

2016

**State of Utah, Plaintiff/Appellee v. Preston Michael Cowlshaw,
Defendant/Appellant**

Utah Court of Appeals

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STATE OF UTAH,
Plaintiff/Appellee,

v.

PRESTON MICHAEL
COWLISHAW,
Defendant/Appellant.

Case Number: 20160477-CA

BRIEF OF THE APPELLANT

Appeal from a conviction for kidnapping, a second degree felony, failure to respond at the command of police, a third degree felony and theft, a second degree felony in the Second District Court, State of Utah, the Honorable Ernie W. Jones, Judge, presiding.

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NATURE OF THE PROCEEDINGS AND JURISDICTION

Appeal from a conviction for kidnapping, a second degree felony, failure to respond at the command of police, a third degree felony and theft, a second degree felony in the Second District Court, State of Utah, the Honorable, Ernie W. Jones, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

1. Whether the trial court erred in finding sufficient evidence where no witness identified Mr. Cowlshaw as the perpetrator or as the person who stole the vehicle.

- a. Standard of Review: "When reviewing a bench trial for sufficiency of the evidence, we must sustain the trial court's judgment unless it is 'against the clear weight of the evidence, or if [we] otherwise reach[] a definite and firm conviction that a mistake has been made.'" *State v.*

Briggs, 2008 UT 75, ¶ 10, 197 P.3d 628 (quoting *State v. Gordon*, 2004 UT 2, ¶ 5, 84 P.3d 1167 (quoting *State v. Goodman*, 763 P.2d 786, 786–87 (Utah 1988) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)))).

- b. Preservation of the Argument: Mr. Cowlishaw argued that there was insufficient evidence due to the State’s failure to identify him. R. 111-12.

CONSTITUTIONAL OR STATUTORY PROVISIONS

The texts of the relevant Constitutional provisions and statutes are in Addendum A and B.

STATEMENT OF THE CASE

The State charged Mr. Cowlishaw on June 26, 2015. R. 1-2. On April 14, 2016, the case was tried to the court, who convicted Mr. Cowlishaw that same date. R. 188-331. On May 25, 2016, the court sentenced Mr. Cowlishaw to prison. R. 119-28. Mr. Cowlishaw timely appealed the conviction to this court on June 8, 2016. R. 139-40.

STATEMENT OF THE FACTS

On June 24, 2015, Officer Joel Green received a call of a domestic disturbance occurring at a toll booth in Ogden, Utah involving a grey vehicle. R. 196. He showed up on the scene, observed a grey vehicle and flipped a U-turn to get behind it. R. 198. The car stopped briefly and then took off at a high rate of

speed. R. 198-99. The officer pursued, activating his lights. R. 198-99. The officer lost the car at one point, then decided to check a field with tire tracks in it. R. 201. As he ran through the field, he heard a woman screaming for help down an embankment. R. 201-03. He looked down and saw the vehicle "wedged between the scrub oak and brush." R. 203-04. When the officer approached her, she said that "he wouldn't let her go" and that he had been holding her "all night, all day." R. 201. Officer Green, however, had no idea how many people were in the vehicle or who was the driver. R. 213.

Officers brought in canine units and set up a perimeter, but were unsuccessful in finding the driver. R. 207. They interviewed the woman, Rachel Jones, who told them she had been kidnapped by a person named Preston. R. 213, 226. She could not remember his last name. R. 214, 226. Deputy Michael Aschinger interviewed Jones, who showed him a text message saying, "Help, I have been kidnapped." R. 223. He also saw a text that said, "If you are interested in making some more \$\$ tonight, call me quick." R. 225. Jones had warrants for her arrest for drug possession and was taken into custody. R. 225, 272. Aschinger also observed that the car in the embankment was a "silver Nissan hatchback." R. 223.

Safwan Saad testified that his car, a sky blue 2010 Nissan Versa, was taken from his work when he left it briefly to run inside the office. R. 229-31. He did not see who took it, but when it was recovered, he did not recognize any of the items in it, which included garbage and food items. R. 234-36.

Sharon Leinweber testified that she was working at a toll booth when a silver car pulled up. R. 241. A girl jumped out and ran toward the office screaming, and video of this encounter was shown to the court. R. 241, State's Ex. 31 and 32. Leinweber asked the driver, a "white Caucasian with a baseball cap" what was going on. R. 242. He responded that the girl was drunk and that he would be back. R. 242. He backed up the car and followed the girl. R. 242-45. Leinweber called 911 and believed, but did not see, that the girl got back into the car. R. 247-48.

Rachel Jones testified that she met "Preston" once or twice before at her parents' home. R. 251. On the date of this incident, she said that he asked her if she wanted to get some food. R. 253. The two of them picked up food at Burger King in Salt Lake City and after, he continued to drive north past her house, saying he wanted to "get to know me more." R. 253.

As the two passed Lagoon, he asked for Jones's phone. R. 254. He then took it from her and removed its battery, saying it was a distraction. R. 254. He drove crazily and fast, which scared Jones. R. 255. She asked him to stop to swim or bowl but he did not do it. R. 255-56. They eventually stopped at a church near an elementary school and after he made her remove her shoes, he allowed her to use her phone. R. 256-57. She called her mother and when she said she wanted to go home, he again took the phone from her. R. 257.

He became sincere and told Jones he would take her home if she got back in the car. R. 258. She got back in. R. 258. As they continued to drive, she thought

he said “crazy things” and alternated emotions from calm to anger. R. 259. They stopped another time at a gas station/restaurant. R. 260.

Eventually, they pulled up to a toll booth. R. 261. When they stopped, Jones testified she jumped out of the car. R. 262. She ran toward the office screaming for help and when no one was there, she turned and ran up the hill, eventually collapsing. R. 262. He came back and told her to get in. R. 262. She agreed. R. 262.

When the police got behind them, he said that “[t]his can’t happen” and sped off, running a red light. R. 263. He crashed into a tree and then tried to pull her out of the car. R. 263. Because his door was pinned, he climbed over Jones and took off. R. 264. She was in the car with him approximately six hours. R. 259.

Officer Green told his superiors that he worried his case was not too strong. R. 210. Particularly, he was worried about the victim’s willingness to cooperate. R. 210. Consequently, he obtained a Burger King cup from the vehicle after Jones told him Preston had been drinking from it. R. 211. Fingerprint analysis of the cup and of prints obtained from the driver’s side window came back to Mr. Cowlshaw. R. 287-89.

SUMMARY OF THE ARGUMENT

The State failed to present sufficient evidence of all three offenses. No witness identified Mr. Cowlshaw as the person who kidnapped Jones or who was driving and failed to respond to the police. While Jones mentioned a “Preston,” at

no point did she say Mr. Cowlshaw was that person. Police never observed or apprehended the driver. Nor did any of the State's evidence establish that Mr. Cowlshaw took the vehicle or that the vehicle recovered was even the vehicle taken from Saad. No witness observed the theft and no witness testified that Mr. Cowlshaw illegally took possession of it. Additionally, no physical evidence linked Mr. Cowlshaw to the crime enough to say that he was the person who committed any of these offenses. The trial court erred in denying the motion for directed verdict.

ARGUMENT

POINT I

The trial court erroneously denied the motion for directed verdict given that no witness identified Mr. Cowlshaw as the driver of the vehicle or as the person who committed the crime, nor did they identify the car stolen as the same car recovered.

During trial, no witness specifically identified Mr. Cowlshaw as the person who kidnapped Jones, who failed to respond to police or who stole a motor vehicle. Nor did the State ever identify Saad's stolen vehicle as the same one police recovered. Jones was asked one question: "When did you see—and the defendant is in the courtroom today; is that correct? A. Yes." R. 252. But at no point did she say that the person who sat in the courtroom was the person who committed this

offense. Jones herself only referred to a "Preston" once and she made no other statements of identification. R. 257.¹

Defense counsel pointed this out to the court. "No one actually identified [Mr. Cowlshaw] today," he said. R. 298. Jones never pointed him out. R. 298. Nor did the toll booth operator identify him. R. 298. As Mr. Cowlshaw argued to the court, "[n]either [witness] was asked specifically if this individual sitting here is the individual involved in this case." R. 298.

The evidence did not remedy the identification problem. Deputy Green testified it was too dark for him to see the driver, Deputy Aschinger did not see the driver, nor did Mr. Saad see who took his vehicle. R. 213, 234, 298. Jones never stated "Preston's" last name, either to the police or in court. R. 299. As for the fingerprints, even that evidence was not conclusive. R. 299.

The State agreed it failed to formally identify Mr. Cowlshaw. But it contended that Jones "mentioned him as Preston several times" and "noded towards" him such that formal identification was "not necessary." R. 302-03. It also argued that it did not need to formally identify him because fingerprint evidence put him in the vehicle. R. 303.

The court rejected the identification argument. It agreed that Mr. Saad "never identified the car that we see in the photographs 15, 16, and 17 as being his car." R. 305. But the court found that circumstantially, because Mr. Saad came up

¹ The State also asked her, "did you know the defendant, Preston Cowlshaw?" to which she replied "I had met him shortly once or twice, maybe three times." R. 251.

and looked at a car which was “completely totaled” which was “consistent with the condition of the car” in the photographs, the two cars were the same. R. 305-06.

The court also believed there was no question “that the defendant was the one involved in the theft of this motor vehicle based on the location of the fingerprints.” R. 306.

As for his identification, the court found that while Jones “may not have come out and made an identification” she said the man driving was “Preston.” R. 306. “[I]t just so happens that the defendant’s first name is Preston. So while she may not have pointed to him and made a formal identification in court, I think when you couple the fingerprints and both of them being in the car, and him having the name Preston, I think that’s enough to establish the identification.” R. 306.

