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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 7 FEBRUARY 2022 AT 9:05 AM

Transcribed by: EPIQ

MR STRICKLAND SC: Your Honour, if the court pleases, I appear with Ms Callan and Ms Poole for the Crown.

HIS HONOUR: Yes, thank you, Mr Strickland.

MR EDWARDSON QC: And if your Honour pleases, I appear with Mr Luke Officer on behalf of the accused, Zachary Rolfe.

HIS HONOUR: Thank you, Mr Edwardson.

Now I believe all parties should have received an email from my Associate on Friday indicating that this morning I would make a ruling that the objection to the admission of the text messages, which the Crown proposed leading at the trial of the accused, would be upheld. And I will accordingly make that formal ruling now.

The second matter that I need to deal with is the application which was made by the accused to sever count 3 from the indictment. And you're ready now for me to give my decision in that regard?

MR EDWARDSON: Yes, your Honour.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: Thank you.

The indictment against the accused, on which the Crown proposes to proceed to trial contains three counts. Count 1 is a charge of murder. Count 2 is a charge of manslaughter, and is pleaded as an alternative to count 1. Count 3 is a charge under s 161A *Criminal Code*, of engaging in a violent act, causing the death of the deceased. The violent act, alleged by the Crown, as I understand it, is the discharge of a firearm. Count 3 is pleaded as an alternative to counts 1 and 2. The accused seeks an order that count 3 be severed from the indictment, and that he proceed to trial on an indictment containing counts 1 and 2 only. The submission made by the accused is that the events which give rise to the present charges are remote from those contemplated by the legislature when it introduced s 161A.

The accused submits that it was never contemplated by the legislature that this provision would have any application to a police officer exercising his powers as a police officer, to affect an arrest in the course of which his firearm is discharged, resulting in the death of the person being apprehended. In support of that proposition, learned senior counsel for the accused has taken me to the second reading speech made by the responsible Minister, when introducing the bill, which when passed, introduced s 161A into the *Criminal Code*. By reference to that speech, the accused submits that the offence found in s 161A was intended to be a standalone charge, where the Director of Public Prosecutions accepted that no charge of murder or manslaughter could reasonably be made against an accused. The responsible Minister said in his speech, "There is space for this new offence in our *Criminal Code* to cover unique cases where a violent act causes death, and the

Director of Public Prosecutions does not consider that there is a reasonable prospect of conviction of murder or manslaughter.”

The accused submits that the Director obviously considers that there are reasonable prospects for convicting the accused of murder or manslaughter, because those charges have been included on the indictment against the accused. The accused also referred to the examples of the type of offending that might fall within the provision, as stated by the Minister in his speech. These included, one punch attacks at pubs, clubs and sporting activities. The accused submits that the Minister’s speech focused on violent attacks that occur in and around licensed premises and the like. The accused also submits that inclusion of count 3 (inaudible) to unnecessarily complicate the trial. In that regard, he submits that the defences he has flagged will be run at trial, will apply to all three offences, so that if any one of those defences is successful, he must be acquitted of all three charges. The addition of count three will therefore unnecessarily complicate directions to the jury.

The Crown opposes the application on the grounds, firstly, that severance of count three will have no effect in substance. Because the offence found within s 161A, is by virtue of s 316 of the *Criminal Code*, a statutory alternative verdict to murder and manslaughter.

Secondly, count 3 is founded on the same facts as counts 1 and 2 as required by s 309 of the *Criminal Code* and by virtue of that provision it may be included on the indictment.

And thirdly, the court should decline the accused's invitation to look behind the decision of the director to include count 3 by reference to the suggested purpose of the provision.

This application raises a question of statutory interpretation, being the appropriate interpretation of s 161A and whether that interpretation permits the Crown to charge that offence against the accused in the circumstances of the present alleged offence.

The application is largely based upon statements made by the responsible minister in the second reading speech. In my opinion I am not entitled to take into account that material in interpreting s 161A.

Section 62B(1) of the *Interpretation Act* 1978 provides that extrinsic material including a Minister's second reading speech may only be used in ascertaining the meaning of a provision by confirming the meaning of the provision is the ordinary meaning conveyed by the text of the provision or to determine the meaning of the provision where the meaning is ambiguous or obscure or the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or unreasonable.

In other words, where the text of a provision is not ambiguous or obscure, reference to extrinsic material is not permitted for the purpose of casting doubt on the clear meaning of the text.

In my opinion there is no ambiguity or obscurity in the text of s 161A. Applying the ordinary meaning conveyed by the text does not lead to a result that is manifestly absurd or unreasonable. I also note that the provisions of s 316 of the *Criminal Code* specifically envisage a charge under s 161A being an alternative charge to both murder and manslaughter. For this reason, I decline to make an order that count 3 be severed from the indictment.

MR STRICKLAND: If your Honour pleases.

HIS HONOUR: Now, is there anything else that we need to deal with at this point in time?

MR STRICKLAND: Yes, your Honour. In relation to the empanelment of the jury.

HIS HONOUR: Yes?

MR STRICKLAND: There's just two things that I ask your Honour to consider in giving - addressing the jury panel as to whether they should serve. The first is I would ask your Honour to consider advising the jury pool that they will be shown body-worn video which is disturbing in nature.

HIS HONOUR: Well, I was intending to do that.

MR STRICKLAND: Yes.

HIS HONOUR: The last thing that any of us want is to have somebody empanelled on the jury who feels that they, after a period of time that they simply can't confront the material.

MR STRICKLAND: Indeed. Thank you, your Honour.

HIS HONOUR: Yes.

MR STRICKLAND: That is the first. The second is that I ask your Honour to consider asking the jury in some manner to disclose to your Honour if they are a member or follow any Facebook groups which have been created in relation to this trial or related to this trial. So I understand there are a number of Facebook groups, one of them is, "I support Constable Zach" or "I back Zach". I think there are others on the other side of the ledger and I would ask your Honour that if a person has - follows one of those groups and particularly in they post comments on it, in my submission it is likely they would bring an unbiased mind to this trial.

HIS HONOUR: I must say I am not inclined to specifically ask about Facebook groups but I will, of course, say to the jury that it is important - or jury panel - that it is

important that any juror is able to bring an unbiased mind and that if any member of the jury panel believes that they are incapable of bringing an unbiased mind to the determination of the issues in the trial then they should ask to be exempted.

MR STRICKLAND: If the court pleases.

HIS HONOUR: Do you want to say anything in regard to that?

MR EDWARDSON: No, your Honour. I mean, I assumed that your Honour would encompass - if you don't mind me saying - encompass a general direction that is critical and that is, of course, you should completely disregard anything that you have seen, read or heard before the matter proceeded and it is only the evidence.

HIS HONOUR: I will say that once the jury is empanelled.

MR EDWARDSON: Yes, your Honour.

HIS HONOUR: Then unless there is anything further I will adjourn for the moment.

ADJOURNED

## RESUMED

HIS HONOUR: Yes.

MR EDWARDSON QC: Your Honour, may I raise with you just two matters. The first is that there are five jurors, I'll just read them into the transcript. [Edited], number 200. [Edited], number 51. [Edited], number 354. [Edited], number 27. And [Edited], number 304. Part of the defence team is Ms G.G.Dadds, who's present in court and has been working with us throughout. She lives in Darwin, and she's friends with the first four. The latter person, number 51 that I just mentioned, is a person known to my junior, Mr Officer, and indeed, he had dinner with that person recently. And so again, all four of those witnesses – or five, I should say, should not be included in the jury pool.

HIS HONOUR: Can you just give me those numbers again?

MR EDWARDSON: Certainly, your Honour. Number one, [Edited], it's number – sorry I'll start again. [Edited], number 200. [Edited], number 51.

HIS HONOUR: Just one moment. Yes.

MR EDWARDSON: [Edited], number 354.

HIS HONOUR: Yes.

MR EDWARDSON: [Edited], number 27.

HIS HONOUR: Yes.

MR EDWARDSON: And [Edited], number 304.

HIS HONOUR: Thank you.

MR EDWARDSON: And finally, your Honour, separate from that matter. I just had a conversation with Mr Strickland before your Honour came into the courtroom. At committal, the presiding judge took the view that before any video footage was played, he would speak to the assembled masses, and by that, I mean people who are spectating and watching the proceedings, to caution them about the matter. And that if they had any difficulty watching it, they should leave the courtroom.

HIS HONOUR: Yes.

MR EDWARDSON: And I wondered whether something along those lines might be appropriate, so that we don't have any difficulty.

HIS HONOUR: Well that would be fairly standard I would think.

MR EDWARDSON: Certainly. Thank you, your Honour.

MS CALLAN: Your Honour, one thing to raise in relation to the empanelment process. The list of names to be read by the Crown to the jury pool includes four people who are not on the Crown witness list, but who have been involved in a material sense, in the investigation. And the Crown took the view that it was prudent to include those names. The full list, as proposed to be read out, has been given to counsel for the accused.

HIS HONOUR: All right, so it's only four witnesses, or four names, who are not actually to be called as witnesses, is that the case?

MS CALLAN: So your Honour, it's four individuals, if I can put it that way. And then the three police officers who comprise the officers in charge of the investigation.

HIS HONOUR: All right.

Is there any difficulty with that?

MR EDWARDSON: No, certainly not, your Honour.

HIS HONOUR: All right.

Now I'm going to have to require all those members of the press, and others who are present in the gallery, the public gallery, to leave the public gallery at the present time, because we will need all of the seating, and the space in the court, to accommodate the jury panel during the process of empanelment. Once the jury is empanelled, then the court will – the rest of the jury panel will be released, and there will again be space within the courtroom. But for the moment, I'm going to have to ask everyone to leave. Thank you.

Just for the record, I will direct that those members of the jury panel identified by Mr Strickland are to be removed from the panel.

MR CALLAN: By me, your Honour.

HIS HONOUR: Sorry?

MR CALLAN: You said "Mr Strickland" by me you mean?

HIS HONOUR: Sorry - by Mr Edwardson, I am sorry.

MR EDWARDSON: Your Honour pleases.

HIS HONOUR: Now, we bring in the jury panel.

JURY PANEL ENTER

HIS HONOUR: Mr Crown?

MR EDWARDSON: Ms Callan will read out the witness names.

HIS HONOUR: Do you present an indictment?

MR STRICKLAND: I present an indictment, your Honour.

HIS HONOUR: And the date of that again? That is the 25 June 2021?

MR STRICKLAND: That is correct. I present an indictment.

HIS HONOUR: All right, thank you.

MR STRICKLAND: The original has been filed.

HIS HONOUR: All right, thank you. Arraign the accused.

THE ASSOCIATE: Zachary Rolfe, you stand charged on count 1 that on 9 November 2019 at Yuendumu in the Northern Territory of Australia you murdered Charles Arnold Walker.

How do you plead: guilty or not guilty?

THE ACCUSED: Not guilty.

THE ASSOCIATE: In the alternative you stand charged on count 2 that on 9 November 2019 at Yuendumu in the Northern Territory of Australia you engaged in conduct that caused the death of Charles Arnold Walker, being reckless or negligent as to causing the death of Charles Arnold Walker.

How do you plead: guilty or not guilty?

THE ACCUSED: Not guilty.

THE ASSOCIATE: In the further alternative you stand charged on count 3 that on 9 November 2019 at Yuendumu in the Northern Territory of Australia you engaged in conduct involving a violent act to Charles Arnold Walker, namely discharging a firearm and that conduct cause the death of Charles Arnold Walker.

How do you plead: guilty or not guilty?

THE ACCUSED: Not guilty.

THE ASSOCIATE: You may be seated.

JURY EMPANELLED



HIS HONOUR: So I'll take a short adjournment and members of the jury, would you please accompany the Sheriff's Officers to the jury room. We'll resume very shortly.

JURY OUT

ADJOURNED

RESUMED

HIS HONOUR: Yes, now can we bring the jury in please.

