there.

Q. And was that condition resolved?

A. I don't know whether it was or not.

Q. I'm sorry.

A. I don't know how to answer that question.

Q. Let me ask you this question. Are you currently taking medicine for hyperactivity?

A. No, sir.

Q. Back in November of 1985, were you taking any sort of

medications for hyperactivity?

A. No, I wasn't.

Q. For any neurological condition whatsoever?

A. No.

Q. Were you taking any medication for any psychological condition whatsoever?

A. No.

Q. Were you under a physician's care for any medical or psychological condition back in November of 1985?

A. Dental?

Q. Dental? What was wrong with your teeth?

A. I had to have a tooth replacement, a cap; I think that was prior to that time.

Q. Was that --

A. I had a root canal.

Q. Would that be the extent of it?

A. Yes.

MR. GARNEY: Pass the witness.

THE COURT: Counsel.

RECROSS-EXAMINATION

BY MR. LIZARRAGA:

Q. Sir, may I see your teeth?

A. Yes, sir.

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(Witness proceeded to follow the instructions of counsel.)

MR. LIZARRAGA: That's all.

THE COURT: Anything further, counsel?

REDIRECT EXAMINATION

BY MR. GARNEY:

Q. Do you have an overbite, sir?

A. A slight one.

Q. How long have you had that?

A. All my life.

MR. GARNEY: I pass the witness.

MR. LIZARRAGA: Nothing further, your Honor.

THE COURT: You may step down.

MR. GARNEY: Defense rests, your Honor.

THE COURT: Counsel for the State?

MR. LIZARRAGA: We close.

THE COURT: Counsel?

MR. GARNEY: Defense closes, your Honor.

THE COURT: Ladies and gentlemen of the jury, all of the evidence that has been presented for your consideration has been presented. It's the duty now of the Court to prepare a written charge based on the evidence that has been developed here. Let me consult with counsel for just a few minutes.

(At this time a discussion was had at the bench off the record and out of hearing of the jury.)

THE COURT: Ladies and gentlemen, I'm going to recess at this time for the night so that we can prepare the charge. I'm going to instruct you at this time that now that all of the evidence is in to please do not discuss anything about this case with anyone whomsoever including your respective spouses. Do not read anything about this case in the newspaper. Do not watch any news on TV tonight. I don't think that will cause you an inconvenience by not watching or reading anything in the news. Half of it is not true, anyway, so I don't think you'll be hurt. So with that, ladies and gentlemen, we'll recess until tomorrow at 8:00 a.m.

Goodnight, ladies and gentlemen.

(Jury left the courtroom at this time, and a short recess was taken.)

(The following proceedings were had after the recess out of the presence of the jury:)

THE COURT: Counsel, have you all had sufficient time to go over the jury charge?

MR. LIZARRAGA: The State has.

MR. GARNEY: Defense has, your Honor.

THE COURT: All right. Let's start with you, Mr. Lizarraga.

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MR. LIZARRAGA: Your Honor, we only urge that the Court include a definition of without consent from 22.011B and in the indictment that we have alleged it would be B2.

THE COURT: Just a moment. From 22 --

MR. LIZARRAGA: 011.

THE COURT: 22.011?

MR. LIZARRAGA: B2.

THE COURT: B2?

MR. LIZARRAGA: Yes, sir. This would be under the old Code.

THE COURT: All right. I think what should be done, then, counsel, is to take that definition of consent and include that: "A sexual assault or an aggravated sexual assault is without the consent of the person if..."

MR. LIZARRAGA: I agree, your Honor.

THE COURT: And then B2.

MR. LIZARRAGA: Yes, sir.

THE COURT: I'm going to include that, counsel, because I think he's right. I was looking at the new Code, this is under the old Code.

MR. GARNEY: I see.

THE COURT: So I'm going to make that change on the original. We'll go ahead and make the change and get a new page.

MR. LIZARRAGA: Your Honor, and in the general statement of the law, the new Code does now allow a spouse to aggravated sexual assault, but under the old Code that was not the case.

THE COURT: That's right.

MR. LIZARRAGA: And the statement in here appears to be that of the new Code.

THE COURT: Where is that?

MR. LIZARRAGA: Page 2.

THE COURT: Get me a pencil, I just caught a misspelled word. On page 2. Go and make the corrections. Now, where were you talking about?

MR. LIZARRAGA: Okay, under the definitions, general definitions of aggravated sexual assault, it would be a person not the spouse of the other person.

THE COURT: Yes, but you're going under the new Code that just took effect.

MR. LIZARRAGA: The offense occurred before September 1st.

THE COURT: That's what I'm saying. We go under the old law, don't we?

MR. LIZARRAGA: Yes, sir.

THE COURT: Where are we? Give me the section.

MR. LIZARRAGA: It would be, again, 22.011, because aggravated sexual assault is, "If it is a sexual assault..." --

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THE COURT: Without the spouse.

MR. LIZARRAGA: Right. And, lastly, if the Court is looking for misspelled words, I did find one on page 4.

THE COURT: Page 4.

MR. LIZARRAGA: The fifth line, I believe, should be "cause" not "caused."

THE COURT: All right. Any other corrections?

MR. LIZARRAGA: That's it, your Honor.

THE COURT: Okay. I guess you're going to have to change on all three of them: "...of another person who is not the spouse." Is that right?

MR. LIZARRAGA: Yes, sir. You understand that, Mr. Garney?

MR. GARNEY: Yes, Judge, I do.

THE COURT: So we'll change that. Is that all from the State?

MR. LIZARRAGA: Yes, sir. Mr. Garney?

MR. GARNEY: I believe that we're looking for a misspelled word; I think there's one on page 2.

THE COURT: All right.

MR. GARNEY: About the middle of the page, it says: "To said indictments the Defendant has..." it should probably be "plead" or "pleaded but not "has plead." I have no objection to either use of the verb.

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THE COURT: All right.

MR. GARNEY: And for the record, your Honor, I would object on page 2 to the definition given under aggravated sexual assault, under 50015, as being overly broad.

I understand the track of the language of section 22.011. That is, aggravated sexual assault is committed if the anus or female sexual organ is penetrated by any means, however, the indictment in 50015 does the use the term, is limited to the sexual organ of the --

THE COURT: Well, on page 4 the charge is limited; I've given them what the law is and then I'm limiting it as to what they allege in the indictment.

MR. GARNEY: All right, your Honor, I understand. Again, my objection would be to the overbroad of the definition given in cause No. 50033, also, on page 2.

THE COURT: Is that it?

MR. GARNEY: Yes, sir.

THE COURT: Then I'll change page 2 and page 3, and what I'll do I will substitute them and have them ready or you all if you all want to come back we'll have them ready today.

MR. GARNEY: Your Honor, if I could just have a ruling to my objections to the overbroad of the --

THE COURT: All right. Let the record show that the attorney for the Defendant has objected to the language in 50015 and 50033 as being overbroad and that objection is noted and will be overruled.

MR. GARNEY: Thank you, your Honor.

THE COURT: Is that it?

MR. LIZARRAGA: Yes, sir.

THE COURT: Mr. Garney?

MR. GARNEY: Same here, Judge.

THE COURT: All right.

(WHEREUPON, the Court was adjourned until Thursday, January 14, 1988 at 8:00 a.m.)

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MORNING SESSION

THURSDAY, JANAURY 14, 1988

(The following proceedings were had in the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen of the jury. Good morning, counsel. At this time I am going to give each of you a copy of the charge that I have prepared so that you can follow it as I read it. After I finished reading the charge, the attorneys will have an opportunity to argue their cases. I have given each side an hour.

(At this time the Court proceeded to read the jury charge in the guilty/ not guilty phase of trial.)

(After the reading of the charge, the following proceedings were had:)

THE COURT: All right, counsel for the State, you may proceed.

MR. LIZARRAGA: Thank you, Judge Peña. May it

please the Court, Mr. Garney, ladies and gentlemen of the jury.

Some political observers have noted that our president, Mr. Reagan, is a better actor now than he was when he was in Hollywood. And these people say that he's got a strategy. He's got a strategy whereby he wants us to believe that he is a competent person. He wants us to like him. He wants us to want to trust him. And in the context of this case I mean no disrespect to our president.

Let me submit, let me suggest one thing to you. A person, an individual, who has the audacity to rape married women in their own homes in broad daylight, is the same kind of individual who can come before us and sit down and talk to us and deny the obvious. You all have heard the adage, "The bigger the lie the most likely people are going to believe it." So, let's look at what the strategy in this case is. And, ladies and gentlemen, we know what it is because at the very beginning of the trial Mr. Garney told us, he told you during the voir dire, and it was his contention throughout the entire trial that Brandon Moon is innocent. That's the strategy. That's the objective. And where does the acting come in? It comes in, it begins to come in with the testimony of Mr. Moon himself.

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Ladies and gentlemen, we have developed a process in our judicial system whereby we attempt to arrive at the truth

through a certain procedure. Both Mr. Garney and myself had the opportunity to put our witnesses on, and we went through what is called direct examination. We are able to ask questions in such a way that they give information to you through their own mouths. The process gives information to the jury as opposed, for example, on cross-examination where we are allowed to ask questions that limits the process to yes and no questions, that puts words in the mouths of a witness and then out comes yes or or no, either I agree or I don't agree with them. Because the objective of cross-examination is to pin people down, to narrow them. So, I want you to think back to Mr. Moon's testimony and think back to the moment when Mr. Garney concluded his testimony, and what impression did we get from the very mouth of Mr. Moon, what impression did we get of him. Let me suggest a few things that he told us in so many words. He said, "I am a veteran. I have served my country." He told us, "I am a student and I want to be a pilot." He told us a few things about himself to personalized himself with us. "I like to make models of military airplanes." And he also told us that "I am the editor of the yearbook. I am a photographer and I contribute pictures for postures." He gave you a picture that he's an active student, aware of what's going on on campus. And he tells us, "I have a girlfriend and we have contemplated marriage. That's the kind of relationship we have." He

told us a little bit more about himself. "I haven't had a car in years. I walk everywhere. I take the bus. I get rides from other people. I don't have a car." And he tells us that he's in ROTC. He tells you, "I am going through this program where eventually I can receive my commission as an officer."

So, it's the context of this testimony that we have a picture of Brandon Moon that's pretty favorable. To be sure, there are some things we get from him that are rather negative. And you will see that it was a little necessary to put these items in, first of all, because they will come into evidence, and, secondly, because they are part of the alibi. He said, "I wasn't going to some of my classes, and I got an F." And one last thing that we found out, "I have the capacity to get watery eyes when I hear what happened on April 27th because I feel sorry for that person." And isn't that consistent with a person who is innocent who will say, "My eyes are watering because I'm a little incredulous that I am the person being accused of this." But, you see, Brandon Moon was trying to paint a picture of himself when he had the opportunity to communicate with you during direct examination.

Now, let's talk about cross-examination, folks. We have certain impressions about cross-examination because of movies and television. If you will recall, cross-examination

is where Matlock and Perry Mason get that witness to confess to the truth, and, you will notice, that it's always done during cross-examination. And, perhaps, some of us come in here thinking that there will be a rapid cross-examination where he will jump all over his case and will get the witness to break down and confess. And, of course, I will be the first to admit to you all that there is a little hope in the back of my mind that this will happen, and, of course, that would make your job so much easier, but, that's not reality, that's not the reality of the courtroom. And some of you may be disappointed because not a single question came from the prosecutor on cross-examination of Mr. Moon of what happened at 337 Belvidere on April 27th, 1987. Why? Because cross-examination is the opportunity to control the type of information that goes to the jurors. Why should I give Mr. Moon an additional opportunity to deny the obvious? Well, weren't your impressions of Mr. Moon a little bit tarnished after the cross-examination, nonetheless? Because we had had a picture of a very active student, a very innocent student, and now it appears that he was trying to come across as something he really wasn't. Okay, we found out that he has a family here in El Paso. He told us that. After cross-examination we find out that he has another family, that he's got a wife and a child someplace. And that's certainly not the impression that he gave you on direct examination.

You recall when I brought out in cross-examination his involvement with ROTC? He wanted you to believe that he was in the required list, that he was eligible for a contract, but he had to admit that that wasn't the case, that there were problems that would require waivers, and it certainly didn't make him look as good.

And, finally, ladies and gentlemen, I got the impression after cross-examination that not only had Mr. Moon driven a car before, but he admitted that just prior to being arrested he had borrowed his sister's car and the car was parked outside his dormitory room. That's what he tells us. He tells us that this is the first time he has borrowed his sister's car, and it just so happened that it was the week of this rape. So you just start wondering about what you heard about the events of April 27th. You start wondering how much of that was true. You only can account for two hours. So, basically, you can say that your girlfriend woke you up, she came over to your apartment, you were both together until 11:00 o'clock.

Let's pick on Mr. Reagan again, with no disrespect. Who is it that you see giving him support, looking after him, willing to do anything for her mate? Who do you find doing this? Mrs. Reagan. And with that we all can identify with our own lives.

And, now, let's talk about the next witness that he put

on, Hapsari -- I can't pronounced her last name. Let me say this, ladies and gentlemen, it's not likely that Mr. Moon has ever shared his secrets with anyone and that includes Hapsari. It's not likely that he has. Let's give her that benefit of the doubt. But people do distort the truth under oath on the stand. I can suggest three reasons for that. The first one is for emotional reasons. We may do it because it's somebody that we know, somebody we are trying to protect, somebody that we care enough to do it. That's one reason. Another reason why the truth may be distorted is, for calculating reasons. We may have a strategy. And then the third one is what I would call your honest reasons. Let me give you an example of that. Dr. Marchino came here to testify the other day. She took the stand and Mr. Garney asked her some questions, and by the time Mr. Garney was through with her, her testimony was that on Monday, April 27th, she found a note under her door, and she knew the note had Brandon Moon's name on it. Then a couple of weeks later she gave it to the UTEP policeman. Now, again, your impression would be that she changed her testimony on cross-examination, but, I would call that "honest distortion." I tried to develop it during cross-examination: "Isn't it true that you told me that what you really do remember is that when you got the note under your door you thought to yourself, it's too late to drop him, and because you remembered that, you could say that you

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received it that week?" "Yes, I said that." "And, Dr. Marchino, didn't you tell people that you couldn't be positive if that day could've been Monday or Tuesday or Wednesday or Thursday or Friday?" "Yes." "Well, is it your testimony that you got it on Monday?" "Well, no, I can't be positive. I can't be sure." "But you did get it on the last week to drop?"

And what does that have to do with the price of rice in China?

It doesn't have anything to do with it, folks, because Dr. Marchino testified she never got to her office until after her last class that ended at 1:30. So, big deal.

This is just to give you an example of your honest distortions. Things can be clarified on cross-examination.

Going back to Hapsari. Her testimony is a little suspect. Amongst the different exhibits is the calendar that I gladly allowed to come in with no objections to it being introduced as an exhibit. When you go back there and ask for the evidence, I want you to ask for the calendar. I want you to look at it. It's a calendar where the entries begin in January and go on through May. It's almost like a diary. It's kept very neatly in different colors, and, like a diary, it's very organized. Now, the testimony was that her relationship with Mr. Moon had already occurred in 1986 when he gave her a ride to work, and so in April, at the end of April, she

even knows the time that he comes in in the morning: "Brandon can't get up in the morning, so I have to call him and wake him up." And, look, there are entries again in March, but there's nothing from January forward. Why? I don't know. I don't know because it wasn't developed. But, it's a little suspect, isn't it, that on the entries there it's not impossible that someone may have either on a different occasion or used a similar red pen on those times that she called. Now it turns out that after Brandon was arrested she communicated with him at the jail, she talked with him and went to visit him. Certainly enough time for her to have provided the Defendant with an alibi.

You recall on cross-examination of Hapsari she told me that she went to her professor and said, "Look, you've got to tell us that you let us out early that day." Then later on I ask her, "Was there anybody else who could've seen you that morning?" "No." "It was a school day, and you and Brandon went to the Prospector office and you didn't see anybody there that perhaps might have known you or Brandon Moon?" "No, nobody that we really knew. I didn't really know those people." "Well, any of the people that work there that might have seen you?" "I don't know their names, I don't know their names."

Ladies and gentlemen, remember what I told you at voir dire? I have the burden to prove my case, but I don't know what will happen after that. Everybody has the same chance,

everybody has the same right to subpoena witnesses. Now, they could've brought in somebody that might have said they saw him at a particular hour on a particular day. They could have brought them here. And the thing about this is that on the occasion of this offense, Brandon Moon was arrested Friday morning at about 3:30, or whatever the testimony was, they were in a position to get what they needed. They didn't do that. They had seven-eight months.

Ladies and gentlemen, because I have the burden in this case I get to open and I get to close, so after I'm through with my opening, Mr. Garney will come and give you his final argument, and then after that I will have a few more things to say. Let me just talk a little bit about the instructions that you have in the charge. There is this thing about an alibi. Now, Mr. Garney explained to you during the voir dire that there is a section in the Penal Code that contains, basically, what is known in law as an alibi for a defense. Now, this is not a new concept. Since I'm limited for time I will explain to you what alibi means in very basic terms. What it does is that it puts the identification of a defendant at issue. It puts ID at issue. What alibi means in this case is that Brandon Moon could not have assaulted Dana Mocherman on April 27th, 1987 at 9:00 o'clock in the morning, because Brandon Moon was not in her house. He was at the University of Texas at El Paso. And, you see, we have a

situation were Dana Mocherman has taken the stand and said, "That's him. That's him." She identified him. The issue is identification. The situation is that she has properly identified him, so it puts the Defendant's identification at issue.

Now, the law recognizes that the alibi concept is a difficult one to overcome because we are a trusting people who like to think that people don't get up and try to deny the obvious. The law recognizes that. So that is what the law is. Okay. If someone raises the issue of alibi as a defense, then the State is allowed to bring in further evidence of a person identity. The State is allowed to bring in evidence of a person identity from an extraneous offense from another time of another offense. In your charge you will find limited instructions where it says that you are not to consider extraneous offenses -- here I'm talking about Kyta Najera -- you are not to consider extraneous offenses for anything other than the identification.

If I can be little clearer, let me give you an example myself. If you believe that Brandon Moon -- and I'm using the same standard that you have been instructed on -- if you believe that Brandon Moon raped Dana Mocherman on April 27, 1987, then it doesn't matter whether you believe Kyta Najera, because you have already found beyond a reasonable doubt that he did it to Dana Mocherman. So you don't have to find that

Kyta Najera was mistaken although she did point out Brandon Moon as her assailant. If you go ahead and find him guilty of assaulting Dana Mocherman, that's it, that's what he is being tried on today.

Putting it another way. If you believe Kyta Najera when she pointed out Brandon Moon as her assailant, but you have reasonable doubt about Dana Mocherman, you would have to find him not guilty. Why? Because he is only being tried for Dana Mocherman. So, don't forget, the extraneous offense is to the identification issue only. The law allows us to use these cases only to prove identification. If you believe that Kyta Najera was assaulted by Brandon Moon on November 25, 1985, then there was a signature left. We all have signatures, we all leave marks on our signatures, a certain way that we do our signatures. If you believe that Brandon Moon raped Kyta Najera, then you believe her identification of Brandon Moon, and then you can believe that when Brandon Moon rapes women he does it on the west side of town. He has left his signature. He has left his mark. And if you believe Kyta Najera when she identified Brandon Moon as her assailant, you can believe that when Brandon Moon rapes women he does it on Mondays. Again, that's his signature, his mark. And when you believe Kyta Najera's identification of Brandon Moon as her assailant and her description of his skin and eyes, then you can use that to believe that he's the same one that

assaulted Dana Mocherman, because he was wearing a ski mask pulled over his eyebrows. That's his signature by which he, Brandon Moon, rapes women. That's the way he does it.

Ladies and gentlemen, that's just a few similarities, you may have some of your own. If you believe Kyta Najera, than you can use that evidence as identification of Brandon Moon as the assailant of Dana Mocherman, because when Brandon Moon rapes women he leaves his signature. He tells his victims that he's going to rob them. That's another signature. He doesn't rob his victims. That's another signature. He makes his victims lay prostrate on the ground. Another signature. He makes his victims disrobe totally. That's another similarity. He points his gun to their heads. He feels their breasts. He puts his fingers in their vaginas. More similarities.

Now, you can believe that his intentions were to penetrate his victims. That's another signature. The only reason he didn't penetrate Kyta Najera is because she told him that she had hepatitis. He went a little farther with Dana Mocherman.

So, ladies and gentlemen, if you believe that Brandon Moon is the man who assaulted Kyta Najera, you can use that for identification purposes, to the exclusion of anything else. That's important for you to do that. But, if you believe that Brandon Moon is the man, then you can use that

as evidence looking at his signature in finding him guilty for assaulting Dana Mocherman, because in both cases this man's signature was his identifying mark that both victims could identify him as being the one that did this to them.

I will have more to say after Mr. Garney finishes his argument.

THE COURT: Counsel.

MR. GARNEY: May it please the Court, counsel. Ladies and gentlemen of the jury. I'm going to tell you something right now that's going to sound extremely illogical, but it's true. And that is, ladies and gentlemen, it is much much more difficult to defend an innocent man than a guilty one. Now that doesn't make sense, does it? Let me explain to you why. A guilty man knows what happened. He can explain it away. An innocent man wasn't there. He doesn't know what happened. He can't help explain it away, because he has no earthly concept of what occurred. It places us in almost an impossible situation to try and reach out and touch your souls and touch your heart and make you understand what happened in this courtroom over the last 48 to 72 hours.

Ladies and gentlemen, when someone like Brandon, a young man, a student at UTEP, is accused of a horrible crime, you have to go back and start reconstructing a life. It's an impossible task to fully reconstruct a life. Let me give you a real brief idea of what's that like. "Sir, what were

you doing on November 25th at 11:00 o'clock in 1985?" You reconstruct your life. You reconstruct your life on April 27th of 1987. And the same question goes for all of you. It's impossible. And yet even though we have what is the so-called presumption of innocence, you can see that it practically doesn't work that way in a courtroom. It sounds great on paper. It sounds great on TV. But it does not work that way in a courtroom, practically speaking, and you've seen it happened today, yesterday, and the day before. We have attempted to reconstruct the life of Brandon Moon. Now, April 27th of 1987 was an easier task, obviously, close in time, than was November 25 of 1985. It's easier to reconstruct one's past when nearer to the present. Through investigation we were able to determine what Brandon did on the 27th of April of last year. And this is what happened. Let's start with the night of the 26th, a Sunday night. Brandon took the stand and said, "Look, to the best of my ability I was developing photographs. I recall that the Saturday before, the 25th, I was photographing cheerleader tryouts." Now, is that an implausible story? Of course not. Is that reasonable? Of course it is. Very reasonable. We were fortunate enough to verify that. We found a photograph, and a copy of it is in evidence. I believe it's D-2. Please look at that. In fact, you'll see his name underneath it. It was printed in the Prospector. It's not

something that Brandon just made up. It's not an act, ladies and gentlemen, it's the best we can do to help a young man avoid a terrible tragedy. And that's what we did. Brandon worked at the lab until approximately 11:30 at night, maybe 12:00, I forget the exact time. I believe he went over to Hapsari, Lika's, apartment, and stayed approximately an hour with her. That was verified by Hapsari's testimony. And, by the way, another problem we have with this whole process, especially when Mr. Lizarraga starts talking of all of the testimony of the witnesses that we have attempted to present to you to help this man, there's an underlying premise that there are men who lie. That nothing that they say is true. How do you reconcile that with the presumption of innocence? It's not fair. Ladies and gentlemen, that is your prerogative to determine who is telling the truth, and please exercise it. I'm defending Mr. Moon and I'm asking you to exercise it. I am confident that you're going to understand what actually occurred on that Monday morning.

Brandon let Hapsari's apartment on the night of the 26th. He went home to 905B, Berry Hall, 9th floor UTEP campus. That's where he lived. Either he called Hapsari or Hapsari called him to ask each other if they were home. At any event, they spoke for a few minutes, said goodnight, went to sleep. The next morning at 8:07 in the morning Brandon Moon received a call. Hapsari said she has spoken to him numerous times

over the phone, she recognized his voice, and the voice she spoke to over the phone was none other than Brandon's. Look at D-3. This isn't a play, ladies and gentlemen, it's not a prop. It wasn't created for your amusement. It just happened to be a lucky stroke that I came across it. Again, it lets you know that in our attempt to recreate someone's life we found another small particle to put before you. Go through that calendar. You can see her own handwriting where she called Brandon at 8:07. And that was definitely the morning of April 27th of 1987. Look at the date. They spoke for a while, she woke him up, she went to her first class. Now, I disagree with Mr. Lizarraga's rendition of Hapsari's testimony at that point. He told you that she went to her professor and said, "Look, you got to tell us that you let us out early that day." That's not what she testified to. It's nowhere near accurate. If you'll remember, ladies and gentlemen, her testimony was, "Did you let us out early that morning, I need to know." And you're doggone right she needed to know. It's a very important morning in her life and Brandon's life, but, at the time, they didn't know. Several days later they figured out, "Something has happened, we better start trying to put our lives together, just in case." So she went to Bob Heider, I believe was his name, and asked that question. That is not an unusual, that is not an unreasonable thing to do. Nothing out of the ordinary

whatsoever.

Getting back to the 27th. Finished up her class, got out, whenever, 8:40, 9:30, something like that. There's a window there of about 50 minutes or so. At any event, she went back to 905B, had a nap in Brandon's room. Is that an unusual occurrence? Of course not. It is something you would mentally note, even the next day or within two days? Probably not. She was with him that morning during the time that Dana Mocherman was being assaulted. No question about it. They left and went to the English professor's office. Why? Because the 24th, the Friday previous to this terrible occurrence was drop day at UTEP campus. Brandon messed up, he missed it. He didn't get to drop a grade, he dropped with an F. That's too bad. But you don't convict him of aggravated sexual assault because of that.

Now, he went to see his English professor, and this is approximately at 11:30. His English professor was not there. He took some paper, wrote his name on it, requesting to drop the class, put it under the door, went on his merry way. And we don't even have to discuss the rest of the day, because now we're really getting down to the window that we're interested in for purposes of this trial. He finished up his day like he apparently normally did. Now, in and of itself, it's kind of hard to support, but Dr. Marchino actually remembered receiving that note. Another small bit of one's

life that we're trying to bring forward to you, to let you know that there is credence to what that young man is trying to tell you.

Dr. Marchino testified that to the best of her recollection it was the week of the 27th. There's no argument with that. However, she did say, she kept pushing it back to the front of the week; initially, she said, "Monday." I can assure you I didn't tell her to say that. I don't want you to get that implication from arguments. And she was being honest, and that's fine, that's what witnesses should do, be honest. But she did push it back to the front of the week. Monday, maybe Tuesday. But she got that note. And why is that important? Because this is what you're going to have to believe in order to convict Brandon of aggravated sexual assault. You're going to have to believe that Brandon Moon got up on the morning of April 27th of 1987, decided to rape someone. By the way, if you will look at D-1, it's a large map, and I want you to see where UTEP is located and where the Belvidere area is located. About 7.9 miles away in one route, I-10 route. 6.7 miles away up Mesa. You have to believe that he had to get a car somewhere. He didn't own a car. He told you he didn't even borrow a car, and Lika told you he didn't have a car that day. He somehow got a car, went to the Belvidere area and assaulted Dana Mocherman. He came back to his room, changed his clothes, and then he

had the wherewithal, the concern to drop a class. That's an incredibly, unbelievable scenario. And the reason it's unbelievable is because it didn't happen that way. It just didn't happen that way. No way in the world.

Now, that brings us to a hard question. And that is, is Ms. Mocherman lying, because the premise seems to be in this courtroom over the last three days that either Brandon is lying, or Lika is lying, or Ms. Mocherman is lying, or Ms. Najera is lying, or someone is. And that is not true. Is Ms. Mocherman lying? No. Was she assaulted that day? Yes. Did someone hold a gun on her? Yes. Is she mistaken as to who it was? Yes. Did Brandon do it? No. He didn't touch that woman, he was not there. You have to understand, ladies and gentlemen, there's a difference between one's conviction of what happened, the accuracy of one's conviction, and what really happened. Now, do you know what I mean by that? One can be totally convinced as Ms. Mocherman is, and I'll admit it, she is convinced that Brandon hurt her that day. But is that true? And is she trying to lie to you? She's not trying to lie to you. But she's terribly terribly mistaken. A terrible thing happened to her on April 27th, 1987. If Brandon is convicted for that offense, a terrible thing will be happening again today, it's unjustified, absolutely unjustified.

You'll notice the way this trial was conducted was, no

attempt was made to try to tell you good people that Ms. Mocherman is a terrible person. She's not. And I was very honest to the entire full panel of 42. When you first entered this courtroom Monday afternoon, that, look, it happened. But Mr. Moon did not do it.

I also told you that throughout the trial that that would be our position, and, ladies and gentlemen, I stand here before you today, that is still our position. Brandon is innocent. He is a man who is simply caught up in a terrible set of circumstances, and we're just hoping to God that we can get him out of it now. Now, some of you may be thinking that, "Well, you are trying to malign Ms. Mocherman, you did bring out the fact that she smoked some marijuana." Well, you know, I didn't bring it up. It was brought out by Mr. Lizarraga. And I'm not going to dwell on it, other than to tell you that the reason it was brought up -- and it was mentioned by me on cross-examination -- is because it goes to the issue of identity, which is the sole issue in this trial, as I've told you over and over and over again through direct examination, cross-examination, voir dire, and now argument. The ability to perceive. We do not know what her THS levels were that morning, and the reason we do not know that is that her blood was not drawn. It could've been. It was not drawn because it had no value for therapeutics that morning. That's not why it should've been drawn. Not for treatment. It should've

been drawn in order to aid and assess one's ability to perceive. That's the only reason. That was my concern.

Brandon Moon took the stand and testified in his own defense. Mr. Lizarraga would have you believe that he's an accomplished actor; that he's used to doing or portraying himself in front of people to be something that he is not. That is for you to decide. Is what you have seen the last three days a play with actors? Or it is a real life situation in which a young man is going to be trying to reach out and save his own life now, not out of any selfish reason, not out of trying to get away with something that he did, simply because he didn't do anything and he doesn't want to pay the tab for something he didn't do. That, ladies and gentlemen, is a very very reasonable response to this kind of situation.

Let's talk about the lab reports for a while now. That's really the second big body of evidence that I believe we should get into. What we have essentially are two important findings. The first one is, when all is said and done, you talk about Lewis, postive-A, negative-B, all the other business we're talking about. Spectrum analysis. What we're really talking about here boils down to the very simple concept, that is, there are two basic groups of people in this word: secretors and nonsecretors. 85 percent of us are secretors. 15 percent of us are nonsecretors. I believe the gentleman from Lubbock testified that his sole duty in this type of

case is simply to place people in particular categories, and he could never tell you that Mr. Moon had been in the home of Dana Mocherman on April 27th, 1987. He was very honest about that. He could not tell you that. He can only do his job and that job is to place people in groups. He placed Brandon in a group: nonsecretor. You'll notice, we didn't take issue with that. All the blood work came in fine. All the lab results came in fine. Brandon Moon is a nonsecretor. He is in 15 percent of the population. I believe Mr. Adams testified that there are groups and there are groups, and what I mean by that is that there are large groups and there are small groups. 15 percent is a large group. And let me tell you just how large it is. Not in numbers, but conceptually. 15 percent is approximately one in six. Place five blanks in a revolver, the sixth one, a live round, and play some lethal Russian roulette, set it, put it to your head and pull the trigger. Is anybody willing to do that? All of a sudden the 15 percent looks much much larger than a simple minority of what we've been talking about the last couple of days. I can guarantee that if you're very very lucky you still probably won't get to spin that cylinder six times. You're going to be wrong, you're going to be dead wrong before you have a chance to go through all six cylinders. No reasonable person would do that. And no reasonable jury could possibly convict a man who falls within a group of 15 percent

of the general population. It is just too big. It his misfortune to be a nonsecretor. That does not make him guilty of a crime. There are twelve people sitting here today. Statistically, two of you are nonsecretors, which should you make you somewhat uncomfortable when you're start talking about being in a particular group.

Ms. Najera testified. Ms. Najera testified that on November 25 of 1985 she also was attacked, and she showed you where on the map her house was located. We talked earlier about reconstructing a young man's life. Now, we have the problem of going back almost three years, two and a half years, approximately. That, ladies and gentlemen, turned out to be an impossible task. We do know that Brandon was not living at UTEP at the time, he was living way at the northeast, and he showed you on the map, the mountain was there, and he was living way out in space, or whatever, away from the mountain. Just to kind of give you an idea on the map where it'd be. He didn't own a car. And, ladies and gentlemen, on the late morning hours of November 25 of 1985 Brandon was very honest with you, he couldn't tell you where he was. Who could? Ten years from now I'll be able to tell someone that I was in this courtroom because that gentleman is taking down everything that I say in my presence. I am fortunate. If I am ever accused of anything that occurred today at 20 to 10:00, most of the general population does not

have that luxury. We could not reconstruct what happened other than just, again, let Brandon tell you, "I did not go to that address on Mary Stuart." "I never met that young lady in my entire life." "I did not touch her."

Detective Villa testified that Brandon was arrested at approximately 4:10 on May 1, 1987, some four days, five days, perhaps, after the 27th, picked him up, took him away. He then told you that he immediately went for a search warrant. And why? In order to avoid the secreting of evidence. And that makes perfectly logical sense. That's what Detective Villa should have done had he accomplished his task. He obtained the search warrant. He went and search 905B in Berry Hall. What did he find? Did he find a nickel-plate snubnose revolver? No. Did he find corduory shorts, chocolate? No. Did he find a brown ski cap? No. Did he find a horizontally-stripped shirt? No. So, now you're going to have to believe -- and Brandon told you he didn't own a gun -- that he ditched all this stuff in someway, immediately. Perhaps before he went to drop his class he was so concerned about.

You know, that's an incredible type of days someone would have to put together, and it's just not feasible. It can't happen. It's not reasonable. You certainly cannot go back there with the collective brain power that you all have and say, "Yeah, that makes perfect sense beyond a reasonable doubt," and then hit Mr. Moon.

You know, it's so frustrating, ladies and gentlemen. It's like -- you know, being locked inside of a body that won't work and is screaming out to someone, you know, "Help me. Understand that I'm in here. I didn't do anything wrong, and I don't have the faculties to reach out to you good people and let you know what happened."

Now, I would like you to very carefully consider what happened to Mrs. Najera, and the details of that particular instance, and compare the details of what happened to Mrs. Mocherman. They're not the same. They're not the same. They're not the same person and neither of those people are Brandon. Ms. Najera was threatened with a big black automatic pistol. Look at the one that she circled. You can tell it's an automatic, simply from the photo. Not the same gun. There's no signature there. The person who was in her house forced his way in. He wasn't found there. There's no signature there. He was wearing different clothing. A different type of color of hat. I believe it was blue. He had large teeth, he was gritting his teeth. Funny speech. Or different speech. A kin to retarded person. On drugs, or something. Nothing like what happened to Ms. Mockerman. Not even close. She appeared to be a very very nice honest lady. She saw a man she had never seen before in her life, saw him for absolute total of 15 to 20 seconds. Out of her life of 31 years at the time she saw someone -- and not his entire face such

as you're looking at me right now, but half a face, 15 to 20 seconds out of her entire 31 years, and a year and a half later did identify Mr. Moon. That is not conceivable. It's not reasonable. It just couldn't have happen that way. Does she believe that Mr. Moon attacked her on November 25th, 1985? You better believe it. Is she lying to you? No. She is not lying to you. Is she mistaken? Yes. The sole reason of bringing that in -- it's not even similar -- it's just to close your minds to logic and to the testimony that's been presented you on behalf of the Defense, and you say, "Well, that's the end of the story, I'm going home, I'm out of here. I've got better things to do than to worry about Brandon Moon." Ladies and gentlemen, right now, you're right, you have nothing better to do. It's very very important, because the decision you come back with in the near future, you're going to walk away from it. Brandon won't. It's signaling the end of his life. And I mean that vigorously.