A. THERE WAS INSUFFICIENT EVIDENCE THAT MR. COWLISHAW WAS THE PERSON WHO KIDNAPPED JONES OR FAILED TO RESPOND TO POLICE WHEN NO WITNESS IDENTIFIED HIM AS THAT PERSON.

The State never established that the person sitting at the defense table—Preston Cowlshaw—was the person who kidnapped Jones or who avoided the police. Jones only stated that she believed the person’s name was Preston—she never testified that his name was Preston Cowlshaw. Additionally, she never took the simple step of pointing out the person in the courtroom. *State v. Harrington*, 2002-Ohio-2190, ¶ 12, 2002 WL 987836 (finding insufficient evidence where witness failed to make an in-court identification). While she agreed that the

“defendant” was in the courtroom, she did not indicate whether the defendant was Mr. Cowlshaw. These were critical errors that created an insufficient identification and ultimately amounted to insufficient evidence to support a conviction.

“A conviction not based on substantial reliable evidence cannot stand.” *State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 288. Further, “a defendant need not adduce any evidence in his defense unless the prosecution first adduces believable evidence of all the elements of the crime charged.” *State v. Smith*, 675 P.2d 521, 524 (Utah 1983). A “motion to dismiss for insufficient evidence at the conclusion of the State’s case in chief requires the trial court to determine whether the defendant must proceed with . . . his defense.” *State v. Noren*, 74 P.2d 568, 570 (Utah 1985) (citations omitted). “When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.” Utah Code Ann. § 77-17-3; *see* Utah R. Crim. P. 17(p).

This court will hold that there was insufficient evidence if “after viewing the evidence and all inferences drawn therefrom in a light most favorable to the jury’s verdict, the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted.” *State v. Holgate*, 2000 UT 74, ¶ 18, 10 P.3d 346 (quoting *State v. Dunn*, 850 P.2d 1201, 1212 (Utah 1993)).

The State argued that the circumstantial evidence was sufficient to establish Mr. Cowlshaw’s identity and the court agreed. The court focused on two facts:

Jones' indication that the person was named Preston and fingerprints in the car belonged to Mr. Cowlshaw. The two facts, taken together, the court said were sufficient to establish his identity. R. 306.

1. A person's name as "Preston" was not a sufficient basis to identify Mr. Cowlshaw

However, at no point, pre-trial or otherwise, did Jones identify Mr. Cowlshaw. The police did not do an in-person or a photo lineup. They did not have her point to a person in court. "An uncertain or equivocal identification, standing alone, is insufficient evidence to support a conviction." *Gibson v. State*, No. 01-92-00127-CR, 1993 WL 55192, at *2 (Tex. App. Mar. 4, 1993). Here, there was no identification at all.

The fact that Jones agreed with the prosecutor's question that the defendant was in the courtroom does not solve the problem. Jones could have picked someone else (not Mr. Cowlshaw) in the courtroom as the person in the vehicle, believing that person was the defendant. See *Jones v. State*, 1985 OK CR 14, 695 P.2d 13, 16 (insufficient evidence as to identity where witness identified defendant's brother, who was in the courtroom, as the perpetrator). Or she could have been agreeing that the defendant was present, but not agreeing that the defendant was the person who committed the crime.

The fact that the perpetrator was named Preston establishes nothing in terms of identity. The social security index reveals that for the year of Mr. Cowlshaw's birth alone—1989—Preston was the 73rd most popular male baby

name in the State of Utah, having received 62 registrations.² The name of Preston was too probable and insufficiently unique to positively identify Mr. Cowlshaw. Notably, Jones did not know “Preston’s” last name and while there was some testimony that an officer received a last name from Jones’s stepfather, the stepfather never testified, nor did the officer state the last name. R. 226.

No other witness identified Mr. Cowlshaw. The State never asked the toll booth operator if Mr. Cowlshaw was the person she spoke with. Neither police officer interacted with the driver or observed him.

2. Fingerprint evidence did not establish that Mr. Cowlshaw committed the crime or was even present at that time.

Additionally, the fingerprint evidence does not establish that Mr. Cowlshaw was the person who committed these offenses. First, as defense counsel argued to the court, fingerprint evidence has come into large disrepute. The National Academy of Sciences, the most illustrious scientific body in the nation, having conducted an exhaustive and unprecedented examination of latent fingerprint analysis, concluded that fingerprint examiners “have yet to establish either the validity of their approach or the accuracy of their conclusions ...”³ In

² <https://www.ssa.gov/cgi-bin/namesbystate.cgi> (search “Preston” in “1989” for the State of Utah).

³ *Strengthening Forensic Science in the United States: A Path Forward* (The National Academies Press, 2009), 53, http://www.nap.edu/openbook.php?record_id=12589; see also *ibid.*, 102 (“Over the years the courts have admitted fingerprint evidence, even though this evidence

reaching these conclusions, the NAS examined the standard methodology employed by fingerprint examiners and found that it provides “only a broadly stated framework for conducting [fingerprint] analyses,” that “is not specific enough to qualify as a validated method.”⁴ The NAS concluded that there is no “available scientific evidence of the validity of [the fingerprint analysis] method.”⁵ Accordingly, the NAS, in no uncertain terms, concluded that fingerprint examiners are “unjustified” in claiming the ability to match a latent fingerprint to a particular finger to the exclusion of all others in the world.⁶

The state and federal courts of this nation have a long history of treating the reports of the NAS as “authoritative works for purposes of determining generally accepted standards within the scientific community.” *Com. v. Gaynor*, 820 N.E.2d 233, 250 (Mass. 2005); *United States v. Morrow*, 374 F. Supp.2d 42, 49 (D.D.C. 2005). In light of the impartiality and expertise that are the hallmarks of the NAS, courts, including Utah courts, have uniformly recognized that the conclusions of the NAS regarding the scientific validity of a particular methodology are “authoritative.”⁷

has made its way into the courtroom without empirical validation of the underlying theory and/or its particular application.”).

⁴ *Strengthening Forensic Science*, 142.

⁵ *Ibid.*, 143.

⁶ *Ibid.*, 142; *see also* *ibid.*, 7 (recognizing that fingerprint analysis has not been “shown to have the capacity of consistently, and with a high degree of certainty, demonstrat[ing] a connection between evidence [i.e, a latent print] and a specific individual or source.”).

⁷ *See, e.g., United States v. Lowe*, 954 F.Supp. 401, 403 (D. Mass. 1996) (“both the government and the defendant agree [the NRC report] is an authoritative work in

In *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003) the court noted that with respect to forensic fingerprint examination, there have “not been any studies to establish how likely it is that partial prints taken from a crime scene will be a match for only one set of finger prints in the world.” *Crisp*, 324 F.3d at 273. “While fingerprint examiners have long claimed the mantle of science so as to bolster the credibility of their profession, the reality is that the fingerprint community has never conducted any scientific testing to validate the premises upon which the field is based.”⁸ As one scholar noted, fingerprint science ultimately comes down to the subjective interpretation of an examiner, but not to any solidified science: “[W]here a method depends as heavily on subjective human judgment as does

the field”); *State v. Butterfield*, 27 P.3d 1133, 1142 (Utah 2001) (describing NRC report as “authoritative”); *Commonwealth v. Rosier*, 685 N.E.2d 739 (Mass. 1997) (describing NRC report as “an authoritative scientific study”); *People v. Allen*, 72 Cal.App.4th 1093, 1100 (Cal. App. 1999) (describing NRC report as “an authoritative scientific study”); *State v. Kinder*, 942 S.W.2d 313, 327 (Mo. 1996) (describing NRC report as “authoritative”); *Commonwealth v. Bly*, 862 N.E.2d 341, 355 (Mass. 2007) (describing NRC report as “authoritative”); *People v. Wilson*, 136 P.3d 864, 868 n.1 (Cal. 2006) (describing NRC report as “authoritative”); *see also United States v. Davis*, 602 F. Supp. 2d 658, 663 n.4 (D. Md. 2009) (noting that NRC report on DNA is “widely regarded as one of the definitive publications on the use of DNA evidence in the field of forensics”); *United States v. Trala*, 162 F. Supp. 2d 336, 351 (D. Del. 2001) (“Both the government and the defendant agree that the NRC [report] is widely regarded as one of the definitive publications on the use of DNA evidence in the field of forensics.”); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 15 (D. Mass. 1995) (“The most authoritative assessments of the health effects on humans of ionizing radiation are the periodic reports issued by the National Research Council of the National Academy of Sciences . . .”).

⁸ Robert Epstein, “Fingerprints Meet Daubert: The Myth of Fingerprint Science Is Revealed,” *S. Cal. L. Rev.* 75 (2001): 622, 636.

fingerprint examination—the method literally is the people who employ it.”⁹ To make matters worse, the fingerprint examiners’ efforts “to create an error-free aura around fingerprint identification ... ha[ve] the potential to dangerously mislead finders of fact.”¹⁰

Latent prints typically suffer from a considerable degree of smudging, blurring, and distortion because “[c]rime scene prints are unintentional, chance prints for which there is no thought (or desire) to produce a clear reproduction.”¹¹ The distortions in latent prints stem from a number of sources: (1) the surface upon which the print is deposited can affect the quality of the print either because it is less receptive to the deposit of a print in the first place,¹² or because it makes the

⁹ Jonathan J. Koehler, “Fingerprint Error Rates and Proficiency Tests: What They Are and Why They Matter,” *Hastings Law Journal* 59 (2008 2007): 1090 (footnotes omitted).