JURY IN

## OPENING REMARKS TO JURY

MR STRICKLAND: Members of the jury, this case is about the fatal shooting of a 19-year old man at a small Indigenous community called Yuendumu. Yuendumu is located about three hours' drive, west of Alice Springs. The 19-year old man was a Warlpiri man, Charles Arnold Walker. Since his passing, his family culturally refer to him as Kumanjayi Walker. And I will refer to him as Kumanjayi Walker or Mr Walker.

The accused, Zachary Rolfe, had joined the Northern Territory Police Force in 2016. And before that, he was a member of the Australian Defence Force. With stints overseas, including in Afghanistan. As at the time of the shooting, he had extensive experience in handling firearms and weapons. But he had limited experience performing police duties in a remote Indigenous community, such as Yuendumu.

Aside from his general duties as a police officer at Alice Springs, the accused was also a member of a group within the Alice Springs Police Force referred to as the Immediate Response Team. And I'll just call them the IRT. The IRT was deployed either to provide extra general duties to support local police, such as local police at Yuendumu, or specialist duties, which involved a high level of risk, for which they were issued semi-automatic weapons, shotguns, and para-military uniform. When the accused was deployed to Yuendumu on 9 November 2019, he was deployed as a member of the IRT.

Now just before 7 pm on 9 November, the accused and four other officers, Constables Adam Eberl, Anthony Hawkings, James Kirstenfeldt and Adam Donaldson, arrived at Yuendumu. They'd driven from Alice Springs in three separate vehicles. Each of those officers was wearing body-worn video cameras. And those videos, you will see those videos, being played at relevant parts of the incident through the night.

At about 7.20 pm, Constable Eberl and the accused, entered House 511, to arrest Mr Walker. About one minute, or a little over one minute after they entered House 511, the accused had shot Kumanjayi Walker three times with a semi-automatic Glock pistol. The accused fired the first shot when he was about one metre from Kumanjayi Walker. When the first shot was fired, Kumanjayi Walker was standing up and struggling with Adam Eberl. Kumanjayi Walker was holding a pair of medical scissors, which measured about 10 centimetres from handle to tip. And you can see on the screen, that is the scissors that was seized from House 511 after the shooting. The first shot fired by the accused hit the middle region of Kumanjayi Walker's back. That first shot did not kill Mr Walker. That first shot is not the subject of the charges before you.

After the first shot Kumanjayi Walker either fell or was wrestled to the ground by Adam Eberl who was physically larger than Kumanjayi. Eberl was positioned partly on top of Kumanjayi Walker and was pressing his body over Walker who was on the mattress. On the mattress Kumanjayi held the scissors in his right hand and the

Crown case is that Kumanjayi's right arm was, at that point, pinned under his own body.

Now, 2.6 seconds after firing the first shot the accused stood over Kumanjayi Walker whilst he was pinned down by Adam Eberl and fired again, this time into his left torso. About 0.5 or 0.5 seconds after the second shot the accused fired a third time. The accused has this Glock in his right hand and held it point blank against the mid-region of Kumanjayi Walker when he fired both those shots.

Now, the Crown case is that the accused deliberately fired the three shots at Kumanjayi Walker, the last two at point blank range. This rapid discharge of shots with a semi-automatic gun is sometimes called a "double tap" in police and military circles and the "double tap" is designed to ensure maximum injury or death.

Now, I will show you now a diagram which indicates the location of the three projectiles and it is a little bit difficult to see, but A1, which is on the left-hand diagram represents shot 1.

B1, which you can see is the body on the side, B1 represents the entry point of shot 2 and B2 which you can see on the right-hand diagram, represents where the bullet was found at the autopsy.

C1 on the diagram on the side represents where the third shot was fired and on the right and the left hand diagram you can see C2 is where the projectile was retrieved.

Now, the Crown's case is that when the accused fired the second and third shots he intended to kill Kumanjayi Walker or at the very least cause him serious harm.

I am now going to hand to you a copy of the indictment that has been read out to you earlier. I am also - I am going to go through that indictment in a moment and I am also going to hand up to you a folder of documents and you will recall what his Honour said about exhibits. This will become, in due course, an exhibit during the trial and it is a number of documents called exhibits which will be before you and I am going to take you to some of those exhibits during the trial and the witnesses who give evidence will go through those exhibits in more detail when they come to give their evidence.

HIS HONOUR: There is no objection to this course I understand?

MR STRICKLAND: This is with the consent of the accused. We have been in consultation together, your Honour.

HIS HONOUR: Yes, thank you.

MR STRICKLAND: But let me first go to the indictment, that first document I handed to you and I am just going to give you a very brief outline so you understand charges but please, I remind you of what his Honour said. His Honour

will give you directions at the end of the case about the charges and you take the law from his Honour and you will be bound by those directions just as you, and only you, are the judges of the facts.

So the first charge, count 1, is a charge of murder. And that requires the Crown to prove beyond reasonable doubt that the accused did an act or acts, in this case firing the second and third shots, and he did so with a particular intention - that is an intention to cause death or serious harm to Kumanjaya Walker. And the other thing the Crown must prove beyond reasonable doubt is that the firing of one of those two shots - or both of them - in fact caused his death.

Now, count 2 is your alternative charge. You will see it's got there that the charge is in the alternative to count 1, so you only go to count 2 if you find the accused not guilty of count 1. And that is a charge of manslaughter and that requires proof beyond reasonable doubt that the accused engaged in conduct that caused the death of Kumanjaya Walker and that the accused was reckless or negligent as to the causing of his death - and again, those matters must be proved beyond reasonable doubt.

Now, if he is found not guilty of that you then go to the third count, that is a second alternative and that is a charge of a violent act causing death.

HIS HONOUR: I am sorry.

MR STRICKLAND: Not at all.

HIS HONOUR: Thank you.

MR STRICKLAND: So count 3 is a second alternative charge, a violent act causing death, which requires the Crown to prove beyond reasonable doubt that the accused engaged in conduct involving a violent act to Kumanjaya Walker - that's the shooting - the firing of shots 2 and 3 - and that conduct caused the death of Kumanjaya Walker.

Now, I expect that at the end of the trial the most important issue - the central issue for you to consider in relation to each of the three charges, is whether the accused's conduct was legally justified. Now, again, his Honour will give you detailed directions about that at the end but let me just very briefly outline what that concept means.

The accused is not criminally responsible in relation to the death of Mr Walker if his conduct was legally justified. That is sometimes called, "a defence". Now, in this case I anticipate there are three possible defences which will be relied upon by the accused. Any of those defences would lead to a verdict of not guilty if accepted. Now, importantly, the accused doesn't prove the defence. The Crown must point to evidence which establishes beyond reasonable doubt the defence is not available. In other words, the Crown has to prove beyond reasonable doubt that the shooting was not legally justified.

Now, one legal justification is self defence. And I will up - again, this is not a substitute for his Honour's directions. It's just there to assist you and if it doesn't assist you, please ignore it. But there's just a lot of words and concepts so these slides are just there. You can take notes of them if you would like. You don't need to, but I'm just – it's there for assistance.

Self-defence is this: if the accused fired the second and third shots because (a) he believed that it was necessary, either to defend himself or Eberl and his conduct in firing those two shots was a reasonable response in the circumstances that he saw or perceived them, then his conduct is legally justified. Self-defence, not guilty. Now, the Crown's case is that, on the available evidence, self-defence will not be made out.

And that's because either (a) you wouldn't be satisfied beyond reasonable doubt that the accused did not believe that firing shots two and three was necessary to defend himself or Eberl, or you wouldn't be satisfied beyond reasonable doubt that his conduct was not a reasonable response in the circumstances as he saw it. The Crown only has to prove one of those things beyond reasonable doubt. Now again, I emphasise his Honour will direct you about that in due course.

A second legal justification is if the accused was, (a) acting in the course of the duty as a police officer and, (b) his conduct was reasonable in the circumstances for performing that duty. Now, the Crown accepts that the accused was acting in the course of his duty as a police officer when he discharged shots two and three. However, the Crown's case is that his conduct in discharging those shots was not reasonable in the circumstances of performing that duty because – amongst other things – those shots were fired at a time when Kumanjayi Walker was on the ground and was effectively restrained by Adam Eberl.

Now, a third potential legal justification is if the accused fired shots two and three when he was acting in good faith in exercising a duty or performing a function under the *Police Administration Act*. For example, arresting the deceased. And again, we will come back to that – his Honour will come back to that later, at the end. Here, in this case, the Crown – the Crown's case is that – well, the Crown disputes that the accused was acting in good faith when he fired shots two and three.

As I said, each of the IRT members – except for Adam Donaldson – who attended Yuendumu wore body-worn video camera. I'm sorry – Donaldson also did wear the body-worn video. Now, for the purposes of this trial, the officers in charge have compiled a relevant body-worn video footage, which I'm going to play to you shortly. And that is prepared solely to help you understand the different perspectives of – that emerge when you look at each of the body-worn footage together. So they put all the body-worn footage together and playing it chronologically.

Now, I need to say a couple of things about the body-worn footage. First, as his Honour has warned you, it's confronting footage. Secondly, you need to know something about the body-worn footage itself.

Now, I would ask you to turn to the first document in the tender bundle – that large volume. And in tab 1, you'll see there's something called, "Agreed Facts". Now, the agreed facts are simply that. They are facts that have been agreed between the Crown and the defence.

And they have been agreed because that will save a lot of time, rather than the Crown having to prove each and all of these things, the accused and the defence have consulted and these facts are agreed. And this is on tab 1, I'm sorry. If you go to tab 1 of that document. It should be called, "Agreed Facts", pursuant to s 191, that's a provision of the *Evidence Act*.

Now, there is a section in the agreed facts about the body-worn video. And that is an important part of these agreed facts. If you go to par 52 – I'm not going to read these out to you, because in due course that will be done – but from par 52 there's an explanation about the body-worn video. And basically, how it works so you can have an understanding about how that actually operates. What's particularly important for this trial is what appears under the heading on page 10, "Body-worn Video Limitations".

And I think you need to know that – you need to bear this in mind from the outset – there are limitations of body-worn video. I'll just wait till everyone gets there. It's tab 1 page 10. So some of the limitations are self-evident and some of them are not. One of them is, obviously, a body-worn is a two-dimensional representation of a three dimensional event. That's par 59.

The second is that – and there will be evidence of this – the body-worn video – I think that should say BWV, not BWC – but the body-worn – I'm sorry, beg your pardon – C is the camera.

The body-worn camera is positioned on the officer's chest. And it points forward and it records within, as I say, a lateral range of 130 degrees. So that, of course, what the body-worn video sees from the chest may not correspond exactly with what the person can see from a slightly different angle.

Now, par 61. The body-worn video captures all that appears in the frame of the camera. But that doesn't align with the movement of the officer's head, eyes and/or attention. So in other words, the body-worn may be filming that way, but the officer's head may be there. So I'm just giving you an obvious example.

Next, video camera speed can differ from human perception. I think that may be obvious. 63, a video camera may see better in low light than the human eye does. Now, that's important because here – as you'll see – when they go into House 511 at about 7.20 pm, it's very low light. The lighting is poor and a torch is used. So 63 is important in that respect.

And then finally – and this is self-evident – a body-worn video – you will be seeing the body-worn video several times. Indeed, as many times as you – if you ask to see it, you can have it played as many times as you like. And it can be

enhanced, it can be slowed down. It can be examined frame-by-frame, which is what I propose to do. But, of course, what the accused saw was in real time, very quickly. And you must bear that in mind.

So I draw those matters to your attention because it's obviously important to bear it – although we will say the body-worn video is very important evidence in this case – bear in mind those matters in those agreed facts. As I say, they are agreed between the parties.

Now, I now intend to play this what's called bird's eye footage, which has been compiled by the officers in charge as an assistant to you, to understand the events.

DVD PLAYED

MR STRICKLAND: Now, I just need to pause it there. So this is, obviously, the bird's eye view of the relevant houses in Yuendumu. 511 is the key house. And you'll see there were three police vehicles there. I will just tell you who is in each of them. Vehicle 856 is Zachary Rolfe and James Kirstenfeldt. 652 is Eberl and Hawkings. And K913 is Donaldson.