Let me tell you a little story. It happens every day. It happens all the time. A man is walking down the street, waves at somebody he's known for 20 years. The man doesn't wave back. And so he goes his way. Sees the man that he waved to a week later. He says, "Joe, I saw you on Main Street and waved to you, but you didn't wave back, you must've not seen me." Joe says, "I wasn't on Main Street." I say, "Joe, I've known you for 20 years, I saw you there, and I

waved at you, you didn't wave back at me." "I wasn't on Main Street." "Okay, I must be mistaken. But, you know something, Joe, I thought it was you. In fact, Joe, I could've sworn it was you." As Ms. Mocherman swore. As Ms. Najera swore it was Brandon. You see what we have here? A mistake of someone you've known for a very long time could easily occur and you could swear to that mistake. You are absolutely sure of your conviction that you are right. But you are inaccurate. And, ladies and gentlemen, that is what we have here. And the only way that we can stop this entire sequence of events is for you to sit back, be fair. I'm just asking you to be fair, and look at the evidence and come back with a verdict of not guilty.

Let me tell you one last thing. There are people sitting in this courtroom who are watching you. This is a stressful situation, my knees are weak. Brandon told you he was afraid yesterday, he's got every reason in the world to be afraid. Courtroom drama is a very intense quiet kind of drama. And whether you know it or not you're going to go back in that jury room, and you're going to feel a tightness in your neck, you're going to feel the burden, you're going to know this is not easy. What I'm asking you is to, please, be courageous. Do what is right. Work together and try to work this out, and work at it the right way. Do what is right. It's going to take an enormous amount of courage to do that. You're

going to look people in the eye and say, "I did what was right. I found him not guilty. It was hard. But it was right." Don't take the easy road out. Brandon is depending on you for that. He' depending on me for asking you to do that.

Ladies and gentlemen, you've been very attentive for the last three days. I very much appreciate that. I can talk for another hour. I'm not. Judge Peña wouldn't let me. But I would ask you to go back there and very seriously, very carefully look at the evidence. Judge the credibility of Brandon. Judge the credibility of Hapsari. Come back with a verdict of not guilty, because in this case that's a just verdict.

Thank you very much.

THE COURT: Counsel.

MR. LIZARRAGA: Ladies and gentlemen, there are some things I want to go over on the charge real quick. Please note that the Defendant is charged with three separate offenses. Okay. When you go back there you can come back with a verdict on each one. There are three separate offenses. We allege the penetration of the finger, the penis, and the sexual contact. That's three separate offenses that you can come back with a verdict on each one. In the back of the charge -- I don't know if Judge Peña provided the verdict sheets on --

THE COURT: Yes, I did.

MR. LIZARRAGA: Thank you, your Honor. There are six verdict sheets. And when you look back there, if you look on the first one. It says, "We, the Jury, find him not guilty." The second one says, "We, the Jury, find him guilty." Let me, please, remind you. What you have do back there is very very important. It's like when you're going to take a very important test and you want to make sure your name is on it. Same thing with the verdict sheets. Before you come out, after you make your decisions, and after you fill these out, look at the cause numbers, match them up with the charge, and make sure you're making the right decision for that particular charge. And reread it, and whoever is the foreman read it out loud so that everybody agrees that's the one that you're signing. Okay? Because they both look almost the same, so make sure that you're signing the one that you need to sign. Okay? That's on the first three verdict sheets. Then on the final sheet, you're only asked to write in yes or no. That's where you making a finding on a deadly weapon. I suggest to you that if you find the Defendant guilty, then, you necessarily have to write in "Yes" there because it's very obvious that when this happened a weapon was used. As Mr. Garney told you, they're not disputing that this ever occurred. They are just disputing who did it. So you would have to write "Yes" if you found Mr. Moon guilty. And then going to the front of

the charge, very quickly, you have a right to ask for the exhibits. That's in there. The Judge read that to you. Turning to page 3. You see the definition that is crooked. It says, "An aggravated sexual assault is without the consent of the other person if the actor compels the other person to submit or participate by threatening to use force or violence against the other person..." Do you see that? Okay. Force or violence. In our indictments and the way that they are in the charge, you're going to find allegations, "If you find beyond a reasonable doubt that force was used..." in one of them. The other one says, "If you find beyond a reasonable doubt that force or violence was used..." The other one says, "If you find that violence was used..." Well, all we have to show on the one that says "force or violence" that one of those two was used. But, again, as Mr. Garney says, they are not disputing that that happened, as the main issue in this case is ID. I just want to tell you it's "or", and that's exactly what it means, "or". If we need only show one, even though we plead both of them, we need only show one. Once again on the limited instruction, it's on the bottom of the page. It says, "Do not consider Kyeta Najera's testimony for anything except identification. Do not discuss it for anything else." Okay? And then turning the page to page 4 at the very top, continuation of what I'm urging you to do. It says, "If, from the testimony you find that the Defendant was

not present at the time and place of the commission of the offenses, if any, you will find the Defendant not guilty." Please note that the offenses referred to are the three charged offenses on Dana Mocherman; we're not talking about Kyta Najera, we're talking about Dana Mocherman. Okay? So, please, do not consider it for anything else.

All right, let me very quickly go over some of the evidence that was developed here. Ladies and gentlemen, this trial lasted approximately eleven hours, just a little bit over that, with all the testimony and voir dire and everything. So we've been busy the last three days, and one of the reasons that we were so busy is because there was a lot of work done in this case by police, by everybody, to try and eliminate Brandon Moon as a suspect. To try and eliminate him. That's why the victim goes to the hospital, the City has a contract with Dr. Navar and Sierra, and that's why these things are sent over to the lab in Lubbock and that's why we got two or three people working on it over there and that's why the fingerprint men are out there, they go two or three times. That's why all that is done, because they were trying to eliminate Brandon Moon as a suspect. So what they did, the got the blood types, and we're talking about the secretor and nonsecretor, 85-15 percent. I'm not going to suggest to you that there is a 15 percent chance that Brandon Moon is the person that did this. The conclusions of this are that he

belongs to the pool of people who cannot be eliminated. All right. He belongs to a pool of people who cannot be eliminated. He is not a bullet in the chamber because that is not the only thing that indicates that Brandon Moon did this. That's not the only thing. But he belongs to a group of people who could've done it, because he is a nonsecretor. And how do they get this? Look what they did to eliminate any possibility of mistake regarding putting him in that particular pool. We have the testimony of Dana Mocherman that she grab her son's robe from the bedroom and there were semen stains. Now, Mrs. Mocherman's son is 13-14 years old and in the event those stains may have been his a test was run on the robe, and, apparently, there was some discharge from Dana Mocherman because her son, Chris, is a secretor, and the semen found on the robe is that of a nonsecretor. Okay. So they went ahead and did that to try and eliminate that possibility. Then we found out that the evening before when Dana Mocherman was with her husband, the evening before, they wanted to make sure and eliminate him, so that no one will say, "Well, it could've been Reid Mocherman." So what they did they went down and he got a blood test also and they figured out that he was a secretor. And, of course, Dana Mocherman, since the substances were mixed, they were able to discriminate from those samples because she was also a secretor. So what they found was this, ladies and gentlemen,

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that Brandon Moon is a nonsecretor, and that the bathrobe, what did it have? nonsecretor, and that comforter of the bed, consistent with the testimony of where this occurred, non-secretor. And the swabs, the vaginal swabs, consistent with being Brandon Moon, nonsecretor. And we also know that this is not when we stack up the cards and deliberately do things to incriminate people. We try and eliminate them. A scientist came in here. Your scientist came in here. They serve all of the State of Texas, and what they said was, "Well, one of them was inconclusive, we couldn't scientifically say that." So I think that there's no question about the reliability of these tests. And the conclusion is that he is in a pool of people who did it. Now does that mean that there's a one in six chances here in El Paso that Brandon Moon is the perpetrator? Use your common sense. No, that doesn't really mean that either. Because, remember the description and the features that the witnesses gave us of this person. Remember? They both said, "His skin was so white." And how many people you find in El Paso -- we don't even have a million people here, so let's don't round up percentages -- but how many people do you find here in El Paso whose skin is so white where it jumps out at you? And, naturally, this feature does jump out at you because this is all you see, and when it's happening to you, you make a mental thing: "I'm going to live to identify -- If I live I'm going to identify this

guy. So I'm going to start observing." So that's not the only way that you determine the identification of this individual, all you know is that he belongs to these pool of people, but we go with the other characteristics. So you have to figure out in your mind: "How many people have these characteristics? We know about his skin. We know about the type of face." Now, let's go over those composites. You're going to have a chance to go over them. And, remember the testimony? They are not photographs. They are investigatory tools. Do you remember the testimony of -- well, Brandon Moon said he wasn't arrested until May 1st, and that he didn't even know what was going on. But, before he was arrested, Dana Mocherman had an opportunity to view a photo lineup of him, and the photo was fished out after she gave a composite. They didn't have any idea who did it. No fingerprints. That's what they fished out of the bowl. Obviously, someone used those features and tried to determine what happened. Okay? And it's just an investigatory tool. That's all it is. It's not meant to be a photograph of a person. And, in fact, you heard Kyta Najera testify that she did the same thing where she couldn't find the right kind of teeth, so she used the one that she put on there. So we've got the features of the face, general shape matches, the skin is probably the most obvious thing to all of us, and it's also one of the things that probably eliminates and even more from that pool of 15 percent. And then

his eyes. Now, everybody, when you go back there, try and describe what I look like to each other. Okay? Try and put that to words. Try and put into words what my eyes look like to you as I stare at you. And each one of you is going to have a different answer. And ask each other, what is the most distinguishing feature of Marcos Lizarraga? And you're going to find out -- some of you are going to say my eyes, others my nose, some of you are going to notice the profile of my face than some of my other features. And the same thing with the composites, because those composites are subjective, and they are only investigatory tools. But, my gosh, the last item that surprised everybody, I'm sure, the distinguishing characteristics, was the testimony that was developed on cross-examination about these fingers that are kind of pointy. How many people in El Paso have that kind of complexion and have those kind of fingers? And have that kind of built that they are ID'd? Well, we're not even facing the identification on those features. We go beyond that. We go beyond that, because you can have somebody with those features, and let's say just/that you have somebody with those features and it turns out that it's a woman. That last element that we have is that memory bank of the brain, and I want to talk about the lineup, the lineup that was conducted. You heard Dana Mocherman say, "Yes, I saw a photo lineup, and it looked like him, and I picked him out, but I wanted to be a hundred percent

sure, so I told the officers I want to see him." Maybe it would've sounded better if she had said that she was a hundred perent sure that it was him, but she told the officers she wanted to see him. And she goes in there and they tell her, "You don't have to pick somebody out, Mrs. Mocherman." But we know what those mirrors look like, we know that not only do we get to see him up close, but we know that he's staring at you, and you know it's a two-way mirror because they told you, but it doesn't look like that, because that nightmare is there again. And Mrs. Mocherman's testimony was of events that had occurred four days earlier. And some of you may understand that people don't go into these lineups idly; they don't go in there saying, "I'm going to find somebody and convict them." You go in there and if you're not sure, if you can't make that decision, you tell the officer you can't do it. That's the kind of people we are. That's the kind of person Dana Mocherman is. Hey, you go to the hospital and they're filling out reports, you know what's going on. And the doctors says, "Did you use any drugs or alcohol or whatever?" "Yeah, well, I smoked marijuana." And the doctor said, "How often?" "I smoke it daily." Well, that's not something that she tells everybody about, but she has nothing to hide. This whole process has been an attempt at the truth. And if she went in there and she wasn't sure, ladies and gentlemen, she would have said, "I'm not sure." And she didn't say that. She

said, "That was him. That was him."

Now, let's look at the profile of this particular rapist. But, again, identity is the issue. The man who did this is very cunning. He could be depressed. He might have a lot of idle time on his hands. He might be a loner. And we know that he has a lot of audacity. A lot of audacity. And he is smart. He's intelligent. Dana Mocherman said he was wearing a wrinkled shirt that looked like it had been crumpled up, stored someplace. Now, I think it was clearly developed that you can't hide that gun in the dorm room, because other people have access to it. But it was also clearly developed that there were other things that Brandon Moon has here in El Paso to where he could've done it. Ladies and gentlemen, why do people do that? You can only speculate when you go back there. But you can use your common sense. What is the fun of the game? Is it for sexual pleasure? No. We already said during voir dire, sexual assault is a violent crime. You know what the thrill is? The ultimate enjoyment is getting away with it. That is the thrill of a rapist who did the things that were done to Dana Mocherman and to Kyta Najera. That's where the thrill comes in. Because, you see, you can wear a ski mask covering your entire face, but it's not thrilling. You don't walk the edge. And the ultimate thrill, folks, is getting away with it. They didn't discover me. They didn't convict me.

What the suggestion has been is that the State has to prove by a hundred percent who this person is. That's been the suggestion. Look at the question: "Did you ever run a DNA analysis on that blood, Mr. Scientist?" And what was his reply? He said they don't do that. "Well, did you ever go to any of these residences and get search warrants?" In other words, we could be a hundred percent certain of this if there was a house-to-house search of all his brothers and sisters and his parents. How do you get a warrant like that? Try and get a warrant like that. If somebody knows you, just because you're an acquaintance, the police are going to come in and search your house because you might've left something there? Try and get a warrant. Good luck.

Ladies and gentlemen, a tragedy did occur on April 27th, 1987. And that's why we're here today. And for Brandon Moon, and for society, a tragedy did occur on May 1, 1987, when he was arrested. The tragedy for Brandon Moon on May 1, 1987, was that in spite of all his precautions he got caught. The game was up. Well, it's not up yet, he still has you to deal with. And the tragedy for society is that there is a man in our society who get a perverse pleasure in doing that. So, on May 1, there was a tragedy. And, ladies and gentlemen, there's only one tragedy that will be bigger than any of those tragedies. And that would be if this man walks free. And that's why you're here today, to stop the tragedies.

I'm asking you to go back there, to consider all the evidence, and don't deny the obvious. I'm asking you for a verdict of guilty.

Thank you very much.

THE COURT: Mr. Bailiff, take charge of the jury.

(At this time the jury left courtroom and proceeded to jury room to commence their deliberations on guilty/not guilty phase of jury trial.)

(At approximately 10:55 a.m., the following note was received from the jury: "The class times of Professor Marchino on Monday, Wednesday, Friday, during April, 1987. Signed Ricardo Alvarez, Foreman."

The Court answered: "The Court cannot furnish the jury with any testimony unless there is a conflict among jurors as to what a witness said or did not say.")

(Shortly thereafter the following note was received from the jury: "There is a disagreement. Witness said she went to her office after first class and before second. One juror claims it was after her second class. She referred to a time period. This will satisfy the disagreement. Signed Ricardo Alvarez, Foreman.")

(Shortly thereafter the jury was brought into courtroom and the following proceedings were had:)

THE COURT: Ladies and gentlemen of the jury, the court reporter will read back those portions of the testimony that you have asked about.

(At this time the testimony was read

back by the court reporter.)

(Reporter's note: The readback portions are as follows and are herewith indicated by page and line number:

-- Cross-Examination of Louise Annette Marchino: Page 355 lines 2 through 25; page 356 lines 1 through 4.)

THE COURT: Is that satisfactory, Mr. Foreman?

THE FOREMAN: Yes, sir, it is, thank you.

THE COURT: Mr. Bailiff, take them back to the jury room.

(Jury left courtroom and proceeded to jury room to continue with their deliberations.)

(At 11:55 a.m. the jury announced they had reached a verdict. Jury was brought into courtroom and the following proceedings were had in the presence of the jury and of the Defendant:)

THE COURT: Mr. Alvarez, has the jury reached a verdict?

THE FOREMAN: Yes, sir.

THE COURT: Please hand it to the bailiff. Let the record show the Court is receiving the verdict of the jury at 12:01 p.m. on the 14th day of January, 1988 and the same will be ordered filed.

Cause No. 50015: "We, the Jury, in the above-styled and numbered cause, find the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment."

Cause No. 50032: "We, the Jury, in the above-styled and

numbered cause, find the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment."

Cause No. 50033: "We, the Jury, in the above-styled and numbered cause, find the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment."

All three verdict forms are signed by the foreperson, Juror No. 11, Ricardo Alvarez.

Special Issues. Cause No. 50015: "Do you find beyond a reasonable doubt that the Defendant, Brandon Lee Moon, used and exhibited a deadly weapon as that term is herein defined? Answer: Yes."

Cause No. 50032: "Answer: Yes."

Cause No. 50033: "Answer: Yes."

Once again signed by Juror No. 11, Ricardo Alvarez, the foreperson.

Counsel for Mr. Moon, do you want the jury polled?

MR. GARNEY: Please, your Honor.

THE COURT: At this time, ladies and gentlemen, I'm going to call out each individual's juror's name and ask if this is your verdict.

(The Court proceeded to poll the jury at which time all members of the jury answered in the affirmative.)

We will recess for lunch and start at 1:00 o'clock on the second phase of these proceedings, the punishment phase. You will go to lunch at Luby's in the custody of the bailiff.

AFTERNOON SESSION

THURSDAY, JANUARY 14, 1988

(The following proceedings were had in the presence of the jury:)

THE COURT: Counsel for the State, are you ready to proceed?

MR. LIZARRAGA: Yes, your Honor. May I have an opening statement for the punishment phase?

THE COURT: Just a moment. Let me first ask for announcements.

MR. LIZARRAGA: The State is ready, your Honor.

THE COURT: Counsel for Defense, are you ready?

MR. GARNEY: Ready, your Honor.

THE COURT: All right. Counsel for the State, you may proceed.

MR. LIZARRAGA: Thank you, your Honor.

MR. GARNEY: May we approach the bench?

THE COURT: Yes.

(At this time a discussion was had at the bench off the record out of hearing of the jury.)

MR. LIZARRAGA: Your Honor, may I proceed with a brief opening statement?

THE COURT: Yes, sir.

MR. LIZARRAGA: Ladies and gentlemen of the jury, this is the punishment phase of the trial. And in this stage

of the trial you will be considering the entire evidence of the entire trial, and the State may proceed without putting on any witnesses, and asking you to consider the nature of the offense and all the testimony that you heard.

In this particular case we will be presenting the entire testimony to the Judge and ask you to consider the entire testimony that you already heard, except for the testimony of Kyta Najera, which is no longer to be considered in the punishment phase of this case.

And at this time, your Honor, the State would rest.

THE COURT: Counsel for Defense?

MR. GARNEY: Your Honor, I have no opening statement, however, we're ready to call witnesses.

THE COURT: All right. Call your first witness.

MR. GARNEY: The Defense calls Brandon Lee Moon.

THE COURT: Mr. Moon, please take the stand.

BRANDON LEE MOON,

the Defendant, called as a witness, after first being duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GARNEY:

Q. Again, sir, will you state your name for the record?

A. My name is Brandon Lee Moon.

Q. And, Mr. Moon, I have a number of questions to ask you. First one is, have you ever been convicted of a felony offense

in this state or in any other state of the United States?

A. No, sir.

Q. Mr. Moon, are you asking this jury to place you on probation?

A. Yes.

Q. And, finally, Mr. Moon, should the jury recommend probation to the Court, are you telling this Court and this jury that you will follow all those terms and conditions of probation as imposed upon you by the Court?

A. Yes.

MR. GARNEY: I pass the witness, your Honor.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. LIZARRAGA:

Q. Mr. Moon, would you agree with me that what happened to Dana Mocherman doesn't happen everyday in El Paso?

A. Yes.

Q. Would you agree with me that the man who raped Dana Mocherman is an extremely dangerous individual?

A. Yes.

Q. Would you agree with me that the victim in this case will never be the same?

A. That's true.

MR. LIZARRAGA: No more questions.

THE COURT: Anything further, counsel?

MR. GARNEY: No, your Honor.

THE COURT: You may step down. Call your next witness.

MR. GARNEY: Defense rests, your Honor.

THE COURT: Counsel for the State, do you close?

MR. LIZARRAGA: Yes, sir.

MR. GARNEY: Defense closes.

THE COURT: Ladies and gentlemen, I'm going to take a few minutes recess at this time. Once again, we'll prepare a charge, I'll read the charge to you and you will hear summation of counsel.

(Jury left courtroom and the following proceedings were had out of presence of the jury:)

THE COURT: Counsel, prior to the lunch hour I gave you all a copy of the charge of the punishment phase. I'll ask the State. Have you had an opportunity to read the same?

MR. LIZARRAGA: Yes, your Honor.

THE COURT: Do you have any objections, corrections, or requests?

MR. LIZARRAGA: No, sir; assuming that's the revised charge.

THE COURT: Did they give you the new one?

MR. LIZARRAGA: Yes, sir.

THE COURT: All right. Mr. Garney, I'll hear

from you now.

MR. GARNEY: Your Honor, I've had sufficient time to review the punishment charge and I have no objections.

THE COURT: How much time do you all need to argue this case?

MR. LIZARRAGA: Thirty minutes.

MR. GARNEY: At max, Judge.

THE COURT: All right. Bring in the jury.

(Jury was brought into courtroom and the following proceedings were had in the presence of the jury:)

THE COURT: Once again, ladies and gentlemen, the Court is going to read a charge that it has prepared.

(At this time the Court proceeded to read the jury charge on the punishment phase to the jury.)

(After the reading of the charge the following proceedings were had:)

THE COURT: Counsel for the State, you may proceed.

MR. LIZARRAGA: May it please the Court, Mr. Garney. Ladies and gentlemen of the jury, I'm going to ask each of you to please turn to the second page of the verdict forms. Paragraph 9. "You shall not consider any offense other than the offenses for which you have found the Defendant guilty in determining his punishment."

Please do not go back to that jury room and mention Kyta Najera's name. It is not to be considered because, ladies

and gentlemen, the thing that you were already considering it for has been proven. You have made a determination already that Brandon Moon on April 27th, 1987, is the man who brutally raped Dana Mocherman, and when you go back there to your punishment deliberations, that has been done. You have decided that. It is no longer in consideration. We are at that stage of the trial where you are going to discuss what's going to happen to him now for having done that. But there is no longer any question of whether he did it or not. He did. Do not consider any other of the cases except the ones that are before you, and there are three cases. The three cases that you have found him guilty of, and they allege separate acts that were done there. The penetration, the fingers, the penis, sexual contact. Those are the three cases that you're going to deliberate on. And those are the three cases and each one with a gun. Those are the three cases that you're going to determine punishment.

When you determine the punishment, you can tell from the verdict sheets that are attached to your chart, you are to consider each case separately. For example, you turn to the verdict sheet, 50015, you determine what kind of punishment are we going to give for 50015. As an example, ladies and gentlemen, if you determine that you're going to give him the minimum of five years, you don't cut up five three different ways. For instance, two years and two years and

two years, and add up. You don't do that. Each separate case is measured by its own terms. So when you go back there, you sit down, and you open up and then you say, well, okay, on case No. 50015, and discuss the merits of only that case and make a determination. What is that case worth? What kind of punishment do you give a man who committed that offense in that case?

Again, as in the first part of the trial, because I have the burden of proof I get to open and close. And, so, at this time, I will be sitting down and will have some concluding remarks after Mr. Garney has addressed you.

Thank you very much.

THE COURT: Counsel.

MR. GARNEY: May it please the Court, counsel, ladies and gentlemen of the jury. My remarks will be very brief. Please do not mistake the brevity of what I'm about to tell you for any lack of importance, because I really don't mean it that way. It's just simply that you have all the evidence there is to be considered before you and there's no use at this point rehashing. You have made a determination, I'm not going to argue about that with you.

Ladies and gentlemen, you have an opportunity now to set the punishment of Brandon as you see fit. You're unfettered by the law, except up to the maximum and down to the minimum. It's totally within your discretion. I beseech

you on the part of Brandon because he can't talk to you now. I can, to grant him probation. Grant him probation for as long a term as you deem reasonable, but, please, grant the man probation. Give the power of the Court supervision over him. You have seen how Judge Peña runs this courtroom, you know how he acts. Put Brandon under the power of the Court. The Court will treat him fairly and justly. Brandon will have to abide by the terms of probation, he will have to do what the Court tells him to do. If he doesn't, he answers to the Court. And at this time I'm asking you to simply grant him probation for a reasonable length of time.

Thank you very much.

THE COURT: Counsel.

MR. LIZARRAGA: Ladies and gentlemen, I know when you made the decision that you made about an hour ago, it's really not that easy to go to lunch. When you come back you tend to have a little more acid in your stomach than you normally do. It's not easy. In our voir dire those were some of the questions we were asking you. Can you make that kind of a decision? Can you consider the full range of punishment? And, obviously, all of you can.

You're going to have to work through this when you get to the jury room. You're going to have to work through it together. For some of you it's very obvious what this case is worth. Others of you are going to want to discuss it.

But, in the end, I'm going to ask all of you, don't deny the obvious. Don't deny the obvious.

The range of punishment in this case is in your charge. The minimum is five years, the maximum is 99 years to life. The maximum fine is $10,000, the minimum is zero cents. If you will look at your charge, what it says is, "Determine what the punishment is going to be. How many years. How much of a fine. And then if the time falls ten years or less, then you consider probation." That's what your charge tells you. And I'm asking you not to deny the obvious when you go consider the amount of time in this case. Okay?

This is not even going to apply in this case, because it's not the type of case that this applies. This is not a ten-year case. It's not going to apply. It's not a minimum type of case. So, what do you do when you go back there? You go back there and you discuss it and you evaluate it and then you determine, well, -- because you have all the evidence -- you determine if a man goes to another person's house with a gun and he rapes a woman the way that Brandon Moon did on April 27th, 1987, what do we do with that man? What is the case worth? What is the obvious?

I want to suggest to you that about an hour and a half ago you convicted one of the most dangerous men in El Paso. You did. This not happen everyday in our city. And why is so dangerous? Because we live by certain sacred trusts that

that we have. Okay? Let me go over some of those. We trust that when we go off to work in the morning our wives are going to be safe. Reid Mocherman had that trust on April 27th, 1987. And look what happened? You think he's got that trust anymore? That trust is not going to exist as long as this Defendant is on the streets. It won't. And it may never exist for the Mochermans again. It probably won't. Look what else we trust. All of us trust in the safety of daylight. Every morning we take for granted when we get up, "Well, nothing can happen to us in the morning." That's what Dana Mocherman thought on April 27th, 1987. She said it was a nice cheerful morning. Her pool had been cleaned the day before. You think that pool has been used very much after April 27th, 1987? I mean, we fear darkness, and even at darkness we don't expect these things to happen. But this happened in daylight. So, what is the case worth? We trust in the safety of our homes. Dana Mocherman had bars on all her windows, locks on all her doors. Do you think that she's got that trust anymore? So, what is the case worth? And do you think that Dana Mocherman will ever be the same after this regardless of what your verdict is today? Of course not. And why are our trusts in jeopardy? Because here's a man who has tasted the thrill. Because there's no other explanation on why people do this, he's tasted the thrill.

You all have heard that adage: "Once a dog tastes human

blood, you better get rid of it if you don't want it to bite again." You all have heard that.

I'm going to ask you right now to turn to your verdict sheets. I'm going to ask you to turn to 50015, which is the same as the other two attached sheets, it just has a different cause number on it. Now, when you go down to the third item on that sheet, you say, "We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment, assess a fine of blank dollars." Whatever you determine in that dollar amount is what you are telling the community that this case is worth. It's what you are telling the community that this case is worth in El Paso County. And you're telling the community across the state of Texas, because we're all Texans, we all live here, and so we are going to send a message of what this case is worth in monetary terms, if you could ever place that amount for a case like this. The maximum is $10,000. And it doesn't matter what other people tell you, you know, what you do here today is going to get outside of this courtroom. It's going to get outside of El Paso, and then depending on what you do on the amount of time, the message is going to be sent as far as Huntsville. Who do you want to send the message to? Do you want to send it to our law-abiding citizens? Yes. We want to let them know that if something like this happens, people will not get away with it. Do you want to

send this to all the criminals in Texas? Of course. You want to let them know that if they dare come to El Paso and do something like this, they are not going to get away with it. Because, believe me, when this man goes to the penitentiary, just like every other person that arrives at Huntsville, everyone is going to know what he was charged with, what he was convicted for, and he's going to be telling people how long he's got to served. So this message is going to get out to the very people that we want it to get out to. So, item No. 3, I urge you in each one of your verdict sheets, to fill in the amount of $10,000. Let's let everybody know at Huntsville and let's let everybody know here in El Paso and all across the state of Texas that, if there is a sexual assault here in El Paso County, Texas, if somebody uses a gun, if somebody violates all of our trusts, they are going to have to pay for it. $10,000. Each cause number.

Now, ladies and gentlemen, I'm going to quote Mr. Garney in his final argument in the guilt/innocence phase of the trial. When he said this I wrote it down. He said, "Once you convict Brandon Moon, it's the signal of the end of his life." And, ladies and gentlemen, what I've been asking you all along, do not deny the obvious. Mr. Garney was stating the obvious. For this particular offense, for each one of them, we haven't been left any choice. How can you give anything less than life? You're going to have to work through

this together. For some of you it's very obvious. Some of you are going to want to talk about it. But, in the end, don't deny the obvious.

We kind of wish that we could grasp at straws. We kind of wish that we could've heard something differently. There has been no acceptance that this has happened. We haven't heard anything that can allow us to give anything less than the maximum. So when you go back there and you give each one of your verdict sheets, I want to ask you to do something that's very difficult after you discuss it. I'm going to ask you all to turn to your foreman and ask him to sign the first line on that sheet. "We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment, assess his puishment at confinement in the Texas Department of Corrections for life."

And I told you during voir dire that it's not pleasant. You're going to have to work through it together. But don't deny the obvious.

THE COURT: Mr. Bailiff, take charge of the jury.

(Jury left courtroom and proceeded to jury room to commence with their deliberations on punishment phase of the jury trial.)

(At approximately 3:11 p.m. the jury announced they had reached a verdict. Jury was brought into courtroom and the following proceedings were had in the presence of the jury and of the Defendant:)

THE COURT: Mr. Alvarez, has the jury reached a verdict?

THE FOREMAN: Yes, sir.

THE COURT: Please hand it to the Clerk. Let the record show the Court is going to order the verdict filed at 3:17 p.m. on the 14th day of January, 1988.

Mr. Moon, will you please stand.

Cause No. 50115: "We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment, assess his punishment at confinement in the Texas Department of Corrections for 75 years.

"We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment, assess a fine of $7,500."

Signed by the Foreman of the Jury, Juror No. 11, Mr. Ricardo Alvarez.

Cause No. 50032: "We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment, assess his punishment at confinement in the Texas Department of Corrections for 75 years.

"We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictement, assess a fine of $7,500."

Signed, once again, Foreman of the Jury, Mr. Ricardo Alvarez.

Cause No. 50033: "We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment, assess his punishment at confinement in the Texas Department of Corrections for 75 years.

"We, the Jury, having found the Defendant, Brandon Lee Moon, guilty of aggravated sexual assault as charged in the indictment, assess a fine of $7,500."

Mr. Moon, the jury has found you guilty and has assessed punishment in all three cases. It's going to be the duty of the Court to formally sentence you. However, the Court is not going to sentence you at this time because there is a question in my mind as to whether to sentence you concurrently or consecutively. That is, whether to serve all 75 years at the same time or whether this Court is going to be able under the law as it existed in 1987 at the time these offenses occurred, that I stack them, that is, you serve one 75-year term, then you serve another 75-year term, and then when you complete that second one you start serving the third one. So, at this time, the Court is not going to sentence you. You may be seated.

Ladies and gentlemen, the Court would like to take this opportunity to thank you for your services here this week. I know that it has been hard. I know that you all have been patient and sitting down. Now you know what I have to go through day in and day out, you sit down and listen to

witness after witness. It's hard. And I thank you for your services. You will be discharged at this time which means that you will be discharged from your oath of secrecy. What does that mean? It means that you are free to discuss the case with anyone, including the attorneys. However, you are also free to decline discussing the case.

Many times after a trial in order to determine if there was any jury misconduct, that is, that you did not follow my instructions, you did not follow the law, you may called upon to give an affidavit. Once again, you are free to give an affidavit or you may decline to give an affidavit. However, you are subject to being subpoenaed, brought into Court on a motion for a new trial to give testimony in order to determine whether there was any jury misconduct.

If you will remain for a few minutes, your pay vouchers are being prepared to pay you for your services. We don't pay much. Six dollars a day doesn't even pay for a meal, however, I think, though, that the services you have rendered, especially in this case, are of the utmost importance, not only to the community, but most important to the criminal justice system. I'm sure that on behalf of both Defense attorney, Mr. Garney, and Mr. Lizarraga, from the District Attorney's office, they also thank you. And let me say this, gentlemen, directing my remarks to the attorneys, I thank you. It's not very often that we the courts see competent

attorneys, well prepared for trial, and as I was remarking to you, there was not that many objections, which means that both of you knew what you were doing.

Do you have the checks?

THE CLERK: Yes, sir.

THE COURT: Does anyone have traffic tickets? Go and give them to the Clerk -- I mean parking, not traffic, just parking tickets. Is there anyone that needs affidavits for your employers? All right.

Thank you very much. Be sure and give the buttons to the Bailiff.

(WHEREUPON, the proceedings in this trial were concluded, and the Court was adjourned.)

WEDNESDAY, JANUARY 20, 1988

(The following proceedings were had before the Court:)

THE COURT: Cause No. 50015, 50032 and 50033, the State of Texas versus Brandon Lee Moon. Is the State ready to proceed?

MR. LIZARRAGA: Marcos Lizarraga for the State is ready, your Honor.

THE COURT: Counsel for the Defendant?

MR. GARNEY: Norbert Garney from the Public Defender's Office is ready, your Honor.

THE COURT: Counsel for the State, do you have anything?

MR. LIZARRAGA: No, your Honor. We did file a motion to accumulate sentences.

THE COURT: Counsel for Defense?

MR. GARNEY: Your Honor, we would oppose such motion on two grounds: Number one, it violates the double jeopardy rights of the Defendant, and, number two, that the facts of this case simply do not warrant the stacking up of sentences.

THE COURT: Mr. Moon, do you want to tell me anything before I sentence you?

MR. MOON: No, sir.

THE COURT: All right, sir. Now I have done some

reading and briefing and I'm not so sure that under the law I am authorized to sentence Mr. Moon to consecutive sentences. I think that the law is in state of flux, there is a case pending in a motion to rehearing before the Court of Criminal Appeals that may answer that question, but, unfortunately, we can't wait for that answer. So, rather than make a decision not knowing what the law is, that is, in favor of consecutive sentences, the Court is going to become conservative and order that Mr. Brandon Lee Moon be sentenced to 75 years in cause No. 50015, 50032 and 50033, which sentences shall run concurrently.

Now, at the same time, Mr. Garney, I believe, one, you told me you are leaving the Public Defender's Office, is that correct?

MR. GARNEY: That is correct, your Honor. My last date there is February 26th of this year.

THE COURT: So, then, this Court is going to allow you, as per your request, to withdraw from representing Mr. Moon in the other cases, but then, the Court is going to set cause No. 50027, 50028, 50013, 50025, and 50026, for April 4th at 1:00 p.m.

Mr. Moon, between now and that time the Court will appoint you counsel. I have already contacted one attorney, but, unfortunately, he is ill and hospitalized and he doesn't think that he can adequately represent you. I want you know,

Mr. Moon, that in the event that you are found guilty in these other cases by a jury and sentenced, that there is a strong possibility that the sentences could be consecutive instead of concurrent. In other words, that they would be stacked. I want you to think seriously about that.

All right, do you have any questions?

MR. GARNEY: None, your Honor.

THE COURT: All right.

MR. GARNEY: Judge, I will be filing a notice of appeal, and I will be handling that.

THE COURT: Yes, you have indicated that you would be handling it.

MR. GARNEY: Thank you, your Honor.