¹⁰ Simon A. Cole, “More than Zero: Accounting for Error in Latent Fingerprint Identification,” *The Journal of Criminal Law and Criminology* (1973-) 95, no. 3 (2005): 991.

¹¹ John P. Nielson, “Rebutting the ‘No Fingerprint’ Defense,” *Prosecutor* 39 (December 2005): 34; Andre A. Moenssens, *Scientific Evidence in Civil and Criminal Cases* (Foundation Press, 1995), 514..

¹² David R. Ashbaugh, *Quantitative-Qualitative Friction Ridge Analysis: An Introduction to Basic and Advanced Ridgeology* (Boca Raton, Fla.: CRC Press, 1999), 124 (“various substrates [surfaces] can cause distortion or interfere with the deposition of a print, affecting its appearance and quality.”); Nielson, “Rebutting the ‘No Fingerprint’ Defense,” 34 (“Objects that are extremely porous or are made using coarse fibers prove to be poor receiving surfaces.”); G. A. Fine, “A Review of the FBI’s Handling of the Brandon Mayfield Case,” *Washington, DC: US Department of Justice Office of the Inspector General*, 2006, 103 (“One factor affecting the clarity of a latent fingerprint is the surface or “substrate: upon which a latent fingerprint is deposited.”).

transfer of a print by law enforcement more complicated;¹³ (2) the shape of the ridges can be distorted or blurred by the amount of pressure used to deposit the print;¹⁴ (3) movement of the finger while the print was deposited can distort the print, as "movement of the finger by a distance equal to the width of one furrow between ridges (1 to 2/100ths of an inch) is sufficient to blur a print beyond use;¹⁵ (4) overlapping or "double tap" prints can "obscure details in each print;¹⁶ (5) prints can be compromised by materials that are either on the surface where the print has been deposited, or on the finger or thumb of thumb itself;¹⁷ and (6)

¹³ Nielson, "Rebutting the 'No Fingerprint' Defense," 34 ("If the surface is uneven, only partial transfer will result leaving a print that is of no real value for identification. If the surface is rough, fingerprint powder may become trapped in the recesses causing such a loss of contrast as to obscure latent impressions.").

¹⁴ Ibid. ("Because blurring due to rotational, lateral or longitudinal movement, deformation of the finger as it presses firmly against a surface typically causes some distortion and edge blurring."); Ashbaugh, *Quantitative-Qualitative Friction Ridge Analysis*, 123 ("Deposition pressure generally changes the shape of the friction ridge by flattening or broadening each ridge.").

¹⁵ Nielson, "Rebutting the 'No Fingerprint' Defense," 34 (citing problem of "fingerprints deposited while the surface or hand was moving causing slippage and resulting in only partial clarity"); Ashbaugh, *Quantitative-Qualitative Friction Ridge Analysis*, 125 ("pressure distortion takes place on the lateral or horizontal place [and] is usually accompanied by sideways sliding of the friction ridges resulting in a smearing or ridge matrix.").

¹⁶ Nielson, "Rebutting the 'No Fingerprint' Defense," 34; Ashbaugh, *Quantitative-Qualitative Friction Ridge Analysis*, 114; Fine, "A Review of the FBI's Handling of the Brandon Mayfield Case," 103.

¹⁷ Ashbaugh, *Quantitative-Qualitative Friction Ridge Analysis*, 116 ("Dirty surstrates [surfaces] may not accept all of the matrix [substance deposited by the fingertip] available during deposition. The resulting print can appear blotchy, have areas missing, or generally lack details."); Nielson, "Rebutting the 'No Fingerprint' Defense," 36 ("Depositing surface interferences include any contaminant on the friction ridges that hinders or prevents the deposit of fingerprint residue. For instance, dirt, grease and other foreign matter can obliterate the fine detail that must be present to effect an identification.").

fingerprints are developed and transferred by a variety of methods, all of which have the potential to cause distortions.¹⁸ “Because of these factors, latent fingerprints are not perfect reproductions of the friction skin, even over a small area.”¹⁹

Traditionally, examiners when comparing prints have looked for “ridge characteristics,” points along a particular ridge where something occurs: for example, a ridge might come to an end, a “ridge ending,” or bifurcate into two ridges, a “bifurcation.”²⁰

It is commonly believed that an average human fingerprint contains between 75 and 175 ridge characteristics.²¹ But there is no standard agreement among fingerprint examiners as to either the precise number or nomenclature of the different characteristics.²² Given the typically small size of latent prints, and given the amount of distortion that many latent prints suffer, fingerprint examiners

¹⁸ Ashbaugh, *Quantitative-Qualitative Friction Ridge Analysis*, 117 (“Improper procedures, and especially efforts to correct those improper procedures, can cause various alterations in the lifted print.”); *ibid.*, 117–18 (describing incident where lifting tape caused alteration of several of the major ridge path deviations and error was only discovered because print had been photographed prior to lifting); Fine, “A Review of the FBI’s Handling of the Brandon Mayfield Case,” 103 (“Each development medium can affect the appearance of a latent print and the accuracy with which the details are reproduced.”).

¹⁹ Fine, “A Review of the FBI’s Handling of the Brandon Mayfield Case,” 104.

²⁰ Ashbaugh, *Quantitative-Qualitative Friction Ridge Analysis*, 141.

²¹ Federal Bureau of Investigation, “Law Enforcement Bulletin: An Analysis of Standards in Fingerprint Identification,” June 1972, 1.

²² James F. Cowger, *Friction Ridge Skin: Comparison and Identification of Fingerprints* (Elsevier, 1983), 143 (“The terms used to define and describe these characteristics vary markedly among writers in the field and differ even among examiners depending upon the organization in which they were trained.”).

often are in the position of making identifications on the basis of very limited information.²³ In many published decisions, for example, identifications were made on less than fifteen common ridge characteristics, even though as discussed above, a full fingerprint is thought to have between 75 and 200.²⁴

It has been well documented that different people can share a number of fingerprint ridge characteristics in common.²⁵ There have been no scientific studies performed that can reasonably serve to predict the probability of such events occurring. During the course of the past century, about a dozen or so fingerprint

²³ Fine, "A Review of the FBI's Handling of the Brandon Mayfield Case," 99 ("In many latent prints, only a small fraction of the friction ridge detail on a complete finger is reproduced.")

²⁴ *United States v. Durant*, 545 F.2d 823, 825 (2d Cir. 1976) (fourteen points); *Garrison v. Smith*, 413 F. Supp. 747, 761 (N.D. Miss. 1976) (twelve points); *Magwood v. State*, 494 So.2d 124, 145 (Ala. Crim. App. 1985) (eleven points); *Ramirez v. State*, 542 So.2d 352, 353 (Fla. 1989) (ten points); *People v. Alexander*, 571 N.E.2d 1075, 1078 (Ill. App. Ct. 1991) (eleven and fourteen points); *People v. Garlin*, 428 N.E.2d 697, 700 (Ill. App. Ct. 1981) (twelve points); *State v. Murdock*, 689 P.2d 814, 819 (Kan. 1984) (twelve points); *State v. Starks*, 471 So.2d 1029, 1032 (La. Ct. App. 1985) (twelve points); *People v. Jones*, 344 N.W.2d 46, 46 (Mich. Ct. App. 1983) (ten points); *State v. Jones*, 368 S.E.2d 844, 846 (N.C. 1988) (ten points); *State v. Cepce*, 1991 WL 57237, at *1 (Ohio Ct. App. 1991) (eleven points); *Commonwealth v. Ware*, 329 A.2d 258, 276 (Pa. 1974) (nine points); *Commonwealth v. Hunter*, 338 A.2d 623, 624 (Pa. Super. Ct. 1975) (fourteen points); *Commonwealth v. Walker*, 116 A.2d 230, 234 (Pa. Super. Ct. 1955) (four points); *State v. Awiis*, 1999 WL 391372, at *7 (Wash. Ct. App. 1999) (eight points).

²⁵ Y. Mark & D. Attias, *What Is the Minimum Standard of Characteristics for Fingerprint Identification?*, 22 FINGERPR. WHORL 148 (1996) (discussing prints from different people with substantial similarity and recognizing that "an expert with many years of experience behind him" could make a false identification when comparing two such prints); JAMES W. OSTERBURG, *THE CRIME LABORATORY: CASE STUDIES OF SCIENTIFIC CRIMINAL INVESTIGATION* 132 (1968) (discussing fingerprints from different people with ten matching characteristics); Fine, "A Review of the FBI's Handling," at 130 (recognizing the substantial similarity between a fingerprint from Brandon Mayfield and a latent print deposited by another person).

probability models have been proposed.²⁶ “None of these [models] even approaches theoretical adequacy, however, and none has been subjected to empirical validations.”²⁷ Consequently, “these models *occupy no role* in the routine professional practice of fingerprint examination.”²⁸

Given the absence of probability studies, latent print examiners do not offer opinions of identification in terms of probability. Instead, latent print examiners make the claim of “absolute certainty” for their identifications. Examiners provide an opinion that the latent print at issue was made by a particular finger to the exclusion of all other fingerprints in the world.²⁹ Such assertions of absolute certainty, however, are inherently unscientific. The National Academy of Sciences concluded that such opinions of absolute certainty by fingerprint examiners are plainly “unjustified.”³⁰

Having conducted an exhaustive and unprecedented examination of the various forensic identification fields, including latent fingerprint analysis, the NAS concluded that fingerprint examiners “have yet to establish either the validity of

²⁶ David L. Faigman, *Modern Scientific Evidence: The Law and Science of Expert Testimony* (St. Paul, Minn.: West Group, 2002), sec. 21–2.3.1, at 72; David A. Stoney and John I. Thornton, “A Critical Analysis of Quantitative Fingerprint Individuality Models,” *Journal of Forensic Sciences* 31, no. 4 (1986): 1193.