Thank you.

DVD PLAYED

MR STRICKLAND: I'm not going to interrupt this that much, but I just need to explain a couple of things. So the top left video is what the recording of Zachary Rolfe. The top right video is the recording of Adam Eberl, and the two small ones on the right hand are Hawkings and Kirstenfeldt. And they are not all – even though this – all of these four are being played simultaneously, doesn't mean that each of the body-worn videos are not necessary on all the time. That's why you're getting a blank screen for some.

Thank you.

DVD PLAYED

MR STRICKLAND: And I've just been – I've been asked, your Honour, that it may be that some people don't want to see this. And if – and I just – I thought it would be appropriate to - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - for your Honour just to say - - -

HIS HONOUR: I'll just simply give a warning to those who are present in the court room that the material which is going to be depicted in this video recording, includes the shooting of the deceased. And it may be confronting, so that if anybody does not wish to view that material, they should leave the courtroom.



MR STRICKLAND: Thank you, your Honour.

So just before I resume, I'm sure it's obvious, but what you're listening to now is the body-worn of Zach Rolfe, and – because the green light is on.

Thank you.

#### DVD PLAYED

MR STRICKLAND: On the bottom left screen, you can see, and although the writing is somewhat difficult to see, that shows the movements of each of the officers with – and they have their initials. So the green dots represent the movements of each of the officers. And that just – that's just showing you the location of each of the officers at the time you're seeing these body-worn video.

Thank you.

#### DVD PLAYED

MR STRICKLAND: Now, members of the jury, I will play each individual part of the body-worn video again but what is important as from now is to note that when the first shot was fired the accused, Mr Eberl and Kumanjaya Walker were standing. But when the second and third shots were fired Kumanjaya was on the mattress, lying down and Adam Eberl was on top of him.

I want to go to another part of the address, which is about the context of the offences. I am going to rewind a bit. When considering the three defences, the Crown suggests that you should not just focus on what happened immediately before the accused fired the second and third shots. That's what you've just been seeing. You also should consider - but it is a matter for you - that things and the steps leading up to the shooting - that is the context in which the shooting took place.

So on 29 October 2019 about a week before the shooting, Kumanjaya had breached a court order which required him to live at an alcohol rehabilitation centre in Alice Springs, I think it's - for short it's called CAAAPU. He also had to wear an electronic monitoring device. Whilst at the rehabilitation centre he removed that device and illegally left the rehabilitation centre to return to Yuendumu in order to attend his great uncle's funeral.

Now, the rehabilitation centre, quite properly, reported his absence to the police who then began to look for him. First of all, they looked in the Alice Springs area including at the Warlpiri camp where Kumanjaya adoptive mother, Leanne Oldfield lived at House 6.

On 5 November 2019 a warrant was issued which authorised police to arrest Kumanjaya Walker for having breached a court order. The next day, 6 November - that's three days now before the shooting - Senior Constable Chris Hand who was

stationed at Yuendumu was alerted to that arrest warrant for Kumanjaji Walker. Now, Hand knew Walker - Kumanjaji Walker because of his prior dealings with police and you will see in that agreed facts that I showed you, annexure A - there's four annexures to those agreed facts and annexure A details his convictions for violence - and you will see that in Annexure A.

Now, Chris Hand knew that when Kumanjaji Walker was at Yuendumu he normally lived at House 577 with his partner, Rakeisha Robertson(?). Now, if you go tab 4 of the agreed facts - I'm sorry - of the bundle - you will see a diagram which again is just designed to try and help you when you hear the different names, so his - Rakeisha Robertson you can see is his partner and her relatives - and you are just about to see them when I play the next body-worn - Lottie Robertson, Eddie Robertson and Ethan Robertson. So Ethan Robertson is Rekeisha's father and Lottie and Eddie are the parents of Ethan Robertson. Anyway, I will come back to this but this is just a useful diagram to guide who the different people are that are associated with Kumanjaji Walker.

Now, another officer who accompanied Chris Hand to House 577 was Senior Constable Lanyon Smith - also he was stationed at Yuendumu, and if you go to tab 1, go to the agreed facts and you will see there's an annexure there. It might be easy to look at it on the screen as well, it's Annexure C and that just shows - that's a map of Yuendumu and you can see on the - I'm not sure whether it's clearer but you can see on the left hand - upper left-hand corner of that map there is an oval and on the western side of the oval is Lot 577 is what we call House 577. On the other side of the oval - that's the eastern side of the oval you've got House or Lot 511.

Now, at about 6:25 pm on the Wednesday 6 November, Smith and Hand went to House 577 to execute the warrant to arrest Kumanjaji Walker and again they wore body-worn video and because this is part of a context in which the shooting happened, I think, it is appropriate to play that, so I am going to play - they are very short segments - about a couple of minutes each and I am going to play the body-worn video each from Constable Hand and Constable Lanyon Smith. So constable Hand - Chris Hand - is the first one. I should say there's no audio on most of these for the first 30 seconds - that's just how the body-worn operates.

DVD PLAYED

MR STRICKLAND: Now, from Lanyon Smith. The young woman you could see, that was Rakeisha Robertson and the officer you could see by the doorway was Lanyon Smith. Now, you are going to get the body-worn from Lanyon Smith's perspective.

DVD PLAYED

MR STRICKLAND: Now, I expect the evidence will be that Kumanjaji Walker dropped that axe. And you could see on the porch, or somewhere close-by, and of course he wasn't caught by the police who were chasing him. Now that is what I –

what will be referred to in this trial, at least by me, and I think by the police, as the axe incident, on 6 November.

Now both Hand and Smith had considerable experience in policing in remote Indigenous communities. You'll notice that when Kumanjaya Walker was armed with that axe, neither Hand, nor Smith, thought it was necessary to draw their guns. Shortly after that incident, Chris Hand sent an email to Assistant Commissioner Travis Wurst, you'll see that in the email in tab 9, I won't take it to you, where he referred to that incident, the axe incident, and Hand wrote, "I don't think he", meaning Walker, "Wanted to chop us up. He just wanted to escape. No one was injured, and that's the best result in my view."

Now immediately after that incident, Constable Hand contacted his supervisor, Sergeant Julie Frost, who by the way was also his partner, and Julie Frost is an important witness in this case, you'll hear from her. She was the officer-in-charge at Yuendumu Police Station. And by the way, I should say, Hand and Lanyon Smith, will be amongst the first witnesses that I will call.

Now Julie Frost called several officers at Alice Springs, including Superintendent Jody Nobbs, you'll hear from him. And there is by the way, in the agreed facts, there's a chart, which I'll take you to, which shows the different – shows the relevant command structure of the Northern Territory Police. That is relevant to this case. So Frost called Jody Nobbs to tell him about the axe incident. And she recorded a description of that axe incident on something called PROMIS. It stands for Police Real Time Online Management Information System.

Now that's basically a computer database used by the Northern Territory Police to record information and incidents, so other police who need to, can read about those relevant incidents. Now there's something about PROMIS, and how it works, and how you can access it, in the agreed facts. That's at tab 1. I'm not going to take it to you now, but it's there, pars 40 to 48, you can read about the PROMIS system again, rather than calling a whole bunch of evidence about how it works, it's quicker if you just read those nine paragraphs.

Now once information about – is entered on PROMIS, further information can be added. Now Kumanjaya Walker had a profile on PROMIS. And part of the work of police officers in the Northern Territory, is to access to PROMIS system. Police officers could and did access the PROMIS entry for that axe incident. So they could view the body-worn of the axe incident. And you can also access the PROMIS system on your mobile phone, that is, a police's mobile phone.

Now whenever an officer accesses PROMIS, a record is kept. Again, you'll see that in the agreed facts. So when an IRT officer accessed the PROMIS records relating to Mr Walker, or looking at the body-worn, there's a record of that. So we can say when an officer accessed the body-worn video of the axe incident, for example. Now Sergeant Frost was a very experienced police officer. Before she – she's very experienced in remote communities. Before being a police officer, she

worked as a nurse in those remote communities. She knew the Yuendumu Community very well. She'd been the officer-in-charge there for about 12 months.

Now on the evening of 6 November, after the axe incident, she attended House 57 with Lanyon Smith and Chris Hand, and she spoke to Lottie and Eddie Roberston. You remember, you saw them, both of those people in the body-worn. And they are senior and respected members of the Yuendumu Community.

Frost urged Eddie and Lottie to get Kumanjayi Walker to hand himself into the police. And she said you got – he's got two hours to do that. So the next morning, he hadn't turned himself in. That's 7 November. But then, Julie Frost learned from an Aboriginal Community Police Officer called Derek Williams, and I expect you'll hear from him as well, that the reason why Kumanjayi Walker had left the rehabilitation centre, and was unlikely to hand himself in for the next few days, was because he wanted to attend his great uncle's funeral. Now Julie Frost understood the importance of funerals in the Indigenous community. So she, and Derek Williams, went back to House 577, and spoke to Lottie and Eddie Roberston again.

Now Lottie and Eddie confirmed the funeral was rescheduled to take place at Yuendumu the following day, the Friday. So Frost withdrew her previous demand that he turn himself in within the two hours, and told Lottie and Eddie that police would leave Walker until after the funeral on Friday, provided he came to the station and handed himself in afterwards. That is the following morning.

And arrangements were put in place for Derek Williams to be contacted and assist Kumanjayi Walker with handing himself in at the time. And so after that, there were no further attempts to locate him. Now that evening, that's the Thursday evening, 7 November, in the evening, Frost received an SMS indicating that the funeral had been postponed from Friday to the Saturday, that's 9 November, the day of the shooting. And Derek Williams' understanding of Frost's discussion with Lottie and Eddie was that Arnold would hand himself in on the following morning. There may be some conflicting evidence about what the understanding was, but that was certainly his understanding, Derek Williams. And I should say that Derek Williams was – he had arrested Kumanjayi Walker, without fuss, on other occasions.

Now let me tell you how the accused became involved in this matter. On the – at 3 pm, on 7 November, the accused commenced his shift at the Alice Springs Police Station. He, quite properly, accessed information about the axe incident on PROMIS. And he looked at Kumanjayi Walker's profile on PROMIS. He accessed the body-worn video footage of the axe incident. And later that afternoon, the accused and his shift partner at the time, Mitchell Hansen, began looking for Kumanjayi Walker around Alice Springs, including at a place called the Warlpiri Camp, with other officers. And you'll – though you'll hear some evidence, and indeed we'll play a body-worn video of the search for the accused on 7 November.

The plan for the search on 7 November at Warlpiri Camp was standard cordon and control technique. That is, you identify the house that Kumanjayi Walker was supposed to be in, and you work out which sides of the house you're going to cordon

off, control, and then you call him out of the house. And that cordon and control technique is something that's going to become important when you hear the person who is in charge of the training of Northern Territory Police, is a very important witness in this case, called Detective Barram.

So that's why the search on 7 November has some importance. Now the officer did not locate Kumanjayi Walker at the Warlpiri Camp. Later that evening, the accused again accessed the body-worn footage of the axe incident, and again saw what occurred. So did Mitchell Hansen. And together they discussed what they thought Smith and Hand had done. In fact, they criticised, or they thought that what Smith and Hand had done was, was wrong and they discussed what they would have done in that situation. And again, on 8 November, the accused was on an afternoon shift and that night he again accessed the body-worn footage of the axe incident.

Your Honour, I note the time is 1 o'clock. Would your Honour wish me to stop now or at 1.15?

HIS HONOUR: I think probably we will stop at this point.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: So I said earlier, members of the jury, we will be working shorter hours in this trial. So I'm now going to release you for the day and I will ask that you reassemble tomorrow morning for a 9.30 start. And I simply remind you not to discuss your role in the trial with anybody else, other than other members of the jury. All right. You may now retire.

JURY OUT

HIS HONOUR: Now, the accused. Bail will be continued throughout all of the breaks in the trial.

MR EDWARDSON: As your Honour pleases.

HIS HONOUR: Is there any other matters that we need to deal with this afternoon?