THE COURT: Now, Mr. Moon, in all probability you will be transferred to the penitentiary, we're going to have to bring you back, the sentence exceeds 15 years, so in all probability -- that's why I want to get an attorney as soon as possible before you leave so that he can at least make an initial contact.

MR. MOON: Your Honor, is there any way that you could order to have me kept here?

THE COURT: No, sir; the law is that once you receive a sentence in excess of 15 years you go to TDC immediately.

(WHEREUPON, the proceedings in the sentencing phase were concluded, and the Court was adjourn[illegible])

CERTIFICATE

THE STATE OF TEXAS §
§
COUNTY OF EL PASO §

I, Margarito Venzor, the Official Court Reporter for the 327th Judicial District Court, El Paso County, Texas, do hereby certify that the above and foregoing 597 pages contain a true and correct transcription of the proceedings had in the above-styled and numbered causes, to-wit: pre-trial motions heard before the Court and jury trial of the case in chief, all of which occurred in open court and reported by the undersigned.

I further certify that this transcript of the record of the proceedings truly and correctly reflect the exhibits, if any, offered by the respective parties.

WITNESS MY HAND AND SEAL on this the 27th day of May, 1988.

Margarito Venzor

Official Court Reporter for the
327th Judicial District Court
El Paso County, Texas

Certification Number: 376
Date of Expiration: 12/31/88
Business Address: 214 City-County Bldg.,
El Paso, Texas 79901
Telephone Number: (915) 546-2032

The within examined, found correct, approved and ordered filed as the Statement of Facts in the cases of the State of Texas vs. Brandon Lee Moon, No. 50015, No. 50032, No. 50033, on this the 27th day of May, 1988.

ENRIQUE H. [illegible]NA, Judge
327th Judicial District Court
El Paso County, Texas

TEXAS DEPARTMENT OF PUBLIC SAFETY

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ROBERT B. HOLT
JAMES B. FRANCIS, JR.
COMMISSIONERS

April 24, 2003

F. Zubia #1866
El Paso Police Department
911 N. Raynor
El Paso, Texas 79903

Laboratory Case Number	Agency Case Number	Offense Date
L4E- 41169	04-23040I	04/27/87

Suspect(s)
Moon, Brandon Lee 08-28-61

Victim(s)
Mocherman, Dana 01-19-55

Offense: Sexual Assault
County of Offense: El Paso (071)

Evidence Submitted

Among other items submitted in person by F. Zubia on October 24, 2002:

A. Blue bath robe
B. Rape kit from suspect Moon with Red top tube
C. Rape kit from victim with Red top tube
D. Blankets, sheets, orange bed spread

Requested Analysis

Compare semen stains found by Donna Stanley using STR loci.

Results of Analysis

Please refer to the reports issued on July 20, 1987 by Burgess J. A. Cooke from the Midland Lab, November 7, 1987 by David E. Mahan and Glen Adams from the Lubbock Lab, and January 9, 1997 by Donna Stanley from the Austin Lab.

Extracts saved from Donna Stanley's work in 1997 were analyzed using PCR DNA. Items B and C were extracted by a method that yields DNA. The DNA isolated from all the samples was then analyzed using PCR DNA. The following STR loci were characterized: D3S1358, vWA, FGA, Amelogenin, D8S1179, D21S11, D18S51, D5S818, D13S317, and D7S820. Additionally, D16S539, TH01, TPOX, and CSF1PO were characterized for the robe stains A, B1 and 2, C, D, E, comforter B, Mocherman and Moon.

The DNA profile from the robe, stains A, B1 and 2, C, D, E sperm cell fractions and the comforter A1, A2 and B sperm cell fractions are not consistent with the DNA profile of Mr. Moon. Mr. Moon is excluded as a contributor to the robe stains A, B1 and 2, C, D, E, the comforter A1, A2 and B sperm cell fractions. Statistics are available upon request.

The DNA profile from the robe stains A, B1 and 2, C, D, E epithelial cell fractions are consistent with a mixture of Ms. Mocherman and an unknown male. Statistics are available upon request.

Laboratory Case Number	Agency Case Number	Offense Date
L4E-41169	04-23040I	04/27/87

The DNA profile from the comforter A1, A2, and B epithelial cell fractions are consistent with a mixture of Ms. Mocherman and an unknown male. Statistics are available upon request.

Disposition of Evidence

The remaining cuttings and DNA extracts will be stored frozen to preserve their biological constituents.

Except for the items retained frozen in our laboratory, the evidence has been returned to the El Paso Police Department.

Christine Ceniceros
Criminalist IV
Texas DPS El Paso Laboratory

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
346TH JUDICIAL DISTRICT

State of Texas	)	
	)	No. 50015-327
	)	[redacted]
vs.	)	No. 50033-327
	)	
	)	
Brandon Lee Moon	)	

DEFENDANT'S MOTION FOR AN IMMEDIATE HEARING AND FINDINGS OF FACT, PURSUANT TO TX. C.C.P. ART.64.04, ON EXCULPATORY RESULTS OF POST-CONVICTION DNA TESTING

In 1989, Brandon Moon was convicted by a jury of three counts of sexual assault arising from the brutal April 1987 rape of Dana M____.[1], an El Paso housewife. The rape was committed by a single assailant who broke into Mrs. M.'s home at gunpoint. At the time, Mr. Moon was an Army veteran and a college student at the University of Texas at El Paso, with no prior criminal convictions. Since the day of his arrest, Mr. Moon has consistently maintained his innocence, asserting that the victim was honestly but tragically mistaken when she identified him as her attacker in a lineup. For over fifteen years, he has waged a truly extraordinary effort -- in the face of maddening procedural obstacles -- to obtain DNA testing on evidence from the crime that could prove his claim of innocence beyond any doubt.

That day has finally come. Conclusive DNA tests on semen that could only have been left by the man who attacked Dana M___ prove that Brandon Moon is innocent, and further provide an opportunity for the State to enter the rapist's DNA profile into the CODIS DNA databank, to identify him before he commits more crimes.

[1] Although part of the court record, the victim's full name has been redacted here to protect her privacy.

APPENDIX

The new DNA tests were obtained in the wake of a landmark DNA testing statute passed by the Texas Legislature in 2001, under which Mr. Moon finally obtained relief. Conducted at the Texas crime laboratory pursuant to a 2002 Order of this Court (Baca, J.), with subsequent testing done *pro bono* by an accredited private laboratory in 2004, the new DNA tests conclusively prove what Mr. Moon has maintained for over fifteen years: that he is in fact absolutely innocent of this horrific crime. And they further reveal that the serology (blood typing) evidence presented by the State's expert witness at trial -- and upon which the jury surely relied in rendering its verdict -- was itself deeply flawed.

This state-of-the-art Short Tandem Repeat ("STR") DNA testing was recently conducted on two semen stains recovered from the crime and used in evidence at trial. These stains were found, respectively, on the seat of the bathrobe in which the nude victim wrapped herself immediately after the assault, and on the bed on which the rape occurred. The bathrobe, in particular, showed a large stain in the interior buttock area; the jury was rightly asked to infer that semen had drained onto the robe from the nude victim's vaginal area immediately after the rape, as she wrapped herself in the robe and sat down in her car to drive for help. Further comparative testing was then performed on a sample provided by the victim's former husband.[2]

At trial, the State's experts claimed that conventional serology testing showed that Mr. Moon -- but not the victim's husband, or her teenage son -- was among just 15% of the population who could possibly have been the source of any of this semen. This was

[2] The victim's ex-husband now resides in Louisiana. The Innocence Project located him in November 2004, and he agreed to provide a reference sample for comparison. The sample was collected by a private, independent laboratory in New Orleans, and the laboratory took his photograph and fingerprints to confirm his identity. Those documents are included with the 2004 DNA results.

the only scientific evidence presented to the jury to inculpate Mr. Moon, and was clearly critical to his conviction. Analysis of all other trace evidence (including hairs) excluded Mr. Moon, and he offered an alibi that was partially corroborated by two witnesses.

The new DNA results, however, dramatically reverse the scientific underpinnings of the entire case. They show that each stain contained a mixture of DNA from a male donor and the victim herself, *and* that:

(1) **Mr. Moon could not have been the source of the semen from either stain;**

(2) The semen on the bathrobe and the semen on the comforter came from two different males, both mixed with the victim's own DNA (*i.e.*, consistent with vaginal secretions from two separate acts of intercourse);

(3) The victim's only son, who owned the bathrobe on which one of the stains was recovered, is also conclusively excluded as the donor of either stain; and

(4) The semen on the comforter (but not the bathrobe) came from the victim's husband.

See DPS Report dated April 24, 2003; Orchid Cellmark Report dated Dec. 9, 2004; and Affidavit of Mark Stolorow and Lewis Maddox (attached hereto, respectively, as Exhibits A, B, and C).

The meaning of these results is clear. Mrs. M___, a married woman, testified about only two men with whom she had sexual intercourse at the time of the rape: her husband (with whom she made love the night before the attack), and the rapist. If that was true, then the semen stains on the bathrobe – which, the jury was told, had drained there when the nude victim pulled on the robe and drove to get help right after the rape – could only have come from the rapist. And DNA testing proves **that man is not Mr.**

Moon. Moreover, the tests also show that the findings of the State's serologist at trial -- who told the jury that the husband was definitively *excluded* as the source of that stain – were false.

The DNA results excluding Mr. Moon as the donor of all of these semen stains were reported to the District Attorney's office in April 2003. With the additional results showing that the husband is the source of the DNA on the comforter, and that the state's serologist presented false testimony at Mr. Moon's trial, there can be no conceivable excuse for further delay. Accordingly, defendant respectfully asks this Court to **hold an immediate "favorability" hearing** on the DNA results. Such a hearing, provided under the State's new DNA statute, is a precursor to Mr. Moon's release from custody on a writ of *habeas corpus*, executive clemency, or otherwise. It requires only that this Court determine "whether, by a preponderance of the evidence, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." Tex. C.C.P. Art. 64.04. These conclusive DNA test results surely exceed that standard. Furthermore, given the long period of time in which the 2003 DNA results have been in the State's possession while Mr. Moon languishes in prison, defendant respectfully asks that this hearing be held, and the appropriate findings be entered, at the earliest possible date.

STATEMENT OF FACTS

On January 14, 1988, a jury convicted Brandon Lee Moon of three counts of aggravated sexual assault before the Hon. Enrique H. Pena of the 327th Judicial District Court, El Paso County. All three counts contained a firearm specification. (TT, 576-

77).[3] The jury sentenced Moon to a term of imprisonment for 75 years and assessed a fine of $7,500 for each count[4]. (TT, 591-92, 596).

The convictions arose from a single assault perpetrated against Mrs. Dana M___ by an unknown assailant on the morning of April 27, 1987.[5] At approximately 9:00 A.M., Mrs. M___ was "surprised" to see an unfamiliar man standing in her hallway as she was putting away groceries. (TT, 79). The man was wearing a stocking cap, was holding a gun, and appeared to be looking for someone in the house. (TT, 79). Mrs. M___ could see the intruder's profile as he was "pivoting" and looking into other rooms. (TT, 129). When he saw her down the hallway, the assailant lunged at Mrs. M___, brandishing the gun. (TT, 82). Mrs. M___ recalled that he came up to her in a "flash," and when she saw the gun, she was "terrified." (TT, 133).

The assailant then forced her into the master bedroom. (TT, 82). With the gun to the back of her head, the assailant forced her onto the bed, face down, and proceeded to assault her. (TT, 85). During the assault, the assailant repeatedly ordered Mrs. M___ not to look at him or he would "blow [her] brains out." (TT, 91). Indeed, after she was forced into the bedroom at gunpoint and placed face down on the bed, she did not glimpse the assailant's face again. (TT, 139).

At trial, Mrs. M___ stated that, before the assailant made her turn around, she got a good look at his face because they were "just nose, face to face." (TT, 84). She told the jury that she recalled the structure of his face, his physique, the size of his body, the shape of his nose, the color of his complexion, and hands. (TT, 83). Yet there were other

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[3] TT refers to trial transcript from *The State of Texas State v. Brandon Moon*, December 28, 1987 – January 14, 1988, El Paso County, Judge Enrique H. Pena and will be used throughout.

[4] The jury sentenced Moon on each count to 75 years in prison. The judge sentenced him to serve the sentences concurrently. (TT, 596).

indications that her ability to identify the perpetrator may have been compromised by the brevity of their interaction and the enormous trauma of the assault. For example, Mrs. M___ could not tell the police whether the perpetrator had a moustache, even immediately after the incident occurred (TT, 109, 135). Moreover, she could not tell the perpetrator's eye color, as there were no lights on in the hallway or in the entire house. (TT, 141). She described the hallway as "so very dark" because there were no windows in the hallway, although a small amount of secondary light was cast from the windows of adjacent rooms. (TT, 162).

Although Mrs. M___ initially estimated the time she saw the assailant in the hallway to be "three to five minutes" she later acknowledged that these events took "approximately five to fifteen seconds" at most. (TT, 130). And the "only face-on view" of the assailant's face that Mrs. M___ glimpsed that day was during this brief confrontation in the darkened hallway. (TT, 139).

After forcing Mrs. M___ onto her bed, the perpetrator initially told her that he was "just going to rob" her. (TT, 84). Then he said told her "he just wanted to touch" her. (TT, 88). He laid down on top of her, slid his hand under her shirt and fondled her breasts. (Id.). He then told her to take her shirt off, but also told her not to move. (Id.). He pushed the gun into the back of her head and ordered Mrs. M___ to take off her pants. (TT, 90). As she began to take them off, he ripped off her pants and inserted his fingers into her vagina, all the while keeping the gun at the back of her head. (Id.) He asked her if it "felt good" and if she "wanted him" inside of her, and then he penetrated her vagina with his penis. (TT, 92). Mrs. M___ felt him ejaculate inside her vagina. (TT, 94). The

perpetrator again ordered Mrs. M___ "not to move," and fled the scene immediately thereafter. (TT, 93).

After lying still on the bed to make sure he was gone, Mrs. M___ fled her home. (TT, 94-95). She grabbed her sixteen year old son's robe from his bedpost on the way down the hall, and put it on to cover her nude body, clutching the robe around her. (TT, 95). Mrs. M___ then drove herself to a local convenience store and begged the staff to call the police; she was wearing only the robe and holding it against her as she hid in a room in the back of the store and waited for the police to arrive. (TT, 105-6, 277-78).

Mrs. M___ was taken to the emergency room at Sierra Medical Center at 10:30 A.M., where Dr. Paul David Navar attended to her. (TT, 73-77). Dr. Navar performed a pelvic examination and a routine rape examination. (TT, 288). A rape kit was prepared; in addition to combed pubic hairs, fingernail scrapings, known head and pubic hair of the victim, as well as vaginal, cervical, and oral swabs, a blood sample and vaginal saline washes were collected from Mrs. M___. (TT, 190-93). The vaginal saline washes were mounted on glass slides. Dr. Navar examined the vaginal slides under a microscope and observed the presence of non-motile sperm on slides. (TT, 198). She told Dr. Navar and the police that prior to the rape, her last act of sexual intercourse was with her husband the previous evening. (TT.180)

As reflected in her records from the hospital exam, Mrs. M___ told Dr. Navar that she had smoked marijuana on a daily basis for ten years prior to the attack, including the night before the attack occurred. (TT, 151-52). (Later, at trial, the defense urged the jury to note the marijuana use for the sole purpose of how it might have impacted her memory and ability to accurately identify her assailant.) (TT, 556). No toxicology

screen was taken at the hospital to determine the THC levels in Mrs. M___'s bloodstream at time of the rape examination. (TT, 213).

Identification Procedures

The day after the attack, Mrs. M___ visited the Westside Police Station to create a composite drawing of the perpetrator. (TT, 107-08). The following day, the police summoned her to the station to identify the perpetrator from a photo array of five men. (TT, 110-11, 150). Mrs. M___ did not conclusively identify Mr. Moon from the photo array; she told police that Mr. Moon's photo "looked like" the man who raped her, but that she "wasn't sure" if he was the attacker. (TT, 150). The next day, the police obtained a warrant for Mr. Moon's arrest, which they executed on May 1st. (TT. 301)

On May 2, 1987, the police conducted a physical lineup of six men in which Mr. Moon was present, and Mrs. M___ positively identified him as the rapist (TT, 117, 151). However, Mr. Moon was the only subject who appeared in both the photo array and in the physical lineup. (TT, 151). Moreover, Mrs. M___ was only able to make an identification after asking to see all the subjects wearing a hat similar to the one the perpetrator wore. (TT, 118-19).

Later that day, the police contacted another woman who had been a victim of a still-unsolved sexual assault from 1985, which they believed had been committed by the same assailant, due to the distinctive similarities between that case and the Dana M___ case. The victim in the earlier case, Carmen N___, was also assaulted while alone in her home by a white male with pale skin and blue eyes, wearing a ski cap and brandishing a gun. (TT, 483-485). He entered her home around noontime, pushing her away from the door when she answered it. (TT, 483, 485). Mrs. N___ stated that she was able to see his

face until he ordered her to "turn around" and to "get down." (TT, 485-86). However, at the "very max," she saw the perpetrator's face for just twenty seconds. (TT, 517). As Mrs. M___'s assailant had done, the perpetrator put the gun to the back of her head, told her he wanted her money, fondled her breasts, and told her he was "just going to feel" her. (TT, 492, 495). The attacker forced her to remove her pants and underwear and inserted his fingers into her vagina, as he did with Mrs. M___, and said that he knew she "like[d] it." (TT, 495-96). As Mrs. M___'s assailant had done, the perpetrator repeatedly told he would "blow [her] away" if she didn't "shut up." (TT, 489). Mrs. N____ then heard the attacker unzip his pants. (TT.443). However, after she tearfully told him "I am so sick," and that she had hepatitis, the attacker did not have intercourse with her. (TT. 443, 494). Telling her that if she moved or made a sound he would "blow [her] away," the attacker fled. (TT.497).

Over a year and a half after her assault, after Mrs. M____ selected Mr. Moon from the lineup, Mrs. N___ was asked by the El Paso Police to identify her assailant from a live lineup as well. (TT, 117, 501). Mrs. N___ "got a phone call that they had found someone that might fit the description would I come down to identify someone in a lineup." (TT.501). Mrs. N___ selected Mr. Moon. (TT. 502-3).

Detective Joe Villa of the Burglary Division of the El Paso Police Department arrested Mr. Moon for the rape of Dana M_____ at 4:10 A.M. on May 1, 1987 at his residence, a dormitory on the campus of the UTEP. (TT, 309). (Note: the warrant was obtained, and the arrest made, after Mrs. M's tentative identification of Mr. Moon in a photo array on April 29th, but *before* either Mrs. M____ or Ms. N____ positively identified him in the May 2nd lineup.) When the detective executed a search warrant on

Mr. Moon's dorm room at 9:40 A.M., police found not a single item of clothing that matched that worn by assailant as described by Mrs. M___. (TT, 318). Nor did they find a gun of any make or model. (TT, 317). In addition, Detective Villa did not find any clothing item or gun matching that worn or used by the assailant in a locker belonging to Mr. Moon. (TT, 319).

At the time of the assault, Mr. Moon was a sophomore at the University of Texas at El Paso (UTEP) with no criminal record. (TT, 360). Mr. Moon was actively involved in student life there; he was photo editor of the yearbook and was a cadet second lieutenant with the Air Force Reserved Officer Training Corps (ROTC). (TT, 390). (TT, 390). Prior to enrolling at UTEP, Mr. Moon served four years in the U.S. military. (TT, 24-5). Mr. Moon was also an avid photographer, having been so for four or five years prior to his arrest. (TT, 363). Mr. Moon had recently separated from his wife, with whom he had a son, and was in the process of obtaining a divorce. (TT, 395).

The Trial Evidence

Mr. Moon's trial for the rape of Mrs. M___ began in December 1988. The prosecution urged the jury to find that Mrs. M___ had correctly identified Mr. Moon as her assailant. Even though she had only briefly glimpsed the assailant in the dark hallway before she was ordered to lie facedown on the bed, and despite the enormous strain of the event, the prosecution argued that she had recalled many details of the rapist's appearance which matched Moon's, such as the shape of his fingers and his build. (TT, 570-72).

In addition to Mrs. N___'s testimony, the prosecution called Glen David Adams, a chemist and serologist with the Texas Department of Public Safety ("DPS") crime

laboratory in Lubbock, to the stand. In setting forth Mr. Adams' credentials on direct examination, the prosecution explained that DPS was "like the FBI of Texas." (TT.227) Mr. Adams testified that he had performed a series of serological (blood typing) tests on semen stains from the bathrobe Mrs. M wore immediately after the assault; on the bedspread where the rape had occurred; and on the vaginal swabs from the rape kit. (TT, 231-35). His tests revealed the presence of semen on each of these items. (TT. 233-35). Mr. Adams also tested blood and saliva samples taken from Mrs. M___, her husband, and her son, as well as blood and semen samples of Mr. Moon. (TT, 235-36).

The results of Mr. Adams' tests led him to conclude that Mr. Moon – but not the victim's son or husband – was among just 15% of the population who could have contributed the semen stains on these items. This is because, he told the jury, a series of tests showed that the semen on these items (other than one of the two vaginal swabs, upon which the result was inconclusive) could only have come from a "nonsecretor" – that is, a person who does not secrete the antigens for their blood type into their other bodily fluids, such as semen and saliva. (TT, 235-37, 243). Mr. Adams told the jury that his tests had revealed that Mrs.M___'s son and husband were both "secretors" (as was Mrs. M___ herself), and thus could not have contributed the semen on these items. (TT.235-36). Mr. Moon, however, was a nonsecretor, and thus was a potential donor of the semen. (TT.239). Mr. Adams further stated that 85% of the population are secretors, while just 15% -- including Mr. Moon – are nonsecretors. (TT. 230-31).

For its part, Mr. Moon's counsel, Norbert Garney (now a federal Magistrate Judge), asserted a defense of misidentification and alibi. The defense did not dispute that the Mrs. M___ had been brutally assaulted. Rather, the defense argued that she was

honestly but "terribly mistaken" in her belief that Mr. Moon was the assailant. (TT, 555). Nor did the defense dispute the accuracy of DPS's serology tests, or the fact the semen on the stains came from the rapist. Instead, it argued that while Mr. Moon was among the potential 15% pool of males who could have contributed the semen, the tests did not provide conclusive proof of the semen donor's individual identity. (T.558-59). In addition, the defense noted that the State's own experts from DPS had *excluded* Mr. Moon as source of all crime scene hairs upon microscopic examination, including those recovered from the comforter, the robe, and the victim's own pubic combings. (TT, 267).

Mr. Moon took the stand in his own defense, and denied committing the rape. He offered a detailed alibi which placed him on the UTEP campus at the time of the assault, as well as the previous evening and following afternoon.

The rape occurred at approximately 9:00 AM on Monday, April 27, 1987. However, Mr. Moon's girlfriend, Haspari Kumaradjaja, testified that she had telephoned to wake him up on that day (as was her habit, at approximately 8:07 AM. (The specific time she spoke to him that day was reflected on her calendar, on which she had a habit of noting her phone calls and activities; that calendar was entered into evidence at trial, and the relevant pages are annexed hereto as Exhibit D.) (TT.407-08). After her class ended at 9:15 AM, she walked over to Mr. Moon's dorm room and met him there. (TT.410) She noticed nothing at all unusual about his demeanor. (TT. 412). At approximately 10:30, after Ms. Kumaradjaja took a nap, they went to the office of Mr. Moon's English professor, who was not there, and Mr. Moon left a note under the professor's door. (TT.412). The professor, Louise Marchino, testified that she did receive the note, and that it was "probably on Monday" when she received it, but she was not "absolutely sure"

of the date. (TT.351). The professor's frame of reference for her receipt of the note was that Friday had been the last official day on which students could drop courses without the professor's permission, and Mr. Moon was seeking her assistance because he had missed that deadline. (TT. 351-52) Mr. Moon then went to the photo lab, to develop some photographs he had taken for the school newspaper, at approximately 10:45. (T.378). A copy of the April 28th newspaper with the photo credit bearing his name was entered into evidence at trial. *See* Exhibit D annexed hereto.

The defense argued that because Mr. Moon did not have a car, and because a detective had determined that the quickest route to the house where the rape occurred was a 6.7-mile drive, by freeway, from the campus (TT.307), it was not possible for Mr. Moon to have committed the rape. The defense also argued that the alibi was highly credible, perhaps more so because Mr. Moon had not documented every minute of his time. (TT, 557).

After Mr. Moon put on his alibi defense, the court ruled, over the defense's objection, that the prosecution could call Carmen N___ to testify about her 1985 assault, relevant only to the issue of "identity." The prosecution successfully argued to the court that the highly distinctive nature of the two offenses constituted a "signature" of the same assailant. (TT.470-75, 548) In her testimony, Mrs.N___ described the assault and identified Mr. Moon as the perpetrator. (TT. 476-504) Mr. Moon took the stand in rebuttal, denying that he had committed the assault and stating that he had never seen Mrs. N___ before in his life. He further testified that he could not remember or document his whereabouts at the time of Mrs.N___'s assault, which had occurred over three years before trial. (TT.

On January 14, 1988, the jury convicted Mr. Moon of all three counts of sexual assault against Mrs. M___. (TT.576-77.) Upon information and belief, he was never prosecuted for the 1985 assault of Mrs. N___.

POST-CONVICTION DNA TESTING PROCEEDINGS

Desperately seeking to access to DNA evidence to prove his innocence for over fifteen years, Mr. Moon has filed a series of (largely *pro se*) DNA motions during that time -- seeking access to the biological material from the case for DNA testing, as well as for relief from his conviction based on the partial DNA results he was able to obtain.

Upon information and belief, including documents produced in 2004 in response to a Public Records Act request to the Texas Department of Public Safety ("D.P.S."), Mr. Moon's efforts to secure DNA testing since trial have yielded the following:

(1) Primitive DNA test results on the semen stain on the comforter (which appeared to exclude Mr. Moon, but which were ultimately held to be inconclusive) at a now-defunct laboratory called ***Lifecodes, Inc., in 1989***;

(2) DNA testing using a slightly more advanced ("DQ-Alpha") methodology ***conducted by the State at D.P.S./Austin in 1997***, which <u>did</u> appear to yield DNA profiles from the semen on the comforter, robe, and victim's vaginal slides, but which, remarkably, were <u>never compared</u> to the DNA profiles of Mr. Moon, the victim, the victim's ex-husband, or the victim's son;

(3) ***State-of-the-art DNA testing by D.P.S./El Paso in 2003*** on semen stains from the comforter and robe, <u>and</u> on known "reference samples" from the victim and Mr. Moon; these tests (a) yielded definitive male DNA profiles, each mixed with the victim's

DNA, on both items, and (b) conclusively excluded Mr. Moon (and the victim's only son) as their source; and

(4) ***DNA testing in December 2004 on a swab provided by the victim's ex-husband,*** by Orchid Cellmark laboratories in Germantown, Maryland.

The proceedings that led to, and/or resulted from, each round of testing are briefly summarized here. It bears emphasizing, however, that until today, Mr. Moon has at no time sought or obtained any judicial review of the court-ordered 2003 DNA test results, nor has he sought or obtained such review regarding any other DNA tests that definitively excluded him from any item of semen-stained evidence in the case. That is what the current (2003) results do, and he is entitled to immediate relief based on them.

1. ***Lifecodes (1989-90)***

In 1989, Mr. Moon successfully petitioned the Court for an order releasing the semen-stained evidence used against him at trial (the vaginal swabs/slides; the bedspread; and the bathrobe) to Lifecodes, Inc., for DNA testing.

In February 1990, Lifecodes published the results of its analysis. Using the primitive DNA technology then available, the lab was only able to obtain a DNA profile from a single item of evidence: the cutting on the bedspread. It then compared that result to a blood sample provided by Mr. Moon himself. Lifecodes concluded that the results did appear to exclude Mr. Moon as the source of the DNA on the bedspread. Because Lifecodes did not have a reference sample from the victim, however, the lab reported that it could not be absolutely sure whether the DNA analyzed was from a male, or was simply female DNA from the victim. (*See* Exhibit E, attached.) Upon information and belief, however, the victim's DNA was never tested and compared to the results obtained

by Lifecodes, despite numerous motions by Mr. Moon for such testing over the next decade.[6]

Mr. Moon also filed a series of state and federal *habeas corpus* petitions in the 1990s based on the Lifecodes results that were available to him (as well as other challenges to the constitutionality of his conviction). He also sought further "discovery," in the form production of the biological evidence used against him, for new testing using more advanced DNA methodology. His claims for relief were all denied on the grounds that, because Lifecodes could not conclusively determine whether or not the DNA on the bedspread was actually from a male, he was not excluded as the source of the semen stain; these courts also denied his requests for production of the victim's blood sample for further testing that could resolve the issue.

At no time, however, did any Court conclude or opine that if there were definitive DNA profiles obtained from one or more male donors on the crime scene evidence, and those results excluded Mr. Moon, he would not be entitled to relief. Indeed, they implied quite the opposite. In 1999, U.S. District Judge Harry Lee Hudspeth denied Mr. Moon's federal habeas petition for relief based on the Lifecodes results, but aptly observed, "If Petitioner had shown that the DNA recovered from the bedspread originated from a man but did not originate from him, this might be a different case." Moon v. Johnson, No.EP-97-CA-74-H (W.D.Tex. March 29, 1999) at 9.

2. Texas Department of Public Safety, DQ-Alpha Testing (1996-97)

In 1996, while Mr. Moon's *habeas* petitions were winding their way through the courts, the State submitted samples of the crime scene evidence to D.P.S. This testing was conducted without Mr. Moon's knowledge, and he only learned the (partial) results

[6] For several years the State asserted that Lifecodes had, in fact, been provided with the

of the testing in the fall of 2004, when his new counsel filed a Public Records Act request with D.P.S. and obtained the crime laboratory's file. From those records, it appears that Donna Stanley, an analyst at D.P.S.'s Austin laboratory, tested and consumed (1) "minute strands" of the cotton tips of the vaginal swabs from the victim's "rape kit" (the swabs themselves having been consumed by the pretrial serological analysis); (2) the two semen-stained vaginal slides, also prepared in conjunction with the victim's rape kit; (3) four cuttings from the semen-stained bathrobe, and (4) three cuttings from the semen-stained bedspread. Ms. Stanley also drew a diagram of the bedspread and robe, showing where the semen stains had been deposited on each, before removing them for analysis. *See* Report of Jan.9, 1997 and diagram, attached as Exhibit F hereto.

But the results of this round of testing were, like the Lifecodes results, of little probative value on their own. This is because, while the State submitted the crime scene evidence for testing, it appears to have failed to ever submit any reference samples from any of the parties for comparison (including Mr. Moon, the victim, her ex-husband, or her son) – despite the DPS analyst's direct request for those samples upon completing the preliminary testing on the evidence itself. *See* Exhibit F at 3 ("Without reference blood standards from [these individuals], an interpretation of the results cannot be attempted. . . . Please submit one [sample] from each individual for comparison.") Based on the specimens available to her, Ms. Stanley concluded only that "the semen donor on the comforter is different from the semen donor on the robe and the vaginal secretions," *see id.* But lacking reference samples, she could draw no further conclusions about whether Mr. Moon was actually the source of either stain. Upon information and belief, the State never provided Ms. Stanley with the blood samples she had requested.

3. *Department of Public Safety Short Tandem Repeat ("STR") Testing, 2002-2003*

In its 2001 session, in the wake of a host of dramatic DNA exonerations of innocent persons convicted in Texas and nationally, the Texas Legislature enacted Article 64.01 *et. seq.* of the Code of Criminal Procedure, to provide convicted persons with a statutory route to obtain post-conviction DNA testing. On January 1, 2002, Mr. Moon filed a *pro se* request for testing and appointment of counsel under the new law. The motion was assigned to Judge Baca, then of the 346th Judicial District Court.[7] On August 29, 2002, the court appointed the El Paso Public Defender to represent Mr. Moon for the purposes of investigating whether any DNA evidence remained to be tested, and to represent him during any testing proceedings. Subsequently, the parties informed the Court that evidentiary samples from both the semen-stained bathrobe and semen-stained comforter remained in the State's custody, and the Court ordered them submitted to D.P.S. for testing at the State's expense.

The evidence was sent to D.P.S.'s El Paso Laboratory on October 24, 2002. Pursuant to industry standard, the evidence was tested using Short Tandem Repeat ("STR") DNA analysis. Although DQ-Alpha testing was the primary method utilized by state crime laboratories in the mid-1990s, it has since been replaced by STR testing. STR's advantages include: (1) by testing two "alleles" at each of thirteen genetic markers, it is far more discriminating than DQ-Alpha testing (usually narrowing down the potential sources of DNA profiles to the exclusion of all but one member of the world's entire population); (2) it can sex-type and isolate both male and female DNA profiles from a mixed sample; and (3) the results can be entered into the uniform CODIS

[7] Mr. Moon's case was tried in the 327th Judicial District, but his 2002 motion was assigned to the 346th after the 327th became an all-civil court.

databank, for instantaneous comparison to millions of DNA profiles from convicted offenders and unsolved crimes in Texas and nationally.

D.P.S. notes reflect that on November 8, 2002, upon completion of the STR DNA testing, the analyst contacted Assistant District Attorney John Davis by telephone "to tell him Moon's DNA did not match semen stains. There are two males, one on robe and one on comforter – but neither is Moon." On April 24, 2003, the laboratory issued its report, finding that the stains on the bathrobe and comforter each contained a mixture of DNA "from [the victim] and an unknown male," and that Mr. Moon was conclusively excluded as the male donor on both stains. *See* attached Exhibit A.

In the fall of 2004, Mr. Moon's new *pro bono* counsel at the Innocence Project in New York, NY, filed a request under Texas' Public Records Act for the D.P.S.'s file, including the data upon which D.P.S. had based its report. The documents received in response not only confirmed the findings contained in D.P.S.'s April 2003 report, but further established that, if the victim's son is indeed her biological child (as her testimony and medical records indicate)[8], he is also conclusively excluded as the source of the semen on the robe and the comforter. *See* Stolorow/Maddox affidavit, attached as Exhibit C.

Finally, in November 2004, the Innocence Project located the victim's ex-husband and secured his consent to have his sample compared to the DNA results. That testing (provided on an expedited basis by Orchid Cellmark, an accredited and nationally recognized private laboratory) confirmed that the semen on the comforter from the master

[8] At trial, Mrs. M___ testified that she had three children: a son, and twin daughters. (TT. 62-63, 85) Medical records from her examination at the hospital immediately after the rape, and entered into evidence at trial, reflect that Mrs. M___ delivered her children by C-section in both pregnancies. *See* documents attached as Exhibit G.

bedroom did indeed come from the husband – leaving only the semen stains from the rapist, on the bathrobe in which the victim wrapped herself, that remains unidentified.

ARGUMENT

Movant is Entitled to an Immediate "Favorability" Finding That it Is Reasonably Probable That He Would Not Have Been Convicted Had the New DNA Results Been Available at His Trial

Since the time of Mr. Moon's conviction in 1988, forensic DNA technology has revolutionized the nation's criminal justice system. In the words of Attorney General John Ashcroft, DNA is "nothing less than the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent."[9] In the instant case -- thanks largely to Mr. Moon's own extraordinary, unwavering efforts to obtain access to DNA tests that could clear his name for over fifteen years -- this "truth machine" has clearly done its job. It is now imperative that this Court do what the District Attorney's office will not: make express findings that the results of these DNA tests prove Mr. Moon's innocence, or, at the very least, make it "reasonably probable" that the jury would not have convicted him had the results been available at trial, which is all that is required under Texas' new DNA statute.