²⁷ Faigman, *Modern Scientific Evidence*, sec. 21–2.3.1, at 72.

²⁸ *Ibid.*, sec. 21–2.3.1, at 72 (emphasis in original).

²⁹ Fine, “A Review of the FBI’s Handling of the Brandon Mayfield Case,” 111 (“FBI laboratory fingerprint examiners only express a conclusion of individualization in terms of absolute certainty with a zero likelihood that the latent fingerprint was made by a different person.”).

³⁰ *Strengthening Forensic Science*, 142.

their approach or the accuracy of their conclusions.”³¹ In reaching these dramatic conclusions, the NAS specifically examined the standard ACE-V methodology employed by fingerprint examiners. As the NAS recognizes, ACE-V provides only a “broadly stated framework for conducting friction ridge analyses” and “is not specific enough to qualify as a validated method . . .”³² The report provides

ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results. A recent paper by Haber and Haber presents a thorough analysis of the ACE-V method and its scientific validity. Their conclusion is unambiguous: “We have reviewed available scientific evidence of the validity of the ACE-V method and found none.”³³

The NAS also considered the claim of fingerprint examiners that “the [ACE-V] method, if followed correctly (i.e., by well-trained examiners properly using the method) has a zero error rate.”³⁴ In unambiguous language, the NAS dismisses this assertion:

Clearly, this assertion is unrealistic, and moreover, it does not lead to a process of method improvement. The method, and the performance of those who use it, are inextricably linked, and both

³¹ *Strengthening Forensic Science*, 53; see also *ibid.*, 102 (“Over the years the courts have admitted fingerprint evidence, even though this evidence has made its way into the courtroom without empirical validation of the underlying theory and/or its particular application.”).

³² *Strengthening Forensic Science*, 142.

³³ *Ibid.*, 142–43; The NAS also notes that the “ACE-V method does not specify particular measurements or a standard test protocol, and examiners must make subjective assessments throughout.” *Ibid.*, 139.

³⁴ *Strengthening Forensic Science*, 143.

involve multiple sources of error (e.g., errors in executing the process steps, as well as errors in human judgment).³⁵

The NAS also recognized that the fundamental issue in latent fingerprint analysis was not the uniqueness of each person's fingers, but the ability of examiners to accurately make identifications from the small, distorted fragments of fingerprints detected at crime scenes.³⁶ As the NAS further explained,

Uniqueness and persistence are necessary conditions for friction ridge identification to be feasible, but those conditions do not imply that anyone can reliably discern whether or not two friction ridge impressions were made by the same person. Uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused, or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source. The impression left by a given finger will differ every time, because of inevitable variations in pressure, which change the degree of contact between each part of the ridge structure and the impression medium. None of these variabilities—of features across a population of fingers or of repeated impressions left by the same finger—has been characterized, quantified, or compared.³⁷

The NAS thus recognized that to “properly underpin the process of friction ridge identification, ... research is needed into ridge flow and crease pattern distributions on the hands and feet ... and the discriminating value of the various ridge formations and clusters of ridge formation”³⁸ Contrasting fingerprint analysis

³⁵ Ibid.

³⁶ Ibid., 43 (“The question is less a matter of whether each person's fingerprints are permanent and unique – uniqueness is commonly assumed – and more a matter of whether one can determine with adequate reliability that the finger that left an imperfect impression at a crime scene is the same finger that left an impression [with different imperfections in a file of fingerprints.]”).

³⁷ Ibid., 144.

³⁸ Ibid.

with DNA evidence, the NAS observed that “population statistics for fingerprints have not been developed, and friction ridge analysis relies on subjective judgments by the examiner.”³⁹ The NAS further recognized that, while “little research has been directed toward developing population statistics, ... more would be feasible.”⁴⁰

Given the lack of research that has been conducted in the fingerprint field, the NAS explicitly stated that fingerprint examiners’ routine claim—that they can match a latent print to the one and only person in the entire world who produced it—was “unjustified.”⁴¹ As the NAS explained,

At present, fingerprint examiners typically testify in the language of absolute certainty. Both the conceptual foundations and the professional norms of latent fingerprinting prohibit experts from testifying to identification unless they believe themselves certain that they have made a correct match. Experts therefore make the claim that they have matched the latent print to the one and only person in the entire world whose fingertip could have produced it ... Given the general lack of validity testing for fingerprinting; the relative dearth of difficult proficiency tests; the lack of a statistically valid model of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified.⁴²

Thus, as the NAS recognized, fingerprint analysis has not been “shown to have the capacity of consistently, and with a high degree of certainty, demonstrate a

³⁹ Ibid., 139.

⁴⁰ Ibid., 139–40.

⁴¹ Ibid., 142; quoting Jennifer L. Mnookin, “Validity of Latent Fingerprint Identification: The Confessions of a Fingerprinting Moderate,” *Law, Prob. & Risk* 7 (2008): 127.

⁴² *Strengthening Forensic Science*, 142.

connection between evidence [i.e, a latent print] and a specific individual or source.”⁴³

While defense counsel did not present this massive body of research to the court—nor did he challenge the fingerprint finding itself—he did alert the court to this issue, observing that fingerprint evidence is not conclusive and that it lacked proper standards. R. 298. Therefore, the court could not take the fingerprint evidence as a given match to Mr. Cowlshaw. If anything, the court could have seen it as potential evidence linked to Mr. Cowlshaw, but not as proof.

But even if the fingerprints belonged to Mr. Cowlshaw, they do not establish that he committed the crime. The fingerprints merely establish that he touched the car’s window at some point and that a cup he touched was in the car. Absent evidence identifying him as the perpetrator, which never happened here, the fingerprints become meaningless. *See* discussion point I.B., *infra*.

For these reasons, the State insufficiently proved that Mr. Cowlshaw committed any of these offenses because it failed to establish his identity. The court erred in failing to dismiss these charges.

**B. THERE WAS INSUFFICIENT EVIDENCE THAT MR. COWLISHAW
COMMITTED A THEFT OF A VEHICLE WHEN THE ONLY
EVIDENCE TYING HIM TO THE THEFT WERE HIS
FINGERPRINTS**

The State presented two pieces of evidence supporting a car theft. Mr. Saad testified that his car was taken while he went into his office. R. 230-31. He did not

⁴³ *Ibid.*, 7.

see who took the car, however. R. 234. The only other evidence was Mr. Cowlshaw's fingerprints. R. 287-89. But those fingerprints do not establish that Mr. Cowlshaw took the vehicle. No witness testified as to how the car came into Mr. Cowlshaw's possession.

If fingerprint evidence alone can be sufficient to convict one of a theft of a vehicle, then any innocent person could be convicted if she happens to merely touch a stolen vehicle. Instead, the State must produce some evidence to meet the elements of the offense. Here, the State must show that Mr. Cowlshaw had the "intent to deprive" Saad of his motor vehicle. Utah Code Ann. § 76-6-404 (defendant must have the "purpose to deprive" the owner of his property); *State v. Cornish*, 568 P.2d 360, 362 (Utah 1977).

This case is similar a case in which the Utah Supreme Court found insufficient evidence. In *State v. Franks*, the defendant was stopped for a traffic violation and subsequently arrested. *State v. Franks*, 649 P.2d 3, 4 (Utah 1982). When officers searched the impounded vehicle, they found title belonging to someone else. *Id.* Officers contacted the owners, who came and recovered their car. *Id.* The court found insufficient evidence to support the theft charge, since the State failed to prove that the defendant's use of the vehicle was not authorized. *Id.*

Here, while Saad did not know Mr. Cowlshaw or allow him to take his car, there was no evidence that Mr. Cowlshaw in fact drove the vehicle, as discussed *supra*. But even more importantly, even had he done so, there is no evidence that Mr. Cowlshaw was the person who took the vehicle at the office. His prints could

have arrived there at any time after. For example, Jones could have taken the vehicle or anyone else for that matter. If that person represented to Mr. Cowlshaw that he could drive the vehicle, then Mr. Cowlshaw would have lacked the requisite intent—a purpose to deprive the owner of the vehicle. Critically, the fingerprint evidence says absolutely nothing about intent. *See State v. Morrell*, 89 Utah 498, 118 P. 215 (1911) (insufficient evidence for a theft where defendant lacked the intent to take property).

Nor did the State present any evidence that Mr. Cowlshaw stole the car. The only evidence they presented was a statement of Mr. Cowlshaw's that "I've been stealing vehicles since I was 17." R. 208. But this statement came when the officer said Mr. Cowlshaw was "extremely high" "just saying crazy off the wall things," such as that the officer was "being controlled by the government with microchips and radiation." R. 208. This statement does not qualify as an admission that Mr. Cowlshaw took a vehicle.

This case nearly mirrors one in which the Utah Supreme Court found insufficient evidence. In that case, a truck with a camper disappeared from a used car lot. *State v. George*, 25 Utah 2d 330, 331, 481 P.2d 667, 667 (1971). About a week later, two witnesses testified that the defendants brought the camper to their place and that they found a buyer for it. *Id.*

"There was no evidence," the court said, "as to whether the defendants or either of them or neither of them took the truck and camper, save by way of inference from their presence when the camper was left and sold ..." *Id.* The court

was left to “indulge an inference upon an inference that could lead but to conjecture not justifying a conclusion that a theft was accomplished by both or either of the defendants beyond a reasonable doubt and to the exclusion of any reasonable hypothesis other than theft.” *Id.* Consequently, it reversed the conviction.