MR STRICKLAND: Not from our part, your Honour.

MR EDWARDSON: No, sir.

HIS HONOUR: All right. Just before we do break, it did seem to me, Mr Strickland, that you might have got yourself tied up a little bit in explaining to the jury self-defence and what they would need to be satisfied of in self-defence. I must say, I wasn't able to write it down verbatim, but it did seem a little convoluted.

MR STRICKLAND: I can tell you what I said, because I have written this bit down. Would you like me to - - -

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour, I thought he told us the onus of proof, but I wanted to check the transcript before I made any comment about it.

MR STRICKLAND: What I'll do is, I'll check the transcript - - -

HIS HONOUR: Yes, check the transcript.

MR STRICKLAND: If I've erred I will, first thing tomorrow, correct it.

HIS HONOUR: I was going to give you that opportunity.

MR STRICKLAND: Thanks, your Honour.

HIS HONOUR: Yes. All right, then.

I'll adjourn.

ADJOURNED 1.02 PM TO TUESDAY 8 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON TUESDAY 8 FEBRUARY 2022 AT 9:36 AM

(Continued from 07/02/2022)

Transcribed by: EPIQ

MR EDWARDSON QC: Your Honour, before the jury come in, can I raise a couple of matters. Firstly, can I seek your Honour's leave, or permission, for my client to sit immediately behind me. There's two reasons for that. One, it means he can actually see the jury, and vice versa, which I think is appropriate. And secondly, it gives him access to my instructing solicitor who will be just to his left. And also, my other assistant can then use that table, and the security officer will be there as well.

HIS HONOUR: If there's sufficient space, then I'm quite content.

MR EDWARDSON: There is, your Honour.

HIS HONOUR: I think the concern had been that there may not be sufficient space, but I'm happy for that to happen.

MR EDWARDSON: And that's with proper spacing between seats.

HIS HONOUR: All right.

MR EDWARDSON: Thank you. The second thing, your Honour, is can we make some corrections to the transcript. The first is page five.

HIS HONOUR: Yes, just one moment.

MR EDWARDSON: My learned junior's been appointed to the district court and wasn't here yesterday, it was me.

HIS HONOUR: Page five.

MR EDWARDSON: It's got "Mr Allen."

HIS HONOUR: I see.

MR EDWARDSON: Page eight, your Honour, I certainly did not present the indictment. Mr Strickland did.

HIS HONOUR: Yes.

MR EDWARDSON: And finally, your Honour, your Honour will remember neither of us could actually get down precisely what the words were that were uttered by Mr Strickland in the context of what I thought was a reversal of proof. I think the passage is at page 14. In particular, under the heading of "Self-defence." In the second paragraph, and it may be that my learned friend would like to correct that.

MR STRICKLAND SC: I will do that, your Honour.

MR EDWARDSON: I don't need to say anything, but yes.

HIS HONOUR: Yes, all right.



Now unless there's anything else that we need to deal with at this point, I'll simply have the jury brought in.

Yes, bring the jury in.

JURY IN

HIS HONOUR: Now I've received a note from one of the jurors, indicating that another person who was on the panel, not a member of this jury, has told their co-workers that this particular juror is on the jury. I don't know that it's anything that – I'll have that followed up but at the present time we will simply proceed.

MR STRICKLAND: Your Honour pleases.

HIS HONOUR: Yes, thank you. Yes.

MR STRICKLAND: Members of the jury, I want to remind you of one thing I said yesterday about self-defence and correct one thing I said because I used the dreaded double negative, which was both confusing and wrong. So I am just going to remind you of something and then tell you something about self-defence.

So, now, your Honour, the connection doesn't appear to be working. Thank you, if that could be enlarged if possible? Thank you very much.

So what I said yesterday which was correct is that in relation to self-defence, if the accused fired the second and third shots because he believed it was necessary either to defend himself or Eberl and his conduct in firing those two shots was a reasonable response in the circumstances as he perceived them, then his conduct is legally justified. That would mean that self-defence is established and not guilty.

Now, the Crown has to prove that he was not acting in self-defence. We must prove that beyond reasonable doubt.

Now, the Crown case is - and this is what I used the double negative yesterday, so I will now put it correctly. The Crown case is that you - at the end of the day you won't be satisfied beyond reasonable doubt that the accused believed the firing of shots two and three was necessary to defend himself or Eberl.

HIS HONOUR: No, I'm afraid you've got that wrong again, Mr Strickland, if I may interrupt you. I am loathe to do so.

MR STRICKLAND: Not at all, your Honour.

HIS HONOUR: Surely, at the end of the day, in order to convict the accused, the jury will have to be satisfied positively that the accused did not believe that firing the second or third shots was necessary or, alternatively, they will have to be positively satisfied that the conduct of the accused was not a reasonable response in the circumstances as he perceived them to be.

MR STRICKLAND: Yes, your Honour, I accept that.

HIS HONOUR: Yes, all right.

MR STRICKLAND: Given, as I said right at the beginning, his Honour is the judge of the law. What his Honour has said is the case. I am sorry I keep using the double negatives.

Now, your Honour, Ms Callan asserts there was one other matter - a correction from yesterday about the body-worn - that the - - that's what on the body-worn, that bird's-eye footage.

MS CALLAN SC: Your Honour, this is something that was raised by defence yesterday after court.

Ladies and gentlemen of the jury, yesterday when playing you what is described as the, "bird's-eye video," which is the synchronised presentation of the different body-worn footage, you might recall one of the features of that video is at certain points in time there are little green dots which signify the location of particular individuals in and around House 511.

It was observed yesterday that there was an error at a point in time in relation to that green labelling as to the identity of the person in that location, so you might recall - knowing there was a lot that you were absorbing yesterday - that what was played in that bird's-eye video was described as "sequence 1" and that was what occurred outside House 511 and then "sequence 2" which is what occurred inside House 511.

Now, towards the end of sequence 1, when Constables Rolfe and Eberl are outside House 511, the green marker indicating who was positioned outside the door was around the wrong way. The position is - and there is no dispute about this - that Constable Eberl was at the door to House 511 and Constable Rolfe was behind him and that labelling, your Honour, was, as I said, an error in that video. The position is correct thereafter in sequence 2 as to the positioning of those two officers inside.

Thank you, your Honour.

HIS HONOUR: Thank you.

MR EDWARDSON: Your Honour, that is the position and we are grateful to our friends.

HIS HONOUR: Thank you. Yes?

MR STRICKLAND: So, members of the jury, let me resume where we were yesterday and that was we are now on 9 November 2019 and you recall we are at the stage where Julie Frost, who you will hear from, is going to be requesting help from the Immediate Response Team.

So, you have - if you go to tab 3 of your - that bundle, you will see there is an organisation chart. And this is not all the relevant - this is not all the police in the Northern Territory at the time, it's just the people that are relevant for the purposes of

this case - or some of them - and you will see - you will be hearing from Travis Wurst, who is the Assistant Commissioner and you will also be hearing from Jody Nobbs who is a Superintendent of the Southern Desert Division. So they were different superintendents for different divisions, the Superintendent of Crime, the Superintendent of Alice Springs and the Southern Division, of course, includes Alice Springs.

So Julie Frost called Superintendent Nobbs at about 1 o'clock on 9 November and requests the deployment of the Immediate Response Team from Alice Springs to provide general support at Yuendumu. So it's not high-risk - it's not a high-risk deployment, it is general support deployment. And she asked for the IRT for a number of reasons, one of them was because the medical staff at Yuendumu said that they were going to leave because of some break-ins and it was likely that there would be an overflow of police calls.

So Julie Frost, wanted the IRT to help the local police do what she called, "High visibility general duties" that is just go out into the community, be visible. And also she wanted the IRT to help arrest Kumanjayi Walker if he did not surrender, because you remember there were some arrangements in relation to him attending this funeral; and I expect there will be evidence about the importance of Kumanjayi Walker attending that funeral, there was a cultural significance to that.

Now, Frost specifically asked Nobbs for a police dog. She said that would be crucial in any plan to arrest Kumanjayi Walker because Walker might run from the police and if he ran, a police dog could be used to round him up and that was apparently standard police operational procedures. There is a lot of open space around Yuendumu as you will see from the body-worn. So, you will hear a little bit about the IRT itself, why it is set up. It is set up to respond to either high-risk incidents - for example like a siege, if the Darwin-based Tactical Response Group - that's another specialist group - isn't available and the IRT is also established to provide general support, that is, just supporting the police in their general duties, the arresting people, domestic violence, whatever.

Now, the deployment at Yuendumu, as I said, was general support deployment and the officers who participate in the IRT are generally general duties officers but they receive some additional training in tactical - in tactics, defensive tactics, and you will hear what, "defensive tactics" is and weapons training. And if you go to tab 41 - I am not suggesting you do it now but you will see that there is a summary of the IRT training of all the members - of all those IRT members who went on 9 November.

So, on 9 November this request by Julie Frost - it's an email request - for the IRT deployment, worked its way through that chain of command that I showed you and the request was approved. Just go back please, just to the last - you will see that there is one of the officers there under - can you see, "Superintendent of Alice Springs" reporting to her is a person called Shane McCormack? And you will see there is a little asterisk. He was the acting sergeant and, on that day, he was responsible for the IRT. He was responsible for organising the police at Alice Springs to go to Yuendumu. So he rang - that is McCormack rang the accused - he

rang James Kirstenfeldt, he rang Anthony Hawkings. Hawkings himself called Eberl. All of those men were available. And McCormack asked them to liaise with Julie Frost and assist in the arrest of Kumanjaya Walker.

McCormack's understanding was that Frost was running the show at Yuendumu and the IRT were to report to her and take directions from her. And, in accordance with Julie Frost's request, a fifth officer from the Dog Operation Unit, Senior Constable Adam Donaldson, was also deployed to Yuendumu to accompany the IRT team.

Now, during that afternoon of 9 November, Nobbs and Frost developed what's called an "Operational plan" to arrest Kumanjaya Walker. An important part of that plan was to arrest Kumanjaya at 5 am on the Sunday morning. The funeral should have been finished by the Saturday. And the idea was to allow Kumanjaya Walker time to hand himself in after the funeral and, if he did not, then he should be arrested on Sunday morning when, hopefully, he would be asleep at 5 am.

And then there would be Constable Alefaio present – he was a local Yuendumu police who knew Kumanjaya Walker – and all of that was designed to minimise the need for any violent confrontation. Now, that operational plan was emailed to the IRT members at 4.59 pm.

If you go to tab 14, you'll see there's an email from Julie Frost to Watch Commanders and then Adam Donaldson, Anthony Hawkings, Adam Eberl, Zachary Rolfe, James Kirstenfeldt, Felix Alefaio – he's the member I just told you about – Chris Hand, who you saw in the other video, and other people were copied. I'm not going to read it all to you now. You'll get to read that in due course. But if you go to the second page of that, you'll see there is a plan:

Day 1, Saturday 9 November 11 pm, IRT commenced duty and conduct high visibility patrols in response to call-out. Sunday, 10 November 5 am. SDOU Donaldson –

That's the Dog Squad, Donaldson:

- in Yuendumu. Alefaio commenced duty along with IRT members to affect arrest of Walker.

And then, if you go over the page:

If arrested, Walker to be taken to Yuendumu Watch Station.

Now, if you go to the bottom of page 3 you'll see there's a heading, Implementation of Plan. And then you'll see houses, House 577 and then – that's regarded as the primary residence, and then some other houses. And then there's a reference to equipment, which you can see over the page. And then the vehicles over the page.

Now, that email was sent after the IRT team members had already left Alice Springs for the drive to Yuendumu and I assume there'll be some evidence about mobile reception. But a screenshot of part of that email – the one which, if you go to page 3 it says, "Implementation of Plan." Part of that email is found on the accused's phone after he was arrested. So if you go to tab 16, there will be – these are the screenshots – or some of the screenshots found on the accused's phone.