The State's case against Mr. Moon at trial consisted of two key elements: (1) Mrs. M____'s testimony that she believed Mr. Moon was the man who assaulted her, corroborated on the issue of "identity" by another woman, Ms. N_____, who was the victim of this same serial offender, and who also identified Mr. Moon in a lineup and in court; and (2) expert testimony that Mr. Moon could not be eliminated as the donor of the semen-stained evidence. Notably, the other forensic analyses performed by the state –

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[9] Naftali Bendavid, U.S. targets DNA backlog-Agency to spend $30 million to aid state crime labs, Chi. Trib., Aug. 2, 2001, at 10.

including hairs recovered from the semen-stained evidence, and fingerprints lifted from the points of entry into the home – yielded nothing that could have come from Mr. Moon. Nor did the police department's search of his dorm room and campus locker -- effectuated upon his surprise arrest at 3:00 AM just four days after the crime -- yield any clothing consistent with that of the perpetrator, or a gun of any kind.

The one piece of scientific evidence upon which the state did rely at trial, of course, has now been proven false by conclusive DNA testing which excludes Mr. Moon as the male donor of the mixed male/female stains on the robe and comforter. And that same science has proved that the two victims of this serial rapist – though no doubt sincere in their belief that Mr. Moon was that man – were simply mistaken. Tragically, such erroneous identifications have led to dozens of wrongful convictions around the nation in the last decade, including ten rape cases in Texas alone.[10]

As this State's DNA testing statute is still new, there is scarce precedent under the Act for what entitles a defendant to favorable findings under Art. 64.04. Indeed, upon information and belief, to date the Texas courts have not yet adjudicated a contested motion under Art.64.04, where, as here, the defendant has been conclusively excluded from crime scene evidence by state-of-the-art DNA testing. *Cf. Hicks v. State*, 2004 WL 240596 (Tx.App. Oct. 27, 2004) (denying relief where DNA results *inculpated* defendant); *Fuentes v. State*, 128 S.W.3d 786 (Tx.App. 2004) (same). This is not a surprising fact: in the Innocence Project's experience litigating under similar DNA

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[10] These include the following: Kevin Byrd (exonerated 1997); Ben Salazar (exonerated 1997); A.B. Butler (exonerated 2000); Carlos Lavernia (exonerated 2000); Anthony Robinson (exonerated 2000); David Shawn Pope (exonerated 2001); Victor Larue Thomas (exonerated 2001); Calvin Washington (exonerated 2001); Mark Webb (exonerated 2001); Josiah Sutton (exonerated 2004). *See* www.innocenceproject.org/caseprofiles.

statutes throughout the nation, the vast majority of prosecutors simply *consent* to vacate a flawed conviction when presented with exculpatory DNA test results under analogous circumstances. *See, e.g.,* "DA Says Inmate Should Be Freed," THE HOUSTON CHRONICLE, Oct.1, 2004 (Houston D.A. Chuck Rosenthal consenting to vacate rape conviction of George Rodriguez, after DNA evidence which excluded Rodriguez from crime scene pubic hair also proved that flawed serological testimony was presented to the jury at trial).

But since the El Paso DA's office not yet consented to do so here, defendant respectfully asks this Court to make the necessary findings without delay. The legal threshold under Art.64.04 – which uses the same standard found in a host of other states' DNA laws – is easily met under these circumstances. *See, e.g., Haddox v. State*, 2004 WL 2544668 (Tenn.Crim.App. Nov. 10, 2004) at *5 (explaining that "a reasonable probability that the defendant would not have been convicted" exists whenever DNA results "would have created a reasonable doubt *in the mind of one or more jurors.*") (emphasis supplied).

A. By proving that the *only* scientific evidence presented against Mr. Moon at trial was false, and that another man deposited these semen stains, the new DNA test results prove Mr. Moon's actual innocence – or, at the very least, make it "reasonably probable" that the jury would not have convicted him

The centerpiece of the instant motion, of course, is the dramatic new DNA evidence. At trial, the prosecution went to great lengths to bolster the eyewitnesses' identifications with expert scientific testimony -- asking the jury to infer, from the results of the serology tests performed by the Department of Public Safety, that Mr. Moon was the donor of the semen that drained from Mrs. M___'s vaginal canal after the rape. Explaining to the jury that DPS was "like the F.B.I. of Texas," the prosecutor carefully

established the following "facts" through his expert's testimony: (1) that the semen on the bathrobe, bedspread, and vaginal swabs/slides all came from a "non-secretor"; (2) that non-secretors are just 15% of the population; (3) that the other males in the victim's household (*i.e.*, her husband and teenage son) are both "secretors," and (4) Mr. Moon, by contrast, is a non-secretor. As the prosecution argued at summation, of these potential semen donors, only Mr. Moon "belongs to a group of people who could have done it, because he is a non-secretor . . . . [and] I think there's no question about the reliability of these tests." (T.568-69).

The conclusive new DNA tests, however, show otherwise. They prove two key things: (1) that Mr. Moon does not, in fact, "belong[] to a group of people who could have done it," and (2) the tests performed by Mr. Adams, the DPS serologist, were far from "reliable" – indeed, they appear to be marred by incompetence, fraud, or both. Because the victim's husband has turned out to be the source of the male DNA on the stained comforter, "these DNA results make clear that, in 1987, DPS/Lubbock must have incorrectly determined the secretor status of the victim's husband, the contributor(s) to the comforter stain, or both." Stolorow/Maddox affidavit, Exhibit C, at ¶ 32.

The implications of this error go beyond the typing of this one stain. For since Mr. Adams has now been shown to have made this error, there may well be reason to doubt the accuracy or integrity of *any* of the findings he presented to the jury – including whether or not Brandon Moon was in fact included or excluded as the donor of <u>any</u> of the semen-stained evidence used against him at trial. The 2003 DNA tests, of course, prove to a scientific certainty that Mr. Moon was <u>not</u> the source of that evidence. But given that the DNA results also prove that at least one aspect of this serologist's 1987 analysis was

erroneous, it is certainly possible that a properly conducted serological analysis might have excluded Mr. Moon at the time of trial as well.

Most importantly, the DNA tests conclusively exclude Mr. Moon as the source of the semen that is mixed with the victim's own DNA on all of these stains. Moreover, because the male DNA in both stains does not include any genetic markers possessed by the victim herself at several "loci," her biological son could not have contributed any of the semen on either the bathrobe or the comforter. *See id.* at ¶___. Thus, if the trial evidence regarding the victim's two sexual partners (the husband, and the rapist) is true, then the stains on the robe *must have come from the rapist – and that man is not Mr. Moon*. These tests squarely rebut the only scientific evidence upon which the jury's verdict rested -- and turn the entire case against Mr. Moon on its head.

What these new DNA tests do not change, of course, is the clear link between the rapist and the semen stains that was established at trial, and which neither side disputed. With the bathrobe, in particular, the State elicited detailed, unrebutted testimony from the victim about how she wrapped her son's robe around her nude body, and then drove her car to the nearest convenience store just after the perpetrator ejaculated into her and fled. As the 1997 sketch of the robe by D.P.S.'s Austin analyst makes clear (see Exhibit F), the "pooling" of the semen stain on the interior of the robe, mixed with the victim's own DNA, makes it virtually certain that this fluid drained from the her vaginal canal after the rape. That is why the prosecution vigorously argued to the jury that the rapist -- rather than the victim's son or husband -- was the source of each of these stains.[11]

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[11] As the prosecution argued in summation:

> We have the testimony of Dana M____ that she grabbed her son's robe from the bedroom and there were semen stains. Now, Mrs. M____'s son is 13-14 years old and in the event

Similarly, in vouching for the credibility of the DPS scientist who determined that Mr. Moon was a potential contributor of the stains, the prosecution argued that the State does not "stack up the cards and deliberately do things to try and incriminate people. We try and eliminate them." (TT. 569) The clear implication, of course, is that if D.P.S. *had* eliminated Mr. Moon as the source of any of these stains, he would not have been a defendant in the case any longer. And sixteen years years later, "eliminate" Mr. Moon is exactly what the DNA unit at DPS has done.

B. The identification testimony against Mr. Moon, without more, is clearly insufficient to uphold his convictions in light of the new DNA results

Despite the enormous force that eyewitness testimony can have on juries, there exists a substantial body of research demonstrating that even "certain" eyewitnesses in criminal cases can be tragically mistaken. *See, e.g.,* Samuel R. Gross et. al., Exonerations in the United States: 1989 through 2003 at 17 (finding that out of 328 post-conviction exonerations in U.S. during study period, fully 64% involved misidentification by one or more eyewitnesses, and that "[t]he most common cause of wrongful convictions is eyewitness misidentification"); Brian L. Cutler, Eyewitness Testimony (2002) at 3-4 (in four independent crime-simulation studies from 1982-1990, 36% of witnesses mistakenly

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those stains may have been his, a test was run on the robe, and apparently, there was some discharge from Dana M___ [after the rape] because her son, Chris, is a secretor, and the semen found on the robe is that of a nonsecretor. Okay. So they went ahead and did that to try and eliminate that possibility. Then we found out that the evening before when Dana M___ was with her husband, the evening before, they wanted to make sure and eliminate him, so no one will say, "Well, it could have been Reid M_____. So what they did was they went down and got a blood test and also figured out that he was a secretor. . . . So what they found was this, ladies and gentlemen: that Brandon Moon is a nonsecretor, and that the bathrobe, what did it have? Nonsecretor. And that comforter of the bed, consistent with the testimony of where this occurred, nonsecretor.

TT. 569.

identified an innocent suspect in photo arrays, and only 42% were able to correctly select the perpetrators).

Moreover, despite the common belief that a victim of a violent crime is likely to "never forget the face" of her assailant, the stress inherent in such traumatic events actually makes it less likely that the witness will make an accurate identification after the fact. *See, e.g.,* Charles Morgan et. al., Acccuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress (2004) (Yale University study of military trainees, noting inaccuracy of lineup identifications conducted under simulated but highly stressful "prisoner of war" conditions). This is particularly so where – as in the instant case – the assailant brandishes a dangerous weapon, which has been proven to draw the victim's attention away from the assailant's facial features and towards the weapon as a means of self-preservation.[12]

Moreover, DNA exonerations in serial-offender cases have proven that even when multiple victims independently select the same suspect from a police lineup, they, too, can be mistaken. *See, e.g.,* "Man Cleared By DNA Tests is Freed After 17 Years," ST. LOUIS POST DISPATCH, Aug. 26, 2003, at B1 (although four separate victims identified Lonnie Erby as the serial rapist who attacked them in Missouri in 1986, in 2003 DNA testing exonerated Mr. Erby of each of the sexual assaults for which he had been

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[12] "A visible weapon draws an eyewitness's attention, and the eyewitness's capacity to attend to multiple things or events simultaneously is limited. Consequently, eyewitnesses are less accurate at describing other people, things, or events when there is a weapon visible at the scene of a crime." Brian L. Cutler, Eyewitness Testimony 19 (2002). *See also* Loftus & Doyle, *supra* note 4, 33 ("The term `weapon focus' refers to the concentration of a crime witness' attention on a weapon--the barrel of a gun or the blade of a knife--and the resultant reduction in ability to remember other details of the crime."); Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 101 (1995) ("[T]he presence of a weapon during a crime attracts the attention of the witness to the weapon, leaving less attention to the perpetrator's facial and physical characteristics.")

convicted); Convicted by Juries, Exonerated by Science, Nat'l Instit. Just., Off. Just. Programs, U.S. Dept. Just., NCJ161258 (June 1996) at 36 (citing case of Kirk Bloodsworth, death row inmate exonerated of rape and murder despite the fact that five eyewitnesses had testified at trial that they were certain he was the last person seen with the victim); id. at 14 (DOJ study of first 28 post-conviction DNA exonerations in U.S., finding that each one involved mistaken identification by one or more eyewitnesses).

In the post-DNA era, individual crime victims -- sobered by proof of their honest but tragic mistakes -- have also spoken out about the errors that can befall even the most confident eyewitnesses. This was vividly recounted in a recent article by one rape victim, Jennifer Thompson, who misidentified her assailant at not one but two separate trials:

> During my ordeal . . . I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars; I looked for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was going to prison and he was going to rot . . . .
>
> Several days later, looking at a series of police photos, I identified my attacker. I knew this was the man. I was completely confident. I was sure.
>
> I picked the same man in a lineup. Again, I was sure. I knew it. I had picked the right guy, and he was going to go to jail.
>
> When the case went to trial in 1986, I stood up on the stand, put my hand on the Bible, and swore to tell the truth. Based on my testimony, Ronald Cotton Jr. was sentenced to prison for life.

Eleven years later, however, DNA testing of crime scene evidence not only exonerated and freed Mr. Cotton, but revealed that an alternate suspect -- who Ms. Thompson had testified she had "never seen before in [her] life" -- had actually committed the crime. Ms. Thompson's certainty was, unfortunately, not a gauge of her accuracy:

> The man I was so sure I had never seen in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit

> away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent.

J. Thompson, "I Was Certain, but I Was Wrong," THE NEW YORK TIMES, June 18, 2000.

In the instant case, then, the mere fact that both Mrs. M___ and Mrs. N___ were "certain" that Mr. Moon was their assailant cannot, without more, uphold his conviction in light of the dramatic new DNA results. This is particularly so given that both victims had only a fleeting opportunity to view the face of the perpetrator – just 15-20 seconds – before he ordered them to "turn around" for the duration of the assault.

In the only assault for which Mr. Moon was prosecuted or convicted (that of Mrs. M____), the identification was further compromised by the fact that she had only a fleeting opportunity to view the perpetrator's face occurred in a "very dark" hallway. Even more importantly, however, what transpired after the assault bears many classic "danger signs" of mistaken eyewitness identification, as documented by experts in the field. First, the lineup procedure via which her identification was made was highly suggestive, in that the defendant was the only subject present in both the photo array and the in-person lineup several days later. Thus, when Mrs. M. "identified" him in the lineup, she most likely "remembered" his face from the photograph she viewed several days earlier – and by the time she testified at trial, that mistaken I.D. had solidified in her mind. Such suggestive procedures are also well known to erroneously inflate a witness' "confidence indicators" – that is, the extent to which she reports that she is "certain" about the I.D. – and further distorts her recollection as to how good an opportunity she actually had to view the perpetrator during the offense.[13] Equally telling here was Mrs.

[13] *See, e.g.*, Gary Wells et. al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads , 22 Law and Human Beh. 6 (1988) at 27-28; Gary Wells, et. al.,

M___'s own *lack* of confidence when she first viewed Mr. Moon, in the police department's photo array. Although at trial (now having become completely convinced that Mr. Moon was the assailant, and testifying against him) she insisted she was not at all uncertain when she viewed the photo array, and just wanted to see him live to make "absolutely" sure she was correct, it is undisputed that when she first viewed the array, she did *not* make a conclusive ID – and, indeed, even after viewing the lineup (with Moon the only repeat player from the array) she still needed to see all the participants wearing a hat before she could bring herself to choose one. And perhaps most telling of all is her initial statement, upon viewing the array, that Mr. Moon "looked like" the man who raped her. As El Paso's own Professor Roy Malpass was among the first to document, when a witness makes an incorrect "identification" because the true perpetrator is not in the lineup, she has most often fallen into the trap of selecting the one suspect among the choices available who *most closely resembles* the perpetrator.[14]

C. The DNA results add substantial additional weight to the other exculpatory evidence already in the trial record

The new DNA evidence does more than rebut the "scientific" evidence presented against him at trial, or cast doubt on the victim's ability to accurately identify her attacker. It also casts the exculpatory evidence presented by the defense in a whole new light. Certainly, the absence of Mr. Moon's semen (and the presence of semen from other males) on these critical items of evidence highlights the fact that none of Mr. Moon's hairs – even pubic hairs – were ever found at the crime scene or in the combings from the victim's rape kit. Nor was a weapon any item of the perpetrator's clothing

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supra; G. Wells & A.L. Bradfield, Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience, 83 J. of Applied Psych 360-76 (1998).

[14]R.S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*. 66 J. of Applied Psych, Vol. 482-89 (1981).

found in his dorm room or locker when the police arrived in the middle of the night with a search warrant. Similarly, the detailed alibi that Mr. Moon and his corroborating witnesses offered -- portions of which the jury, clearly wrestling with its verdict, asked to have read back during their deliberations -- was highly credible, in part for its ordinariness, *i.e.,* because it reflected the simple routine of a college student who spent that day in class, with his girlfriend, and on his extracurricular activities at the school yearbook and newspaper.

Those details were, of course, all before the jury that convicted him – but with the new DNA results, they are of a wholly different caliber. For that same jury was told that the semen on the robe and comforter came from the rapist, and no one else. We now have scientific proof that each stain was mixed with the victim's own DNA, and *each came from someone other than Brandon Moon*. We also know that one of the two stains came from the victim's own husband. Given that the record reveals only two men with whom the victim had sexual intercourse (her husband, and the rapist) at that time, DNA evidence establishing that Brandon Moon is excluded from both stains would make his acquittal not just "reasonably probable" – it would be a virtual certainty.

WHEREFORE, defendant-petitioner Brandon Lee Moon respectfully asks this Court for the following relief:

(1) That it issue an *Order to Show Cause* as to why an immediate favorability hearing should not be held, pursuant to Texas C.C.P. Art.64.04, regarding the results of DNA testing completed by the Department of Public Safety in April 2003;

(2) That it *hold an immediate favorability hearing pursuant to Art. 64.04*;

(3) That it consider and adopt *"Defendant's Proposed Findings Under Art. 64.04,"* annexed to this Motion; and

(4) That it issue a *bench warrant* to the Texas Department of Corrections permitting the defendant's presence at the hearing and any subsequent proceedings.

Luis E. Islas

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CERTIFICATE OF DELIVERY

I hereby certify that on this the 16th day of December 2004, I hand delivered a copy of the foregoing Motion to Jaime Esparza, District Attorney, District Attorney's Office, Room 201, County Courthouse, 500 E. San Antonio, El Paso, Texas.

Luis E. Islas

LUIS E. ISLAS, Esq.

LIFECODES CORPORATION
SAW MILL RIVER ROAD
VALHALLA, NEW YORK 10595
(914) 784-2600

Division of Quantum Chemical Corporation

February 23, 1990

Thomas S. Hughes
Attorney
120 North Florence
El Paso, TX 79901

Re: Lifecodes Case #:FB20959

I. Evidence Receipt

The following evidence was received on May 16, 1989 from El Paso County Sheriff's Department, 600 E. Overland, El Paso, TX in a sealed container via Federal Express.

Accession #	Sample
FB20959	1 Red top blood vial Exb. A
FI20960	1 Royal blue bath robe Exb. #3
FI20961	1 Peach colored bedspread Exb. #4
FI20962	1 Box containing 2 rape kits (N.R.) Exbs.# 32,34,35,36,37,38 & 44)

II. Summary of Results:

The DNA recovered from the peach bedspread and the blood from Brandon Lee Moon can be excluded as having a common origin.

However, since a blood exemplar from the victi. has not been provided for comparison, a definite conclusion can not be reached as to the source of the DNA recovered from the peach bedspread.

Exh. C

EXHIBIT E

LIFECODES CORPORATION
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Division of Quantum Chemical Corporation

II. Results:

	SAMPLE #	NOT PROCESSED	SPERM VISUALIZED	INSUFFICIENT DNA	HIGH MOL WEIGHT DNA	DEGRADED DNA	DNA PARTIALLY DEGRADED	HUMAN DNA	Y CHROMOSOME DNA	DNA PRINT MATCHES	DNA PRINT NON MATCHES	BACTERIAL DNA
1	FB20959				X			X	X		3	
2	FI20960		X	X								
3	FI20961		X				X	X			1	
4	FI20962	X										

The DNA isolated from the peach bedspread (FI20961) did not match the pattern of the exemplar (FB20959) with four genetic systems: DXYS14, D17S79, D14S13 and D18S27.

The DNA isolated from the peach bedspread (FI20961) did not yield a DNA-PRINT™ with the genetic system D2S44.

A minimum of 5% of the undigested DNA recovered from all processed evidentiary saples has been retained.

LIFECODES CORPORATION
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Division of Quantum Chemical Corporation

III. Conclusion

A comparison of the DNA-PRINT™ pattern obtained from sample FI20961 excludes Brandon Lee Moon (FB20959) as the source of the DNA recovered from the evidence sample. No conclusions can be made without a victim exemplar for comparison.

IV. Disposition of Evidence

The evidence will be repackaged and returned under separate cover to Thomas S. Hughes via UPS as per your Evidence Return Confirmation sheet.

The DNA isolated in this case is retained on a nylon membrane(s) at Lifecodes and can be made available for additional analysis.

Joanne B. Sgueglia, B.A.
Forensic Scientist

Joanne B. Sgueglia

cc: Steve Simmons, D.A.
34th Judicial District
3rd Floor
El Paso City - County Building
El Paso, TX 79901
Attn: Dan Kopra

L-147973
A

JAIME ESPARZA
DISTRICT ATTORNEY
THIRTY-FOURTH JUDICIAL DISTRICT
(EL PASO, CULBERSON AND HUDSPETH COUNTIES)
201 COUNTY BUILDING
EL PASO, TEXAS 79901
915/546-2059

May 9, 1996

Donna M. Stanley
Criminalist, Texas Department of Public Safety
5805 N. Lamar Blvd.
P.O. Box 4143
Austin, Texas 78765-4143

Re: *Ex parte Brandon Lee Moon*; Applications for writ of habeas corpus
Cause numbers 50015-327-04, 50033-327-04
Lifecodes Case #FB20959

Dear Ms. Stanley:

The above-named defendant was convicted of two counts of aggravated sexual assault and sentenced to 75 years' confinement in each case in 1988. In 1990, it appears that evidence from one or both of those cases was released to a local defense attorney who sent the evidence to Lifecodes Corporation of Valhalla, New York, for DNA comparison of the evidence to a sample of the defendant's blood. A report (of which you have a copy) in the above-referenced Lifecodes case is attached to the writ application indicating that DNA found on some of the evidence does not match the DNA from the defendant's blood sample.

This agency is requesting that you contact Lifecodes Corporation for a full explanation of the tests conducted by them and the results obtained, and to determine whether further DNA testing can and should be done. If further testing is advisable and can be done, this agency also requests that you seek release of any DNA currently in the possession of Lifecodes concerning these cases for immediate transmission to the Texas Department of Public Safety for further testing.

Thank you for your assistance.

Very truly yours,

John L. Davis
Appellate Chief

DEPARTMENT OF PUBLIC SAFETY
INTEROFFICE MEMORANDUM

Date: 12/16/ 2004

Division: CLS

To: Gary Stone, Asst. Chief CLE

CC: Ron Urbanovsky, Laboratory Director

From: C. Glen Johnson, Asst. Manager
D. Pat Johnson, Manager

Subject: Brandon Moon case

Overview

The Innocence Project has recently reviewed laboratory reports, trial transcripts, and other data concerning the rape conviction of Brandon Moon in 1988. There appears to be sufficient information developed through DNA testing, both by DPS Crime Laboratories and the Orchid-Cellmark Laboratory, that Brandon Moon could not be the source of semen evidence collected at the crime scene and from the victim. The Project has contacted the District Attorney in El Paso County and has advised them of this information, and as of today, when DNA testing was completed on the final evidence sample, we have reported to the El Paso DA that none of the evidence DNA profiles match defendant Moon.

Assistant D.A., Penny Hamilton, El Paso County contacted us on Monday, December 13, 2004. She advised us that the Innocence Project was preparing to target the DPS Crime Laboratory Service for faulty testing and/or testimony conducted on the Brandon Moon rape case from 1987. She stated that they were prepared to go to the State Legislature and to ask for a complete investigation of the Crime Laboratory Service.

She further outlined the sequence of events of the case. Apparently, the defendant was found guilty in the 1988 trial and sentenced to 75 years in prison. He is still serving that sentence in a TDCJ unit. Key testimony at the trial included the victim's identification of the defendant and collaborative testimony from another woman, who also identified the defendant as her rapist in a similar case occurring a year earlier. However, according to Assistant D.A. Hamilton, the testimony of DPS Criminalist Glen Adams, was the key element in obtaining the conviction.

Tests conducted by Glen Adams was limited to circumstantial evidence as it only concluded that the defendant was a non-secretor and that testing of some recovered stains indicated they came from a non-secretor. Approximately 15% of the population are non-secretors who do not secrete their blood group antigens in other body fluids.

In 1987 this testing was commonly conducted by all laboratories throughout the country. Since the development of DNA technology, a science that is far superior and provides conclusive results, the old testing methods of 1987 are no longer used.

Sequence of Events

The offense occurred in 1987. The evidence was submitted to the DPS Lubbock Laboratory where Glen Adams and co-worker David Mahan conducted examinations. The reported results indicated that the defendant was a non-secretor, that the stains were from a non-secretor, and that the victim, the victim's husband, and the victim's son were secretors. (Laboratory case L5L-30910) Further it was reported that only 15% of the population are non-secretors, Brandon Moon was a non-secretor, and since the evidence semen stains were from a non-secretor, Moon could not be excluded as the possible semen source.

Further, hair recovered as evidence was examined and compared to suspect Moon, and it was reported that no evidence hair matched hair from Brandon Moon. This was also brought out in the trial testimony.

Additional testing for enzymes was conducted in the DPS Midland Laboratory in an attempt to gain more meaningful examination results. However, the results showed that the victim and the suspect shared the same PGM 1 enzyme, so the test did not furnish any further discrimination of the suspect. (Laboratory case L4M-23686)

While DPS had no involvement in this, in 1990 some evidence items were tested by Life Codes in New York using the DNA technology of RFLP. This procedure consumed large quantities of existing evidence samples. No results were apparently obtained that helped prove whether Brandon Moon did or did not commit this offense.

In 1996 some evidence items were re-examined by the DPS Austin Laboratory. At this time DQ-Alpha tests by Donna Stanley indicated that there was semen from two different males, but that no further interpretations of the DNA data could be made until reference samples could be obtained. In the laboratory report of January 1997, she requested known samples from the defendant, the victim, the victim's husband, and the victim's son. That report was sent to the District Attorney in El Paso. (Laboratory case L-247973)

Beginning in late 2002, some evidence items were re-examined by the DPS El Paso Laboratory using STR DNA technology. This testing indicated that the defendant did not contribute either the semen on the robe or the semen on the comforter (two of the three evidence items). In the report of April 2003 a request was made by the laboratory for known samples from the defendant, the victim, the victim's husband, and the victim's son. This report was sent to the El Paso Police Department. (Laboratory case L4E- 41169)

In 2004 some evidence items were examined by Orchid Cellmark Laboratory. They obtained a

reference sample from the victim's ex-husband (husband at the time of the offense), and were able to determine that the evidence semen stains on the comforter came from the victim's husband. They further obtained records of all work performed so far by the DPS Crime Laboratories and concluded that no semen evidence in the case could be linked to the defendant. They ascertained by reverse paternity evaluation of DNA profiles of the victim and ex-husband that the semen stains on the robe could not have come from the victim's son.

In December 2004, at the request of the District Attorney of El Paso, DNA extracted from semen, recovered from a microscopic slide in the rape kit, was examined. On December 15, 2004, a full DNA profile was developed on this semen that is the same as the DNA profile obtained on the semen stains from the robe. This DNA does not match the DNA profile from Brandon Moon. A CODIS search was conducted on 12-13-04 of this evidence DNA profile (from the robe) and no hit was obtained in the Texas CODIS database. Brandon Moon's full DNA profile is in this database. Known samples from the defendant, the victim, the victim's ex-husband, and the victim's son have been requested to complete the examinations.

AFFIDAVIT OF MARK D. STOLOROW AND LEWIS MADDOX

1. We are, respectively, the Executive Director and Laboratory Director of Orchid Cellmark, Inc., in Germantown Maryland. Our *curricula vitae* are attached to this affidavit.

2. We have been asked to provide this Affidavit upon review of certain documents in the case of Texas v. Brandon Moon.

Background and Scope of Review

3. We have reviewed the following documents as part of this review: (a) the trial testimony of DPS/Lubbock's serologist, Glen David Adams, (b) a report by Mr. Adams dated November 17, 1987, (c) an April 24, 2003 report from the Texas Department of Public Safety/El Paso division on the results of post-conviction STR DNA testing it conducted on items of evidence from the case in 2002, as well as two pages of laboratory data summarizing the genetic profiles it yielded from those tests. (d) electropherograms reportedly underlying the two pages of laboratory data provided in (c) above.

4. We have been informed by the Innocence Project, Inc., that the case of Texas vs. Brandon Moon involves a 1987 sexual assault perpetrated by a single assailant, for which Mr. Moon was convicted.

5. Although we have not reviewed the full trial record, we have reviewed documents from the case indicating that a serologist named Glen David Adams from the Texas Department of Public Safety ("DPS"), Lubbock Division, performed serological testing and analysis on three items of evidence collected by authorities immediately after the rape, which alleged to contain semen deposited by the perpetrator: (1) a semen-stained comforter, taken from the bed upon which the rape occurred, (2) a bathrobe in which the nude victim had wrapped herself immediately after the rape, containing a series of stains on the interior buttock area; and (3) a vaginal swab from the victim's rape kit.

6. We have been told by the Innocence Project that at trial, the jury was asked to infer that each of these items of evidence contained semen from the perpetrator, and that neither side disputed this proposition. We have further been told by the Innocence Project that at trial, the victim testified that she was married, with three children (an older son, and twin daughters), and that her medical records reflect that she had two pregnancies, each resulting in delivery by Cesarean section.

7. We have also been informed that the prosecution argued to the jury at Mr. Moon's trial that the results of Mr. Adams' serological testing conclusively established that (1) the semen on each of these items came from a non-secretor (that is, a person who does not secrete detectable levels of ABO blood group antigens into his or her other bodily fluids, such as semen and saliva); (2) Mr. Moon was a non-

secretor, (3) the victim, her husband, and her teenage son (who owned the bathrobe on which the semen stains were found) were all secretors, and thus (4) the victim's son and husband are excluded as semen donors on these items, while Mr. Moon, as a non-secretor, was a potential donor.

8. Prior to our receipt or review of any documentation in connection with the case, Orchid Cellmark conducted STR-DNA testing on a reference sample from the victim's former husband, Reid Mocherman. We conducted such testing "blindly," that is, without knowing the results of the STR-DNA testing that DPS had conducted on the underlying evidence. The results of our testing on Mr. Mocherman's buccal swab were published in a report dated December 8, 2004.

9. For purposes of this review, we have assumed the validity of the STR-DNA results reported by DPS/El Paso, and that the data reflected in the documents provided by the laboratory reflect the actual STR-DNA profiles they obtained. We have also assumed that the victim's son is in fact her biological child, as we understand is indicated by her trial testimony and medical records.

10. We have received no compensation for our consultation on this case, nor do we expect to receive any. Our laboratory, Orchid Cellmark, has also provided the testing on Mr. Mocherman's sample *pro bono*, under a preexisting arrangement with the Innocence Project, pursuant to which their organization may submit DNA evidence for testing without charge in a limited number of cases each year.

STR-DNA Test Results

11. The STR-DNA testing conducted by DPS/El Paso ("the 2003 DNA tests") yielded the DNA profile of a single male on all five samples tested from the stained bathrobe.

12. The single male profile obtained from the sperm fraction on the bathrobe was mixed with DNA types consistent with the victim, *i.e.*, from the victim's own epithelial cells.

13. The 2003 DNA tests also yielded the DNA profile of a single male on all three samples tested from the stained comforter.

14. The single male profile obtained from the sperm fraction on the comforter was also mixed with DNA types consistent with the victim.

15. The male contributor to the mixed male/female stains on the bathrobe is a different individual than the male contributor to the mixed male/female stain on the comforter.

16. The DNA profiles from these mixed stains, containing a mixture of semen from a male and epithelial cells reportedly from the female's vagina, are consistent with those produced by acts of sexual intercourse during which the male ejaculated.

Brandon Moon

17. The April 2003 DPS/El Paso report concludes that Brandon Moon is conclusively excluded as the donor of the semen on the bathrobe.

18. The April 2003 DPS/El Paso report concludes that Brandon Moon is conclusively excluded as the donor of the semen on the comforter.

Reid Mocherman

19. The DNA profile from the sperm fraction of the comforter stains is consistent with the DNA profile of Mr. Mocherman, the victim's husband.

20. Mr. Mocherman is excluded as the donor of the DNA from the sperm fraction of the mixed male/female stains on the bathrobe.

The Victim's Son

21. Comparison of the STR DNA profiles yielded from the victim's reference sample with the STR DNA profiles yielded from the bathrobe and comforter reveals that the victim's son, assuming he is truly the biological offspring of the victim, is conclusively excluded as the donor of the sperm fraction from both of these items.

22. This conclusion is clear from the data that the victim herself does not share any genetic types, or "alleles," with the male donor of each stain at several locations tested, and thus, her biological offspring are excluded as potential donors as well.

23. STR-DNA testing measures the number of "repeats" of a particular genetic sequence at designated STR locations, or "loci." The number of repeats of a particular genetic sequence inherited by a person at each locus is referred to as an "allele."

24. At each locus, an individual will share at least one-half the alleles of his or her parent (with each STR test measuring two alleles at each locus). This is because each parent contributes one allele to the offspring's DNA sequence. Accordingly, the data from STR DNA test results will show two alleles (for example, "15, 17") at each locus, except when the individual is a "homozygote" at that locus (i.e., "15, 15"), meaning that the allele contributed by each parent is the same.

25. The data from the 2003 DNA tests on the bathrobe stains reflect that the victim, Dana Mocherman, does not share *any* alleles with the male contributor to the bathrobe stains at the following four loci: FGA, D18S51, D16S539, and TPOX.

26. The data from the 2003 DNA tests also reflect that the victim, Dana Mocherman, does not share *any* alleles with the male contributor to the comforter stains at the following six loci: D3S1358, vWA, FGA, D8S1179, D18S51, and THO1.

27. Accordingly, the victim's son is conclusively excluded as the male contributor to the stains on either the bathrobe or the comforter.

DPS/Lubbock's 1987 Serological Analysis

28. In his 1987 report, DPS/Lubbock's serologist, Glen David Adams, allegedly wrote that based upon the serological testing he had performed, he concluded that "Evidentiary semen on the [vaginal] swab, bathrobe, and comforter are from a non-secretor individual."

29. At trial, Mr. Adams repeated this assertion to the jury. He explained that he had tested the semen stains from the bathrobe, comforter, and a vaginal swab, and those tests failed to yield any ABO blood group substances. This led him to conclude that the donor of the semen on each item of evidence was a non-secretor. (TT.236-37)

30. Mr. Adams told the jury that Reid Mocherman, the victim's husband, was conclusively excluded as the donor of the semen on the comforter (as well as on the other evidentiary items) because that semen came from a non-secretor, while Mr. Adams' tests on Mr. Mocherman's blood and saliva samples showed that he was a Type A secretor. (T.247, 254)

31. As the 2003 and 2004 DNA data demonstrates, however, Mr. Mocherman shares the identical, 13-STR-loci DNA profile of the male contributor to the stain on the comforter. The composition of the stain is consistent with that resulting from an act of sexual intercourse between the victim and her husband.

32. Accordingly, these DNA results make clear that, in 1987, DPS/Lubbock must have incorrectly determined the secretor status of the victim's husband, the contributor(s) to the comforter stain, or both.

33. As Mr. Adams has now been shown to have made this error, there may well be reason to doubt the accuracy or integrity of *any* of the findings he presented to the jury – including whether or not Brandon Moon was in fact included or excluded as the donor of any of the semen-stained evidence used against him at trial. The 2003 DNA tests, of course, prove to a scientific certainty that Mr. Moon was not the source of that evidence. But given that the DNA results also prove that at least one aspect of this serologist's 1987 analysis was erroneous, it is certainly possible that a properly conducted serological analysis may have excluded Mr. Moon at the time of trial as well.

34. We have learned from the 2003 and 2004 DNA test results that the mixed semen stains on the comforter are consistent with having originated from a mixture of epithelial cells from the victim, Dana Mocherman and from semen from her husband, Reid Mocherman. According to Mr. Adams' trial testimony, both the victim and her husband are ABO type A secretors. Consequently, it is unlikely that a mixed semen stain created by the mixture of semen and vaginal secretions from two people who are both ABO type A secretors would, if Absorption Inhibition testing were properly conducted in 1987, have failed to demonstrate the presence of *any* detectable ABO substances.