Similarly, Mr. Cowlshaw’s print was found on the vehicle, but there was no testimony establishing that he took the car other than an “inference upon an inference that could lead but to conjecture ...” *Id.* The court had to infer that because Mr. Cowlshaw’s print was on the vehicle, he must have been driving it. From there, it would have to infer that because he was driving, he must have taken the vehicle from Saad. From there, it had to infer that he had the intent to steal the vehicle. One’s fingerprints are simply not enough to make the repeated inferential chain.

Finally, the State never linked the two automobiles together. “[I]t is clear that the State must definitely identify the goods found in the defendant’s possession as the goods which were charged to have been stolen before the jury may draw an inference of guilt based upon the proof of possession by the defendant.” *State v. Hall*, 105 Utah 162, 145 P.2d 494, 496 (1944). Saad testified that he owned a “sky blue” Nissan Versa and one officer said the car was blue. R. 148, 230. Yet Saad never identified the crashed vehicle as his and three witnesses testified that the car was silver or grey in color. R. 147, 196, 197-98, 212, 223, 241, 243.

The problem could have been fixed by simply asking Mr. Saad if the recovered vehicle was in fact his. But the State would also have to correct the inferential chain by having Jones and officers identify the crashed vehicle as the one she rode in and/or the one they chased. But the State failed to take those steps, and absent that effort, the court lacked sufficient evidence to convict Mr. Cowlshaw of theft of a motor vehicle.

CONCLUSION

The court erred in convicting Mr. Cowlshaw when there were two insufficiencies. First, there was no evidence that Mr. Cowlshaw was the person who committed kidnapping or failing to respond to the police since no witness identified him. Second, there was insufficient evidence that Mr. Cowlshaw committed a theft of a vehicle when none of the evidence established that he illegally took the car with the intent to steal.

RESPECTFULLY SUBMITTED this 18 day of November, 2016.

/s/ Samuel P. Newton
SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

RULE 24 CERTIFICATE OF COMPLIANCE

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Baskerville 13 point, and contains 7206 words, excluding the table of contents, table of authorities, and addenda.

/s/ Samuel P. Newton
SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

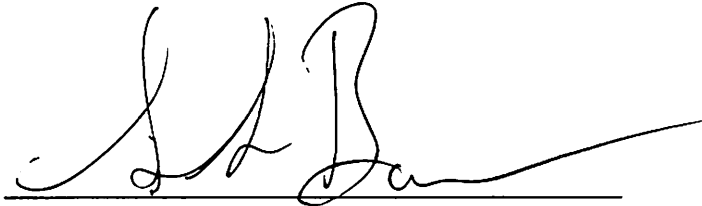
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Tab A

ADDENDUM A

Constitutional Provisions

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CONSTITUTION

ARTICLE I, SECTION 7. [DUE PROCESS OF LAW.]

No person shall be deprived of life, liberty or property, without due process of law.

ARTICLE I, SECTION 12. [RIGHTS OF ACCUSED PERSONS.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

Tab B

ADDENDUM B
Statutory Provisions

Utah Code Ann. § 76-6-404. Theft -- Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Ann. § 77-17-3. Discharge for insufficient evidence.

When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged.

Utah R. Crim. P. 17(p)

(p) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Tab C

ADDENDUM C

Motion for Directed Verdict

1 THE COURT: Okay.

2 CLOSING ARGUMENTS OF COUNSEL

3 MR. TREE: Your Honor, you've received the evidence in
4 this case. We have charged the defendant with three different
5 charges. The first charge is that of kidnaping. We're going
6 forward on two different theories, both of which the evidence
7 today supports both of those theories.

8 The first theory is that the defendant intentionally,
9 knowingly without authority of the law detained or restrained the
10 victim in this case, Rachel Jones, for any substantial period of
11 time. In this case, the testimony was that at least beginning in
12 Clinton and possibly even before, the defendant was restraining
13 her, detaining her, driving her around against her will. She
14 asked him to take her home several times. He had her phone as a
15 means to keep her with him. He made several promises to take her
16 home, but he continued against her will to drive throughout Davis
17 and Weber County, driving as she put it, very dangerously.
18 From -- she goes with him around 4:30 to 5, and she shows up at
19 the toll booth at 10:30.

20 The second theory is that he detained or restrained her
21 in circumstances exposing her to risk of bodily injury. That
22 also -- the State has provided evidence to support that theory.
23 Specifically -- as your Honor is well aware, that bodily injury
24 is -- the definition of bodily injury is very slight physical
25 injury. It doesn't require serious bodily injury or death, but

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1 certainly the ride just -- if we just look at nothing else but
2 the toll booth and the evading chase that he took Rachel on, that
3 in and of itself would satisfy the kidnaping under that theory.
4 I'll just play this for just a moment, your Honor.

5 (Video plays in open court)

6 If you remember, your Honor, at this point the defendant
7 says that he's not going to let this happen, this can't happen
8 and begins going at a high rate of speed down Adams Parkway. The
9 lights, the siren -- the lights at this point are going 10:30 at
10 night, 10:50. There's a construction area before the hospital.
11 Here come the siren on.

12 You can see the increase -- obvious increase in speed by
13 the defendant and by Deputy Green, flipping through these cones
14 are the first traffic light, and then the most -- the dangerous
15 one on 89. As you can see the speed of Deputy Green got to
16 almost 85 there following him, red light. We heard the testimony
17 of Rachel that they were nearly hit in that intersection. Then
18 the defendant willfully or wantonly continues down the dead end
19 road, through the field and down the steep embankment.

20 This -- from the toll both to the steep embankment
21 alone, the Court has been provided with enough facts that the
22 defendant had detained or restrained the victim in circumstances,
23 exposing her to risk of bodily injury. Add to the fact his
24 driving pattern, his -- the donuts, the dangerous driving that he
25 had been doing prior to that starting in Clinton, and that the

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1 State has certainly met that on many different counts, has met
2 the burden on kidnaping under that theory. But under both
3 theories the Court could find -- should find the defendant is
4 guilty of kidnaping.

5 The second charge that the Court -- the State has filed
6 is evading or failure to respond to an officer's signal to stop.
7 Obviously we just watched State's Exhibit -- I believe it was No.
8 32 where Deputy Green made both an audio and visual signal to the
9 defendant to stop, and he refused to stop. He certainly did so
10 in a willful or wanton manner, and the other theory is he was
11 attempting to avoid law enforcement.

12 Finally, your Honor, the third charge that the State has
13 charged the defendant with is theft. When the defendant -- we
14 look at one of the most important pieces of evidence on -- on the
15 theft is Exhibit 24. You had testimony from the victim in this
16 case that his vehicle was stolen sometime from 3:30 to 4. You
17 had further testimony from Detective Colvin that the dispatch
18 report actually shows it was closer to 4:30.

19 From the Bimbo Bakery, which is marked in State's
20 Exhibit 24, to just a little under a mile away from where Rachel
21 was at when the defendant took her for the ride of her life, she
22 said they left sometime between 4:30, 5. Certainly the defendant
23 going -- taking the vehicle, going and picking her up indicates
24 that he was the person that stole the motor vehicle.

25 Then later on his actions, his fleeing from the police

1 go -- only support and confirm that he was the one -- he knew
2 that the vehicle was stolen, that he had obtained unauthorized
3 control of the vehicle, and that he was trying to avoid detection
4 during that ride with Rachel.

5 Then finally, your Honor, one thing that had been raised
6 by the defense is the identify of the defendant. I think that
7 the State has provided the Court with ample evidence to support
8 that the defendant was in fact the person that committed these
9 offenses. The victim talked to the Court about her knowledge,
10 her acquaintance with the defendant. She ID'd him in court, and
11 then we have the fingerprint mat -- comparison, which indicated
12 the defendant was the individual in the vehicle at the time this
13 was all taking place. Taking all the evidence together, your
14 Honor, the State has met its burden on all three counts.

15 THE COURT: All right. Thanks, Mr. Tree. Mr. Bushell?

16 MR. BUSHELL: Thank you, your Honor. Judge, I too, have
17 two distinct theories. May I turn this just a little bit?

18 THE COURT: Yes.

19 MR. BUSHELL: I don't want to (inaudible).

20 THE COURT: Yeah, no problem.

21 MR. BUSHELL: It's easier for me if I (inaudible) like
22 this.

23 THE COURT: That's fine.

24 MR. BUSHELL: I have also two distinct theories about
25 this case, maybe two separate defenses, and there are two that I

1 would like to present to the Court for its consideration today.
2 The first is the defense of that this individual who sits before
3 you today was not involved in this case at all, the reason being
4 is that the evidence today simply didn't bear that out.

5 No one actually identified my client today. Rachel was
6 not asked to point out and identify Preston Cowlshaw as the
7 individual she was with. I specifically noted that, because
8 that's a typical tactic that defense -- I'm sorry, the
9 prosecutors to use to say is this the individual in the courtroom
10 today, where is he, then asks your Honor to take note on whether
11 or not that happened. I wrote down that that was not done for
12 Rachel or for Sharon, the toll booth operator today, who had the
13 best opportunity to see my client, and neither was asked
14 specifically if this individual sitting here is the individual
15 involved in this case.

16 Deputy Green did not see. He testified that it was too
17 dark, and he couldn't even tell how many occupants were in the
18 vehicle as it was racing up Adams Avenue. The individual who
19 owned the vehicle, Mr. Saad, did not see or even know my client.
20 Deputy Aschinger did not see either.