You'll see a photograph of Kumanjayi Walker on page 1. On page 2, you'll see an image of a phone – of the accused holding the phone. Page 3, there's a map of Yuendumu. Page 4, there's a larger map of Yuendumu. If you look at page 5, you'll see – you've got to turn it on its side – you'll see there's a thing, "Implementation of Plan, Locations of Interest", et cetera. On the title of page 3. And the Crown case is, that is a still image of that email I showed you.

So before the IRT and Donaldson left Alice Springs, they met up at Alice Springs Police Station to sort out their equipment. We'll hear evidence about a quick briefing from Shane McCormack. The accused asked Shane McCormack, "What's the mission?" And McCormack said it was to arrest Kumanjayi Walker. Whilst they're at the Alice Springs Police Station, the members of the IRT watched the body-worn video of the axe incident again and the IRT criticised Hand and Smith for not taking firmer action against Walker. That's during the axe incident.

And you'll hear from Hand and Lanyon Smith – Chris Hand today, I imagine. Lanyon Smith today or tomorrow. And they will give evidence about the axe incident and why they did what they did. The accused also accessed the PROMIS profile of Walker.

Now, the Crown case is that, having looked at the body-worn video of the axe incident several times, the accused should have – but he did not – prioritise safety and caution and planning in executing the warrant to arrest Kumanjayi Walker.

Now, between 3:00 and 4 pm that afternoon, the four IRT members departed Alice Springs. Donaldson went first, travelling with his dog. Then Kirstenfeldt and Rolfe went in one vehicle, followed by Eberl and Hawkings in another vehicle. Now, you'll see CCTV images, stills, of the IRT members arriving at the Yuendumu Police Station. And that gives you an idea of the times when they arrived, 6.33, Rolfe and Kirstenfeldt arrived.

Kirstenfeldt will say, I imagine, that Frost showed him a plan which – contained in an email, which included a plan to arrest Walker at 5.30 am. So there will be evidence of that email I told you about, the 4.59 pm email. There will be some evidence about it being communicated – the contents of it - being communicated to the IRT. There may be some conflicting evidence about what was communicated to the IRT.

Eberl and Hawkings arrived next, at about 6.56 pm. Donaldson had arrived first, he had gone around to have a look and then he comes back to the station. And then

at 7 pm, in the muster room at Yuendumu, Frost briefs the IRT members. And you'll evidence from each of the IRT officers about what was said at that briefing.

According to Frost, her briefing was quick and it was as per that email – that 4.59 pm email - that is, “Your job is to provide” – this is the briefing – “Your job is to provide high visibility policing, gather intel” – intelligence – “On where is Kumanjayi, where is he going to stay the night, and arrest him the following morning at 5 am when Felix Alefaio would come on duty,” because Felix Alefaio could identify who Walker was. Frost's instructions were also if they happened to come across Walker in their intel-gathering phase, then they should arrest him.

Now, the Crown case is that the accused and the other IRT members chose to ignore that operational plan to arrest Kumanjayi Walker at 5 am on Sunday. When they left Yuendumu Station at 7.06 pm, they were intent on finding and arresting him that evening.

Now, when they left the Yuendumu Station at 7.06, they headed for House 577. You remember in that email, it has House 577 (primary residence). And that's House 577 is where the axe incident took place. So that's where they went first, understandably. Each of the IRT members were carrying their Glock semi-automatic firearm. In addition to that, the accused had a Taser and Kirstenfeldt had a Taser and a bean bag shot gun. And Hawkings had an AR15 assault rifle.

Now I'm going to play to you, the body-worn video of the accused. And then Mr Kirstenfeldt, in relation to that initial search of House 577. And just pausing there, just a couple of things to note – I'll just wait until it gets on the screen.

#### DVD PLAYED

MR STRICKLAND: Just a couple of things to note, first, you'll see the map of Yuendumu. And that's what the IRT were given at Yuendumu. You'll also notice that there's a time. Now it's a little bit confusing, but the timing becomes important in this case, and what's on the body-worn is universal time, or they call it Z Time. So you've got to add nine and a half hours to that time, to get Eastern Standard Time (sic). And I – what I'm going to do is I'm going to ignore the Z Time. It's confusing, and just tell you Eastern Standard Time, because you do – you can calculate that back, if you want to, to the Z Time.

So the Eastern – when I mention the Eastern Standard Times, that will relate back to these central times.

Beg your pardon? I said Eastern Standard Time. There you go, I've just betrayed where I come from. It's Central Standard Time, I'm sorry. So when - I beg your pardon. So I'll be giving you the Central Standard Time, and that time is based upon the Z Time.

So if that could be played, thank you.

DVD PLAYED

MR STRICKLAND: So, one of the features of that body-worn is the accused says to Ethan Robertson, right at the beginning, "Hey, we're here to grab Arnold hey, because we've got to get him." And that, you may consider, at the end of the case, is whether that indicates what his actual intention was, whether to follow the Frost plan, or whether to arrest him then and there.

And then you'll notice at the end of that clip that Ethan Robertson told the accused that Kumanjaya Walker was likely to be in House 511. And that's why they go to House 511.

I now want to play you the same entry of 577, but this time from a different perspective. And this is perhaps the more important one, because it's Kirstenfeldt and showing what the accused is doing when he's going into House 577. And there's a particular aspect that I'm going to pause when we get there. I'll give you an address about that.

Thank you.

DVD PLAYED

MR STRICKLAND: Now you'll hear some – you're going to hear some evidence about the Glock. If you go to tab 31, you'll see a photograph of the Glock. And you'll also see the evidence of a holster. That is, what the Glock is held in. If you go to tab 32, you'll see that. Now if you notice back on the image on the screen, you'll see that shortly after he's entered House 577, the accused has his right hand on the Glock. And you'll hear some evidence about this. But the Crown case is that the accused disengaged his initial retention device on the Glock, on his holster, sorry, which held the Glock. And the purpose in doing that was to prepare for a fast draw of the hand gun. And I'll play the next 30 or 40 seconds, and you can decide for yourself. It's a matter for you what you see. But you'll see that he maintains a hand on the firearm for most of that search. And he does that, despite the fact that he's also got a Taser in his accoutrement. So just have a – I'll just play it until the next 30 seconds.

DVD PLAYED

MR STRICKLAND: Pause.

And again, you can see it's fairly clear there where – there'll be evidence about where that hand is. The Crown will suggest that's his hand on the Glock.

Yes, you can continue, thanks.

DVD PLAYED



MR STRICKLAND: You can see the rest of that, the other angle. So you will hear – one of the important witnesses in this case is Detective Sergeant – Senior Sergeant Andrew Barram. He was the officer-in-charge of what's called the Operational Safety Section. That's responsible for training police in a whole range of disciplines. Including the use of firearms. What's described as defensive tactics, police use of force. I anticipate that he will be asked about this search of House 577. He will say there was – he will be critical, I anticipate, of the accused disengaging the initial retention device, whilst he was in House 577. Particularly when there were children around. Indeed, I anticipate he'll be critical of, what was described by another Officer Hawkings, as the clear inside the house itself. It was inappropriate to do so. There were young children there. And moreover, you will know that Kirstenfeldt spoke to this 12-year old – well, a 12-year old boy there, who said Walker had left three minutes ago with his girlfriend Rakeisha, but he was coming back to stay that night.

And according to Kirstenfeldt, he – Kirstenfeldt told Rolfe that information. You can see that there, and said he thought the kid was genuine. So the Crown case is given that they knew that, that he was going to be staying there at House 577 that night, that's what they were tasked to do. Find intelligence as to where he'd be that night. Come back the following morning. But they didn't follow that plan. They didn't wait until the Sunday morning to arrest Kumanjaya Walker. So they then went, having received the information from Ethan Robertson, they then went to House 511. The four members all drove to IRT, and then you've got those – you remember from the bird's-eye view that you got the different perspectives. Where they land, and who they spoke to.

So I'll play the body-worn again, but just from two different perspectives, Eberl, and the accused. Donaldson also arrived, and he left the dog in the car. So I'll play the accused body-worn video, just up until they enter House 511.

DVD PLAYED

MR STRICKLAND: Now he is speaking to Leanne Oldfield - that's the accused's mum, and I expect you will hear from her as well.

HIS HONOUR: No, not the accused's mum but the - - -

MR STRICKLAND: I am sorry, I beg your pardon - Kumanjaya Walker's mum, I beg your pardon.

HIS HONOUR: Yes.

DVD PLAYED

MR STRICKLAND: So, there is a reference to Margaret - Margaret is Margaret Brown, you will see on the - I think it is tab 3 or tab 4 there's a reference to Margaret Brown. She is the grandmother and it is her house.

The accused meets up with Eberl, goes to the front of House 511 and he transmits on his radio, "Me and Adam are just going to clear this red house" being 511. Now, "Adam" is of course Adam Eberl. The red house was House 511 and the phrase, "Clear a house" is a term used by police and military officers and it refers to a method of entering a house, checking the rooms to see if the person they are looking for is inside.

I will play now what - in respect of from Eberl as he gets up and to House 511.

#### DVD PLAYED

MR STRICKLAND: So the significance of that is he speaks to - Eberl speaks to a woman called Elizabeth Snape, she is the woman with the two young children. I anticipate she will be called. She is the one asking, "Why have you got a gun?" like he is aiming to shoot someone. She is probably - she is probably referring to Hawkings, who is carrying the assault rifle - it's the AR15. Eberl denies the gun is aimed at anyone and says, "Someone probably shouldn't run at police with an axe" referring to - presumably - the axe incident.

When Eberl then joins the accused they go to the front of House 511 and speak with Nathan Coulthard. I imagine he will - I anticipate he will give evidence and then Eberl sees someone in the back of House 511.

There will be evidence about this. You have got a diagram of House 511. I anticipate the evidence will be there is only one access to that house and that access is via the front door. There were rear access doors but they were blocked at the time. So it is seven - now I am now going to use Central Standard time for the times now become important.

At 7:20 pm and 56 seconds Eberl enters House 511 and I get that - you get that time from the Z time, doing the conversion of nine and-a-half hours. Three seconds later - that is just before 7:21, the accused enters the house and as you will see - as you have seen from the body-worn video it is almost dark outside and it's dark inside the house and so Adam Eberl turns his torch on.

Now, the Crown case is that the accused's decision to enter and clear House 511 when he suspected Kumanjaya Walker was inside was made without adequate planning or assessment and, in doing so, he did not properly consider the potential risks either to himself or to Eberl or to Kumanjaya Walker.

So I am now going to play just an excerpt of about 10 or 15 seconds of the shooting and, your Honour, again, this is the disturbing part of the video if anyone from the body of the court doesn't wish to be present.

HIS HONOUR: Those who are present in the gallery of the courtroom have heard what the Crown Prosecutor has had to say. The video which is now about to be shown will show material which may be distressing to a number of people. If that is the case then those persons should now leave the court.

DVD PLAYED

MR STRICKLAND: I will now play the same segment from the accused's perspective.

DVD PLAYED

MR STRICKLAND: Now, what is relevant to notice is what Kumanjaya Walker is wearing. And that becomes relevant later on, when they're on the mattress and you need to determine where Kumanjaya Walker is on the mattress. And you can – Crown case will be you can tell that from that red satchel. Now, what will be tendered in this case – and I'm not going to handle it – it's got to be tendered in a proper conveyance – is the shirt itself.

It's a Chicago Bulls shirt, number 23, I believe was Michael Jordan's number. And it's a shiny motif and so you can see it – I'll show you when it's clear. I'm going to keep going, but when it's ready I'll show it to you and you can just see – it's kind of clearer when you see it firsthand. Of course, the shirt has – also shows the entrance of the bullets.

And you can see the accused holding up his mobile phone, displaying a photograph of Kumanjaya Walker, and Kumanjaya Walker is continuing to say his name is Vernon Dixon which, of course, it wasn't. And you'll notice that the accused asked Kumanjaya Walker several times to remove his red baseball cap and keep it removed, and then Walker kept on trying to put it back on to his head. I'll just see how it's going. Could the officer-in-charge just come close to the body of the shirt – I don't want to handle it myself, and just - - -

HIS HONOUR: Yes.