35. Mr. Adams also provided testimony that he tested the victim's vaginal swab and identified the presence of semen. Although we have been informed that no STR DNA tests were subsequently conducted on the semen-vaginal secretion mixture on the vaginal swab, this evidence item further begs the question of the plausibility of failure to find any detectable ABO substances by Absorption Inhibition testing. Assuming that Mr. Adams correctly identified Dana Mocherman as an ABO type A secretor, it is surprising to learn that Mr. Adams concluded that the semen donor was a non-secretor. If Mr. Adams failed to detect any ABO substances on the vaginal swab from a woman who herself is an ABO type A secretor, it is difficult to explain why Mr. Adams was not suspicious of the absence of any secreted ABO substance and, more peculiarly, how Mr. Adams could conclude that the semen must have originated from a non-secretor.

36. It is also worth noting that Mr. Adams' trial testimony was also questionable on its face, in making the unqualified assertion that all of the semen stain evidence came from a non-secretor. Even assuming that his tests did not, as he claimed, yield any detectible ABO blood group substances, he should not have definitively concluded from that fact alone that the semen donor was necessarily a non-secretor. A finding that the semen could only be consistent with having originated from a non-secretor is too limiting for the test results reported in this case by Mr. Adams in 1987. With the uncertainty created by the absence of any detectable ABO substances in semen-vaginal stain mixtures on the vaginal swab and other stains from a victim who is an ABO type A secretor, it was inadvisable to exclude any male as a semen donor in this case. (For example, Mr. Adams' exclusion of Reid Mocherman as a possible donor of the semen on the comforter was particularly inadvisable, inasmuch as the semen stain on the comforter matches Reid Mocherman, as it turns out.)

37. The absence of any ABO antigens in Mr. Adams' test results made the tests themselves of no value to the jury. Indeed, if the evidence was too degraded or diluted to obtain an interpretable ABO result, these tests may not reveal anything about the serology of semen donor at all – *i.e.*, making it no more likely that Brandon Moon was the perpetrator than any other man.

I swear under the penalties of perjury that the statements in the foregoing affidavit are true and correct to the best of my knowledge and ability.

Mark D. Stolorow _____ Date _____

Lewis O. Maddox _____ Date _____

STATE OF MARYLAND

COUNTY OF MONTGOMERY

SWORN AND SUBSCRIBED before me on this_____ day of December, 2004

_____
Notary Public

_____
Printed Name

My commission expires_____

Texas Department of Public Safety
PERSONNEL ACTION — CLASSIFIED EMPLOYEES

PE-25 (9/87)

September 1, 19 87

Payroll Name of Employee: ADAMS (Last) Glen (First) David (Middle) SS# 466-35-9975

Major Division: Administration Subdivision, Service: Crime Lab

TLE, CLE District/Section/Co.:

TLE Region/Adm. Bureau: Chemistry Home Station: Austin (City) Travis (County)

TYPE OF PERSONNEL ACTION

1. ☐ New Appointment
2. ☐ Reinstatement
3. ☐ Military reinstatement
4. ☒ Transfer
5. ☐ Promotion
6. ☐ Demotion
7. ☐ Merit Increase
8. ☐ Other Increase
9. ☐ Salary Reduction
10. ☐ Name Change
11. ☐ Change of Status
12. ☐ Retirement
13. ☐ Resignation
14. ☐ Discharged for Cause
15. ☐ Interagency Transfer
16. ☐ Military Leave
17. ☐ Disability Leave
18. ☐ Suspended with pay
19. ☐ Suspended without pay
20. ☐ Reallocation
21. ☐ Reclassification
22. ☐ Appointment
23. ☐ Death
24. ☐ Other

PRESENT STATUS	PROPOSED STATUS
Class. Title: Chemist III	Class. Title:
Class #: 2663 Gp.: 15 Step: 1	Class #: Gp.: Step:
Working Title: Chemist-~~Toxicologist~~, Criminalistics	Working Title:
Working Title #: CL/HQL/C-2	Working Title #:
Monthly Salary: $1,969.00	Monthly Salary:
Budget Code: 4308 FLSA ☒ Exempt ☐ NonExempt	Budget Code: FLSA ☐ Exempt ☐ NonExempt

EFFECTIVE DATE OF ACTION: August 1, 1987

1. ☒ Full Time ☐ Hourly and Rate $
2. ☐ Part Time
3. ☐ Temporary

Date Employed: 11-17-86

Date and Type Last Payroll Action: 11-17-86 (New Appointment)

Date of Last Merit Increase: N/A

Reason for Recommended Action: Completion of training at Headquarters Lab, Austin; Transfer to Lubbock Lab

152

If Action results from selection process, job announcement number:

TERMINATION INFORMATION

1. Date includes accrued vacation ☐ Yes ☐ No (# accrued hours on date)
2. Number of annual hours used since Jan. 1 calendar year
3. Number of accrued sick leave hours on date
4. Total number of hours to be compensated for on date of separation (do not include FLSA time)

RECOMMENDED: Pat Johnson
Region, Bureau or Activity Head

Division Head

CERTIFIED: Jerry N. Driver
Personnel Director

Classification Officer

ORIGINAL SIGNED BY W. J. McLEAN
Major Division Head

APPROVED: Joe E. Bassett
Director

SEP. 09 1987
Personnel Bureau Date

Submit to Personnel Bureau in triplicate. Inter-Division and/or Region transfers require signatures of the two Division or Region Heads concerned and are submitted in quadruplicate.

THE STATE OF TEXAS
APPLICATION FOR EMPLOYMENT

AN EQUAL OPPORTUNITY / AFFIRMATIVE ACTION EMPLOYER

SUBMITTED TO: Texas Department of Public Safety
(Agency)

PRINT IN BLACK INK OR TYPE. These instructions must be followed exactly. Fill out the application form completely; if questions are not applicable, enter "NA". Do not leave questions blank. Resumes will be accepted for whatever additional information they contain, *but not in place of a completed application.* Be sure to sign the application when it is completed.

NAME Adams Glen David — Social Security No 466 35 9975
(Last) (First) (Middle) (Maiden)

ADDRESS (Current) 5321 S. Loop 289 #1316 Lubbock TX 79424 794-8082
(Street) (City) (State) (Zip) (Phone)

(Permanent) 5321 S. Loop 289 #1316 Lubbock TX 79424 794-8082
(Street) (City) (State) (Zip) (Phone)

Type of position desired

Salary expected $ 25,000 Full-Time ☒ Part-Time ☐ Seasonal ☐ Date available for work 10-18-86

Are you willing to work hours other than 8-5? Yes ☒ No ☐ If yes, when any time

Geographic preference Lubbock Texas If appointed, are you willing and prepared to accept assignment or transfer to any part of the State of Texas where services are required? Yes ☒ No ☐

Are you willing to travel? Yes ☒ No ☐ If yes, what percent of time? 30-40 Driver's License Texas 04456310
(State) (Number)

Do you have any physical/mental handicaps which preclude you from performing certain kinds of work? NO

If yes, describe NA

Have you ever been convicted of a felony? Yes ☐ No ☒ If yes, describe NA

EDUCATION:
Elementary or High School grade completed (Circle) 1 2 3 4 5 6 7 8 9 10 11 (12) Did you graduate or achieve GED? Yes ☒ No ☐
(NOTE TRANSCRIPTS MAY BE REQUIRED FOR VERIFICATION OF EDUCATION)

Type of School	Name and Location of School	Dates Attended From Mo.	From Yr.	To Mo.	To Yr.	Number of Sem. Hrs. Completed	Graduated Yes	Graduated No	Type Diploma or Degree	Major Field of Study
COLLEGE OR UNIVERSITY	Cochise College Douglas Arizona	8	1978	5	1980	61	✓		A.A.	Pre med Laboratory Aid
	Texas Tech : Lubbock	8	1980	8	1984	100	✓		B.S.	Microbiology
TECHNICAL OR VOCATIONAL	Lubbock General Hosp School of Med Tech	8	83	8	1984	32	✓		MT (ASCP)	

Current Licenses/Certifications/Registrations (Indicate types and dates received): MT (ASCP) Aug 8, 1984

Special Skills/Qualifications: List all special skills you possess and machines or office equipment you can use, such as adding machines, dictation equipment, printing or graphics equipment, data processing equipment, etc. Can Work Blood Bank, Hematology Chemistry, Microbiology, Serology

Approximate Words Per Minute In: Typing NA Dictation NA

Foreign Languages (list):

Language	Speak Fair	Speak Good	Speak Excellent	Read Fair	Read Good	Read Excellent	Write Fair	Write Good	Write Excellent
NONE	☐	☐	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐	☐	☐

MILITARY SERVICE: (active duty) Branch None DATES: From NA To NA

Are you in the Active Reserve? Yes ☐ No ☐

(NOTE: A CERTIFIED PHOTOSTATIC COPY OF A REPORT OF SEPARATION FROM THE ARMED FORCES MAY BE REQUIRED.)

Glen Adams

5321 S. Loop 289 #1316
Lubbock, Texas 79424
Telephone (806) 794-8082

OCCUPATIONAL OBJECTIVE

To be associated in an administrative or highly expert and challenging capacity with a hospital medical testing laboratory or forensic testing laboratory.

EXPERIENCE RECORD

St. Mary of the Plains Hospital Laboratory
Lubbock, Texas

This laboratory takes care of testing for its 200 bed hospital and any number of out-patient tests.

1984 to Present

Medical Technologist. Perform laboratory tests to aid in detecting, diagnosing, and treating patients, following very closely advanced laboratory techniques.

Performed several duties because of limited number of workers. Duties included work in almost all areas of the medical laboratory, Blood Banking, Hematology, Serology, Chemistry, and Microbiology.

EDUCATION

Graduated from Irvin High School, El Paso, Texas, 1978.
B.S. Degree in Microbiology, at Texas Tech University, Lubbock, Texas, 1984.
Educational Diploma in Medical Technology, at the Lubbock General Hospital School of Medical Technology, Lubbock, Texas, 1984.

PERSONAL AFFILIATIONS

American Society of Clinical Pathologists (ASCP), Chicago, Illinois

PERSONAL DATA

Birthdate: September 6, 1959
Marital Status: Single
Height: 6' 3 3/4 "
Last physical: 1984
Health: Excellent
Willing to relocate

REFERENCES

Available at your request.

NUMBER	[illegible]	DATE AND PLACE OF BIRTH	May 15, 1980
HOME ADDRESS	4956 Vulcan El Paso, TX 79904	DATE ENTERED COCHISE COLLEGE	DATE GRADUATED Associate of Science
PARENT'S NAME		MAJOR	A.A. DEGREE

COCHISE COLLEGE
Douglas, Arizona

Social Security No. 466-35-9975

ENTRANCE RECORD

H. S. _____

Date of Grad. _____ H. S. Rank _____

ENTRANCE UNITS					
English		Algebra		Music	
		Pl. Geom.		Speech	
		So. Geom.		Man. Tr.	
		Trig.		Mec. Draw.	
Spanish		Gen. Sci.		Bk. Keep.	
German		Chem.		Stenog.	
Am. Hist.		Physics		Typing	
Hist.		Biol.			
Civics		Art		TOTAL	

AMERICAN COLLEGE TEST	ENG	MATH	S.S.	N.S.	COMP
Standard Scores					
Percentile College-Bound Norms					

COCHISE COLLEGE GRADING SYSTEM

A SUPERIOR	4	Grade-Points
B GOOD	3	" "
C AVERAGE	2	" "
D POOR	1	" "
F FAILURE	0	" "
WF WITHDREW FAILING	0	" "
W WITHDREW		
I INCOMPLETE		
AU AUDIT		
P PASS		
CR CREDIT		

A, B, C, D, F, WF are computed in GPA.
W, I, AU and XF units are not computed in GPA.
P & CR units provide credit but are not computed in GPA.

TRANSFER UNITS NOT COMPUTED IN G.P.A.

16 WEEK SEMESTER. PROBATION LEVEL=2.000

This copy of the student's academic record becomes an official transcript when signed and sealed by the registrar. Unless otherwise designated, the student is in good academic standing.

_____ Registrar

466 35 9975 ADAMS GLEN D

FALL SEMESTER 1978

CH	121	01	GENERAL CHEMISTRY	4	C
EN	001	01	BASIC STUDY SKILLS	1	C
EN	004	01	SPELLING IMPROVEMENT	1	A
EN	022	01	INDIVIDUALIZED READ	2	C
EN	101	01	COMPOSITION	3	C
MA	120	01	COLLEGE ALGEBRA	3	C
PE	131	01	VARSITY BASKETBALL	1	A

PREVIOUS	THIS SEM	CUMULATIVE	GRADE POINT AVERAGE	
	034 015	0034 015	2.26	2.267

466 35 9975 ADAMS GLEN D

SPRING SEMESTER 1979

CH	122	01	GENERAL CHEMISTRY	4	C
EN	102	01	COMPOSITION	3	B
HI	141	01	SURV WESTERN CIV II	3	C
PE	131	01	VARSITY BASKETBALL	1	A
PY	101	01	ELEM PSYCHOLOGY	3	A

PREVIOUS	THIS SEM	CUMULATIVE	GRADE POINT AVERAGE	
0034 015	039 014	0073 029	2.78	2.517

466 35 9975 ADAMS GLEN D

FALL SEMESTER 1979

CH	240	01	ORGANIC CHEMISTRY	4	C
HU	205	01	HUMANITIES	4	C
MA	124	01	PLANE TRIGONOMETRY	3	B
PE	131	01	VARSITY BASKETBALL	1	A
SE	102	01	FUND OF SPEECH	3	C

466 35 9975 ADAMS GLEN

SPRING SEMESTER 1980

CH	241	01	ORGANIC CHEMISTRY
MA	161	01	ANALYT GEOM/CALC
MU	101	01	INTRO TO MUSIC
PE	112	01	WEIGHT TRAINING
PE	131	01	VARSITY BASKETBALL
PY	113	01	CHILD PSYCHOLOGY

PREVIOUS	THIS SEM.	CUMULATIVE	GRADE POINT A	
0108	044 044 017	0152061	2.58	2.

RECORD OF ADAMS (LAST) GLEN (FIRST) DAVID (MIDDLE) 466 35 9975 (MATRICULATION NUMBER)

ME ADDRESS 4945 VULCAN
EL PASO TEXAS 79904

ADVANCED STANDING
COCHISE COLLEGE

HIGH SCHOOL RECORD
GRADUATED IRVIN HIGH SCHOOL
EL PASO TEXAS 05/79

COURSE	DESCRIPTIVE TITLE	LEC-LAB	GRADE	SEMESTER CREDITS	GRADE POINTS
	FALL 1980	ARTS & SCIENCES			
466-35-9975					
PHYS 141	GENERAL PHYSICS	03 03	B	4	12
ENGL 231	MASTERPIECES OF LITERATURE	03 00	W	0	00
BIOL 144	PRINCIPLES OF ZOOLOGY	03 03	A	4	16
SPAN 141	A BEGINNING COURSE IN SPANISH	03 02	B	4	12
12	CURRENT TOTALS GPA 3.33			12	40
12	OVERALL TOTALS GPA 3.33			12	40
	SPRING 1981	ARTS & SCIENCES			
466-35-9975					
SPAN 142	A BEGINNING COURSE IN SPANISH	03 02	B	4	12
BIOL 143	PRINCIPLES OF BOTANY	03 03	C	4	08
PHYS 142	GENERAL PHYSICS	03 03	C	4	08
12	CURRENT TOTALS GPA 2.33			12	28
24	OVERALL TOTALS GPA 2.83			24	68
	1ST SUMMER 1981	ARTS & SCIENCES			
466-35-9975					
ENGL 231	MASTERPIECES OF LITERATURE	03 00	C	3	06
3	CURRENT TOTALS GPA 2.00			3	6
27	OVERALL TOTALS GPA 2.74			27	74
	2ND SUMMER 1981	ARTS & SCIENCES			
466-35-9975					
ENGL 232	MASTERPIECES OF LITERATURE	03 00	C	3	06
3	CURRENT TOTALS GPA 2.00			3	6
30	OVERALL TOTALS GPA 2.67			30	80
	FALL 1981	ARTS & SCIENCES			
466-35-9975					
POLS 231	AMERICAN GOVT ORGANIZATION	03 00	A	3	12
CHEM 241	ANALYTICAL CHEMICAL METHODS	03 03	C	4	08
SPAN 231	SECOND COURSE IN SPANISH I	03 00	B	3	09
MBIO 341	PRINCIPLES OF MICROBIOLOGY	03 04	C	4	08
14	CURRENT TOTALS GPA 2.64			14	37
44	OVERALL TOTALS GPA 2.66			44	117
	SPRING 1982	ARTS & SCIENCES			
466-35-9975					
MATH 133	COLLEGE ALGEBRA	03 00	B	3	09
M AP 217	CLASS GUITAR	01 00	A	1	04
MBIO 3310	GENETICS	03 00	A	3	12
POLS 232	AMERICAN PUBLIC POLICY	03 00	C	3	06
SPAN 232	SECOND COURSE IN SPANISH II	03 00	A	3	12
13	CURRENT TOTALS GPA 3.31			13	43
57	OVERALL TOTALS GPA 2.81			57	160
	1ST SUMMER 1982	ARTS & SCIENCES			
466-35-9975					
MBIO 3420	CELL BIOLOGY	03 03	B	4	12
4	CURRENT TOTALS GPA 3.00			4	12
61	OVERALL TOTALS GPA 2.82			61	172
	2ND SUMMER 1982	ARTS & SCIENCES			
466-35-9975					
HIST 334	HISTORY OF JAZZ	03 00	B	3	09
3	CURRENT TOTALS GPA 3.00			3	9
64	OVERALL TOTALS GPA 2.83			64	181

DATE OF BIRTH 05/05/50 ENTRANCE DATE SEPT 12 1980

[illegible] J ADAMS

[illegible] VULCAN EL PASO TEXAS

EXPLANATION OF GRADES:

[illegible] HONORS PROGRAM

[illegible] EFFECTIVE SEPTEMBER 1982

GRADING SCALE FOR SCHOOL OF [illegible]

90-100	A
78-89	B
70-77	C
62-69	D
60-61	F

A	B	C	D	F	S	U	I	W	WF	P	R	X
4	3	2	1	0								

NOT INCLUDED IN HOURS ATTEMPTED FOR COMPUTING GPA
GRADE POINT VALUE

NOT VALID WITHOUT UNIVERSITY'S SEAL

ADAMS (Last) GLEN (First) DAVID (Middle) 466 35 9975 Matriculation Number

Course	Descriptive Title	Lec-Lab	Grade	Sem. Hr. Cr.	Grade Pts.
466-35-9975	FALL 1982	ARTS &	SCIENCES		
MBIO 442	IMMUNOLOGY AND SEROLOGY	03 04	D	4 —	04
ANTH 3323	MAN & THE SUPERNATURAL	03 00	B	3 +	09
MBIO 444	PATHOGENIC MICROBIOLOGY	03 04	C	4 —	08
ANTH 231	ORIGIN & NATURE OF MAN	03 00	B	3 +	09
14	CURRENT TOTALS GPA 2.14			14	30
78	OVERALL TOTALS GPA 2.71			78	211
466-35-9975	SPRING 1983	ARTS &	SCIENCES		
MBIO 433	PHYSIOLOGY OF BACTERIA	03 00	D	3 —	09
MBIO 436	GENETICS OF BACT & THEIR VIRUSE	03 00	A	3 —	12
MBIO 412	APPLICATIONS OF ACADEMIC TRAIN	01 00	B	1 —	03
MBIO 439	INTRODUCTION TO VIROLOGY	03 00	B	3 —	09
10	CURRENT TOTALS GPA 3.30			10	33
88	OVERALL TOTALS GPA 2.77			88	244
466-35-9975	1ST SUMMER 1983	ARTS &	SCIENCES		
HIST 231	HISTORY OF U S TO 1877	03 00	A	3 +	12
CHEM 335	ORGANIC CHEMISTRY	03 00	A	3 —	12
6	CURRENT TOTALS GPA 4.00			6	24
94	OVERALL TOTALS GPA 2.85			94	268
466-35-9975	2ND SUMMER 1983	ARTS &	SCIENCES		
HIST 232	HISTORY OF US SINCE 1877	03 00	B	3 +	09
CHEM 336	ORGANIC CHEMISTRY	03 00	B	3 —	09
6	CURRENT TOTALS GPA 3.00			6	18
100	OVERALL TOTALS GPA 2.86			100	286

EXPLANATION OF GRADES:

'S IN DESCRIPTIVE TITLE INDICATES HONORS PROGRAM.

GRADE-POINT SYSTEM EFFECTIVE SEPTEMBER 1962.

- Excellent
- Good
- Average
- Inferior
- Passing
- R - Credit
- C - No Credit Incomplete

PR - In Progress
W - Withdrew or Dropped Passing
WF - Withdrew Failing
P - Passing
R* - Repeated to Remove Incomplete
X - No Grade Reported

GRADING SCALE FOR SCHOOL OF LAW

86-100	A
78-85	B
70-77	C
62-69	D
50-61	F

	A	B	C	D	F	CR	NC	I	RP	WP	WF	P	R	X
4	✓													
3		✓												
2			✓											
1				✓										
0					✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

* NOT INCLUDED IN HOURS ATTEMPTED FOR COMPUTING G.P.A.

GRADE POINT VALUE

OFFICE OF THE REGISTRAR

NOT VALID WITHOUT UNIVERSITY SEAL

STUDENT NUMBER: ADAMS, GLEN D
BIRTH: 466-35-9975
ADMITTED FROM:

TEXAS TECH UNIVERSITY
LUBBOCK, TEXAS 79409
OFFICE OF THE REGISTRAR

COURSE NUMBER	TITLE	GRADE	HRS. EARNED	QUAL. PTS.
	UNDERGRADUATE ACADEMIC RECORD			
	*** INITIAL STATISTICS ***			
	ERN QHRS QPTS HQHR HQPTS			
	100.0 100.0 286.0 0.0 0.0			
	DEGREES AWARDED: AUGUST 1984			
	BACHELOR OF SCIENCE			
	MAJOR: MICROBIOLOGY			
	TRANSFER CREDIT:			
	FICE CODE: 999998			
	TOTAL		61.0	
	--------- 1983 FALL ---------			
	ENTERING PROGRAM:			
	AS			
	DEG: BS			
	MAJ: PMED			
	ATT ERN QHR QPTS GPA			
	CURRENT 0.0 0.0 0.0 0.0 0.000			
	STATUS GOOD STANDING			
	CUMULATIVE 0.0 161.0 100.0 286.0 2.860			
	--------- 1984 FALL ---------			
1 TH-1301	INTRO TO MUSIC THEORY	A	3.0	12.0
	ATT ERN QHR QPTS GPA			
	CURRENT 3.0 3.0 3.0 12.0 4.000			
	STATUS GOOD STANDING			
	CUMULATIVE 3.0 164.0 103.0 298.0 2.893			
	******* NO ENTRIES BELOW THIS LINE *******			

COURSE NUMBER	TITLE	GRADE	HRS. EARNED	QUAL. PTS.

GLEN D ADAMS
5416 50ST #243
LUBBOCK TX 79414

PAGE 1 OF 1

OFFICIAL TRANSCRIPTS BEAR SIGNATURE SEAL IN RED INK

Glen Adams
466-35-9975

Lubbock General Hospital
School of Medical Technology

Grade Report Sheet

	Hematology	Blood Bank/ Immunology	Chemistry	Microbiology
BASIC				
Exam I	77.8	65.5	73 9	95.8
Exam II	84.0	76.0	78.0	91.0
Exam Average	31.0	71.0	78.0	93.4
Clinical (Bench) Rotation	86.0	84.0	88.0	88.4
Basic Average	83.5	77.5	83.0	90.9
ADVANCED				
Exam I	78.C	71.0	76.0	84.0
Exam II	76.C	78.0	35.0	83.C
Exam Average	77.C	74.5	80.5	83.5
Clinical (Bench) Rotation	87.9	9.3.0	91.C	94.7
Advanced Average	82.5	83.75	85.1	89.1
TOTALS	83.0	80.6	84.3	90.0

Carolyn R. Wirtanen

Carolyn R. Wirtanen, MT(ASCP)
Program Director
Lubbock General Hospital
School of Medical Technology

GRADING SCALE:

90 - 100 = A
80 - 90 = B
70 - 80 = C

OTHER EMPLOYMENT REQUEST OR CANCELLATION

MAJOR DIVISION

Employee Name (Last) (First) (Initial)	ID#	TLE	CLE	ADM X	☐ TEMPORARY (3 days or less) ☒ LONGTERM (4 days or more)
Adams Glen D	6300	SERVICE OR BUREAU	REGION OR DIVISION		
Job Title: Chemist - Toxicologist	Station: Lubbock		5		

NAME AND ADDRESS OF ~~BUSINESS OR ENTERPRISE~~ School

Texas Tech University - Lubbock Texas

☒ REQUEST - Date ~~Employment~~ Will Begin 8-28-89

☐ CANCELLATION - Date Cancelled _____

By _____ Name and Title

POSITION TITLE

HOURS PER WEEK: 9 hrs.

~~DESCRIPTION OF DUTIES~~ Schedule of Classes

Course sect.	Course Title	Credit Hours	Day	Time-School	Time-work
ZOOL 2403 001	Human Anatomy/Physiology I	4	MWF	1:00 pm - 1:50 pm	Monday: 7-3:30 = 7½ hrs
ZOOL 2403 504	Human Anatomy/Physiology Lab	0	Tuesday	11:00 am - 12:50 pm	Tuesday: 7-5 = 8 hrs Wednesday: 7-4 = 8 hrs
PHY 5402 001	General Physiology	4	M, Thurs	4:00 pm - 6:00 pm	Thursday: 7-3:30 = 8½ hrs Friday: 7-4 = 8 hrs

I CERTIFY THAT THIS EMPLOYMENT COMPLIES WITH THE PROVISIONS CONTAINED IN GENERAL MANUAL SECTION 01.07.36.00

Glen Adams
SIGNATURE

8-21-89
DATE

FIRST LINE SUPERVISOR: JM M Thomas	☑ APPROVED ☐ DISAPPROVED	MAJOR, AIC, MANAGER	☐ APPROVED ☐ DISAPPROVED
SERVICE COMMANDER OR SECTION HEAD	☐ APPROVED ☐ DISAPPROVED	DIVISION CHIEF	☐ APPROVED ☐ DISAPPROVED

ORIGINAL AND 4 COPIES THRU CHANNELS TO DIV CHIEF

TLE-16 (Rev. 2/82)

Texas Tech University

REGISTRATION AND BILLING INFORMATION

BUILDING ABBREVIATIONS

AC	Athletic Training Center	EE	Electrical Engineering	MG	Men's Gym	**Off-Campus Locations**	
AD	Administration	EN	English and Philosophy	ML	Meats Lab	AB	Abilene
AE	Agricultural Education and Mechanization	ER	East Research Center	MM	McClellan Memorial	AM	Amarillo
AG	Agriculture	FL	Foreign Language	MU	Museum	BR	Brownfield
AH	Architecture	FT	Food Technology	PE	Petroleum Engineering	CY	Canyon
AN	Animal Science	GO	Goddard Range & Wildlife Mgt	PS	Agricultural Plant Science	ED	Edinburgh
AR	Livestock Arena	HE	Home Economics	PV	Pavilion	EP	El Paso
AT	Art	HH	Holden Hall	PY	Psychology	FW	Fort Worth
AX	Annex	HS	Health Sciences Center	RA	Radio Station	JN	Junction Center
BA	Business Administration	IE	Industrial Engineering	SC	Science	KR	Kress
BI	Biology	IG	Intramural Gym	SP	Speech	LA	Lamesa
CA	Civil & Agricultural Engineering	JO	Journalism	SR	Student Recreation Center	MI	Midland
CD	Child Development Lab	JS	Jones Stadium	TH	Thompson Hall	MP	Mt. Pleasant
CE	Chemical Engineering	LI	Library	TS	Television Station	PL	Plainview
CH	Chemistry	MA	Mathematics	UC	University Center	SA	San Antonio
CP	Computer Engineering Center	MB	Music	UT	University Theatre & Speech & Hearing Clinic	SM	San Marcos
DR	Drane Hall	MC	Mass Communications	WG	Women's Gym	SN	Snyder
		MD	Medical School	X	Temporary Building	WF	Wichita Falls
		ME	Mechanical Engineering				

M = MONDAY T = TUESDAY W = WEDNESDAY R = THURSDAY F = FRIDAY S = SATURDAY U = SUNDAY

BILLING INFORMATION **IMPORTANT NOTICE** **BILLING INFORMATION**

Failure to pay by the University Due Dates will result in cancellation of your registration, addition of late charges, withholding of transcripts, or other penalties as provided by Texas State Law and Texas Tech University policy.

NAME ADAMS GLEN DAVID

You may pay your account in Full or you may pay one of the amounts under the optional payment plans as listed at the right. For further information consult the University General Catalog or Class Schedule or contact the Bursar's Office in room 163 Drane Hall. No option plans available for the Summer Semesters.

TOTAL BALANCE DUE	331.40
OPTION 1	248.55
OPTION 2	165.70
OPTION 3	82.85

STUDENTS REGISTERING AFTER JULY 7TH WILL NOT BE BILLED BY MAIL. DUE DATE FOR THE INITIAL PAYMENT USING ANY OF THE OPTIONS IS AUG. 7TH. FAILURE TO PAY BY THIS DATE WILL ADD LATE PAYMENT CHARGES TO YOUR ACCOUNT OR WILL RESULT IN CANCELLATION OF YOUR REGISTRATION.

NAME	DEGREE	CLASS	STUDENT NUMBER	MAJOR	TERM	FIT DATE	PAGE
ADAMS, GLEN DAVID		SR	466-35-9975	PMED	891	07/25/89	1

OL/DEPT COURSE SECT	COURSE TITLE	CREDIT HOURS	MEETING DAY	TIME	BLDG	ROOM
ZOOL 2403 001	HUMAN ANATOMY/PHYSIOL I	4	M W F	1:00PM - 1:50PM	BI	LH10
ZOOL 2403 504	NO CREDIT LAB	0 NC	T	11:00AM - 12:50PM	BI	0040
PHY 5402 001	GENERAL PHYSIOLOGY	4	M R	4:00PM - 5:50PM	HS	4A10

Texas Department of Public Safety
PROGRESS REPORT FOR PROBATIONARY EMPLOYEE

REPORT NO. _____

EMPLOYEE NAME (Last)	(First)	(Initial)	I.D. NO.	MAJOR DIVISION			REGION OR DIVISION
Adams	Glen		6300	TLE	CLE	ADM X	Crime Lab

JOB TITLE	SERVICE/BUREAU	PERIOD ENDING: FEB. ☐ APRIL ☐ JUNE ☐ AUG. ☐ OCT. ☐ DEC. ☐ OTHER May 1987
Chemist III	Chem Lab	

SECTION A	1 NOT SATISFACTORY	2 SOME IMPROVEMENT NEEDED	3 MEETS STANDARDS	4 EXCEEDS STANDARDS	FACTOR CHECKLIST — Immediate Supervisor Must Check Each Factor in the Appropriate Column	5 DOES NOT APPLY
		X			1. Observance of Work Hours	
		X			2. Attendance	
		X			3. Grooming & Dress	
		X			4. Compliance with Rules	
		X			5. Safety Practices	
		X			6. Public Contacts	
					7. Suspect Contacts	X
		X			8. Interpersonal Relations	
	X				9. Job Knowledge	
		X			10. Work Judgments	
	X				11. Planning and Organizing	
		X			12. Job Skill Level	
		X			13. Quality of Work	
		X			14. Volume of Acceptable Work	
		X			15. Meeting Deadlines	
		X			16. Accepts Responsibility	
		X			17. Accepts Direction	
		X			18. Accepts Change	
		X			19. Performance Under Stress	
		X			20. Appearance of Work Area	
		X			21. Operation & Care of Equip.	
		X			22. Work Coordination	
		X			23. Initiative	
		X			24. Energy Conservation	
					25.	
					26.	
					27.	
					28.	
					29.	
					30.	
FOR EMPLOYEES who SUPERVISE OTHERS						
					31. Scheduling & Coordinating	
					32. Training & Instructing	
					33. Effectiveness	
					34. Evaluating Subordinates	
					35. Judgments & Decisions	
					36. Leadership	
					37. Budgetary Efficiency	
					38. Supervisory Control	
					39. (ADDITIONAL FACTORS)	
					40.	
					41.	

CHECKS IN COLS. 1 AND 2 MUST BE EXPLAINED IN SECTION D. CHECKS IN COL. 4 REQUIRE AN EXPLANATION IN SECTION B.

SECTION B: Record job STRENGTHS, superior performance incidents, progress achieved, or checks in Col. 4.

Glen works will with his co-workers and readily accepts directon. Glen worked well under great pressure to complete the first phase of his training (training project).

SECTION C: Record specific GOALS or IMPROVEMENT PROGRAMS to be undertaken during next evaluation period.

Continue to train and to gain work knowledge and experience.

SECTION D: Record specific work performance DEFICIENCIES or job behavior requiring improvement or correction. (Explain checks in Cols. 1 and 2.)

Glen needs to apply himself much more into gaining a better understanding of basic forensic serology. He also needs to develope better work coordination into planning and organizing his work.

RATER: I certify this report represents my best judgment. ☐ I DO ☐ I DO NOT recommend this employee be granted permanent status. (For final probationary reports only.)

Ron Carbaugh — RATER'S SIGNATURE | Sup. Crim. Sec. — TITLE | 6-11-87 — DATE

EMPLOYEE: I certify that this report has been discussed with me. I understand my signature does not necessarily indicate agreement. ☐ I wish to discuss this report with the reviewer.

Comment:

Glen Adams — EMPLOYEE'S SIGNATURE | 6-15-87 — DATE

REVIEWER:

REVIEWER'S SIGNATURE | TITLE | DATE

IN-LINE REVIEW:

SIGNATURE | SIGNATURE

DPS-23 (Rev. 7/81)

Texas Department of Public Safety
PERFORMANCE EVALUATION REPORT

EMPLOYEE NAME (Last) (First) (Initial)	I.D. NO.	MAJOR DIVISION			REGION OR DIVISION
		TLE	CLE	ADM	
ADAMS, Glen D.	6300			X	5

JOB TITLE	SERVICE	SECTION OR BUREAU	FOR PERIOD ENDING
Chemist-Toxicologist I (Serologist)	Crime Lab	Laboratory	06-30-88

SECTION A — FACTOR CHECKLIST — Immediate Supervisor Must Check Each Factor in the Appropriate Column

	1 NOT SATISFACTORY	2 SOME IMPROVEMENT NEEDED	3 MEETS STANDARDS	4 EXCEEDS STANDARDS	5 DOES NOT APPLY
1. Observance of Work Hours			X		
2. Attendance			X		
3. Grooming & Dress			X		
4. Compliance with Rules			X		
5. Safety Practices			X		
6. Public Contacts			X		
7. Suspect Contacts					X
8. Interpersonal Relations				X	
9. Job Knowledge			X		
10. Work Judgments			X		
11. Planning and Organizing			X		
12. Job Skill Level				X	
13. Quality of Work			X		
14. Volume of Acceptable Work			X		
15. Meeting Deadlines			X		
16. Accepts Responsibility			X		
17. Accepts Direction			X		
18. Accepts Change			X		
19. Performance Under Stress			X		
20. Appearance of Work Area			X		
21. Operation & Care of Equip.			X		
22. Work Coordination	X				
23. Initiative			X		
24. Energy Conservation			X		
25.					
26.					
27.					
28.					
29.					
30.					
FOR EMPLOYEES who SUPERVISE OTHERS					
31. Scheduling & Coordinating					
32. Training & Instructing					
33. Effectiveness					
34. Evaluating Subordinates					
35. Judgments & Decisions					
36. Leadership					
37. Budgetary Efficiency					
38. Supervisory Control					
39. (ADDITIONAL FACTORS)					
40.					
41.					