21 While there is some question about the fingerprints that
22 were found, fingerprint evidence is not 100 percent conclusive.
23 There is no real industry standard of how many marks -- let me
24 get the correct phraseology that was used here -- similarities or
25 points of comparison. Our CSI agent just testified if she gets

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1 over 10, that's usually good enough. That's not 100 percent
2 conclusive that that was his. It could have been somebody
3 else's.

4 One thing that I hit on early on was the scratches.
5 In the exhibits that the State provided there were two small
6 scratches that looked like they had been scabbed over, and to
7 me -- I'm not a scientist, I'm not a doctor -- looked like they
8 were older type of scratches, not freshly consistent with running
9 through thick scrub brush in the middle of the night, dark,
10 without a flashlight, going through that -- that area, which was
11 described as steep, almost straight down. There were cactus
12 around. You would think that someone running away from cops with
13 two dogs would just race through this type of foliage and be
14 scratched up a lot worse than what happened.

15 One also final piece of evidence that was brought to our
16 attention today was that Rachel had no idea who the last name of
17 this individual was initially. She had two or three different
18 opportunities to provide that to the officers and never did. In
19 fact, the individual who gave it to the officers wasn't even here
20 to testify today.

21 So our first argument is, your Honor, is that this
22 incident that occurred did not involve my client whatsoever. Now
23 the second theory is one where I place my client in a situation
24 where his guilt would be, I think, proven in Counts II and III of
25 the Information. The reason I'm doing this, your Honor, is

1 because I believe that Count I, the kidnaping, is a more serious
2 of the three charges. As my calling allows to do what's best for
3 my client, there is another theory here that I think makes a lot
4 of sense as well for your Honor to consider.

5 That is that Rachel and Preston knew each other, that a
6 car was taken. You look how close the proximity was, it makes
7 sense. Preston and Rachel decided to go out that evening, in
8 this stolen vehicle, and they went out for the sole purpose of
9 using drugs.

10 The reason I made such a big deal of trying to get in
11 and eventually getting in what Rachel was ultimately booked into
12 jail for was for warrants -- outstanding warrants for
13 paraphernalia and for possession or use of a controlled
14 substance.

15 Your Honor, the indi -- the exhibits that were presented
16 to us today by the State, specifically Exhibits 15, 16 -- I think
17 it was 15 and 16 -- show a vehicle that was not at all described
18 by Mr. Saad. These pictures look like you would see in cars that
19 people are living in, that are using in. Garbage strewn
20 everywhere.

21 My theory of this case is, your Honor, is that Rachel
22 and Preston went out, started using and drove around. If you
23 take what they're saying as truth, Rachel got picked up around
24 4:30, 5 o'clock. They drove around for six hours almost, and
25 only made one stop early on to get a pie and a cup of water.

1 Mr. Saad testified that this garbage in his vehicle was
2 not there when it was stolen, so obviously there were some stops
3 made. There are Gatorade cups in here, there are plastic bags.
4 There's a nut bag. There's Powerade. There's just a lot of
5 garbage, consistent with making multiple stops.

6 Rachel had numerous chances to leave. I think there
7 were more than the two stops she talks about, the one at the
8 church and the one at the toll booth. I think the garbage in the
9 car proves that, that there were chances to get out. What I
10 think happened here is these individuals were using. They were
11 using pretty heavily. They were driving around. They get
12 hungry, they got thirsty, they stopped.

13 We didn't get into it a whole lot, but there was a phone
14 call made. Rachel had a chance to call her mom. There was a
15 text made. The officer testified he read that text, and that
16 looked like a text to come in and either sell some drugs or buy
17 some drugs.

18 This is a hard argument for me to make, your Honor,
19 because it does place my client directly in a stolen vehicle, and
20 it places him at the scene of the crash, but it doesn't give rise
21 to the kidnaping charge, which is the more serious of all of
22 these charges, because at this point, under our theory, Preston
23 Cowlshaw did not knowingly or intentionally or without authority
24 of law and against the will of the victim, Rachel Jones, detain
25 or restrain her for a substantial period. She voluntarily went

1 along. She voluntarily got back in the car -- if you take her
2 word for it -- twice, but I think Exhibits 15 and 16 show that
3 there had to have been more than two stops. There had to be
4 ample opportunity to go into a store and buy these items.

5 Or under subsection (b) of that, detain or restrain the
6 victim in circumstances exposing the victim to risk of bodily
7 injury. Two individuals out on a drug binge. She was there on
8 her own accord, and while he was driving, my guess is
9 intoxicated, the use of drugs. It doesn't put her in that
10 situation where she falls under the level of a kidnaping.

11 This was a voluntary joy ride these individuals went on
12 to go out and to use narcotics, and as Mr. Tree indicated on that
13 vehicle where he's driving away and saying this isn't going to
14 happen, that makes sense for two individuals who are using drugs,
15 driving around in a vehicle for six plus hours to want to try and
16 get away. That's our theory of the case, your Honor. If the
17 Court is not agreeable to the first theory, I would ask the Court
18 to consider strongly the second theory in that my client is not
19 guilty of at least Count I of that Information, the kidnaping.

20 THE COURT: All right. Thanks, Mr. Bushell. Mr. Tree?

21 MR. TREE: Thank you, your Honor. Your Honor, the
22 necessity to have a formal identification as -- the Courts have
23 talked about that when you talk about the individual, when you
24 speak to the witness as the defendant, as she mentioned him as
25 Preston several times, that formal identification by the witness

1 is not necessary. Obviously in court she nodded towards the
2 defendant. She used his name. We used the name defendant
3 several different times. If that formal identification wasn't
4 made, it was certainly made throughout her testimony as she
5 described what the defendant did to her.

6 Additionally, Officer Green formally identified the
7 defendant as Preston Cowlshaw as the same individual they used
8 the fingerprints for, and that necessity that Mr. Bushell claims
9 that we have to do the formal identification is not necessary and
10 was not necessary in this case, given the totality of what
11 happened during the testimony of Ms. Jones.

12 Second, looking at the theory of the case that because
13 there's a lot of garbage in the vehicle, these two did drugs for
14 this entire time, there's no evidence of drug use found, no
15 evidence of needles, drugs in the vehicle at all. That cer --
16 his theory certainly isn't supported. Those kinds of things --
17 you would see paraphernalia, you would see those things. The
18 most -- the worst item that was found in the vehicle was
19 cigarettes. Certainly nothing that would indicate that this was
20 a drug binge gone wrong.

21 Mr. Bushell talked about the victim's chances to leave.
22 I think she adequately explained why she kept going back with the
23 defendant, hoping, believing when he said, "Okay, I'll take you
24 home," that he would in fact take her home. She was -- it was a
25 very surreal experience for her. She had a hard time believing

1 that he wasn't going to take her home, that he was going to keep
2 her and drive around with her for -- until something like this
3 apparently happened.

4 As the State explained, even if you were to take
5 Mr. Bushell's theory at face value that she was knowingly with
6 him, certainly at the time they got to the toll booth, that
7 theory goes down the drain. The second that vehicle stopped you
8 saw that door open, you saw her go into the office. You saw the
9 look on her face. You saw her looking around, looking for help.
10 She ends up back in the car, but even though she ended up back in
11 the car, that ride during the evading was against her will. She
12 asked him several times to stop.

13 He did detain or restrain her in circumstances, exposing
14 her to risk of bodily injury, going at the speeds he went through
15 that narrow construction zone, through the stop lights and
16 through 89, and then darting over the embankment at the end of
17 the road. All of those things are indicative of that the
18 defendant did kidnap her under the definition provided under the
19 law.

20 THE COURT: Thank you. All right. Thank you, Mr. Tree.
21 All right. I appreciate the arguments and the evidence. I think
22 I'm ready to rule on the case, though. I was thinking about
23 taking it under advisement. I think after hearing the testimony
24 and the arguments, I'm prepared to deal with the case.

25 Let me deal with them in reverse order, because I do

1 agree with Mr. Bushell. I think the real tough issue here is the
2 kidnaping charge. One Count III, the theft, there's no question
3 that Mr. Saad discovered that somebody had taken his car. It
4 took place -- he noticed it sometime around 3:30 or 4 or 4:30 in
5 the afternoon. He reported it.

6 There's no question that we've got -- his motor vehicle
7 was stolen, and as -- I think the defense raises an interesting
8 argument that Mr. Saad had never identified the car that we see
9 in the photographs 15, 16 and 17 as being his car. While that's
10 true, I mean I -- it's -- you look not only at direct evidence,
11 but circumstantial. To me, the compelling evidence that the car
12 that the police recovered here up in Ogden is the same car is the
13 fact that Mr. Saad was called and said, "We found your car. It's
14 up here in Ogden," and he came up and looked at it, and of course
15 he said he was completely totaled, which is consistent with the
16 condition of the car that we have in the photographs, Exhibits
17 15, 16 and 17.

18 So while he may not have identified the photographs, I
19 think based on the totality of the evidence, there's no question
20 that the car that's recovered here in Ogden is the one that
21 Mr. Saad reported as being missing. So as I recall, he was
22 shown some of the photographs, and that he never made a clear
23 identification, but I -- but I'm just convinced that we're
24 talking about his vehicle being the one that was recovered that
25 had been totaled. So I think it's the same car, regardless of

1 that fact. So no question that the car that we're talking about
2 is the one that belonged, at least in my mind, to Mr. Saad.