MR STRICKLAND: Perhaps you could just come closer so the jury can see it. The whole jury. Thank you.

And that's what you can see there. There'll be evidence about that. That was seized – thank you very much.

Now, the accused then directs Walker to put his hands behind his back. Walker then raises his right arm and the struggle begins.

Now, the struggle and those events that unfolded once the accused and Eberl had entered 511, are the very things that Frost's operational plan was designed to avoid. The Crown case is that if the accused had followed that operational plan, waited the next morning, Sunday morning, Alex Alefaio (sic) would have accompanied the IRT team. Alefaio knew Walker. There would have been no need to identify him by phone.

I anticipate that Detective Barram will say that, having entered House 511, the accused should have done one of either two things. Either (a) closed in rapidly, taking effective control of Walker with Eberl, grabbing both of his arms to make an arrest, or (b) should have stepped back outside the house and contained him inside, tried to negotiate a peaceful resolution. That's one of the tactics that are taught: cordon and contain, it's called.

And Barram will give evidence that NT Officers, in deploying use of force and defensive tactics, are trained to minimise the risk of becoming involved in these very high-risk situations. And that I anticipate Barram will say that the failure to either immediately gain firm control of Arnold Walker or cordon and contain him was contrary to the accused's training and put himself and Eberl in a position of danger.

Now, I talked yesterday about the context of the shooting. So what I've sought to do, in brief form, in outlining the Crown case from the axe incident and the accused's knowledge of the axe incident until this point in time, is what I meant by understanding the context in which the shooting took place. Because the Crown's case is the choice made by the accused to draw his Glock and fire the second and third fatal shots must be seen in the context of this background.

And in particular, the accused's knowledge of – and his reaction to – the axe incident. In particular, his failure to follow the operational plan to arrest Kumanjayi Walker on Sunday morning. In particular, the failure of the accused to follow proper training – that is, approaching Kumanjayi Walker too closely without taking control of him. Or, if he did not want to take that option, not exiting the house and cordoning and containing him – exiting 511.

Now, I'll now play the two perspectives of the shooting up until the end of shot 3. And you'll notice – so this is from the time when Kumanjayi Walker was asked to turn around by the accused and then starts to resist.

DVD PLAYED

MR STRICKLAND: That was from Rolfe's body-worn. I now play Eberl's.

DVD PLAYED

MR STRICKLAND: So after Walker begins to resist, Walker raises his right arm and strikes at the accused's left shoulder with the scissors. And there's a photograph of the scissors in the – in that folder. The accused went to hospital later that night and the medical records show that the accused had a small puncture wound to his left shoulder. And you can see photographs of that injury if you go tab 19, photographs 3 and 7. And if you go to tab 25, you'll see the scissors.

So from the time the struggle commences up until the first shot, it appears that Constable Eberl – who was behind Walker holding him around the left shoulder and neck in a kind of a bear hug – it appears that Eberl didn't have control over Kumanjayi Walker's right arm. The accused steps backward, disengages from Eberl

and Kumanjaya Walker and draws his firearm. And then – and this an agreed fact – at 7.22.01 pm – that's Central Standard Time – the accused fires the first shot, into the middle right region of Kumanjaya Walker's back. He's about a – the accused is about a metre away at that point. And that's not a fatal shot. And as I said yesterday, the Crown hasn't charged the accused with any offence relating to the first shot. At the time he fired the first shot, the accused had just been struck with the scissors by Kumanjaya Walker, and Walker was struggling with Constable Eberl. Therefore, the Crown accepts that there's a reasonable possibility, that when the accused fired the first shot, he was acting to defend himself or Eberl.

The Crown case, as I said yesterday, relates solely to the second and third shots. The situation had changed dramatically from the first shot. By the time the accused shot Kumanjaya Walker the second time, Walker was pinned beneath Constable Eberl and a thin foam mattress.

By the time the accused shot Kumanjaya Walker the second and third time, Kumanjaya Walker was not striking out with the scissors, because Eberl had Kumanjaya Walker under control.

So, the Crown case is that when he fired the second and third shot, there was no legal justification for his action. And given that the accused shot Kumanjaya Walker at point blank range, and there'll be some ballistic evidence about that. It was some five centimetres away, the Crown case is that the accused intended either to kill him, or at the very least, to cause him serious harm.

Now you'll hear from a witness called Mr Sorell, he's a police officer. And he has taken various – and looked at, various still shots. That is, you've seen – you've seen the moving video, and you can take stills of those. And the – there are 30 frames per second. And the expert witnesses in this case, called by the Crown, who I'll come to in a moment. McIntosh, and Detective Barram, have looked at those stills, have looked at the body-worn video in real time. That is, normal time. And slow-motion, and in the stills. So you will be shown a number of stills. And the experts will give some evidence about that.

Now just – I'm not going to show you all the stills now, but I'm just going to give to you, just a number of stills. Because that is relevant to, we say, the issues of – or a number of the issues - in relation to legal justification. So I'll just hand those out now.

Your Honour, could I mark those for identification at this stage.

HIS HONOUR: I have those marked for identification with the letter A.

EXHIBIT MFIA: Stills.

MR STRICKLAND: I think I said Sorell was a police officer. I don't think that's the case. But he'll give his expert – he'll give his qualifications when he does. Now, the first frame, I'm just showing you that, and just remembering that you've got these

three images. The left hand one is from the accused's body-worn. The one on the top right is from Mr Eberl. The one on the top left is from Hawkings. So frame 36, and again, that's Z Time, 7.21.51. Just showing that shirt that you saw, and the red satchel. That's just the context. If you go to frame 165. The – that's when the struggles began – begun. And you can see Kumanjaya Walker standing up against the wall.

If you go now to 314, that's when – this was just before the first shot. And the importance that you can – both Kumanjaya Walker and Adam Eberl, you can see there's a kind of blue and white chequered hat, it's worn by Eberl. And that motif, the shirt, is what seems to reflect the torch. That's that light coming.

Now if you go to frame 320. So that's the accused holding the Glock in both hands. You notice on the left hand he's wearing a watch band. And then at frame 331 – 339, I'm sorry, that's the evidence of the first shot being fired.

Now that's where we get 7.21.01, because of the – you translate the Z Time, 9.52.01 at nine and a half hours, you get to 7.22.01 pm. The orange flash is the explosion from the projectile. The explosion causes the projectile to leave the muzzle. And that causes the orange flash. And you can see it appears that he's holding the Glock in the right hand.

Now just notice the frame number, that's 339. And if you go over the page – sorry, next one is 366. So there's 30 frames a second. So that's a further 27 frames. They're about a second. And you can also – it's the Z Time. It's – we're now at 9.52.02. That's one second. So one second has elapsed, approximately, between frame – between the firing of it. Shot one. And when Eberl is on top of Kumanjaya Walker on the mattress. And then if you go to – these next frames are just helping identify the position. And I should say, it appears, or I anticipate that the evidence that what Eberl is doing, consistent with his training, is pressing Kumanjaya Walker onto the thin foam mattress.

I should say, if you go back to 366, you can see Eberl's left arm. And then if you go to 372, then 373, and 373 you can see Eberl's right arm, appearing to be over the top of Kumanjaya Walker's body. And you can see the left leg of Kumanjaya Walker. Can I just say, when I say "You can see", I remind you what his Honour said, this is – what I'm saying is not evidence, it's a matter of what you find. But I'm anticipating what the Crown case will be. But at the end of the day, what you make of these images is what you make of them. Not what anyone else makes of them.

Frame 374, and then Crown case is, that what Eberl is trying to do is to – is another term taught, ground stabilise Kumanjaya Walker. That's an important part of police training to control Kumanjaya Walker. Now it's a dynamic situation. It's obviously happening extremely quickly in real time. And the accused is moving. So the body-worn video therefore, was capturing things from different angles. Which is why when you go through the different frames, you will see the – you're seeing it from slightly different angles.

Now if you go to frame 377, it's not that easy to see, but you'll see a kind of a red dot. Yes, just next to Eberl, there's a red dot. It's on the right of Eberl. Now, I anticipate the evidence will be that that signifies – that red dot is from the body-worn video. And that signifies that Eberl's body-worn video has come off his body during the struggle. But nevertheless, the body-worn video continues to record after that.

So if you go in the top right-hand corner of that 377, that's from Eberl's body-worn and that light is the - I anticipate the evidence will be that is a torch, that's his mag torch. If you go to frame 414 it's a little bit clearer, that red light, and so that is on the mattress - that is his body-worn is on the mattress - Eberl's body-worn is on the mattress, recording what the accused is doing, you can see that on the top right-hand corner.

Now, at 414 - this is very shortly before the second shot - very shortly before - milliseconds before - 414 and then at 415 you can see the accused's left hand is in the belt - in the back area of Eberl. On the right hand, he's holding his Glock and you can also see his - you can also see Eberl's capsicum spray - the capsicum spray. Now, 416 and then if you go to 417, now this is 7:52:03, so we're talking 2.6 seconds after the first shot and again you can see the orange flash. At 417 that's the second shot.

If you to 419 - I'm sorry, I beg your pardon - 418, it's immediately after the first - second shot. 418 and 419 you can see the accused's position of his hand on Eberl and also you can see Eberl's body-worn showing the accused's face and at 418 and then also 419 they are fairly clear pictures of Eberl's - the position of Eberl's right arm over Kumanjaya Walker's upper body and this is where you can see the position of Kumanjaya Walker, you can see that's where that red satchel comes in - that helps you identify his position.

And 426, you get the clearest picture of the body-worn device which is recording the images, that's Eberl's body-worn device and you can see the accused's face. Eberl's head is against the wall, his upper body - his body is still holding the upper body of Kumanjaya Walker. And then at frame 433 - so this is now at 7:22:04 there is the muzzle flash from the third shot fired at Kumanjaya Walker's left torso. That is I think 0.53 seconds after the second shot and again you can see the accused's hand on Eberl, the right hand holding the Glock.

Now if you go to 447 that, again, shows the position of Eberl, one of the clearer pictures on top of Kumanjaya Walker who is still on the mattress. And then - now, at that point in time you can see, at 447, you can see there is now images on the bottom right hand - bottom right hand. Now, that comes from Hawkings and when you - when Mr Hawkings gives evidence, you will note that he passes the front door at around about the time of the third shot, and he - there is just momentary vision from his video about what happens. So you will get a third perspective. And this is just a still from the Hawkings video and that is at 7:22:05, it's a second after the third shot, and that gives you a perspective from the front door of the house, the accused leaning over Eberl and Kumanjaya Walker and you can see his right arm extending

downwards, pointing in the direction of Kumanjayi Walker, so it shows just how close the accused was to both of them.

And it is also relevant because Hawkings was another officer who was available to help if the accused had followed his training and reassessed the danger. Hawkings was a third officer who could have helped.

Now, relevantly, before firing his weapon on the second and third occasions, the accused did not give any warning to Kumanjayi Walker or Eberl he was about to use his Glock. He didn't shout anything - he didn't shout, "Knife - knife - knife" or "Scissors - scissors - scissors" didn't direct Walker to drop them and Detective Barram will say the police are trained to give such warnings - or commands - in those situations.

Now, I've mentioned the biomechanic - I've mentioned Dr Andrew McIntosh, the biomechanical engineer - he is a biomechanical expert and he has viewed these images and I anticipate his evidence will be that at the time that shots two and three were fired Walker - Kumanjayi Walker - was only a low-level threat to Eberl. Kumanjayi was lying sideways on the mattress with Eberl pressing down on him. Kumanjayi Walker's right arm was pinned under his own body and compressed against the mattress and, according to McIntosh, therefore his ability - that is Kumanjayi Walker's ability to move his right arm, which is holding the scissors - was significantly restricted and that therefore made it difficult to use the scissors as a weapon. He could not do - that is, Walker could not do what he had done while he was standing up, which was to swing his arm downwards and hit the accused.