CHECKS IN COLS. 1 AND 2 MUST BE EXPLAINED IN SECTION D. CHECKS IN COL. 4 REQUIRE AN EXPLANATION IN SECTION B.

SECTION B Record job strengths, superior performance, progress achievements.

During this period, Glen has increased his job skills by attending a serology workshop on IEF. He is a good, positive influence on other laboratory employees so that he helps to improve relations and morale.

SECTION C Record specific goals or improvement programs to be undertaken during next evaluation period.

Manage working time to maximize efficency for improved case output to help reduce backlog of cases. Request and run proficiency samples on IEF to work toward routine operation of this procedure.

SECTION D Record specific work performance deficiencies or job behavior requiring improvement or correction (explain checks in the unsatisfactory and improvement needed columns).

Glen needs to increase his proficiency at report writing and and efficiency in coordination of work in serology to improve the flow of casework.

SECTION E Additional Considerations

RATER: I certify this report represents my best judgment.

J M Thomas — Laboratory Supv. — 07-18-88

RATER'S SIGNATURE — TITLE — DATE

EMPLOYEE: I certify that this report has been discussed with me. I understand my signature does not necessarily indicate agreement. ☐ I wish to discuss this report with the reviewer.

Comment:

Glen Adams — 7-29-88

EMPLOYEE'S SIGNATURE — DATE

REVIEWER:

REVIEWER'S SIGNATURE — TITLE — DATE

IN-LINE REVIEW:

SIGNATURE — SIGNATURE

RE-241 (REV 9/80)

Texas Department of Public Safety
PERFORMANCE EVALUATION REPORT

EMPLOYEE NAME (Last)	(First)	(Initial)	I.D. NO.	MAJOR DIVISION			REGION OR DIVISION
				TLE	CLE	ADM	
ADAMS	Glen	D	6300			X	Crime Lab

JOB TITLE	SERVICE	SECTION OR BUREAU	FOR PERIOD ENDING
Criminalist IV (Serologist)	Crime Lab	Lubbock Lab	12-10-89

SECTION A	1 NOT SATISFACTORY	2 SOME IMPROVEMENT NEEDED	3 MEETS STANDARDS	4 EXCEEDS STANDARDS	5 DOES NOT APPLY
1. Observance of Work Hours			X		
2. Attendance			X		
3. Grooming & Dress			X		
4. Compliance with Rules			X		
5. Safety Practices			X		
6. Public Contacts			X		
7. Suspect Contacts					X
8. Interpersonal Relations			X		
9. Job Knowledge				X	
10. Work Judgments			X		
11. Planning and Organizing			X		
12. Job Skill Level				X	
13. Quality of Work			X		
14. Volume of Acceptable Work			X		
15. Meeting Deadlines				X	
16. Accepts Responsibility			X		
17. Accepts Direction			X		
18. Accepts Change				X	
19. Performance Under Stress			X		
20. Appearance of Work Area			X		
21. Operation & Care of Equip.			X		
22. Work Coordination			X		
23. Initiative			X		
24. Energy Conservation			X		
25.					
26.					
27.					
28.					
29.					
30.					
FOR EMPLOYEES who SUPERVISE OTHERS					
31. Scheduling & Coordinating					
32. Training & Instructing					
33. Effectiveness					
34. Evaluating Subordinates					
35. Judgments & Decisions					
36. Leadership					
37. Budgetary Efficiency					
38. Supervisory Control					
39. (ADDITIONAL FACTORS)					
40.					
41.					

CHECKS IN COLS. 1 AND 2 MUST BE EXPLAINED IN SECTION D. CHECKS IN COL. 4 REQUIRE AN EXPLANATION IN SECTION B.

SECTION B Record job strengths, superior performance, progress achievements.

This period included a relocation of the Serology facilities, which was completed smoothly, as Glen continued to reduce backlog and meet case deadlines admirably. He attended a serology workshop in Austin and has taken related classes at Texas Tech this semester to enhance his knowledge and job skill level.

SECTION C Record specific goals or improvement programs to be undertaken during next evaluation period.

Strive to remain current on rape cases while you reduce the backlog on other more tedious cases. Make maximum use of time by planning additional tasks (report writing, reviewing, cleaning, other tests, etc.) during slow or waiting periods of serology testing. Continue assistance in dispositions and return of evidence to help clear storage.

SECTION D Record specific work performance deficiencies or job behavior requiring improvement or correction (explain checks in the unsatisfactory and improvement needed columns).

SECTION E Additional Considerations

See attached memo concerning recommendation of promotion to Criminalist V

RATER: I certify this report represents my best judgment.

J M Thomas — RATER'S SIGNATURE | Supervising Criminalist — TITLE | 12-11-89 — DATE

EMPLOYEE: I certify that this report has been discussed with me. I understand my signature does not necessarily indicate agreement. ☐ I wish to discuss this report with the reviewer.

Comment:

Glen Adams — EMPLOYEE'S SIGNATURE | 12-11-89 — DATE

REVIEWER:

REVIEWER'S SIGNATURE | TITLE | DATE

IN-LINE REVIEW:

SIGNATURE | SIGNATURE

PE-24 (Rev. 9/80)

TEXAS DEPARTMENT OF PUBLIC SAFETY

DATE: 10/01/90 EMPLOYEE BIOGRAPHICAL SKETCH PAGE 1

NAME-ADAMS, GLEN DAVID DOB-09/06/59 SEX-M RACE-B HGT.-603 WGT.-220 EYES-BROWN HAIR-BLACK CITIZEN-USA

HOME ADDR-5321 S LOOP 289 1316 CITY-LUBBOCK 79424 HOME PHONE-(806) 794-8082 SS#- 466-36-9975 ID#-6300

WORK ADDR-BOX 420 CITY-LUBBOCK, TX 79408 WORK PHONE-(806) 747-4491 9132 MARITAL STATUS-S DLN-000000000

OTHER NAME- BIRTH PLACE-EL PASO SPOUSE NAME- BLOOD TYPE-O+

CIVIC ORGANIZATIONS-OTHER CIVIC OR PROFESSIONAL ORGANIZATIONS UNMARRIED NAME-
HANDICAPS-

---CHILDS NAME SEX DOB---

----EDUCATION----
DEGREE-~~BA~~ BS
YEAR OF DEGREE-84
COLLEGE UNITS-161
MJR-OTHER
MNR-CHEMISTRY

--TCLEOSE CERTIFICATES--

--COMMISSION DATES--

----------MILITARY----------
SERVICE-NONE
START DATE - / /
DISCHG. DATE-00/00/00
RANK-
SPEC.-
YEARS -
MONTHS-
DISAB.-
STATUS-

------RESERVES------
DISCHG. DATE- / /
RANK-
STATUS-
YEARS -
MONTHS-
SPEC.-

CHILDREN- 0

MAJOR DIV.-ADMINISTRATIVE
MINOR DIV.-CRIME LABORATORIES
REGION -
DISTRICT-
SGT AREA-
BUDGET CODE-4308

HOME ADDR. RELEASE-~~YES~~ NO
PHOTOGRAPH RELEASE-~~YES~~ NO

---DATE LICENSED---
/ /

TOTAL MONTHS OTHER AGENCIES COMMISSIONED SERVICE-

----------ACCIDENTS----------
DATE TYPE DUTY SEVERITY

FLSA STATUS- 21
GROUP-17 STEP-2
SALARY-$ 2,486.00
CLASS. TITLE-CRIMINALIST V
CLASS. JOB #-6074
FUNC. TITLE-CRIMINALIST V, FIELD LABORATORIES
FUNC. JOB # -CL/FL-4

LAST PERFORMANCE REVIEW DATE-12/31/89
NEXT PERFORMANCE REVIEW DATE-12/31/90

--------EMERGENCY NOTIFICATION--------
CONTACT-ADAMS, FRED J.
ADDRESS-4946 VULCAN
CITY -EL PASO, TX 79904
PHONE-(915) 751-5152
RELATIONSHIP- Father

-----SKILLS----- -----SKILLS-----
----- TYPE ----- ----- TYPE -----
SYSTEM ANALYST COMPUTER PROG.
COMPUTER OPER. ACCOUNTANT
TEACHING AUDIO-VISUAL EQU
WRITING PUBLIC SPEAKING
CZECH GERMAN
SPANISH GARDENER

------FIREARMS QUALIFICATION------
DATE WEAPON TYPE STATUS

----------INJURIES----------
DATE TYPE CAUSE SEVERITY

NAME-ADAMS, GLEN DAVID

TRAINING

DATE	CODE	SCHOOL	HRS	LOC NO.
10/21/87	212	DEFENSIVE DRIVING		DPS 1
08/15/89	832	OTHER TRAINING	28	DPS
03/20/89	524	CHEMISTRY	24	DPS
04/05/88	524	CHEMISTRY		DPS
05/26/87	524	CHEMISTRY		DPS

TOTAL HOURS THIS BIENNIUM- 52

COMPLAINTS OR DISCIPLINARY ACTIONS

DATE	TYPE	COMPLAINANT	DISP	DISP DATE	ACTION 1	ACTION 2	DAYS PROB

DPS EMPLOYMENT

START	TERMINATED	JOB TITLE	STATION	CLASS	EMP. TYPE
01/01/90		CRIMINALIST V	LUBBOCK	6074	FULL
09/01/89	01/01/90	CRIMINALIST IV	LUBBOCK	6073	FULL
12/01/87	09/01/89	CHEMIST & TOXICOLOGIST I	LUBBOCK	2671	FULL
08/01/87	12/01/87	CHEMIST III	LUBBOCK	2663	FULL
11/17/86	08/01/87	CHEMIST III	AUSTIN	2663	FULL

COMMENDATIONS

DATE	NATURE
04/06/89	COURT

AWARDS

DATE	NATURE

Proficiency Testing

Lubbock DPS Crime Lab

PROFICIENCY TESTING LOG --BLOOD

TEST#	DESCRIPTION	CRIMINALIST	DATE	COMMENTS
#84-2	Blood/Semen	Randy Snyder	6-12-84	OK
#85-2	2 blood stains	Randy Snyder	4-2-85	(ABO) OK
#86-B	blood stain	David Mahan	3-6-86	(ABO) OK
#86-D	blood stain	David Mahan	9-2-86	(ABO) OK
#87-D	blood stain	Glen Adams	11-4-87	(ABO, enzymes) EAP and EsD repeat. OK
#87-E	liquid blood, blood stain	Glen Adams Dottie Collins	12-17-87	(ABO, enzymes) OK
#88-2	3 stains	Glen Adams Dottie Collins	5-24-88	EAP #1 : CA reported BA
#PSP.C-88	Paternity Testing Program	Glen Adams Dottie Collins	5-24-88	
#88-14	Mother-father blood stained apron.	Dottie Collins		OK
#89-2	Two stains	Glen Adams		OK
#89-13	3 cig. butts; 3 blood, saliva	Cathy McCord	10-13-89	EsD 2-1 reported as a 1.
#90-02	Blood stain, 2 suspects	Cathy McCord	3-29-90	OK ABO & enzymes
#85-11	Seminal stain, 3 individuals	Cathy McCord Glen Adams	4-20-90	OK ABO No response enzymes

Proficiency

#87-D

DEPARTMENT OF PUBLIC SAFETY
INTEROFFICE MEMORANDUM

HQ-9

DATE: 11-18-87

DIVISION: Lab

TO: Jim Thomas, Supervisor, Lubbock Lab

FROM: D. Pat Johnson, Manager, Field Laboratories

SUBJECT: Prof. Test Sample #87-D

On the results obtained from your lab on this sample, note that the EsD and EAP results obtained were incorrect. This blood sample was EsD 1, not EsD 2-1, and it was EAP CB, not EAP B.

The PGM, ADA, AK, and ABO results are correct.

Please rerun those samples ~~in the~~ for EsD and EAP and please be sure that both Glen and Dottie view the results.

I will be sending you another proficiency blood sample soon.

D Pat Johnson

DPJ:bs

ELECTROPHORESIS

Date 11-24-87

Chemist Initials _____

Circulating Bath Temperature °C 4°

Rx Incubator Temperature °C 37°

Control Source Name: Gp I

Gp II

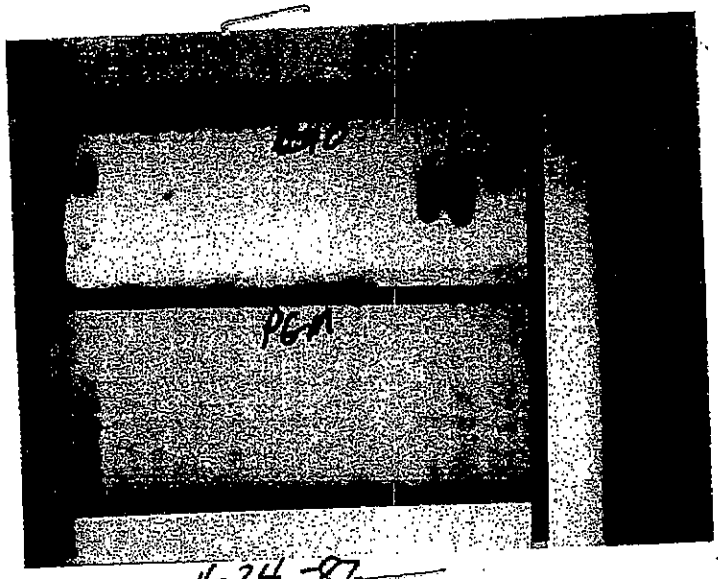
Gp III

Case #-item	EsD	PGM	GLO	EAP	ADA	AK	PGD	Hp	Gc	Tf
1 Control	2-1		2 ?.	CB	1	2-1				
2 LSL-31388 1-1										
3 LSL-31388 1-2										
4 LSL-31388 #2						1				
5 LSL-31388 #3						1				
6 LSL-31388 #4						1				
7 LSL-31388 #5										
8 LSL-31388 35										
9 LSL-31388 36										
10 LSL-31388 38										
11 87-D Poo	1	2-1	2-1 ?.	CB	1	1				
12 87-D Poo	1	2-1	2-1 ?.	CB	1	1				
13 Control	2-1	2-1	2 ?.	CB	1	2-1				
14										
15					1					
16										
17										
18 Control										

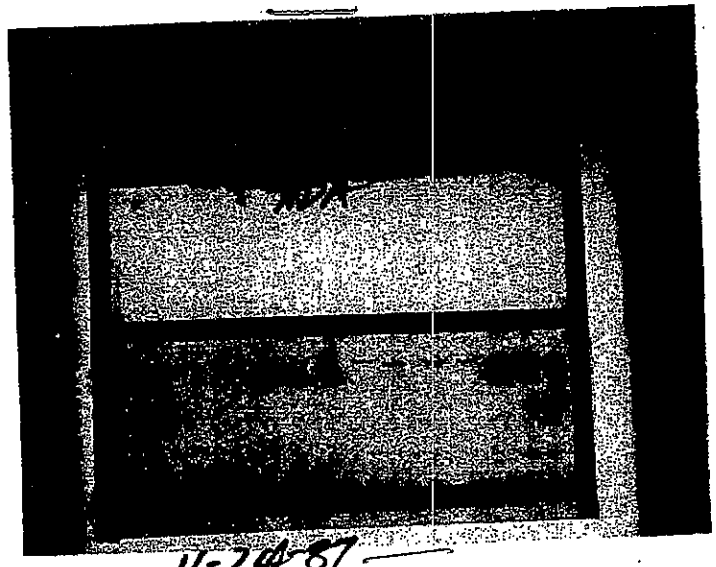
Plate read by LA

Photograph if read by one chemist only and place photos on back of this page.

Information transcribed to case folders (Check) _____ Witness _____



11-24-87



11-24-87

TEXAS DEPARTMENT OF PUBLIC SAFETY
CHEMISTRY LABORATORY
BLOOD WORKSHEET

LAB/c-40 (7/85)

CASE # _____
DATE STARTED 11-4-87
DATE OF OFFENSE: _____

CHEMIST Glen Adams

#	ITEM	BENZ	HUMAN		ANTIBODY A	ANTIBODY B	ANTIGEN A	ANTIGEN B	ANTIGEN H	ABO Gp	Rh	Gp I Es D	Gp I PGM	Gp I GLO	Gp II EAP	Gp II ABA	Gp II AK	Gp II PRD	Gp III Hp	Gp III Bc	Gp III Tf	TRACE EVIDENCE RECOVERED
	Proficiency Test Sample 87-D	+	+		2	N	N	4	3	B		2-1	2-1	ND	B	1	1	ND	1	ND	1	
	Proficiency Test Sample 87-D (Repeat)											1	2-1	ND	CB	1	1	ND	ND	ND	ND	

Prof Test #87-D

Lubbock

aa
BB

AMERICAN ASSOCIATION OF BLOOD BANKS

Dear PSP Subscribers, 10/27/87

Welcome to year five of the PSP program sponsored by the Parentage Committee of the AABB. According to our records there are 130 laboratories subscribing. The first shipment of the 1987-1988 program was sent on September 8, 1987. It should have been mailed September 1, but the individual I had lined up to provide a unit of blood and my backup donors all became unavailable either through accidents, illness or pregnancy. Because of the late start and the slower than normal response in returning worksheets I delayed this letter two extra weeks.

Enclosed you shall find the phenotype results of the reference laboratories that helped to type PSP-A-87. You will note that the nomenclature for PLG and PGM1 reflect the recommendations of recent International Workshops for those marker systems.

Also enclosed are a letter from Dr. Moses Schanfield and his explanation of the GM and KM nomenclature recommendations resulting from the 1987 Human Gene Mapping Workshop. In subsequent mailings you will be receiving GM and KM results with the new nomenclature.

PSP-A-87 should not have presented many problems. Although fewer than expected laboratories returned results (Table 1), we did find discrepancies in Duffy, JK and ACP. Although we were somewhat surprised by the Duffy and JK errors, the problem with ACP was not unexpected. Differentiation of ACP B, BC and C is based upon intensity variation of the bands. Although it might be a judgement call we find that the separation technique has a great deal to do with ability to differentiate these three phenotypes. One suggestion might be to look at some of the isoelectric focusing techniques using agarose or polyacrylamide. The band resolution is very sharp and the ACP B, BC and C phenotypes much easier to read.

If you have any techniques or recommendations you feel the other subscribers might benefit from please mail them to me and I will distribute your comments in subsequent mailings.

Sincerely,

Dale D. Dykes
Research Associate
Memorial Blood Center of Minneapolis
2304 Park Avenue South
Minneapolis, Minnesota 55404
(612)871-3300

DDD/eb

RE: Paternity Specimen Program (PSP)

Listed below are the phenotypes of specimen # PSP-A-87 which was mailed to you on 9-8-87. If you have any questions please direct them to Mr. Dale Dykes, Memorial Blood Center of Minneapolis, 2304 Park Avenue South, Minneapolis, Minnesota 55404.

RBC ANTIGENS		SERUM PROTEINS		RBC ENZYMES	
ABO	B	GC	1	ACP	BC
Rh	DCde	GC(IEF)	1S	PGM_1	21
MNSs	MNs	BF	FS	PGM_1(IEF)	1A2A
Duffy	a-b+	HP	2	PGM_2	1
Jk	a+b+	TF(IEF)	C1	GLO	21
Kell	K-k+	GM	f;n;b*;1	ESD	1
Le	a-b+	KM	3	AK	1
P1		PI	M1	ADA	1
		PLG	AM5	6PGD	1
		F13B	1	PGP	-
		C3	FS	PEP A	1
				CA II	1
				HB	A

* b 0,1,3,4,5

TABLE 1.

NUMBER RESULTS MAILED IN FOR PSP-A-87

ABO	33	GC	8	ACP	12
Rh	30	GC(IEF)	7	PGM1	6
MNSs	30	BF	3	PGM1(IEF)	13
Duffy	29	HP	10	PGM2	3
Jk	28	TF	1	GLO	11
Kell	27	TF(IEF)	3	ESD	11
Le	3	GM	5	AK	6
		KM	5	ADA	8
		PI	2	6PGD	1
		PLG	2	PEPA	3
		F13B	1	CAII	3
		C3	1	HB	2
				GPT	1

TABLE 2.

REPORTED ERRORS FOR PSP-A-87

SYSTEM	PHENOTYPE REPORTED	NUMBER REPORTED
Duffy	a- b-	1
Jk	a+ b-	1
Jk	a- b+	1
ACP	B	2
ACP	C	1

ALLO-TYPE
GENETIC TESTING, INC.

22 October 1987

Dale Dykes
Memorial Blood Center of Minneapolis
2304 Park Avenue South
Minneapolis, MN 55404

Dear Dale:

Attached please find the new guidelines for immunoglobulin allotype nomenclature. I hope it is not too long. The guidelines apply to all systems used in paternity testing.

You can have people call me if they have any questions on allotype notation. If they have questions on the entire system they can contact Dr. Thomas Shows, Roswell Park Memorial Institute, 666 Elm Street, Buffalo, NY 14263, (716) 845-3108.

Regards and best wishes.

Sincerely,

Moses S. Schanfield, Ph.D.
Laboratory Director

Attachment (1)

430 W. Peachtree Street NW
Suite [illegible]
Atlanta, Georgia 30309
(404) 881-0951

Recommendations to bring immunoglobulin allotype notation into conformation with the International System for Human Gene Nomenclature (ISGN 1987).

The last recommendations on immunoglobulin allotype notation were published following the WHO meeting on human immunoglobulin allotype notation in July 1974. In 1979 in response to the recommendations of the Human Gene Mapping Workshop, recommendations were made on a uniform system of nomenclature. In September of 1986 recommendations were made for all human systems at a workshop on human genetic marker nomenclature. These recommendations after review were approved by the Plenary Session of the 1987 meeting of the Human Gene Mapping Workshop. These recommendations will be published and go into effect next year.

The recommendations presented below apply to all polymorphic systems, including blood groups and enzymes, however, the immunoglobulin allotypes are presented below.

1. Gene symbols: The identification of a locus or region should describe the region functionally, if known, and should be 3-5 letters or numbers, all letters should be capital letters. For the immunoglobulin heavy chain allotypes, in increasing order of complexity the loci would be G1M, G2M, G3M, A2M, GM (including all of the IgG heavy chains) and IGH (including both IgG and IgA chains). For the kappa light chains the symbol is KM.

2. Allotypic specificities: For serologically defined markers, only markers detected are presented, with all markers tested presented in a table. The alphanumeric notation uses only capital letters. Further, specificities are separated by a comma, and presented in normal ascending order e.g. A,F,X. Phenotypes should be preceded by the locus designator, followed by one space and then the specificities e.g. G1M A,F,X. When multiple loci are tested, the broader designation is used, followed by a space then the allotypes detected at the first locus, with each additional locus separated by a space e.g. GM A,F,X B0,1,3,4,5,6 or IGH F N B0,1,3,4,5 1. It may be desirable to replace long strings of specificities with short hand designations e.g. G3M B = B0,1,3,4,5 (a table of short hand designations is presented below). For KM allotypes the phenotypes would be KM 1, KM 1,3 and KM 3.

3. Alleles: To identify alleles a new symbol was introduced, the asterisk. All alleles are to be designated either italicized or underlined, with an asterisk separating the gene designation from the specificities or allele designation e.g. GM*A G.

4. Genotypes: A genotype would then be designated in either a long or short form e.g. GM*A G/GM*F B or GM*A G/*F B

SHORT HAND DESIGNATIONS

G1M	G3M
A = A,Z	B = B0,1,3,4,5
F = F	G = G,G5
X = A,X,Z	C3 = B0,1,4,5,C3
G5 = A,G5,Z	C5 = B0,1,C3,5
AF = A,F	S = B0,3,5,S
	T = B0,3,5,S,T

HQ-9

DEPARTMENT OF PUBLIC SAFETY
INTEROFFICE MEMORANDUM

DATE: 10-8-87

DIVISION: Lab

TO: Field Lab Supervisors

FROM: D. Pat Johnson, Manager, Field Labs

SUBJECT: Proficiency Testing Sample #87-D

Enclosed is a sample of blood on cloth. Please do as complete a work up on this sample as you can do and report your results on a Lab/c-40 and Lab/c-40a Blood & Electrophoresis Worksheets. Try to complete this proficiency sample within 30 days of receiving it.

D Pat Johnson

DPJ:bs

RECEIVED

OCT 12 1987

DPS - REGION 5

Proficiency

#87-E

DEPARTMENT OF PUBLIC SAFETY
INTEROFFICE MEMORANDUM

HQ-9

DATE: 1-19-88

DIVISION: Lab

TO: Jim Thomas, Supervisor, Lubbock Lab

FROM: D. Pat Johnson, Manager, Field Labs

SUBJECT: Prof Test #87-E

Results on this test are exactly as you reported:

ABO	Group O
EsD	2-1
PGM	1
EAP	BA
ADA	1
AK	1

Very Good Work.

D Pat Johnson 1/20/88

DPJ:bs

DEPARTMENT OF PUBLIC SAFETY

HQ-9

INTEROFFICE MEMORANDUM

DATE: 11-24-87

DIVISION: Lab

TO: Jim Thomas, Supervisor, Lubbock

FROM: D. Pat Johnson, Manager, Field Labs

SUBJECT: Proficiency Testing #87-E

Enclosed are two blood samples (liquid and stain) from one individual. Please have your serologists analyze this blood and report their results on a LAB/c-40 "Blood Worksheet".

Thank you,

D Pat Johnson

DPJ:bs

RECEIVED

DEC 03 1987

DPS - REGION 5

TEXAS DEPARTMENT [illegible]UBLIC SAFETY
CHEMISTRY LA[illegible]ATORY
BLOOD WORKSHEET

LAB/c-40 (7/85)

CASE # PRe cienty 87-E

DATE STARTED 12-17-87

DATE OF OFFENSE: NA

CHEMIST [signature]

#	ITEM	BENZ	HUMAN		ANTIBODY A	ANTIBODY B	ANTIGEN A	ANTIGEN B	ANTIGEN H	ABO Bjs	Rh	Gp I EsD	Gp I PGM	Gp I GLO	Gp II EAP	Gp II ADA	Gp II AK	Gp II PGD	Gp III Hp	Gp III Sc	Gp III Tf	TRACE EVIDENCE RECOVERED
	Glen Adams				3	4	N	N	3			2-1	1	ND	BA	1	1	ND	1	ND	1	
	87-E																					
	Dottie Collins				4	4	N	N	2			2-1	1	ND	BA	1	1	ND	1	ND	1	
	87-E																					

Proficiency

88-2

PROFICIENCY TESTING PROGRAM
TEST #88-2
PHYSIOLOGICAL FLUIDS

SUMMARY REPORT

In this test, three stains were made from fresh, whole human blood with three drops per sample. The samples were sent to 150 laboratories who were asked to type the three stains in all systems used in the laboratory. Data sheets were returned from 70 laboratories, and the data was compiled into the following tables:

TABLE 1 : Manufacturer's Information

TABLE 2 : Typing Results and Methods Used

TABLE 3 : Frequency of Typing

TABLE 4 : Responses Differing From Manufacturer's Information

TABLE 5 : Examiner's Information

TABLE 6 : Additional Comments

APPENDIX: Data Sheet

Important Note

The following tables show data submission code numbers. The numbers were randomly assigned to the anonymous data sheets after they were returned for analysis and are used only to permit correlation of methods used and results between tables for specific laboratories. In no way can any laboratory be identified by the code numbers.

Proficiency Advisory Committee Comments

There were 1875 reported results on blood groupings on the three samples by 70 laboratories. There were 25 results that were different from the manufacturer's information.

The EAP system accounted for 9 of the discrepencies, primarily with these labs calling the EAP-CA sample an EAP-BA. Adequate standards to help differentiate the intensities of the C and B bands on the electrophoresis plates is imperative.

There were three differences in the G-6-PD all with one lab which could possibly be a transcription error meant for the 6-GPD system.

Three errors were reported in the ABO system, two by one lab. All of them were type "O" blood mistyped as type "A".

Two differences in the PGM subtyping of sample #2 were reported.

Proficiency Advisory Committee Comments Cont'd

A transcription error or possibly a sample transposition was made by one lab accounting for the 2 differences in the AK system.

One difference in the GLO and five in the Hp system were noted.

Nomenclature for the GM and KM system persists to be a problem in the forensic field. Two different nomenclatures were used but the results appeared to be consistent.

PAC also takes note that Lab 262 performed DNA typing on samples 2 and 3. No mention was made of sample #1. This is the first time DNA typing was used as a method in proficiency testing. The population frequencies determined for samples 2 and 3 of 1 in 4.4 billion and 1 in 1.3 billion, respectively, were impressive.

This was also the first time that sexing and A2HS were done on a proficiency test.

It should also be noted that one lab used O-toluidine as an indicator for blood. The PAC has recommended that this carcinogen should not be used when other substitutes are available.

TABLE 1

Manufacturer's Information

System	Sample 1	Sample 2	Sample 3
ABO	O	A_1	O
ADA	1	1	1
AK	1	2-1	1
EAP	CA	B	B
EsD	2-1	1	1
GC	2-1S	2-1S	2-1S
GLO I	1	2	2-1
Hp	1	2	2
GM	-1,-2,10,11	1,-2,10,11	-1,-2,10,11
KM	-1,3	-1,3	-1,3
Le	a-b+	a-b+	a-b+
PepA	1	1	1
PGM	1+1-	2+1-	2-1+
Rh	R_1R_2	R_1r	R_1R_1
MNSs	MS	Ms	MNSs

DEPARTMENT OF PUBLIC SAFETY
INTEROFFICE MEMORANDUM

HQ-9

DATE: 6-8-88

DIVISION: Lab

TO: All DPS Serologists

FROM: D. Pat Johnson, Manager, Field Laboratories

SUBJECT: IEF Proficiency Samples

Since starting proficiency testing on IEF in May, several questions have been raised concerning results. These questions will be addressed as follows:

1. Please request your proficiency samples in writing by memorandum when you are ready for them. Also report your results in writing.

2. If you are not certain of your results on a sample, re-run it. If you are still uncertain, report it inconclusive. Inconclusive results are not considered as wrong results in an evaluation of one's proficiency.

3. If you report one or more results incorrectly, you will be asked to re-examine those samples. Note that before anyone will be given the okay to proceed with use of IEF on evidence, they must demonstrate convincingly that they can identify the correct EAP and PGM markers on every sample in a set.

4. Male serologists, please provide semen samples (vaginal fluid & saliva free) for proficiency #88-3. Please saturate a sterile cloth and air dry it before mailing it in. Send to Irma Rios.

5. Running Group I before reporting PGM Subtypes on samples is highly recommended.

If you have any questions, please feel free to contact me or Irma.

D Pat Johnson

DPJ:bs

cc: Mike Johnston

LWBBOCK

COLLABORATIVE TESTING SERVICES INC

340 HERNDON PARKWAY P.O. BOX 1049 HERNDON, VIRGINIA 22070
Tel. (703) 481-1125 Telex: 467766 COLLAB-TEST CI

PROFICIENCY TESTING PROGRAM
TEST #88-2
PHYSIOLOGICAL FLUIDS ANALYSIS

MANUFACTURER'S INFORMATION

Three stains, that do not match each other, on separate pieces of cloth were sent to each laboratory. The stains were made from fresh, whole human blood using three drops per stain.

	Sample 1	Sample 2	Sample 3
ABO	O	A_1	O
ADA	1	1	1
AK	1	2-1	1
EAP	CA	B	B
EsD	2-1	1	1
Gc	2-1S	2-1S	2-1S
GLOI	1	2	2-1
Hp	1	2	2
Gm	-1,-2,10,11	1,-2,10,11	-1,-2,10,11
Km	-1,3	-1,3	-1,3
Rh	R_1R_2	R_1r	R_1R_1
Le	a-b+	a-b+	a-b+
PepA	1	1	1
PGM	1+1-	2+1-	2-1+
MNSs	MS	Ms	MNSs

Data Sheet
Proficiency Testing Program
Test #88-2
Physiological Fluids

Type the three stains in all the systems that you use in your laboratory. The stains do not match each other. They were made from fresh, whole human blood with three drops per sample.

SYSTEM:	ABO	MN	Rh	PGM	PGMsub	EsD	GLO 1
Sample 1	O			1	1+ 1-	2-1	
Sample 2	A			2-1	1- 2+	1	
Sample 3	O			2-1	1+2-	1	
Method Utilized							

SYSTEM:	AK	ADA	EAP	6-PGD	G-6-PD	GC	HP
Sample 1	1	1	BA				
Sample 2	2-1	1	B				
Sample 3	1	1	B				
Method Utilized							

SYSTEM:	Tf	Lewis	Gm	Km	CA II	Pep A	Hb
Sample 1							
Sample 2							
Sample 3							
Method Utilized							

SYSTEM:	PLG	C3	HLA	SEX			
Sample 1							
Sample 2							
Sample 3							
Method Utilized							

Methods: listed on back

HA 5-24-88

PLEASE RETURN THIS DATA SHEET BY APRIL 13, 1988.

COLLABORATIVE TESTING SERVICES INC

340 HERNDON PARKWAY P.O. BOX 1049 HERNDON, VIRGINIA 22070
Tel. [703] 481-1125 Telex: 467766 COLLAB-TEST CI

RECEIVED

MAR 04 1988

DPS - REGION 5

PROFICIENCY TESTING PROGRAM
TEST #88-2
PHYSIOLOGICAL FLUIDS

INSTRUCTIONS

Enclosed is the Physiological Fluids Test #88-2 sample of the 1988 Crime Laboratory Testing Program.

Please examine the samples according to your normal laboratory procedures.

In order to ensure the confidentiality of data and anonymity of participating laboratories, no code numbers are assigned. Upon completion of testing, record your results on the data sheet (in English), place it in the enclosed plain inner envelope, seal, and then mail in the return envelope. Please do not include letter head, signatures or other markings that would permit the identification of your laboratory. The inner envelopes, containing the data sheets are opened by a different person than the outer envelopes. This procedure ensures that no person can possibly link the data sheet with the submitting laboratory.

An answer sheet with the manufacturer's information for the sample(s) will be sent to all participants shortly after the due date for data sheets. A more complete report for specific portions of the test will be contained in the subsequent summary report to be mailed to each participating laboratory following receipt and tabulation of test sample data.

Although you are encouraged to return your response for analysis, you do have the option of not returning the results. While the guiding philosophy of the program is primarily one of laboratory self-assessment, the program is the development of a national profile of responses and methods used -- a goal which can only be realized when laboratories submit results in a regular and timely fashion.

If you have any problems or questions, please call Sandra Singer at Collaborative Testing Services, Inc., (703) 481-1125.

Proficiency

PSP-C-88

TO: LUBBOCK

RE: Paternity Specimen Program (PSP)

Listed below are the phenotypes of specimen # PSP-C-88 which was mailed to you on 3-1-88. If you have any questions please direct them to Mr. Dale Dykes, Memorial Blood Center of Minneapolis, 2304 Park Avenue South, Minneapolis, Minnesota 55404.

RBC ANTIGENS		SERUM PROTEINS		RBC ENZYMES	
ABO	B	GC	2	ACP	AB
Rh	DEce	GC(IEF)	2	PGM_1	1-W26
MNSs	Ms	BF	FS	PGM_1 (IEF)	1A-W27
Duffy	a-b+	HP	21	PGM_2	1
Jk	a+b+	TF(IEF)	C1	GLO	2
Kell	k	GM	A,F,XNB, G1	ESD	1
Le	a-b+	KM	3	AK	1
P1		PI	-	ADA	1
		PLG	A	6PGD	A
		F13B	1	PGP	-
		C3	-	PEP A	1
				CA II	1
				HB	A
				GPT	2

EAP

B = Bo, 1, 3, 4, 5

G = G, G5

4

RE: Paternity Specimen Program (PSP) # PSP-C-88 Rev

The purpose of the AABB Paternity Specimen Program (PSP) is to provide parentage testing laboratories with known controls for common and unusual variants among the serum protein and RBC enzyme marker systems. Specimens are mailed on a quarterly basis in the form of whole blood in CPDA anticoagulant or a whole blood and an accompanying serum specimen from the same individual. The enclosed specimen is your new PSP control. For most of the marker systems hemolysates and plasma/sera may be frozen at -20° to -70° C for extended periods of time with limited degradation. Reducing agents should be added to those RBC enzyme systems which are known to show a change in band position after storage.