3 What ties the defendant into this, of course, is the
4 fingerprints. As I recall, there were three different
5 fingerprints, two on the window on the driver's side, and then
6 one on the cup that's near the console inside. The testimony of
7 Ms. McKenzie as a CSI is that she's -- it was her opinion that
8 these fingerprints belong to the defendant. So I don't think
9 there's any question that the defendant was the one involved in
10 the theft of this motor vehicle based on the location of the
11 fingerprints.

12 The other argument that the victim has never identified
13 him here in the courtroom, again, while she may not have come out
14 and made an identification, she said the man that was driving the
15 car was Preston. Well, it just so happens that the defendant's
16 first name is Preston. So while she may not have pointed to him
17 and made a formal identification in court, I think when you
18 couple the fingerprints and both of them being in the car, and
19 him having the name Preston, I think that's enough to establish
20 the identification. So I don't think there's any question that
21 the State has proven the case beyond a reasonable doubt on Count
22 III, the theft charge.

23 The same is pretty much true on the failure to respond
24 to a police officer's signal. All you have to do is look at the
25 video, the dash cam video. There's no question that on June 24th

1 somebody was operating the vehicle. They received a visual or
2 audible signal from a peace officer to bring the vehicle to a
3 stop. There's no question that based on what I saw that it was
4 clearly a willful or wanton disregard of the signal, running stop
5 signs, running red lights. There's no question that this
6 conduct, this action endangered the operation of the vehicle or
7 person, and it was an attempt to flee or allude. Again, what
8 ties the defendant into this criminal conduct is the
9 fingerprints, and also I think the testimony of Ms. Jones.

10 It is a difficult call on Count I, at least raises some
11 concern on the kidnaping charge, but here's -- here's what I --
12 what I believe from the evidence that I've heard, is first of
13 all, you have the testimony of Ms. Jones. She testified that she
14 knew the defendant, Preston. She didn't know him real well. She
15 had met him a couple of times. He wasn't a stranger, and I don't
16 think there's any question that initially she got in that car
17 voluntarily. If that had been the situation all the way through
18 because they were just going for a ride, then I would find the
19 defendant not guilty.

20 But according to her testimony, something changed.
21 Something happened in the course of that period of time from 3:30
22 or 4 until about 11 o'clock at night. She said at one point he
23 took her cell phone and said it was a distraction, that she
24 wasn't focused. She said, "I became afraid. I was concerned."
25 There was just something bizarre about Preston, his behavior. I

1 don't know what caused that. I don't have any evidence that it
2 was drugs or it wasn't drugs. I don't -- alcohol was involved.
3 I have no idea, because there isn't any evidence, but Ms. Jones
4 just said his behavior was strange and bizarre. That may not
5 have been her words, but that was the conclusion I reached is
6 that somehow his behavior become different as the night wore on.

7 So he takes her phone away. She said his driving was
8 reckless, the way he was driving was strange. She said, "I
9 became concerned for my own safety." She tried to call home at
10 one time, nobody answered.

11 Then I -- we have the testimony, and nobody really
12 talked about it. I thought one of the officers said that he
13 looked at her cell phone, and that there was this message on the
14 cell phone that said, "Help, I'm being kidnaped or I'm being
15 held," or something like that, which I thought that was pretty
16 significant that there's a message. Maybe I got it wrong, but I
17 thought the officer testified that he looked at her cell phone
18 and there was this message about, "Help, I've been kidnaped," on
19 her cell phone.

20 I thought that was a pretty significant piece of
21 evidence, because it goes to her state of mind at the time of the
22 incident. She told him several times she wanted to go home. He
23 didn't follow those requests or instructions, and continued to go
24 from Salt Lake all the way up here to Ogden.

25 So you have the testimony of Ms. Jones, but it's not

1 just her testimony that I thought was critical. I thought the
2 key to the kidnaping came from the testimony of the lady who ran
3 the toll booth, because her testimony to a large extent
4 corroborates what Ms. Jones said. I know the defense feels like
5 the -- I don't know, maybe she was on drugs or alcohol. She said
6 she wasn't, but I don't even need to get there because I've got
7 the testimony of the toll booth operator, and she said, "Yeah,
8 I -- they pulled up to the toll booth, and this young girl jumps
9 out on the passenger side and runs into the office," and she
10 said, "It was strange. I didn't know what I had in front of me
11 here."

12 The other thing she said there -- as I noticed the girl,
13 she said, "There was something about her body language." I know
14 we've all seen it in different incidents. It's not what you say,
15 it's how you react. She said that when she looked at her, she
16 said, "I could see fear. I could see fear, and I knew that
17 something was wrong." She said, "I became very distressed or
18 very concerned." She said, "What I saw in front of me was a
19 distressed girl." Again, I think that goes back to the body
20 language.

21 Anyway, the toll booth lady, you've got to give her
22 credit. I mean she calls 911. There was something unusual going
23 on here, and she couldn't put her finger on it, but it was just
24 so bizarre, so strange. So she calls 911, and then the police
25 arrive, and we've got the high speed chase and the crash. They

1 find the victim, and I think the officer said that she seemed to
2 me -- Ms. Jones seemed to be very upset. So -- and I don't think
3 it was just over the crash. It was over the whole episode or the
4 entire incident.

5 So anyway, based on that evidence, I am convinced that
6 the State has met the burden of proof on the kidnaping charge.
7 So in summary, the Court will find the defendant, Mr. Cowlshaw,
8 guilty on all three counts. I'll find that the State has met the
9 burden of proof in this case beyond a reasonable doubt.

10 All right. Do we need -- anything else that I need to
11 address?

12 MR. BUSHELL: Maybe just a sentencing date on these,
13 your Honor.

14 THE COURT: I was just going to get to that, and I just
15 didn't know if I hadn't met -- or had to deal with any other
16 issues.