Now, I will now play you the body-worn of what happens after the third shot and what is particularly important here are some of the things that are said by the accused. And this is - and now this is from - I am now going to play Mr Eberl's body-worn after the third shot, and this is from about 7:22:04.

#### DVD PLAYED

MR STRICKLAND: So, I think that is going to be the last video I play to you. So after the third shot you can hear Eberl yelling at Kumanjayi Walker, "Don't fuck around, I'll fucking smash you mate." The accused says, "Give me your arm and then the two officers secure Kumanjayi Walker's hands behind his back.

Eberl says to the accused, "Did you - fuck" which a matter for you - may be a reference to the shooting that just occurred. The accused's response is important, "It's all good, he was stabbing me - he was stabbing me" and Eberl says, "Okay bruz."

And then at 7.22.25 seconds, that's about 21 seconds after the first - third shot, the accused says to Eberl, "He's got scissors right here. He's got scissors right here." And then he says to Walker, "Let go of the scissors, let go of the scissors." And then you hear Kumanjayi Walker calling out to his mother, "Leanne, Leanne," and he says "You mob been shoot me. You mob been shoot me." And Eberl again



says "Let go of the scissors." And Walker says "I'm going to kill you mob." Now even if you think that Kumanjayi Walker meant those words literally, it's important that he said those words, 47 – sorry, 45 seconds after he was shot three times. Not before. The first time the accused refers to the scissors, as recorded in the body-worn is at 7.22.23 seconds. That's 25 – that's 7.22 and 23 seconds.

And that's some 21 seconds after he's fired – or 22 seconds after he's fired the first shot. And if you just look at the – I'll just show you one other frame. And this is at 7.22.25, you can see – this is – you can see the scissors clearly in Kumanjayi Walker's hand. But that's frame 1151.

Now when the accused said the words "He was stabbing me, he was stabbing you," you have to consider the significance of those words. Was the accused either, 1) referring to Kumanjayi Walker stabbing him, and trying to stab Eberl when they were standing up, that's before shot one. Or was he referring to, what the accused believed he saw, when Eberl and Kumanjayi Walker were on the mattress. That's before the second and third shot. Or, or, did he say those words because he knew that he had gone too far when he fired the second and third shots. In other words, when he said those words, "He was stabbing me, he was stabbing you" he knew that the shots were not necessary or reasonable. He knew that everything he'd done was captured on the body-worn video. In short, he said those words in order to justify what he had done.

Now the accused and Eberl handcuffed Walker. And after he did that, the accused said to Eberl, "I'm going to glove up, we need to do first aid." And the IRT officers then took Mr Walker from House 511 to the nearby police paddywagon. And police quickly moved – after getting into the police vehicle, they went – they drove directly to Yuendumu Police Station at 7.36 pm, where first aid was administered to Walker, and the Crown accepts that both at House 511, and at the police station, the accused and other members of the IRT, did the best they could to save his life. But one of the bullets fired by the accused, either shots two or three, fatally damaged Kumanjayi Walker's spleen, his kidney, and his right lung. And he was declared dead at 8.36 pm.

Now if you go to tab 22, you will see that there were photographs taken by various members of the community at Yuendumu. They've each got initials on them. Some of them are not that clear, "JF", "NS", "SB", "TH". Now, none of those people are being called. And this is an example where the agreed facts are designed to save some time.

There's some agreed facts about who took the photographs. When they were taken, and that people who took them didn't touch any of the relevant items before they took the photographs. That's an agreed fact. You'll see that, those agreed facts, so that those witnesses won't be called.

Now if you go to "NS", that's the initials of someone that took them. NS13 and 14 are photographs of the bloodied foam mattress. And you will see in NS14, one of the casings from the Glock pistol. If you go to NS16, you can see the position of the

scissors. You go to NS19 and 23, you get further photographs of where the casing is.

Now the next morning, Senior Constable Ian Spilsbury attended House 511. And you can see he has photographs that also may assist you as to where various items are. The foam mattress, the scissors, the torch, the three shell casings. And that's at tab 23. Now there'll be evidence about a scratch sustained by Adam Eberl.

It's not clear when he sustained that scratch. Photographs were taken of Adam Eberl on 13 November. If you go to – if you go to tab 21. You'd be able to see from the last photograph there, that's photograph 11, when these photographs were taken. That's four days later, 13 November. And you can see from photograph six onwards, you can see the scratch, and the location of the scratch on the left shoulder. Now he was asked – Adam Eberl was asked on 13 November, by investigating police, if he'd received any injury during the struggle four days earlier. And he said "Not that I know of." He didn't know if that injury, which was pointed out to him, came from the scissors, or from something else.

Now there'll be evidence from a forensic chemist called Timothy Simpson, who'll give evidence that he examined Eberl's shirt. If you go to tab 33, you will see there that there is the location of the damage to his shirt. If you go to the second page, it's on the back of the shirt.

The Crown case is that the damage to the shirt doesn't match the location of the scratch on the left shoulder. You'll also hear from Dr Lee, that there was very light blood staining on Eberl's shirt, and that the light blood stain was transferred from what he described – is described as a blood bearing surface. But she can't say what the surface was.

Now I conclude this description of what the evidence will be by going back to Detective Barram. He will give evidence directly about the reasonableness, or his opinion – we say his expert opinion, about the reasonableness of the use of lethal force. Now his opinion is that the first shot was reasonable. Because Adam Eberl was at risk of serious harm or death, from being stabbed by the scissors. And Walker's right arm, carrying the scissors wasn't restrained. And that other options, that is, options apart from using a firearm were not practical at the time. He puts great weight on the fact that Walker was standing up at the time of the first shot.

Barram's opinion is that after the first shot, the situation changed significantly. First, Kumanjayi Walker had been shot in a critical area of his body by a .40 millimetre bullet. And the accused was aware of the likely affect such a bullet wound have at such close range – about a metre.

Secondly, Eberl was no longer at immediate risk of serious harm or death because Eberl had effectively or was effectively restraining him, controlling him on the mattress.

And importantly, Barram's opinion is that, in firing the second shot within a second or two of Eberl and Kumanjayi Walker being on the mattress, the accused did not allow any time to reassess the situation. The situation which had changed dramatically since shot one was fired. The accused did not allow any time to deploy non-lethal options. That is, using verbal commands, "Drop the scissors," or using a Taser or assisting Eberl in grabbing Walker's arms.

Barram will say that continual assessment of danger, in light of changed circumstances, is a critical part of police training. And for those reasons, I anticipate Barram will say, in his opinion the second and third shots were not in accordance with the accused's training and the second and third shots were neither necessary nor reasonable.

Thank your Honour.

HIS HONOUR: We'll take the morning adjournment at this point, and then we'll resume.

So members of the jury, would you retire, please.

JURY OUT

HIS HONOUR: Are there any matters before I rise?

MR STRICKLAND: No, your Honour.

MR EDWARDSON: No, your Honour.

MS CALLAN: Your Honour, just the slides which were displayed the Crown opening address, could I hand up a hard copy of those slides and perhaps they could be marked for identification for the record?

HIS HONOUR: Yes, I'll have that marked for identification with the letter B.

MFI B Slides shown during Crown opening address.

MR EDWARDSON: And your Honour, sorry, while I think about it. I think, with respect, my learned friend should tender the tender bundle. Technically, that's going to go into evidence. Obviously, it has been referred to in the opening by agreement between the parties. But I think it should be formalised and tendered.

MR STRICKLAND: I'll do that, your Honour.

HIS HONOUR: Well, that can be done in front of the jury.

MR EDWARDSON: Yes.

MR STRICKLAND: I'll do that as soon as jury returns. If I may enquire, what time does your Honour resume?

HIS HONOUR: 20 minutes.

MR STRICKLAND: Thank you.

HIS HONOUR: I'll adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Bring the jury in please.

JURY IN

HIS HONOUR: Yes, just one moment.

Members of the jury, I've just been handed a note, and it's something that I think I probably have to deal with now. But I'm going to have to ask you to retire again while I discuss the matter with counsel.

JURY OUT

HIS HONOUR: I've received a note from one of the jurors which says, "I apologise, I should have said something yesterday, however I do not do well with large audiences and was extremely nervous. For your information and consideration with my place on the jury, my sister is a police officer/constable for the NT Police." I'm minded to have the particular brought into court and simply asked whether she feels that this will give her any difficulty in reaching an unbiased verdict in the matter. Do you want to be heard to argue against that course or - - -

MR EDWARDSON: No, your Honour.

HIS HONOUR: - - - adopt another course.

MR STRICKLAND: Well your Honour, no I don't, but is she – I assume the purpose of – I assume the note was written for a particular purpose. And that she intended that if she had not been afraid of large audiences, she would have sought to have excuse herself and - - -

HIS HONOUR: I don't know. The note is - - -

MR STRICKLAND: I have no objection to the course your Honour's taking, and we'll see what happens from there.

HIS HONOUR: Yes, I think that's – that's what I'm trying to get at, is to work out whether that is the situation.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: Yes.

Can we identify that juror and have them brought in please?

#### A JUROR ENTERS

HIS HONOUR: Would you go into the witness box please.

A JUROR, affirmed:

HIS HONOUR: Could you just remove your mask so that I can hear you, thank you. Now I've received a note, which I understand was from you. And in that you say that your sister is a police officer, or a constable for the Northern Territory Police, is that correct?---Yes.

You explain why you didn't say so yesterday, but what I need to know is do you feel that your relationship with your sister is going to cause you difficulty in approaching the evidence in this trial in an unbiased way?---I don't think so.

Sorry?---I don't think so.

All right, so you thought that it was important that you bring that relationship to my attention?---Yes.

But you don't believe that it will affect you in your approach to the evidence?---No.

All right. Well thank you very much for bringing it to my attention. You may now return to the jury.

#### A JUROR EXITS

HIS HONOUR: I don't propose to take any further action.

MR EDWARDSON: Yes.

MR STRICKLAND: Your Honour, just excuse me, would your Honour excuse me just for 30 seconds please.

HIS HONOUR: (Inaudible).

MR STRICKLAND: Your Honour, just excuse me just for 30 seconds while I speak with Ms Callan.

HIS HONOUR: Yes, certainly.

MR STRICKLAND: Yes, thank you, your Honour.

HIS HONOUR: All right, well bring the jury in please.

#### JURY IN



HIS HONOUR: Now Mr Crown.

MR STRICKLAND: Your Honour, I tender the volume that I have provided to the jury and your court.

HIS HONOUR: All right, thank you.

There's no objection to that?

MR EDWARDSON: No, your Honour.

HIS HONOUR: Then that will be exhibit 1.

EXHIBIT P1: Volume provided to jury and court.

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour, I do propose to open, with your Honour's leave.

HIS HONOUR: Sorry?

MR EDWARDSON: I do propose to open with your Honour's leave.

HIS HONOUR: Yes, of course.

MR EDWARDSON: Members of the jury, my name is David Edwardson, and I appear together with Luke Officer, as counsel for Constable Zachary Rolfe. A young police officer, charged with the most serious crime known to our law. He was three years out, at the time of the shooting. He was then 28 years of age. This is not the appropriate time for us to argue the case for the defence. In fact, the law prevents us from launching into an opening speech like that which you heard from Mr Strickland. What I want to do, and what the law permits me to do, is to focus your attention on what will be the significant issues in this case, so that you can listen to the evidence of each witness, and therefore have an understanding of the case, from a defence perspective. That is, issues that essential to Constable Zachary Rolfe receiving a fair trial from you, as the jury. Hundreds of years of experience tells us that juries are robust, fair and impartial.

In other words, juries do understand the presumption of innocence, and will decide the case on the evidence, and the evidence alone. Constable Rolfe is entitled to a trial according to law, and what that means, is that he is innocent, and he remains innocent, unless and until the prosecution has proved his guilt, beyond reasonable doubt, only on the evidence that you will hear in this courtroom.

The lead up to this trial has been the subject of unprecedented publicity, with many examples of biased and totally inaccurate reporting. You must ignore whatever you have previously heard or read about this matter and act only on what

you hear and see in this courtroom. It is only the evidence in this courtroom and nothing else that you will have regard to in determining this young man's fate.