The phenotyping data on this sample is not included in this mailing, but will be sent to you approximately 4 - 6 weeks after receipt of the sample. Participating laboratories may elect to return the enclosed worksheet with their phenotyping results, prior to the arrival of the complete phenotypes, so we can compile inter-laboratory data. Confidentiality of individual laboratories will be protected and only the total number of laboratories reporting various phenotypes will be disclosed. The results of this data will be distributed to all participants at a subsequent mailing.

PHENOTYPE DATA FOR SPECIMEN C-88

RACE White DATE DRAWN 2-26-88 DATE MAILED 3-1-88

RBC ANTIGENS	SERUM PROTEINS	RBC ENZYMES
ABO B	GC	ACP
Rh	GC(IEF)	PGM1 1
MNSs	BF	PGM1(IEF)
Duffy	HP	PGM2
Jk	TF(IEF)	GLO
Kell	GM	ESD 1
	KM	AK 1
	PI	ADA 1
	PLG	6PGD
A 5-24-88	F13B	PGP
		PEP A
		CA II
		EAP BA
		PGM Sub 1+1+

Please direct any questions, comments and the above worksheet to: Mr. Dale Dykes, Memorial Blood Center of Minneapolis, 2304 Park Avenue South, Minneapolis, MN. 55404.

Proficiency

#89-2

PROFICIENCY TESTING PROGRAM
TEST #89-2
PHYSIOLOGICAL FLUIDS

SUMMARY REPORT

In this test, two bloodstains were prepared from fresh whole human blood with three drops per sample. The laboratories were asked to type the stains in all the systems that are in use in the laboratory.

Samples were sent to 167 laboratories and data sheets were returned from 91. The following tables were compiled from the returned data sheets:

Table 1 : Manufacturer's Information

Table 2 : Typing Results and Methods Used

Table 3 : Frequency of Typing

Table 4 : Responses Differing From Manufacturer's Information

Table 5 : Examiner's Information

Table 6 : Additional Comments

APPENDIX: Data Sheet

Important Note

The following tables show data submission code numbers. The numbers were randomly assigned to the anonymous data sheets after they were returned for analysis and are used only to permit correlation of methods used and results between tables for specific laboratories. In no way can any laboratory be identified by the code numbers.

Proficiency Advisory Committee Comments

This proficiency test was designed to give the laboratories the best possible samples that could be expected from dried blood stains.

Of the 1496 responses, only 17 differed from the manufacturer's information. 5 errors in determining ABO types and 4 errors in subtyping PGM accounted for half of the errors. A possible transcription error was noted in the Hp system for lab 268. One lab (222) apparently had problems with both samples in typing EsD and another lab (268) reported Gm (-21) in both samples.

All the PGMsubtype errors were the same error 2+1+ instead of 2-1-. This may be due to distortions in the gel. These labs should review their gel making procedure and consider including additional composite controls distributed across each plate.

Proficiency Advisory Committee Comments Cont'd

DNA typing was done by one lab with the population frequencies given:

	Caucasian	Black
Stain #1	1/21,200	1/291,000
Stain #2	1/ 7,030	1/ 75,000

Using the 16 systems utilized in the manufacturer's lab (ABO, PGMsub, EsD, GLO, AK, ADA, EAP, 6-PGD, Gc, HP, Tf, CA-II, Pep A and Hb) and the manufacturer's local population frequency data, the approximate frequency of each stais would be:

	Caucasian	Black
Stain #1	1/55,500	1/909,000
Stain #2	1/33,300	1/ 50,000

TABLE 1

Manufacturer's Information

Two stains were prepared from fresh, whole human blood.

System	Sample 1	Sample 2
ABO	A	A
MN	MNSs	Ms
Rh	DCEce	DCce
PGM	2	2-1
PGMsub	2+	2-1-
EsD	1	1
GLO 1	2	2-1
AK	1	1
ADA	1	1
EAP	A	B
6-PGD	A	A
G-6-PD	B	B
GC	1S	1F1S
HP	1	2-1
Tf	C	C
Lewis	a-b+	a-b-
Gm	1,-2,3,11,21	1,-2,3,11,21
Km	-1,3	-1,3
CA II	1	1
Pep A	1	1
Hb	A	A
SEX	M	M

LUBBOCK

COLLABORATIVE TESTING SERVICES INC

340 HERNDON PARKWAY P.O. BOX 1049 HERNDON, VIRGINIA 22070
Tel. [703] 742-9107 Telex: 467766 COLLAB-TEST CI

PROFICIENCY TESTING PROGRAM
TEST #89-2
PHYSIOLOGICAL FLUIDS

MANUFACTURER'S INFORMATION

The stains were prepared from fresh, whole human blood with three drops per sample.

SYSTEM	SAMPLE 1	SAMPLE 2
ABO	A	A
MN	MNSs	Ms
Rh	DCEce	DCce
PGM	2	2-1
PGMsub	2+	2-1-
EsD	1	1
GLO I	2	2-1
AK	1	1
ADA	1	1
EAP	A	B
6-PGD	A	A
G-6-PD	B	B
GC	1S	1F1S
HP	1	2-1
Tf	C	C
Lewis	a-b+	a-b-
Gm	1,-2,3,11,21	1,-2,3,11,21
Km	-1,3	-1,3
CA II	1	1
Pep A	1	1
Hb	A	A
Sex	M	M

COLLABORATIVE TESTING SERVICES INC

340 HERNDON PARKWAY P.O. BOX 1049 HERNDON, VIRGINIA 22070
Tel. [703] 481-1125 Telex: 467766 COLLAB-TEST CI

RECEIVED
FEB 15 1989
DPS - REGION 5

PROFICIENCY TESTING PROGRAM
TEST #89-2
PHYSIOLOGICAL FLUIDS

INSTRUCTIONS

Enclosed is the Physiological Fluids Test #89-2 sample of the 1989 Crime Laboratory Testing Program.

Please examine the samples according to your normal laboratory procedures.

In order to ensure the confidentiality of data and anonymity of participating laboratories, no code numbers are assigned. Upon completion of testing, record your results on the data sheet (in English), place it in the enclosed plain inner envelope, seal, and then mail in the return envelope. Please do not include letter head, signatures or other markings that would permit the identification of your laboratory. The inner envelopes, containing the data sheets are opened by a different person than the outer envelopes. This procedure ensures that no person can possibly link the data sheet with the submitting laboratory.

An answer sheet with the manufacturer's information for the sample(s) will be sent to all participants shortly after the due date for data sheets. A more complete report for specific portions of the test will be contained in the subsequent summary report to be mailed to each participating laboratory following receipt and tabulation of test sample data.

Although you are encouraged to return your response for analysis, you do have the option of not returning the results. While the guiding philosophy of the program is primarily one of laboratory self-assessment, the program is the development of a national profile of responses and methods used -- a goal which can only be realized when laboratories submit results in a regular and timely fashion.

If you have any problems or questions, please call Sandra Singer at Collaborative Testing Services, Inc., (703) 481-1125.

GA

PROFICIENCY TESTING PROGRAM
TEST #89-2
PHYSIOLOGICAL FLUIDS

Data Sheet

Type the two stains in all the systems that you use in your laboratory. The stains do not match each other. They were made from fresh, whole human blood with three drops per sample.

SYSTEM:	ABO	MN	Rh	PGM	PGMsub	EsD	GLO 1
Sample 1	A			2	2+2+	inc	inc
Sample 2	A			2-1	2-1-	inc	inc
Method Utilized							

SYSTEM:	AK	ADA	EAP	6-PGD	G-6-PD	GC	HP
Sample 1	1	1	inc				
Sample 2	1	1	inc				
Method Utilized							

SYSTEM:	Tf	Lewis	Gm	Km	CA II	Pep A	Hb
Sample 1							
Sample 2							
Method Utilized							

SYSTEM:	PLG	C3	HLA	SEX			
Sample 1							
Sample 2							
Method Utilized							

Methods: listed on back

PLEASE RETURN THIS DATA SHEET BY MARCH 29, 1989.

Data Sheet Cont'd

METHOD:

1. Absorption-Elution ✓
2. Absorption-Inhibition
3. Crust-Lattes
4. Mixed Agglutination
5. Immunoelectrophoresis
6. Starch Gel Electrophoresis ✓
7. Polyacrylamide Gel Electrophoresis
8. Agarose Gel Electrophoresis ✓
9. Isoelectric Focusing ✓
10. Cellulose Acetate Electrophoresis
11. _____
12. _____
13. _____

How many years has the examiner been examining serology cases? 2 Years

What percentage of the time does the examiner spend on forensic serology cases? 100%

Additional Comments: _____

PLEASE RETURN THIS DATA SHEET BY MARCH 29, 1989.

Proficiency

#85-11

(4-20-90)

COLLABORATIVE TESTING SERVICES INC

8343-A GREENSBORO DRIVE MCLEAN, VIRGINIA 22102 (703) 442-0433

TARGET VALUES
PROFICIENCY TESTING PROGRAM
TEST #85-11
PHYSIOLOGICAL FLUIDS

Sample a. Semen from same person as sample d. (suspect)

	Sample b: Complainant	Sample c: Boyfriend	Sample d: Suspect
ABO	A	O	O
Lewis	a-b+	a-b+	a-b+
Gm/Km	Gm(1,-2,10)Km(-1)	Gm(1,-2,10)Km(-1)	Gm(-1,-2,10)Km(-1)
Hp	1	2-1	2-1
PGM	1+	1+1-	1+
GLO	2-1	2	2
EsD	1	1	1
EAP	B	B	BA
AK	1	2-1	1
ADA	2-1	1	1

More detailed responses for specific portions of this test will be given in the summary report.

DATA SHEET

PROFICIENCY TESTING PROGRAM
TEST 85-11

PHYSIOLOGICAL FLUIDS

Case History

On the pretext of making repairs to plumbing, a man gained entry to an apartment occupied by a young woman and her boyfriend. The boyfriend was absent at the time. The man threatened to kill the complainant unless she complied with his demands. She accompanied the assailant to the bedroom and performed several sex acts. She states that ejaculation occurred immediately following coitus interruptus.

The complainant viewed a lineup and identified a suspect. The suspect has no criminal record. He admits being in the apartment, but denies any sexual activity.

Items Submitted

a. Portion of bedsheet from the scene.

b-1. Blood from the complainant.

b-2. Saliva from the complainant.

c-1. Blood from the boyfriend.

c-2. Saliva from the boyfriend.

d-1. Blood from the suspect.

d-2. Saliva from the suspect.

PLEASE RETURN THIS DATA SHEET BY NOVEMBER 30, 1985

Glen Adams

ANSWER SHEET

1. What physiological fluid(s) were identified on item "a"? Semen

2. How was it (were they) identified? Acid phosphatase, ½ P30 were detected

3. What, if any, grouping data was developed on:*

   a. "H" BGS indicative of ABO Group "O" secretor

   b-1. "A" Antigen detected indicative of ABO Group "A"

   b-2. "A" BGS indicative of "A" secretor

   c-1. "H" antigen indicative of "O"

   c-2. "H" BGS indicative of "O" secretor

   d-1. "H" antigen indicative of "O"

   d-2. "H" BGS indicative of "O" secretor

4. Could any physiological fluid identified on "a" have originated from:

   Complainant No Boyfriend yes Suspect yes

   None of the above _____

5. What procedures were used?

   Absorption-Elution ✓ Polyacrylamide gel _____

   Absorption-Inhibition ✓ Agarose gel _____

   Starch gel _____ Cellulose acetate _____

   Starch:Agarose _____ Other _____

6. How many hours did this test take? _____

*Note: Although grouping in a wide range of systems is not necessary for this test nor part of it, grouping data for the complainant, boyfriend and suspect will be provided with Manufacturer's Data Sheet. For those wishing to check their own results, this data will be provided in the A-B-O, Lewis, Gm/Km, Hp, PGM, GLO, EsD, EAP, AK and ADA systems only.

PLEASE RETURN THIS DATA SHEET BY NOVEMBER 30, 1985

Cathy McCover

DATA SHEET

PROFICIENCY TESTING PROGRAM
TEST 85-11

PHYSIOLOGICAL FLUIDS

Case History

On the pretext of making repairs to plumbing, a man gained entry to an apartment occupied by a young woman and her boyfriend. The boyfriend was absent at the time. The man threatened to kill the complainant unless she complied with his demands. She accompanied the assailant to the bedroom and performed several sex acts. She states that ejaculation occurred immediately following coitus interruptus.

The complainant viewed a lineup and identified a suspect. The suspect has no criminal record. He admits being in the apartment, but denies any sexual activity.

Items Submitted

a. Portion of bedsheet from the scene.

b-1. Blood from the complainant.

b-2. Saliva from the complainant.

c-1. Blood from the boyfriend.

c-2. Saliva from the boyfriend.

d-1. Blood from the suspect.

d-2. Saliva from the suspect.

PLEASE RETURN THIS DATA SHEET BY NOVEMBER 30, 1985

4/20/90

ANSWER SHEET

1. What physiological fluid(s) were identified on item "a"? semen

2. How was it (were they) identified? ① Acid phosphatase @ D30

3. What, if any, grouping data was developed on:*

a. BGS - H'
PGM - no response

b-1. A/E - Aag PGM - no response
Lattes - no response

b-2. BGS - A'

c-1. A/E - H'ag PGM - no response
Lattes - no response

c-2. BGS - none detected

d-1. A/E - H' ag PGM - no response
Lattes - no response

d-2. BGS - H'

4. Could any physiological fluid identified on "a" have originated from:

Complainant NO Boyfriend NO Suspect yes

None of the above _____

5. What procedures were used?

Absorption-Elution	X	Polyacrylamide gel	X
Absorption-Inhibition	X	Agarose gel	
Starch gel	X	Cellulose acetate	
Starch:Agarose		Other	

6. How many hours did this test take? 5 hours

*Note: Although grouping in a wide range of systems is not necessary for this test nor part of it, grouping data for the complainant, boyfriend and suspect will be provided with Manufacturer's Data Sheet. For those wishing to check their own results, this data will be provided in the A-B-O, Lewis, Gm/Km, Hp, PGM, GLO, EsD, EAP, AK and ADA systems only.

PLEASE RETURN THIS DATA SHEET BY NOVEMBER 30, 1985

CASE # CTS-85-11

DATE STARTED 3-6-90

CHEMIST [illegible]

TEXAS DEPARTMENT OF PUBLIC SAFETY
CHEMISTRY LABORATORY
SEXUAL ASSAULT WORKSHEET

LAB/c-62

CODES:
- NS= No Stains Seen
- ND= Test Not Done
- N= No Agglutination (ABO)
- QNS= Quantity Not Sufficient
- W= Weak Reaction
- (−) or NR= No Reaction (spot test)
- I= Inconclusive

CASE HISTORY

DATE OF OFFENSE _____

*RACE OF VICTIM: W B L O

SUSPECT(S): W B L O

TYPE OF CONTACT: VAG ORAL RECTAL

CLOTHING WORN: BEFORE AFTER BOTH

PRIOR SEX CONTACT: ___ HRS. ___ DAYS

EXAM TIME LAPSE: _____ HRS.

DR. REPORT SPERM: YES NO UNKNOWN

*RACE: W = WHITE L = LATIN or MEX/AM. B = BLACK O = ORIENTAL

#	ITEM	WHOLE BLOOD (Ab) A_1	B	A_2	(Ag) A	B	H	A,B	A_1	LEWIS a	b	AUTO CONTROL	ABO Gp	BLOOD PRESUME	HUMAN	AP SPOT	SPERM	p30	SEMEN dil. AP/p30	A/I 20 MIN. ABH	30 MIN. ABH	ABO BGS	A/I TITER	A/E 5 min ABH	15 min ABH	25 min ABH *	LATTES A B O	ABO Gp	AMY dil.
a	bedsheet															4+		+	1/244	1st try 21N 2nd 11N	44L 33N	— H							
b1	blood-victim secretor																							2NN	3NN		NNN	Aag	/
b2	saliva-victim																			NN	N32	A							1/100 18mm
c1	blood-boyfriend non-secretor																							NNN	NN2		NNN	Hag	
c2	saliva-boyfriend																			111	333	—							1:200=15. 1:400=12 13mm
d1	blood-suspect																							NNN NNN	NNN NNN	1st try 2nd try NN1	NNN	Hag	
d2	saliva-suspect secretor																			1st 111 2nd N1N	332 23N	— H							1:200=15. 15mm

HAIR/TRACE EVIDENCE

* NOT TO EXCEED 30 MINUTES

CASE # CTS 85-11

TEXAS DEPARTMENT OF PUBLIC SAFETY
CHEMISTRY LABORATORY
ELECTROPHORESIS WORKSHEET

LAB/c-40a

ITEM # FROM PAGE 1	GROUP I			GROUP II				GROUP III			PGM SUBTYPE	SEMEN				
	EsD	PGM	GLO	EAP	AK	ADA	PGD	Hp	Gc	Tf	Tf	PGM	PepA			
a-sheet											NR					
b-1 victim											NR					
a-1 boyfriend											NR					
a-1 suspect											NR					

COMMENTS:

COLLABORATIVE TESTING SERVICES INC

8343-A GREENSBORO DRIVE · MCLEAN, VIRGINIA 22102 (703) 442-0433

INSTRUCTIONS

Enclosed is the Physiological Fluids 85-11 sample of the 1985 Crime Laboratory Testing Program.

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If you have any problems or questions, please call Tracy Langford at the Collaborative Testing Services, Inc., (703) 442-0433.

RECEIVED

NOV 0 4 1985

DPS - REGION 5

Samples in refrig.

MEMORANDUM

TO: Jim Thomas, Supervisor Tox. Lab.
FROM: Criminalistics Peer Review
DATE: December 12, 1987
SUBJECT: Review of Case

The CPRC has the following comments on the cases that were reviewed from your Lab. A response is required on the indicated items.

L5L-31142 May we suggest using the word "identified" or "detected" instead of "seen" when finding spermatozoa. The Anti-A,B was out of date as indicated on your Q/C sheet. Your whole blood Q/C form indicates that you are not using Anti-A1 when you detect blood group "A". Purchase some Anti-A1 and start using it on individuals who are blood type "A". This is necessary to distinguish the subgroup of " A". If you have already purchased some of the antisera disregard this comment.

L5L-31104 It is a good idea to run a known sample on the same day that you run some samples to make sure that your GC and column are function properly.

L5L-30138 You need to indicate the source of your PAP control. You also need a linearity check on your AP assay. The Anti-A,B is expired on the case also. Blood Group Substance "H" was detected on the panties and the vaginal swabs not "H" Antigen.

L5L-31171 There is no mention of the positive TMB on the panties in this report. Everything else look good.

L5L-30860 Were the T-shirts checked for glass particles. This could have been significant in this burglary case.

L5L-31088 Excellent notes and documentation.

L5L-30107 Your letter dated June 10,1987 the heading indicates that the defendant is unknown yet you have received clothing from the suspect as indicated on the report.

On 8-23-87 the A,B,H titers were found to be A=1:120, B=1:120 and H=1:20. These titers should have been indicated on the secretion testing Q/C form dated 8-24-87. You need to indicate the dilution of the Antisera used on the seminal secretions Q/C form.

What was the victim's blood type? Why did you not request blood from her on your supplemental report? The victim

could also possess the genetic markers that you detected on the gown (#6). Without her blood she can not be eliminated as a possible source of the blood detected on her own gown. On submission II it was requested to determine if the bloodstain on the men's underwear matched the victim's blood yet no blood from the victim was ever submitted. Your hand written report of the supplemental letter shows that you intended to mention the fact that no blood from the victim was submitted yet it was scratched out. A response is requested on this concern. The CPRC might have missed something on your notes or report.

What blood group substances were detected on the swab (#5), gown (#6), and panties (#1)? Were they omitted by mistake or was there a reason for not including them in the report.

You need to indicate the source of the Anti-P30 and P30 standard on your Q/C form.

On your group II plate you should run both known seri standards to make sure that you can distinguish EAP CB from EAP C or EAP B.

On the cigarette butt you reported "B" and "H" Antigen instead of blood group substance "B" and "H".

You should be more careful in completing your Q/C forms and distinguishing between blood group substances and blood antigens.

TEXAS DEPARTMENT OF PUBLIC SAFETY

JAMES B. ADAMS
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

LEO E. GOSSETT
ASST DIRECTOR

August 24, 1987

SUPPLEMENTAL REPORT

TO: Detective Division
Lubbock Police Department
P O Box 2000
Lubbock, Texas 79457

SUBJECT: L5L-30107
DUPREE, Bobby Ray, Defendant
CAGLE, Geneva Lou, Victim
Burglary of Habitation with Intent to Commit Sexual Assault
10-14-86, Lubbock County

DATE SUBMITTED: Submission III (08-19-87)

METHOD OF SUBMISSION: In person by Detective Douglas Sutton

EVIDENCE SUBMITTED: From Suspect:

Item #9. Blood sample
10. Saliva sample
11. Pubic hairs
12. Armpit hairs
13. Right front head hairs
14. Left front head hairs
15. Right rear head hairs
16. Left rear head hairs

REQUESTED ANALYSIS: Standard sexual assault analysis

RESULTS OF ANALYSIS: A dark brown human head hair fragment and a dark brown human body hair possessing insufficient individual microscopic characteristics for significant comparison purposes were found on the gown (Item #6, Submission I). Animal hairs were also found on the gown.

L5L-30107
DUPREE, Bobby Ray, Defendant
CAGLE, Geneva Lou, Victim
Burglary of Habitation with Intent to Commit Sexual Assault
10-14-86, Lubbock County

RESULTS OF ANALYSIS: (Continued) Results of electrophoretic typing on Item #6 (the victim's gown, Submission I) and Item #9 (blood from Bobby Dupree) as well as an ABO type on Bobby Dupree are listed below.

	EsD	EAP	ADA	AK	ABO
Item #6	1	BA	1	1	B
Item #9	1	BA	1	1	B

We are returning this evidence to the Lubbock Police Department property room.

David E. Mahan
Chemist-Toxicologist

Glen Adams
Chemist (Serologist)

DEM/GA/kr

cc: Prosecuting Attorney
Austin Lab
File

JMT

MEMORANDUM

TO: Jim Thomas

FROM: Criminalistics Peer Review Committee

DATE: April 12, 1988

SUBJECT: Case Review

The CPRC has the following comments on the cases that were reviewed from your lab. A response is requested on the indicated sections only.

28984 (Sexual Assault) It is important that a search be made of the vaginal swab to identify sperm in this case. No linearity check was present on the QC sheet for the AP Assay that was run. A conclusion or expanation statement would have been appropriate for this report, particularly since you were comparing suspect's samples to the vaginal samples.

31381 (Sexual Assault) Should have examined the anal and oral smears in this case, paricularly since this involves a twelve year old victim. A 1+ acid phosphatase reaction was reported as "acid phosphatase, a non-specific constituent of semen." This AP is most likely vaginal acid phosphatase since no sperm or p30 were found to confirm semen. It is better to report "no significant amounts of acid phosphatase were detected on the vaginal swab."

31396 (Arson) OK

31398 (Serology) It may be helpful to the officers to indicate or draw a conclusion to the blood chart,"the blood is similar to Frances Lesperence, etc.". In writing the electrophoresis chart, it may be best to use "Inc" for inconclusive rather than "I". The "I" and "1" in the chart look too similar at first glance. Otherwise, it was a good report. Two separate controls need to be run on the Group II plate that show the heterozygotes for AK and ADA. Photographs also need to be taken of the electrophoresis plate if a second reader is not available. It seems that alot of work was done on bloodstains that are clearly associated with wounds, perhaps a blood spatter interpretation course would be beneficial to you. No mention in the letter of amounts of blood, number of stab holes or whether the knife could have made the stab holes, all very pertinent information. Was the knife examined with a stereoscope to find traces of blood?

31455 (Serology) Need Lot number of anti-Human on QC form. The use of the word secretor in this report is not applicable, since this is a blood case not a body fluid case.

31489 (Arson) OK

31562 (Sexual Assault) The anal swab gave only a 1+ acid phosphatase reaction. Perhaps it would be better to report and insignificant amount of AP since no sperm or p30 were found to confirm semen.

31665 (Glass) Excellent notes, however, some work may be unnecessary to identify the glass.

31732 (Shoe cast) OK

31897 (Sexual Assault) OK

31901 (Sexual Assault) It might be informative to the officers to indicate in the letter that samples are being frozen for later analysis. With the large case load that your lab is experiencing, you might want to consider omitting analysis,such as the amylase test in this case, that provides no real information at this point.

31947 (Physical Match of Tape) Good work

31998 (Lamp bulb) May not be a good idea to put voltage on an evidence bulb. Good work, otherwise.

31999 (Arson) OK, good notes.

32003 (Arson) OK

GENERAL COMMENTS: Be sure to indicate the power that sperm slides are being examined even when no sperm were seen.

The p30 test should not be used as a screen test. All suspected semen stains should be examined for sperm when the p30 is negative.

Conclusions are not mandatory on the reports but are very useful to officers and DA's.

Be sure all pages being copied for review are readable. Some of the pages received for review (including graphs) are too light to read.

Most of the laboratories are not listing all the items found in the sexual assault kit, particularly when a complete analysis is not performed and suspect samples have not been submitted. This comment refers to the report only. Especially if your laboratory is experiencing a backlog problem, the time spent by you and your secretary writing all the components in the kit may be time consuming.

TEXAS DEPARTMENT OF PUBLIC SAFETY

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

JAMES B. ADAMS
DIRECTOR

LEO E. GOSSETT
ASST. DIRECTOR

December 30, 1987

SUPPLEMENTAL REPORT

TO: Detective Division
Lubbock Police Department
P O Box 2000
Lubbock, Texas 79457

SUBJECT: L5L-28984
MENEFEE, Walter Thomas, Defendant
TURNER, Teresa, Victim
Sexual Assault
11-16-85, Lubbock County

DATE SUBMITTED: Submission II (10-28-87); Submission III (12-17-87)

METHOD OF SUBMISSION: Submission II (personally by Jonnie Bumpas); Submission III (personally by Ronnie Goolsby)

EVIDENCE SUBMITTED:

SUBMISSION II

From Victim:

Item #7. Whole blood sample
8. Saliva swabs

SUBMISSION III

From Suspect:

Item #9. Whole blood sample
10. Saliva swab
11. Saliva swab
12. Pubic hair
13. Head hair
14. Chest hair

REQUESTED ANALYSIS: Standard Sexual Assault Analysis

RESULTS OF ANALYSIS: The victim, Teresa Turner, is a blood group "B", non-secretor. The suspect, Walter Menefee, is a blood group "O", secretor. No P30, a semen specific protein, was confirmed on Item #2, the victim's vaginal swabs (Submission I, 11-18-85).

L5L-28984
MENEFEE, Walter Thomas, Defendant
TURNER, Teresa, Victim
Sexual Assault
11-16-85, Lubbock County

RESULTS OF ANALYSIS: (Continued)

However, absorption inhibition typing on Item #2 revealed the presence of blood group substance "H". "H" blood group substance in the absence of other ABO blood group substances is indicative of blood group "O" secretor individuals.

We are returning this evidence to the Lubbock Police Department property room.

Glen Adams
Chemist III (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

JMT

TEXAS DEPARTMENT OF PUBLIC SAFETY

JAMES B. ADAMS
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

LEO E. GOSSETT
ASST. DIRECTOR

January 31, 1988

TO: Jerry McKinney
Ector County Sheriff's Department
Box 2066
Odessa, Texas 79760

SUBJECT: L5L-31381
CATANO, Ruben, Defendant
SANDOVAL, Jennifer, Victim
Aggravated Sexual Assault of Child
08-24-87, Ector County

DATE SUBMITTED: Submission I (08-25-87); Submission II (09-01-87)

METHOD OF SUBMISSION: U.S. Mail

EVIDENCE SUBMITTED:

From Victim:

Item #1. Debris collection
2. Genital swabbing
3. Dried secretion
4. Pubic combings
5. Pulled pubic hairs
6. Pulled head hairs
7. Fingernail scrapings
8. Saliva sample
9. Vaginal smear slides
10. Oral smear slide
11. Anal smear slide
12. Nasal mucous sample
13. Anal swab
14. Vaginal swab
15. Oral swab
16. Smear slides
17. Smear slides
18. Whole blood

From Suspect's car:

19. White towel

REQUESTED ANALYSIS: Standard Sexual Assault Analysis

L5L-31381
CATANO, Ruben, Defendant
SANDOVAL, Jennifer, Victim
Aggravated Sexual Assault of a Child
08-24-87, Ector County

RESULTS OF ANALYSIS: The victim is blood group "O", secretor by Lewis typing. No spermatozoa were detected on the vaginal slides. Acid phosphatase, a non-specific component of semen, was present on the vaginal swab (#14); however, P30, a semen specific protein was not confirmed. Acid phosphatase was not detected on the genital swabbing (#2). Semen (acid phosphatase and P30) was detected on the white towel (19).

Dark brown hairs were recovered from the white towel (#19). No hair was present in the pubic combings (#4). No nails or debris was present in the fingernail scrapings (#7). No analysis was performed on Items #1, 3, 5, 6, 10, 11, 12, 13, 16, or #17.

Samples of Items #8, 15, 18, and 19 have been retained and frozen for later analysis. No further analysis will be performed until samples of blood, saliva, pulled head and pubic hair (at least 25 of each) from the suspect are submitted. Please allow three weeks for completion of additional analysis.

We are retaining this evidence until advised by you of the disposition.

Glen Adams

Glen Adams
Chemist III (Serologist)

GA/kr

cc: Prosecuting Attorney
✓ Austin Lab
File

JMT

TEXAS DEPARTMENT OF PUBLIC SAFETY

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

December 2, 1987

JAMES B. ADAMS
DIRECTOR

LEO E. GOSSETT
ASST. DIRECTOR

TO: Robert Payne, Deputy
Roberts County Sheriff's Office
Box 66
Miami, Texas 79059

SUBJECT: L5L-31398
ROSALES, Sally Lopez, Defendant
LESPERANCE, Frances C., Victim
ONITIVEROS, Manuela, Victim
Aggravated Assault
07-19-87, Roberts County

DATE SUBMITTED: Submission I (08-28-87); Submission II (11-09-87); Submission III (11-24-87)

METHOD OF SUBMISSION: Submission I (U.S. Mail); Submission II (U.S. Mail); Submission III (Personally by Tommy Ratliff)

EVIDENCE SUBMITTED:

SUBMISSION I

From Frances Lesperance:

Item #1. Pink striped dress
2. White bra
3. Brown panties
4. White slip
5. Pantyhose

From Manuela Ontiveros:

Item #6. Red pants
7. White blouse
8. Red cloth material
9. Pantyhose

L5L-31398
ROSALES, Sally Lopez, Defendant
LESPERANCE, Frances G., Victim
ONTIVEROS, Manuela, Victim
Aggravated Assault
07-19-87, Roberts County

EVIDENCE SUBMITTED: (Continued)

SUBMISSION I

From Sally Rosales:

Item #10. White panties
11. White bra
12. Stainless steel knife

SUBMISSION II

Item #13. Whole blood
14. Whole blood
15. Whole blood from Sally Rosales

SUBMISSION III

Item #16. Whole blood from Frances Lesperance
17. Whole blood from Manuela Ontiveros

REQUESTED ANALYSIS: To determine the presence, origin, and type of blood on the items submitted above

RESULTS OF ANALYSIS: Human blood was detected on Items #1 through 11. A presumptive test for blood was positive for Item #12, the stainless steel knife, but it did not respond to human origin testing. Items #5 and 9 are unsuitable for further testing. The quantity of Item #11 is not sufficient for further testing. Results of ABO and electrophoresis typing are listed in the table on page 3.

L5L-31398
ROSALES, Sally Lopez, Defendant
LESPERANCE, Frances C., Victim
ONTIVEROS, Manuela, Victim
Aggravated Assault
07-19-87, Roberts County

RESULTS OF ANALYSIS: (Continued)

ABO AND ELECTROPHORESIS TYPING

Item #	ABO Antigens	EsD	EAP	ADA	AK
1	I	I	BA	1	I
2	A,H	QNS	QNS	QNS	QNS
3	A,H	1	BA	I	I
4	A,H	I	BA	1	1
6	I	1	B	1	1
7	I	1	B	I	I
8	H	1	B	1	1
10	I	I	I	I	1

WHOLE BLOOD

Item #	ABO	EsD	EAP	ADA	AK
15	O	1	A	1	1
16	A	1	BA	1	1
17	O	1	B	1	1

(EsD = Esterase D; EAP = Erythrocytic Acid Phosphatase; ADA = Adenosine Deaminase: AK = Adenylate Kinase; QNS = Quantity not sufficient; I = Inconclusive)

Note: "A", "H" antigens found together are indicative of blood group "A" individuals. "H" antigen present in the absence of other ABO antigens is indicative of blood group "O" individuals.

We are returning this evidence with this letter.

Glen Adams
Chemist III (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

TEXAS DEPARTMENT OF PUBLIC SAFETY

JAMES B. ADAMS
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

LEO E. GOSSETT
ASST. DIRECTOR

October 31, 1987

TO: B.J. Richardson, Investigator
Vernon Police Department
Box 533
Vernon, Texas 76384

SUBJECT: L5L-31455
WEST, Lewis, Defendant
HILLIARD, Nelson, Victim
Burglary
09-03-87, Wilbarger County

DATE SUBMITTED: 09-08-87

METHOD OF SUBMISSION: U.S. Mail

EVIDENCE SUBMITTED: Item #1. Towel

REQUESTED ANALYSIS: Determine the presence, origin, and type of blood located on Item #1

RESULTS OF ANALYSIS: Human blood located on Item #1 was found to have "A" and "H" antigens. "A" and "H" antigens found together are indicative of blood group "A" secretor individuals. No further analysis will be done until a suspect blood sample is submitted.

We are retaining this evidence until advised by you of the disposition.

Glen Adams

Glen Adams
Chemist III (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

JMT

TEXAS DEPARTMENT OF PUBLIC SAFETY

JAMES B. ADAMS
DIRECTOR

INTEROFFICE MEMORANDUM
November 14, 1988

LEO E. GOSSETT
ASST. DIRECTOR

TO: Pat Johnson, Manager, Field Laboratories

FROM: Pat Hulen, Chairperson, CPRC

SUBJECT: September Review

The following cases were reviewed by the committee in September, 1988.