17 MR. BUSHELL: No.

18 THE COURT: So --

19 MR. BUSHELL: I don't believe so.

20 THE COURT: All right. Let's -- what are we looking at,
21 Monica, about 45 days for --

22 COURT CLERK: We either have the May 25th date or
23 (inaudible) June 1st.

24 MR. BUSHELL: June 1st is the start of that drug court
25 conference. I'll be gone.

Tab D

ADDENDUM D
Selected Exhibits

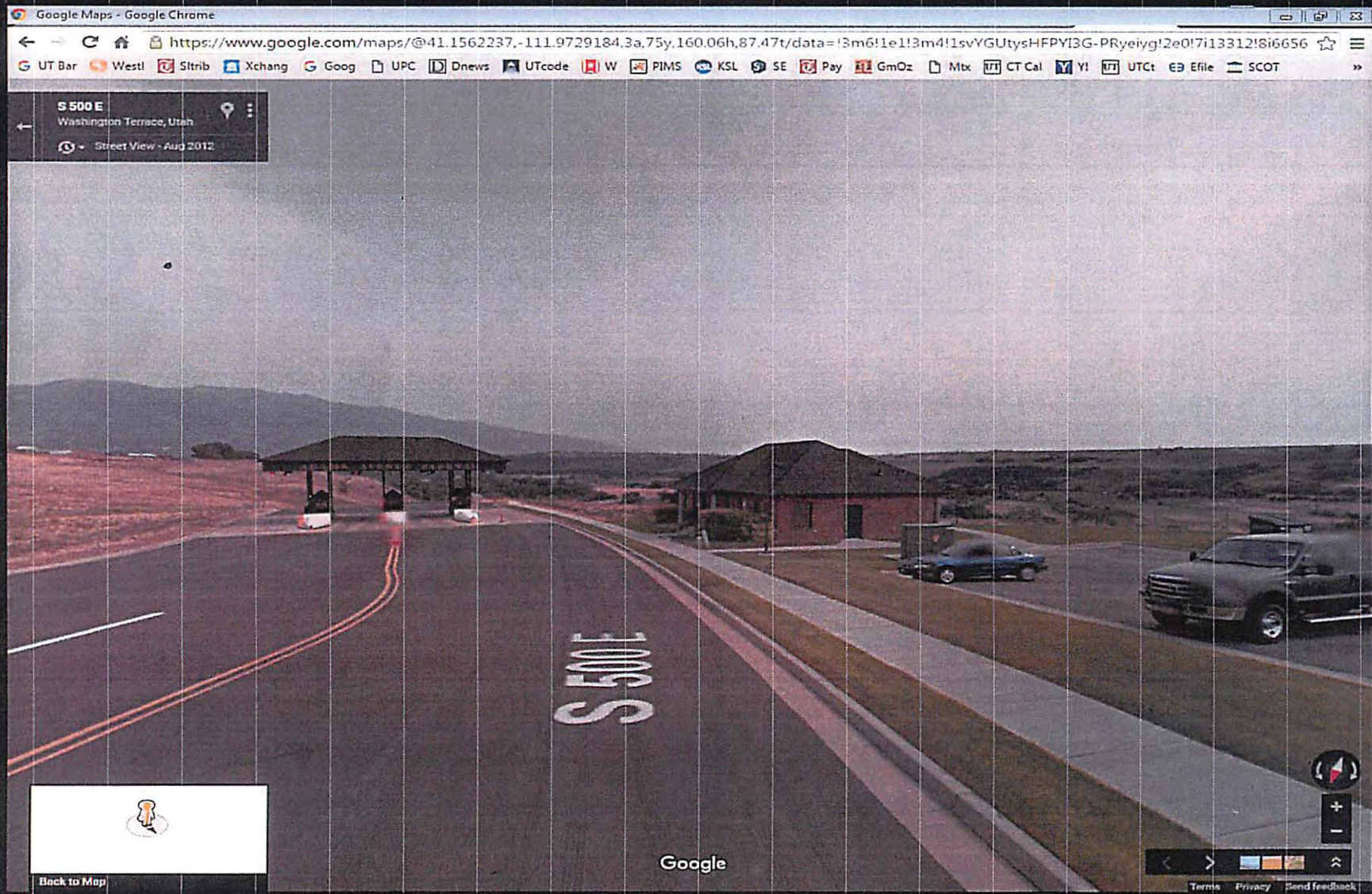
State's Exhibit

Case No. 151901373

Date: 4/14/16

Clerk's Initials MF

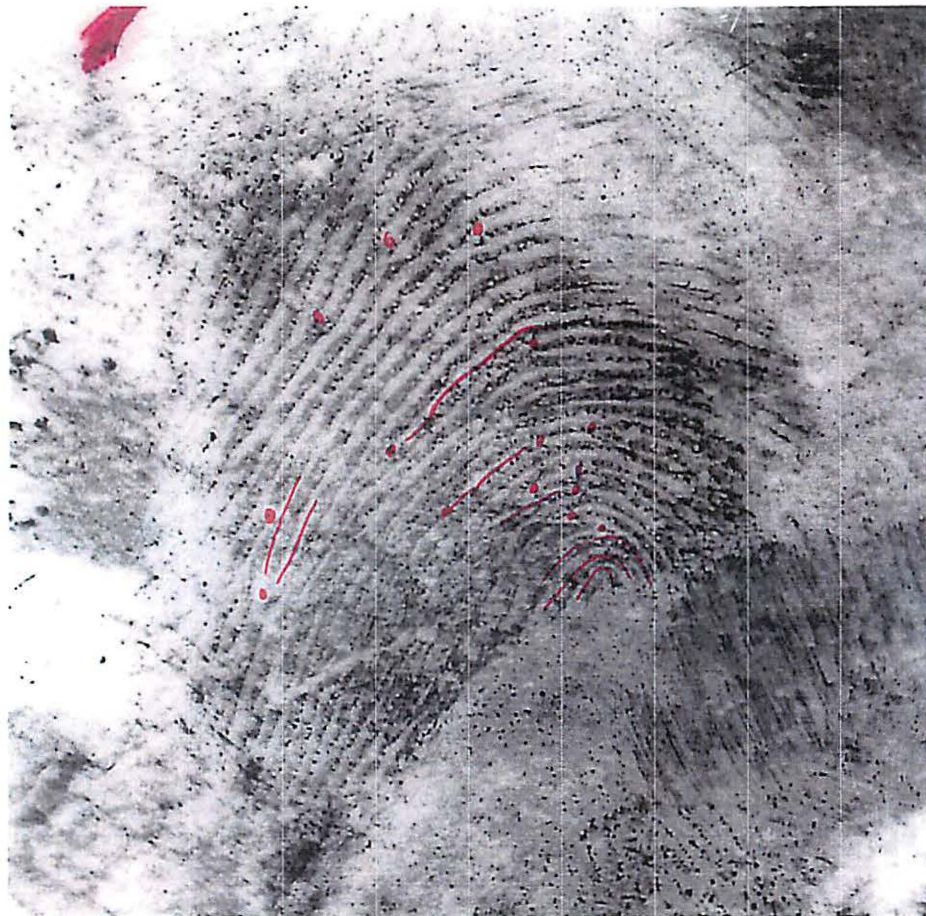
Exhibit 1



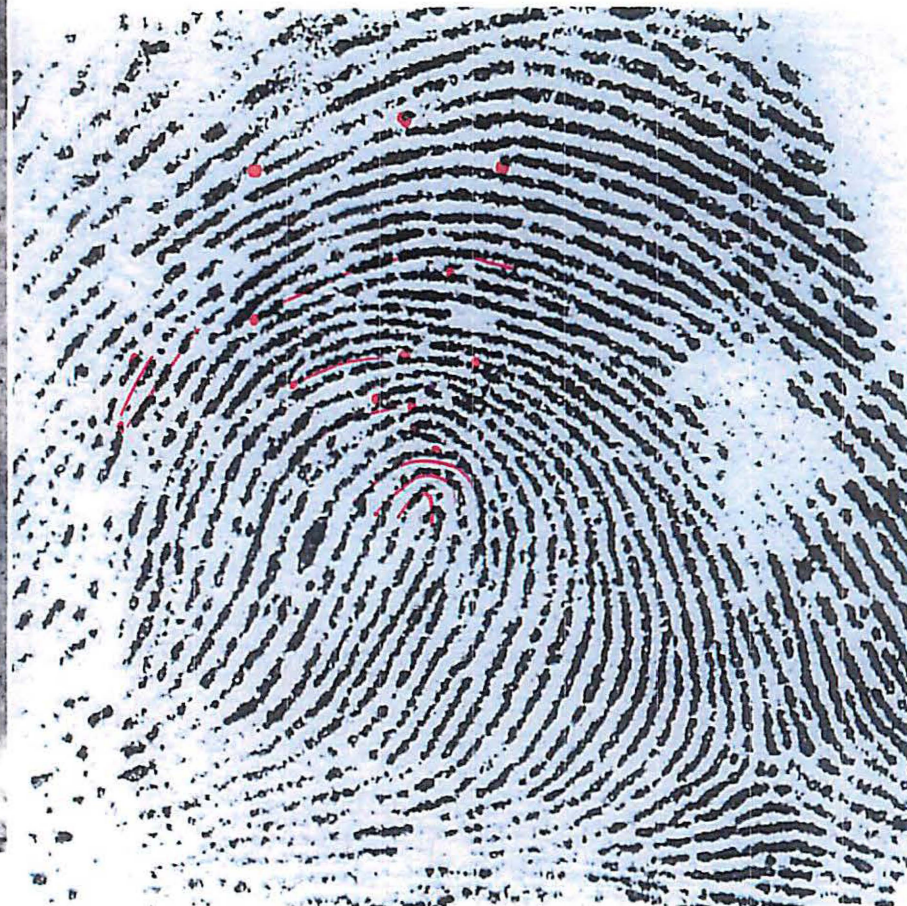
State's Exhibit S10
Case No. 151901373
Date: 4/14/16
Clerk's Initials MF

Exhibit 10





Latent Impression SM01



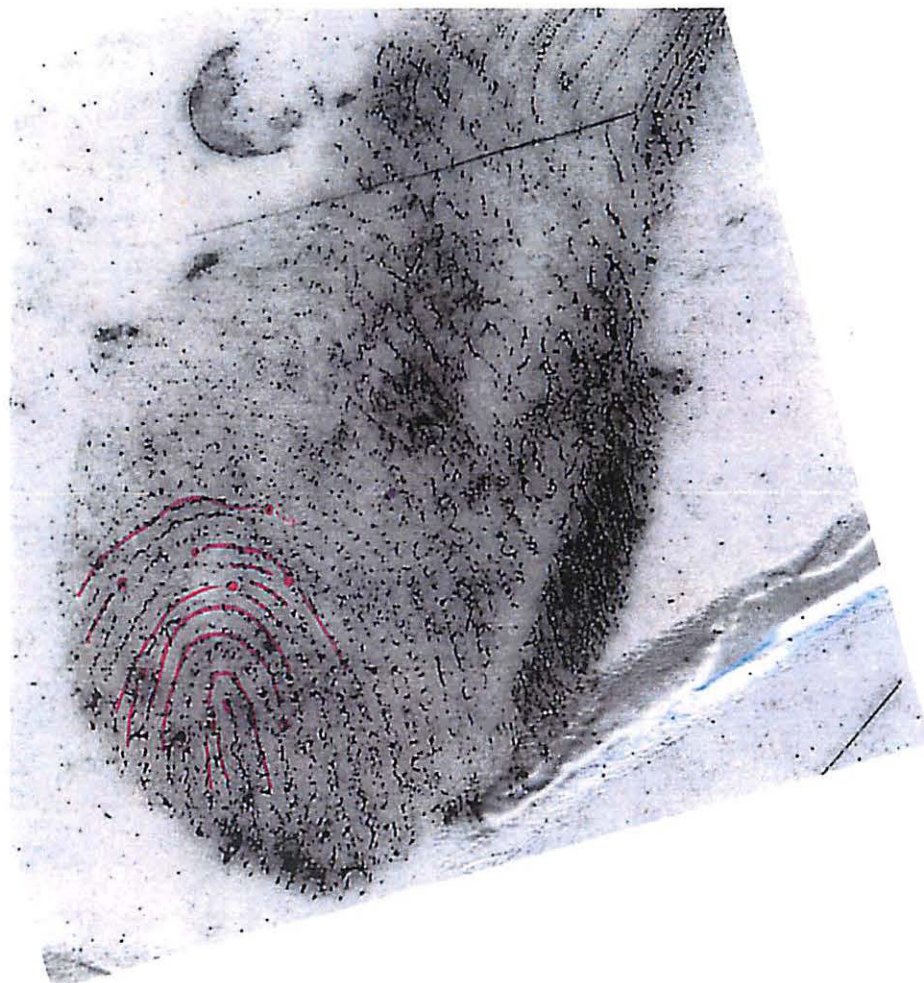
Known Fingerprint Impression #6
Preston Cowlshaw
(DOB 11/24/89)

State's Exhibit S28
Case No. 151901313
Date: 4/14/16
Clerk's Initials MF

sm
7/6/15
ms
07/09/15

sm
7/6/15
ms
07/09/15

State's Exhibit S30
Case No. 15/90373
Date: 4/4/15
Clerk's Initials mf



Latent Impression SM02

SM
7/6/15

4/9
02/06/15



Known Fingerprint Impression #3
Preston Cowlshaw
(DOB 11/24/89)

SM
7/6/15

MS
07/06/15