AUSTIN	CORPUS CHRISTI	GARLAND	HOUSTON	LUBBOCK
L-192338	L3C-33840	L1D-45975	L2H-57193	L5L-31799
L-192665	L3C-36217	L1D-46064	L2H-59562	L5L-32060
L-192778	L3C-36225	L1D-46338	L2H-59951	L5L-32061
L-193150	L3C-36245	L1D-46443	L2H-60122	L5L-32254
L-193286	L3C-36412	L1D-46611	L2H-60132	L5L-32289
L-193553	L3C-36431	L1D-46709	L2H-60395	L5L-32311
L-193657	L3C-36628	L1D-46750	L2H-60462	L5L-32340
L-193658	L3C-36658	L1D-46866	L2H-60484	L5L-32365
L-194520	L3C-36680	L1D-46942	L2H-60698	L5L-32420
L-194522	L3C-36737	L1D-47007	L2H-60719	L5L-32421
L-194547	L3C-36738	L1D-47032	L2H-60831	L5L-32536
L-194881	L3C-36745	L1D-47089	L2H-60858	L5L-32646
L-194960	L3C-36820	L1D-47132	L2H-60901	L5L-32679
L-194962		L1D-47166	L2H-61172	L5L-32740
L-194171				
L-192197				

L5L-32654
Boom
12/8/88

MCALLEN	MIDLAND	TYLER	WACO
L3M-17622	L4M-24683	L1T-28992	L6W-41606
L3M-17655	L4H-25034	L1T-29024	L6W-45093
L3M-17716	L4H-25147	L1T-29380	L6W-47177
L3M-17798			L6W-47250
L3M-17800			L6W-47251
L3M-17808			L6W-47392
L3M-17902			L6W-47582
L3M-17907			L6W-47619
L3M-17999			L6W-47914
L3M-18008			L6W-47952
L3M-18013			L6W-47988
L3M-18057			
L3M-18119			
L3M-18151			

IIQ-9

DEPARTMENT OF PUBLIC SAFETY
INTEROFFICE MEMORANDUM

Date Oct. 31, 1988

TO: Jim Thomas, Supervisor Lubbock Laboratory

Division Crime Lab

FROM: Members of the CPRC

SUBJECT: September 1988 Case Review

L5L-31799 (Blood & semen) (DLC) - The report is somewhat difficult to follow. Perhaps a conclusion statement would help in this case. The information in the chart is different than the victim's and suspect's type reported in the paragraph. Who reviewed the case? No A/I tests performed on semen stains. Need times on A/E typing and the interpretation recorded on the QC sheet. Date and initials need to appear on all pages of notes. Amylase diameters of the control salivas, as a general rule, should be larger. Need interpretations recorded on the BGS QC sheet.

L5L-32060 (Rape) (GA) - Take time to complete the case history on the worksheet. Amylase controls not recorded on the QC sheet. Good work, clear, easy to read report.

L5L-32061 (Arson) (JMT) - Good

L5L-32254 (Rape) (DLC) - Why does a KEY appear in the report. Be sure QC forms are completed, interpretation, whole blood additives. It would be helpful if the report summed up for the officer whether semen was found or not (AP+, sperm+, p30-).

L5L-32289 (Glass) (JAS) - Good notes and report.

L5L-32311 (Rape) (DLC) - Fill in additive of whole blood on QC Form. Complete interpretation of blood group on QC forms and on worksheet. Wrong BGS of oral swab (32340-1K) was transcribed to the worksheet.

L5L-32340 (Rape) (DLC) - Complete A/I QC sheet for reagent blood cells and antisera. Complete interpretations of BGS's and blood groups on QC sheets and worksheets. Amylase control diameter, as a rule, should be larger. Use the liquid blood conditions listed at the bottom of the whole blood QC form, rather than saying "fair". Why go into the long explanation about the amylase on the gauze in the report, and suggest that the amylase could be vaginal in origin? Why ask for a semen sample from the suspect when no BGS's were detected and the suspect is a non-sceretor? No explanation or comparison was given to this matter. Could have done PGM on victim, suspect, and semen stains.

L5L-32365 (Arson) (JMT) - What happened to the analysis on items submitted 3-18-88?

L5L-32420 (Blood) (DLC) - Blood of the victim should have been typed by A/E and Lattes. The blood on the suspect's clothing should have been typed and compared to the victim, particularly since the Deputy had informed the lab that the suspect had not been injured. Could have microscopically examined the hole in the victim's jacket for possible gunshot residue.

L5L-32421 (Rape) (GA) - Where were the stains on the bedsheet? Notes indicate that hairs were recovered from the towel and besheet yet this was mentioned in the report.

L5L-32536 (Paint) (JAS) - Good notes and report. Wouldn't an emission spec. been helpful in comparing the metallic composition?

L5L-32646 (Rape) (DLC) - Date and initial all pages of notes. Fill in interpretations of BGS's on QC sheet.

L5L-32654 (Rape) (GA) - Reporting a weak acid phosphatase from a swab should not be done without confirming the presence of semen by sperm or p30. The weak AP is most like endogenous to the victim and only adds confusion to the report. It is better to report "no semen" with results of a weak AP, neg. sperm, and neg. p30.

L5L-32679 (Blood) (GA) - Indicate on the Human Origin QC sheet if rabbit or goat normal serum is used, it is listed with the items, but also needs to be marked with Manufacturer's lot #. Document how much blood is present on the item.

L5L-32740 (Rape) (GA) - Good report. Indicate on the worksheet that you have frozen samples.

GENERAL COMMENTS:

The case history on the Sexual Assault Worksheets need to be filled in. The information provides insight to a course of analysis, as well as, interpretation of results.

Many of the QC forms were not completed, in particular, the interpretation of the blood group and BGS's. These results need to correlate to the results interpreted on the worksheets, which also need to be filled in. Pay closer attention to that the next time.

Each page in the case file needs to be identified with the case #, date, and analyst's initials.

TEXAS DEPARTMENT OF PUBLIC SAFETY

LEO E. GOSSETT
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

JOE E. MILNER
ASST. DIRECTOR

June 24, 1988

TO: Roger Hearron, Corporal
Lubbock Police Department
P O Box 2000
Lubbock, Texas 79457

SUBJECT: L5L-32679
UNKNOWN, Defendant
VASQUEZ, Louisa M., Victim
Burglary of Habitation
05-03-88, Lubbock County

DATE SUBMITTED: 05-04-88

METHOD OF SUBMISSION: Night Depository

EVIDENCE SUBMITTED: Item #1. Paper card with scrapings under tape

REQUESTED ANALYSIS: Determine the presence, origin, and type of blood.

RESULTS OF ANALYSIS: Human blood was detected in the scrapings from Item #1. A sample of Item #1 has been retained and frozen for later analysis. No further analysis will be done until a sample of blood from the suspect is submitted for comparison.

We are returning this evidence to the Lubbock Police Department property room.

Glen Adams

Glen Adams
Chemist-Toxicologist (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

JMT

TEXAS DEPARTMENT OF PUBLIC SAFETY

LEO E. GOSSETT
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

JOE E. MILNER
ASST. DIRECTOR

June 24, 1988

TO: Lubbock County Criminal District Attorney's Office
P O Box 10536
Lubbock, Texas 79408

SUBJECT: L5L-32421
RAMOS, Enselmo (Elmo), Defendant
SMITH, Patricia, Victim
Sexual Assault
03-20-88, Lubbock County

DATE SUBMITTED: 03-22-88

METHOD OF SUBMISSION: Personally submitted by T.M. Daniels

EVIDENCE SUBMITTED: From Scene:

Item #1. White bedsheet
2. Yellow towel

REQUESTED ANALYSIS: Standard Sexual Assault Analysis

RESULTS OF ANALYSIS: Semen (acid phosphatase and P30) was detected on the white bedsheet (#1) and the yellow towel (#2). Samples of Items #1 and 2 have been retained and frozen for later analysis. No other trace evidence was detected.

No further analysis will be done until whole blood and saliva samples from both the victim and suspect are submitted for comparison. Please allow three weeks for completion of any additional analysis.

We are returning this evidence to the Lubbock Police Department property room.

Glen Adams

Glen Adams
Chemist-Toxicologist (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

JWTT

TEXAS DEPARTMENT OF PUBLIC SAFETY

LEO E. GOSSETT
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

JOE E. MILNER
ASST. DIRECTOR

June 28, 1988

TO: Detective Division
Lubbock Police Department
P O Box 2000
Lubbock, Texas 79457

SUBJECT: L5L-32654
LNU, Jeff, Defendant
LNU, Ray, Defendant
HALL, Kellie, Victim
Sexual Assault
04-30-88, Lubbock County

DATE SUBMITTED: 05-02-88

METHOD OF SUBMISSION: Night Depository

EVIDENCE SUBMITTED: From Victim:

Item #1. Swab
2. Swab
3. Vaginal slides
4. Pubic clippings
5. Pubic combings

REQUESTED ANALYSIS: Standard Sexual Assault Analysis

RESULTS OF ANALYSIS: Acid phosphatase, a non-specific component of semen, was detected on the swabs (#1, 2); however, semen (semen specific components P30 and spermatozoa) was not confirmed. No spermatozoa were detected on the vaginal slides (#3). Two brown pubic hairs present in the pubic combings (#5) are macroscopically similar to the victim's pubic hair (#4).

We are returning this evidence to the Lubbock Police Department property room.

Glen Adams

Glen Adams
Chemist-Toxicologist (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

TEXAS DEPARTMENT OF PUBLIC SAFETY

LEO E. GOSSETT
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

JOE E. MILNER
ASST. DIRECTOR

June 28, 1988

TO: Jo Kelley, Corporal
Odessa Police Department
205 N. Grant
Odessa, Texas 79761

SUBJECT: L5L-32740
SCOTT, Brandon Keith, Defendant
HANCOCK, Michael Deshannon, Defendant
GREEN, Jamieka Charchunne, Victim
Aggravated Sexual Assault
04-25-88, Ector County

DATE SUBMITTED: 05-11-88

METHOD OF SUBMISSION: Federal Express

EVIDENCE SUBMITTED: From Victim:

Item #1. Sex Crime Kit

REQUESTED ANALYSIS: Standard Sexual Assault Analysis

RESULTS OF ANALYSIS: Jamieka Green is blood group "O", secretor by Lewis typing. Acid phosphastase, a non-specific component of semen, was detected on the gauze used to swab the dried secretions above the victim's pelvic area; however, the semen specific protein P30 was not confirmed. Semen (P30 and acid phosphatase) was detected on the vaginal swabs and spermatozoa were detected on the vaginal slides. No other trace evidence was detected.

Samples of the vaginal swabs and oral swabs have been frozen to preserve the genetic markers. No further analysis will be done until a whole blood and saliva sample from the suspect are submitted for analysis. Please allow three weeks before the trial date for completion of any additional analysis.

L5L-32740
SCOTT, Brandon Keith, Defendant
HANCOCK, Michael Deshannon, Defendant
GREEN, Jamieka Charchunne, Victim
Aggravated Sexual Assault
04-25-88, Ector County

We are retaining this evidence until advised by you of the disposition.

Glen Adams

Glen Adams
Chemist-Toxicologist (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

JMT

TEXAS DEPARTMENT OF PUBLIC SAFETY

LEO E. GOSSETT
DIRECTOR

CRIME LABORATORY DIVISION
BOX 420
LUBBOCK, TEXAS 79408

JOE E. MILNER
ASST. DIRECTOR

July 19, 1988

TO: Jeffery K. Dove, Detective
El Paso Police Department
500 E. San Antonio
El Paso, Texas 79901

SUBJECT: L5L-32060
BRECHEISEN, Duane L., Defendant
HOBAN, Kimberly, Victim
Sexual Assault
06-22-87, El Paso County

DATE SUBMITTED: Submission I (01-25-88); Submission (04-04-88); Submission III (04-18-88)

METHOD OF SUBMISSION: U.S. Mail (Submission I, Submission II, and Submission III)

EVIDENCE SUBMITTED:

SUBMISSION I

From Victim:

Item #1. Pink dress
2. White slip
3. White bra
4. White towel
5. Sexual Assault Kit including:
   A. Fingernail scrapings
   B. Known head hair
   C. Mouth swabs

From Scene:

6. Silver duct tape (from scene)

From Suspect:

7. Collection kit including:
   A. Whole blood
   B. Whole blood
   C. Semen smear slides
   D. Known pubic hair
   E. Known head hair
   F. Prostate massage (swab)
   G. Swab

L5L-32060
BRECHEISEN, Duane L., Defendant
HOBAN, Kimberly, Victim
Sexual Assault
06-22-87, El Paso County

EVIDENCE SUBMITTED: SUBMISSION II

From Victim:

Item #8. Whole blood
9. Saliva sample

SUBMISSION III

10. Flattened roll silver duct tape

REQUESTED ANALYSIS: Standard Sexual Assault Analysis

RESULTS OF ANALYSIS: The victim's blood type is blood group "O" secretor and PGM 1. The suspect is blood group "O", secretor and PGM 2-1.

Semen (acid phosphatase and P30) was detected on the front of the victim's pink dress (#1) and on the white slip (#2). No apparent blood or seminal stains were detected on the white bra (#3) and no seminal fluid was found on the white towel (#4). Blood group substance "H" was detected in semen stains on Items #1 and #2. The presence of "H" blood group substance in the absence of other blood group substances is indicative of blood group "O" secretor individuals. Semen stains on Items #1 and #2 did not respond to PGM enzyme typing.

Comparison of the pieces of silver duct tape removed from the scene (#6) and the flattened roll of silver duct tape taken from the suspect (#10) revealed similarities in color, fiber patterns, width, and adhesives. No other trace evidence was detected.

CONCLUSION: Since evidentiary semen stains possess "H" blood group substance from a blood group "O" secretor individual, which is consistent with the suspect, the suspect is thereby included as a possible semen donor. Similar color, fiber pattern, width, and adhesives in Items #6 and #10 concludes that the pieces of silver duct tape from the scene (#6) could have come from the flattened roll of duct tape taken from the suspect (#10).

This evidence was returned to you previously by U.S. Mail.

Glen Adams
Chemist-Toxicologist (Serologist)

GA/kr

cc: Prosecuting Attorney
Austin Lab
File

TEXAS DEPARTMENT OF PUBLIC SAFETY

5805 N. LAMAR BLVD. - BOX 4087 - AUSTIN, TEXAS 78773-0001

CRIME LABORATORY SERVICE
P.O. BOX 4143
AUSTIN, TEXAS 78765-4143
512/465-2105

JAMES R. WILSON
DIRECTOR

DUDLEY M. THOMAS
ASST. DIRECTOR

December 13, 1996

COMMISSION
ROBERT B. HOLT
CHAIRMAN
RONALD D. KRIST
JAMES B. FRANCIS, JR.
COMMISSIONERS

Re:L-247973
Donna Stanley
December 13, 1996

After reviewing all the documentation from LifeCodes and the original testing from the Lubbock and Midland DPS Crime labs, it appears that the DPS crime lab included Brandon Moon as the suspect on the vaginal swabs and the comforter and the bathrobe through the ABO inhibition testing. No BGS was detected in these evidentiary stains, and the suspect Brandon Mood was a non-secretor. Thus the conclusion that he could not be eliminated. The acid phosphatase dilution was sufficient to make an interpretation of the BGS. However, it should be noted that the victim was a ABO blood group "A" secretor and her "A" BGS was not detected in her own vaginal swab. It should also be noted that the victim's husband was also a blood group "A" secretor and the son was a ABO blood group "O" secretor.

David Mahan (DPS Lubbock) sampled and performed three tests from the comforter. It is hard to determine from the Microfilm copies, if these were three separate stains or three samples of the same stain. From my notes and diagrams of the comforter, I found one large area removed and initialed by David. This same area is initialed by the LifeCodes analyst as well, as per date of sampling markings on the comforter. There was no remaining stain left from this area for me to perform testing. It is then likely that the LifeCodes analyst removed from the same stained area so as to remain consistant with what David removed. Two other small areas of the comforter had been removed, but this could be substrate control areas by David. I used the LumaLite on the comforter and located two more stained semen areas near the original area sampled. On the reverse side of the comforter, two more stains were located. Each of these have been removed by me and frozen. And each have been tested with DQα .

The three tests performed by David on the comforter were not determined to be an acid phosphatase dilution sufficient for interpretation of the inhibition BGS results. However, he did make a conclusion. No BGS was detected in these three tests and thus, the conclusion in the report that the semen donor was a non-secretor. I would have expected the victim's BGS "A" should have been detected from these stains. None was detected. This would have suggested that perhaps the stains are not sensitive enough in this particular case to detect the victim's BGS. If so, then the suspect or semen donor to these stains may not be detected as well. The victim's husband is a blood group "A" secretor and it should be expected that he would be detected in the semen stains. At the original time of sampling, not all stains were tested. It is hard to say at this point if the semen stain tested had to do with the rape or was the coital stains from the husband and wife. LifeCodes indicated in their report that the stain tested from the comforter excluded Brandon Moon as the semen donor. They excluded him with three RFLP probes. LifeCodes did not sample the victim's blood, which they received in the rape kit and never opened, and therefore did not identify the victim's contribution to the stain which eliminated Brando Moon as the donor.

David Mahan sampled one area from the bath robe. This stain had sufficient acid phosphatase dilution for BGS interpretation and no BGS was detected. The semen on this bath robe is most likely the evidentiary semen which needs to be sampled since the victim wore this robe to the hospital. LifeCodes sample from this robe is probably in the same area as David Mahan. No other deletions of fabric were observed by me. LifeCodes found the semen to be too degraded for successful RFLP probing. Therefore, no information was gained from LifeCodes. When I observed the robe for semen with the aid of the LumaLite, I found numerous stains other than the one originally sampled. I sampled the edges of the original cutout and sampled four other stains. Each of these stains have been removed and frozen. Each of these were tested with DQα testing.

I performed DQα testing on the stick portion of the remaining vaginal swabs, the vaginal glass slides, four stains from the bathrobe, and four stains from the comforter. The vaginal glass slides, the vaginal swab sticks and the robe stains appeared to be the best evidence to indicate the DQα type of the semen donor for this rape. It appears that the semen on the vaginal specimens and the robe are all consistent with the same semen donor. The semen on the comforter is different than the robe or the vaginal specimens. It appears at this time without reference samples from all the individuals, that LifeCodes eliminated Brandon Moon from stains which may not have had evidentiary value. The semen on the vaginal specimens and the robe are distinctly different from the comforter. It is imperative to obtain a blood sample from Brandon Moon and the victim's husband in order to resolve this case. An additional blood sample from the victim is also needed.

TEXAS DEPARTMENT OF PUBLIC SAFETY

5805 N. LAMAR BLVD. - BOX 4087 - AUSTIN, TEXAS 78773-0001

CRIME LABORATORY DIVISION
P.O. BOX 4143
AUSTIN, TEXAS 78765-4143
512/424-2105

DUDLEY M. THOMAS
DIRECTOR

THOMAS A. DAVIS, JR.
ASST. DIRECTOR

COMMISSION
JAMES B. FRANCIS JR.
CHAIRMAN
ROBERT B. HOLT
RONALD D. KRIST
COMMISSIONERS

January 9, 1997

TO: John Davis
Assistant District Attorney
500 E. San Antonio, Room 201
El Paso, Texas 79901

SUBJECT: L-247973; Lubbock Crime Lab Case # L5L-30910; Aggravated Sexual Assault; 04-27-87; El Paso County; Dana Mocherman-victim; Brandon Moon-suspect; El Paso D.A. Office Trial Cause No. 50015/33

DATE RECEIVED: May 23 and May 24, 1996

METHOD OF SUBMISSION: On May 23, Federal Express pouch; On May 24, UPS; Both directly from LifeCodes;

EVIDENCE SUBMITTED:
On May 23, 1996: One set of eleven duplicate autorads and copies of LifeCodes case material documentation

On May 24, 1996:

1. Sexual Assault kit from Dana Mocherman including: One red top blood tube; one tube with unknown liquid; two swabs without cotton tips; two vaginal slides
2. Collection kit from Brandon Moon including: On red top blood tube; one plastic container with semen; head, pubic and chest hair; saliva sample on cotton ball.
3. Item #3: Bath robe
4. Item #4: Orange comforter
5. In separate styrofoam box, one additional blood sample from Brandon Moon

REQUESTED ANALYSIS: Determine the presence of semen on the submitted items and perform DNA analysis.

RESULTS OF ANALYSIS:
The comforter and the bath robe were each viewed with an alternate light source as an aid in locating seminal fluid stains. These stains were further confirmed to be seminal stains by the detection of spermatozoa, a cellular constituent of seminal fluid

The semen stains located on the bath robe were detected on the inside, back panel (This is consistent with the buttock area of the bath robe). It was observed that approximately 15 inches up from the bottom of the bath robe hem, a large piece of fabric had been removed. With the aid of the LumaLite (alternate light source), I located four more individual stains which were in the same location and very close to the missing fabric. The LumaLite also revealed that the edges of the missing fabric still indicated possible residual semen stain which had not been previously removed.

Donna is DNA testing different semen stains on comforter than those tested by Lubbock Lab.

Further observation revealed approximately seven more individual stains on the inside left edge (edge approximately representing the seam between the back panel and the left front panel). I removed the edge of the missing fabric as one stain and tested one stain next to this, and finally tested three additional stains on the inside seam. A total of five stains were tested from this bath robe.

The comforter was observed to have one large piece of fabric removed from an area approximately in the middle of the comforter. The LumaLite indicated that all of this stain must have been previously removed. The edge did not indicate any residual semen. Further observation revealed two additional stains. Both of these stains were removed and tested. On the reverse side of the comforter two more stains were detected. One stain was removed and tested. A total of three stains were tested from the comforter.

The vaginal glass slides were microscopically observed to contain spermatozoa, the cellular component of seminal fluid. The semen on the vaginal glass slides was tested.

Two vaginal swabs were submitted in the sexual assault kit from Dana Mocherman. I observed that all of the cotton tip of these swabs were missing. All that remained were the bare sticks and minute strands of the previous cotton tip. I tested approximately 2.5 centimeters of the stick with the cotton fibers.

DNA was isolated from each of the mentioned samples or stains. A two step method for extraction of the DNA is used to first recover DNA from the non-sperm cells usually associated with the female's vaginal fluids (called epithelial cell fraction) and the second step recovers DNA from any sperm cells present in the stain (called sperm cell fraction). The isolated DNA from each stain is then tested with the Perkin-Elmer HLA-DQα AmpliType kit. The results are as follows:

DESCRIPTION OF ITEM		DQA ALLELES DETECTED
Vaginal swab	epithelial fraction	INC
	sperm fraction	2,3,1.2
Vaginal slide	epithelial fraction	4
	sperm fraction	2,3,4
Bath robe stain A	epithelial fraction	2,3,4,1.2
	sperm fraction	2,3
Bath robe stain B	epithelial fraction	INC
	sperm fraction	2,3,1.2
Bath robe stain C	epithelial fraction	2,3
	sperm fraction	2,3
Bath robe stain D	epithelial fraction	2,3,4,1.2
	sperm fraction	2,3
Bath robe stain E	epithelial fraction	2,3,4,1.2
	sperm fraction	2,3
Comforter stain A	epithelial fraction	2,4,1.2
	sperm fraction	2,4,1.2
Comforter stain B	epithelial fraction	2,4,1.2
	sperm fraction	2,4,1.2
Comforter stain C	epithelial fraction	INC
	sperm fraction	1.2,2

KEY: INC=Inconclusive (can not interpret DQα alleles)

CONCLUSION: Without reference blood standards from the victim, her husband, son and the suspect, an interpretation of the results can not be attempted. However, from these results it can be concluded that the semen donor on the comforter is different from the semen donor on the robe and the vaginal specimens.

INVESTIGATIVE LEADS: It is possible to perform additional DNA analysis on the evidentiary samples. Please submit one purple top tube of blood from each individual for comparison.

DISPOSITION OF EVIDENCE: We will retain the evidence until we receive notice from you. We do not have the capacity to retain evidence for long periods of time. When you decide the disposition for this evidence, please notify us.

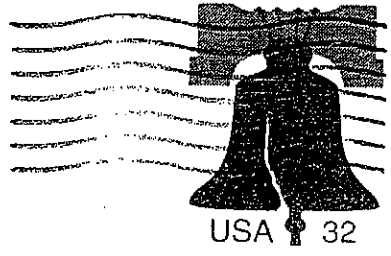
Sincerely,

Donna Stanley, Criminalist VI
DNA Section

Brandon Moon 630500
Rt 2 Box 4400
Gatesville, Tx 76597

P.P.S. Crime LAB
Recd
6-17-96
DS

WACO TX 767
PM
17 JUN
1996



RECEIVED
JUN 17 1996
DPS LABORATORY

Donna Stanley
% Texas Dept. of Public Safety
Forensic Laboratory, DNA Dept.
5805 N. Lamar Blvd.
P.O. Box 4087
Austin Texas ~~78757~~ 78773

RECEIVED
JUN 17 1996
DPS LABORATORY

Donna Stanley
Forensic Laboratory, DNA Dept.
Dept. of Public Safety
5805 N. Lamar Blvd.
P.O. Box 4087
Austin, Texas. 78752

12 June 96

Dear Ms. Stanley:

I am recently in receipt of the State's answer to my petition for writ of habeas corpus. Your affidavit is an exhibit therein. Perhaps it is "inappropriate" for me to write. I don't care. I beg you to please hear me out.

It has been my desire to conduct as thorough of a DNA analyses as possible. I am the one who fought to have these tests conducted - not the State and with little help from attorneys. I understand what DNA analyses is about. It is my desire that the tests be complete. I wish

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JUN 17 1996
DPS LABORATORY

to submit my blood sample - with or without the courts ordering it. I have tried to obtain blood exemplars when I found out that the tests were incomplete. I discussed this issue with Joanne Sgaglia of Lifecodes.

I ask you this: My preference is towards RFLP analyses as opposed to PCR. If at all possible I hope that this will be utilized to conclude the testing. However, please conduct as ~~[redacted]~~ thorough of an analyses as possible utilizing whatever type of testing is in your opinion the most appropriate. Please keep in mind that there should be a hair sample, "brown hair", which was determined not to match my own. No comparison was made to the other exemplars. I want to know who's hair it is. I believe it to be as valuable as the stain on the bed spread. I desire the analyses to be a complete as possible.

Each of us, I hope, seeks the truth. I have fought for 9 years to get the truth, to unlock the secrets hidden in the molecular structure of the DNA. Please. Unlock all of the doors. What matters ~~are~~ is the truth, nothing else.

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DPS LABORATORY

I hope you will inform me of the results of your examination of the evidence once you receive it. I do not expect this though.

Finally, I am enclosing the names and SSN's of the victim and her husband. If possible find them and ask for their blood. I know the State doesn't really want to have these tests completed. But the DPS is an investigative agency. You conduct your own investigation.

Dana Mocherman SSN
Ried Mocherman SSN
Chris Mocherman (SSN unknown)

You must answer to your own conscience. I seek the truth and justice. I ask that you do what is right.

Sincerely

Brandon Moon 630500
Rt 2 Box 4400
Gatesville, Tx. 76597

L-24573

STATE OF TEXAS

COUNTY OF TRAVIS

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared, Donna M. Stanley, a person known to me, who after being first duly sworn, stated on her oath that she had personal knowledge of the facts contained in this affidavit, and stated as follows:

"My name is Donna M. Stanley. I am over the age of 18 years and am competent to make this affidavit. I am employed as a criminalist assigned to the Serology/DNA Section of the Texas Department of Public Safety Laboratory in Austin, Texas. I am a forensic serologist trained and experienced in DNA analysis. I have received training at the FBI Academy in Quantico, Virginia, in DNA analysis. That training included my successful completion of the "Laboratory Application of DNA Typing Methods School" and the "Forensic Application of DNA typing Methods School" both conducted in April-May 1991. Additionally, in March-May, 1992, I successfully completed the "Visiting Scientist Program" in DNA analysis at the FBI Academy. I have performed hundreds of DNA analyses. Also, I have qualified to testify as an expert in the field of DNA analysis in both state and federal courts in Texas.

I have reviewed a DNA report prepared by Lifecodes Corporation dated February 23, 1990 (hereinafter referred to as "DNA report"), and addressed to Thomas Hughes, Attorney, El Paso, Texas. I have also reviewed the application for writ of habeas corpus made by Brandon Lee Moon in cause numbers 50015 and 50033 in the 327th District Court, El Paso County, Texas, dated March 26, 1995. I have also reviewed a summary of the evidence from applicant Moon's trial in cause numbers 50015 and 50033.

Additionally, I have personally talked to Dr. Michael Baird, Vice-President/Director of Laboratory Testing of Lifecodes Corporation. Dr. Baird told me that Lifecodes has been performing DNA analysis in sexual assault cases since 1987. Upon my request, Dr. Baird reviewed the DNA report and the analysis and notes from Lifecodes' lab analysis of the evidence submitted as shown on the first page of the DNA report. After completing his review, Dr. Baird informed me that the DNA examined by Lifecodes from the peach bedspread could not be excluded as being the DNA from the victim because it was possible that the DNA examined by Lifecodes from the peach bedspread was female DNA only. Female DNA is that DNA which would be contributed by a female victim in a sexual assault. This statement by Dr. Baird comports with the statement on the Lifecodes report under the heading "Summary of Results," that states, "[S]ince a blood exemplar from the victim has not been provided for comparison, a definite conclusion can not be reached as to the source of the DNA recovered from the peach bedspread." Dr. Baird's statement is also consistent with the failure of the report (on page 2) to show evidence of the male Y chromosome in the DNA tested from the peach bedspread. Consequently, because it is possible that the DNA examined from the peach bedspread came from the victim, and because a known sample of the victim's blood was not analyzed and compared to the DNA recovered from the peach bedspread by Lifecodes, the DNA report, while

L-HF173
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concluding that the DNA from Brandon Lee Moon and the DNA recovered from the peach bedspread do not match, cannot -- and does not -- exclude Brandon Lee Moon as a suspect in the sexual assault of the victim. At this time, in order to reach any reliable conclusions, the evidence would have to be retested against new samples of applicant's blood, the victim's blood, the victim's husband's blood, and the victim's son's blood.

I also asked Dr. Baird if he still had the evidence that he had received as shown on the first page of the DNA report. He stated that he did. As I have been instructed by the District Attorney's Office for the 34th Judicial District, I have requested Dr. Baird to ship to me all of the evidence. He stated that he would, and would also send the remaining extracted DNA retained by Lifecodes (as shown on page 3 of the DNA report), as well as duplicates of developed autoradiographs and any pertinent laboratory documentation. Upon receipt of this shipment from Lifecodes, I will determine if any of the evidence is still in a condition in which a new DNA test can be done. If so, to properly test the evidence, I will require a new blood sample from the victim, and from applicant, Brandon Lee Moon. Additionally, since the victim stated that she had sexual intercourse with her husband the night before the sexual assault occurred, I will need a blood sample from the victim's husband to insure that any male DNA that I may be able to recover and test from the evidence does not come from the victim's husband as it is possible that the closeness in time between the sexual intercourse between the victim and her husband and the sexual intercourse between the victim and the perpetrator of the assault would yield the victim's husband's DNA on the victim's rape kit or even on the peach bedspread. Further, since the victim left the house wearing her son's bath robe, I need a blood sample from the son to exclude the possibility that any male DNA recovered from the bath robe did not originate from the victim's son. I will require new blood samples from the victim and applicant, Brandon Leo Moon, to perform a DNA test because I believe that any such blood samples received from Lifecodes will be degraded and therefore inappropriate to use for further testing.

The evidence, when received by me from Lifecodes, will remain in my custody at the Texas Department of Public Safety Lab in Austin, Texas."

I HAVE READ THE FOREGOING AFFIDAVIT AND STATE THAT IT IS TRUE AND CORRECT.

Donna M. Stanley

DONNA M. STANLEY

SUBSCRIBED AND SWORN TO May 17, 1996.

Kay Melton

NOTARY PUBLIC
STATE OF TEXAS

NOTARY PUBLIC STATE OF TEXAS
KAY MELTON
Notary Public, State of Texas
My Commission Expires
AUG. 21, 1997

ORIGINAL

COPY

FILED
GILBERT SANCHEZ
2004 DEC 21 PM 12 11
EL PASO COUNTY, TEXAS

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
346TH JUDICIAL DISTRICT

EX PARTE)
)
BRANDON LEE MOON,)
)
APPLICANT)
)
)

No. 50015-327
No. 50033-327

DEFENDANT'S UNCONTESTED MOTION FOR FINDINGS ON FAVORABLE RESULTS OF POST-CONVICTION DNA TESTING PURSUANT TO TX. C.C.P. ART.64.04, AND FOR RELIEF FROM FINAL JUDGMENTS OF CONVICTION PURSUANT TO TX. C.C.P. ART. 11.07 and 11.65

In 1989, Brandon Moon was convicted by a jury of three counts of sexual assault arising from the brutal April 1987 rape of Dana M____.[1]. The rape was committed by a single assailant who broke into Mrs. M.'s home at gunpoint. Mr. Moon was convicted by a jury based on the eyewitness identification of the victim, and on testimony from a serologist from the Texas Department of Public Safety, who opined that Mr. Moon could not be excluded as the source of semen stains recovered from the assault.

Post-conviction DNA testing, however, has now revealed that Mr. Moon was not the perpetrator of this crime. Conducted pursuant to a 2002 unpublished Order of this Court (Baca, J.), under Texas' recently-enacted DNA testing statute (Art. 64.01 *et seq.* of the Code of Criminal Procedure), the new DNA test results definitively prove that Mr. Moon was not the source of semen recovered from the victim's rape kit and clothing with which she covered herself immediately after the assault. The tests further exclude the victim's husband and teenage son as the source of the semen in question, conclusively demonstrating that it came from the rapist – and that the rapist is not Mr. Moon.

[1] Although part of the court record, the victim's full name has been redacted here to protect her privacy.

On Friday, December 10, 2004, Mr. Moon's *pro bono* counsel from the Innocence Project in New York, New York, notified Jaime Esparza, the District Attorney of El Paso County, of these DNA results, and offered to provide Mr. Esparza with a copy of the final motion that counsel intended to file immediately to seek relief on Mr. Moon's behalf. (That motion and its supporting exhibits, including the DNA test results, is attached as the Appendix to this Motion.) Since receiving the draft motion, Mr. Esparza and his assistants worked quickly to review and verify the defendant's claims, and also conducted additional DNA testing on items of remaining evidence to confirm the prior DNA results and to remove any possible doubts about Mr. Moon's innocence.

On Wednesday, December 15, 2004, the District Attorney notified Mr. Moon's counsel that the final DNA tests had confirmed the DNA exclusions that Mr. Moon had asserted, and that he and his assistants agreed that Mr. Moon was innocent of the crimes for which he had been convicted. The District Attorney further stated his office would join Mr. Moon's counsel in an uncontested motion to obtain the required findings of fact and law under the state's post-conviction DNA and *habeas corpus* statutes that are necessary to vacate his convictions and dismiss the indictments. He further agreed that at a hearing before this Court, his office would consent to have Mr. Moon immediately freed on nominal (e.g., $1) bond, pending review and final adjudication of the Court's findings by the Court of Criminal Appeals.

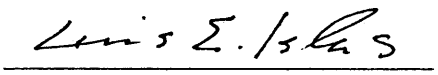
Upon agreement of the parties, Mr. Moon has now been transferred to the El Paso County Jail. The parties have also agreed upon the attached Proposed Findings for the Court's consideration.

WHEREFORE, defendant Brandon Moon, with the consent and cooperation of the Office of the District Attorney, hereby requests that this Court:

1. Schedule a hearing for ***1:00 p.m. on Tuesday, December 21, 2004***, or at the earliest possible date for the Court's and parties' convenience;
2. Consider the attached Agreed and Stipulated Findings and the record on which those findings are premised;
3. At the hearing, upon review of the record, grant the proposed Motion and enter Findings and Recommendation for relief under Art.64.04, 11.07, and 11.65; and
4. After the hearing, release the defendant on nominal bail pending final adjudication of the matter by the Texas Court of Criminal Appeals.

Respectfully submitted,

Dated: Dec. 21, 2004



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Nina Morrison, Esq.
Barry Scheck, Esq.
(Members, New York State Bar)
Innocence Project, Inc.
Benjamin N. Cardozo School of Law
100 Fifth Avenue, 3rd Floor
New York, New York 10011
Tel.: (212) 364-5350
Fax: (212) 364-5341

Laboratory Information Sheet

Case number: L4E- 41169
Analyst: (C)

Date: 11-8-02

Called John Davis 253-0275 to tell him Moon's std did not match semen stains - There are two males one on robe and one on comforter - but neither is moon. He said he will work on getting stds from son + husband to rule them out as contributors. - the robe belongs to the son

11-18-02
Called John Davis for an up date left msg.
Called back - had not spoken to Defense attorney would see them in court soon - asked to see if they would resample. moon - only have partial profile.

1/22/03 Called John Davis - said he had a court date coming up where he would see Defense attorney Scott Segall - will approach him + find out. Still have not located the family. Will call in two weeks.

2/4/03 - Scott Segall - he will locate the family - and get samples from Moon. (In progress hopefully)