It will be the case for the defence that on 9 November 2019 when Constable Zachary Rolfe discharged his firearm three times into the body of Kumanjaya Walker on each and every occasion he was acting in good faith, he was acting in the reasonable performance of his duties and members of the jury, he was acting in the self-defence of himself and his partner, Constable First Class Adam Eberl.

Importantly, on the defence case, he was taught, trained and drilled as a member of the Northern Territory Police Force, the edged weapon equals gun. In other words, where a police officer is confronted with an edged weapon, the appropriate response is to draw your weapon and be prepared to use it. That expression, "edged weapon equals gun" will loom large and ripple through almost all of the witnesses in this case. By that I mean prosecution police witnesses, I am sorry - without exception. It will be the defence case, through the various prosecution witnesses that are to be called that Constable Zachary Rolfe did no more than respond in the way in which he had been trained.

Indeed, it is telling that the prosecution concede that the first shot was lawfully justified. That shot was in response to Mr Walker's deployment of the edged weapon against Constable Rolfe before on the defence case, turning his attention to Constable Eberl.

It is for the prosecution to prove that Constable Zachary Rolfe's response to the aggression and potentially fatal actions of Kumanjaya Walker in deploying those surgical scissors was not legally justified. Put another way, it is for the prosecution to negate each of the three defences beyond reasonable doubt.

Sometimes when outlining what is in dispute it is helpful to identify what is not in dispute. What is not in dispute is that on 29 October the deceased, Kumanjaya Walker, removed an electronic monitoring device that permitted him to be serving a sentence imposed by the Alice Springs Local Court, in the community as opposed to gaol. Further, as a consequence of the deceased removing that electronic monitoring device, a warrant was issued for his arrest commanding all members of the Northern Territory Police Force to apprehend and bring the offender, the deceased, before the local court to be further dealt with according to law.

Only eight days later, at Yuendumu, Senior Constable First Class Hand and Senior Constable Smith attempted to arrest Kumanjaya Walker at House 577 in the Yuendumu township upon the lawful warrant issue for his breach to be at liberty.

In response to the police attempting to arrest Kumanjaya Walker upon the warrant he, as you now know, armed himself with a hatchet and attacked both police, leading to his escape from the attempted lawful arrest. The attack, which I will call - as we both call - for convenience, "the axe incident" was captured on the body-worn video of the two police officers who were the subject of this unlawful

assault. The confronting images of that axe attack were played to you by Mr Strickland yesterday.

What is also not in dispute is that as a consequence of the existence of a warrant for the arrest of Kumanjaya Walker and further, as a consequence of his armed attack on police when they went to arrest him on that warrant, Constable Zachary Rolfe and four fellow police officers were despatched from Alice Springs to apprehend Walker. Their primary responsibility was to arrest him.

Constable Zachary Rolfe and his colleagues from Alice Springs were specifically called in to arrest Walker because they were trained to deal with dangerous arrest targets such as Kumanjaya Walker. In short, the local Yuendumu Police needed help. Constable Rolfe, together with his specialised team members are known as the IRT - that is the Immediate Response Team - and they were tasked to gather intelligence as to the whereabouts of Walker.

Kumanjaya Walker was to be arrested as a consequence of those intelligence-gathering activities. A good, if not logical, starting point for those intelligence-gathering activities was for Constable Rolfe and his colleagues to commence those enquiries at 577 of the Yuendumu township, the very location where the deceased attacked police with a hatchet only three days prior.

You will hear that upon attending at House 577, Constable Rolfe and his colleagues were informed that the deceased had left that vicinity only three minutes prior to their attendance and they were told that he went to either House 518 or 511 of the Yuendumu township. Acting upon that information Constable Rolfe and his colleagues proceeded to conduct further enquiries at House 511 - one of the very houses to which they were directed to only moments before - and you saw that on the video footage today.

When they arrived at House 511 Officer Eberl saw a male inside. Constable Eberl and Constable Rolfe entered to make enquiries as to whether that male was, in fact Kumanjaya Walker. Indeed, it was. Kumanjaya Walker, however, lied to police as to his true identity by claiming his name was Vernon Dixon. Don't forget, ladies and gentleman, Mr Strickland said yesterday that Constables Eberl and Rolfe entered House 511 at about 7:20 pm to arrest Kumanjaya Walker. They were performing their duties as police officers.

As you have seen on the body-worn video once Constable Rolfe verified the true identity of the now deceased, he then moved to arrest him in accordance with the command he was given by the warrant and in accordance with the requirement to arrest Walker as the perpetrator of the axe attack on his colleagues three days before.

On what will be the defence case, at that very moment Kumanjaya Walker suddenly, without notice, deployed a previously hidden pair of surgical scissors and stabbed Constable Rolfe, landing his blow to the shoulder, close to Constable Rolfe's neck. What is not in dispute - and indeed it is implicit from what the prosecution

have told you in their opening - is that in the face of that spontaneous attack with an edged weapon, Constable Rolfe was justified in drawing his police firearm and firing a shot into the back of Mr Walker - shot one. The prosecution concedes that this was an appropriate defensive action.

Ladies and gentlemen, what is in dispute is whether, within the space of a couple of seconds, the subsequent discharge of two further shots into Kumanjayi Walker was unlawful. It is the defence position that Constable Rolfe, having been stabbed by a known violent offender and having lawfully shot him once, was justified in continuing to defend his mate and fellow police officer who was just doing his job, as was Constable Rolfe.

It will be the defence case, contrary to the prosecution position, that he was trained to incapacitate this offender because the offender was armed with an edged blade which had already been used to stab Constable Rolfe and Kumanjayi Walker was now using the same blade against Constable Eberl when the second and third shots were fired. His training required that shots be aimed at his centre body mass to incapacitate not - as Mr Strickland suggested yesterday - to ensure maximum injury or death.

Members of the jury, Kumanjayi Walker's criminal history which is included in the tender bundle that you have now received and the axe incident on 6 November 2019, is relevant because it shows that the deceased was of a violent disposition and that he was, in truth, the aggressor by deliberately deploying the scissors against Constable Rolfe and on the defence case, subsequently against Constable Eberl. It shows that he had the propensity to act in a violent way and indeed, that violent disposition manifested itself such that Zachary Rolfe was entitled to defend himself and defend Constable Eberl in the manner he did, notwithstanding the resulting tragic death of Kumanjayi Walker.

On the defence case Kumanjayi Walker was at all relevant times deploying or attempting to deploy the scissors against Constable Eberl. Constable Eberl did not, contrary to the prosecution position have, as they suggest, control of Kumanjayi Walker. These are the issues that you will have to resolve between the defence and the prosecution against the background of what I have said are the primary issues from a defence perspective.

A word of warning about body-worn video. Mr Strickland said yesterday that body-worn video can be played as many times as you like. It can be enhanced, it can be slowed down, it can be examined frame-by-frame, which is exactly what he proposes to do, so he told you. Indeed, that's the substance of the photographs that have now been presented to you – the frame-by-frame shots taken from the body-worn video.

Although the body-worn video necessarily has significant prominence in the case against the accused, nonetheless as the agreed facts made plain, there are considerable and obvious limitations to that evidence. It will be the defence position that there is considerable importance in looking at the video in real time, rather than

frame-by-frame, because of the wholly unrealistic deconstruct in trying to identify what happened in a frame-by-frame fashion.

It will be a matter for you, but the other limitation on the body-worn video is that often, the violent struggle between Kumanjaya Walker and the arresting police officers was such that one cannot see exactly what was happening at all times. For example, the scissors are not physically seen on the footage until after the three shots have been fired.

The arrest of Kumanjaya Walker occurred in a confined space with poor lighting and was over in a matter of seconds. To break down the actions of Constable Rolfe via a frame-by-frame, fraction of a second by fraction of a second, distorts the reality of the situation.

Contrary to what it sounds like, the Crown will suggest to you it may be that your collective life experience and common sense leads you to the decision that the only way to conduct a proper assessment as to the question of self-defence and the other two defences – in particular, the situation confronting Constable Rolfe – is in real time. Constable Rolfe did not have the luxury of considering tactical options frame-by-frame.

He, on the defence case, had been stabbed. His partner was locked in combat with an armed assailant with a predisposition for violence. He could not press the pause button. He made a split-second decision to fire shots two and three, as we suggest, consistent with his training, he was required to do.

Ladies and gentlemen, I conclude by saying this: this is obviously not a case about emotion. In this case, more than most, it's a case in which the intellect has to rule the heart. It's a case where proper scientific evidence needs to inform the calm, rational assessment of the evidence and that is precisely what you must do in a case such as this. I conclude this opening statement by reminding you that it is very, very important that you keep an open mind throughout the trial.

You must not pre-judge this accused or the issues in this case. Please remember that there are two sides to every coin and it's absolutely critical that you don't rush to any judgment in this matter until you have heard all of the evidence. It is only after you have heard all of the evidence, the addresses of counsel and his Honour's summing up that you will be in a position to properly evaluate the evidence in context.

If your Honour pleases.

MS CALLAN: Your Honour, before calling the first witness, I propose to take the jury to the agreed facts, to ensure that they appreciate the substance of that document.

HIS HONOUR: Are you going to tender those now?

MS CALLAN: They- - -

HIS HONOUR: They were part of the tender bundle, weren't they?

MS CALLAN: They were part of exhibit 1.

HIS HONOUR: Yes, all right.

#### AGREED FACTS READ BY MS CALLAN

MS CALLAN: So ladies and gentlemen of the jury, the folder which has been marked exhibit 1, at tab 1, are the set of agreed facts that has been referred to in the openings already. And you will have plenty of opportunity during this trial at convenient times to consider the content of these agreed facts. The way they've been arranged, you can see, is under headings. So on the first page, under the heading Accused: Zachary Rolfe, are some agreed facts.

In particular, to do with the dates, when certain things occurred about the accused becoming a police officer in the Northern Territory Police Force. And you can see, for instance, at par 3, having been appointed to the rank of Constable on 30 May 2016, and information about when he did recruit training. And par 4, that he was posted to Alice Springs Police Station and his first operational shift was on 21 December 2016.

There's reference at par 6 to him becoming a member of the Alice Springs Immediate Response Team, or IRT, in May 2017. Over the page, ladies and gentlemen, you'll see the heading refers to the victim, Kumanjayi Walker, and some information about him being agreed facts. That is, includes his date of birth, his adoptive parents.

You see at par 9, there's reference to his relevant criminal convictions, which are summarised in a table contained at annexure A. And just to – if you appreciate how to navigate what's behind tab 1, if you turn all the way through to end of the agreed facts – and they're 13 pages in length – you look at the bottom right-hand corner for the pagination. Immediately after page 13 is a cover page which states:

This is annexure A, referred to in the agreed facts.

And you turn over after that cover page and you find there a table which is three pages in length. And that sets out a list of what are described as relevant criminal convictions. And you have an opportunity to consider those as part of the evidence before you. Now, the list is arranged in chronological order and if you turn to the third page of that table, the final four entries include in the left-hand column, in square brackets – which refers to the conviction and sentence date – the date 26 June 2019. With that in mind, if I take you back to the page 2 of the agreed facts- - -

HIS HONOUR: Just before you move from that?

MS CALLAN: Yes?

HIS HONOUR: Can I take you to the last page of that list of criminal history.

MS CALLAN: Yes?

HIS HONOUR: And you'll see there the entry for 11 March. It says:

Aggregate 16 month with conviction, 8 month –

I think that should be “suspended” instead of “suspected.”

MS CALLAN: Yes, you're quite right, your Honour. The best will. We miss these things from time to time. Your Honour's – members of the jury, the judge has just pointed on that third page in the table, the word “suspected” should be “suspended.” I'm grateful to your Honour. As I was saying, those are – that part of the table referred to matters that were dealt with by the court on 26 June 2019.

If you turn back to par 10 of the agreed facts, which appears on page 2, you will find as an agreed fact on that date – 26 June 2019 – Kumanjayi Walker was convicted of a range of offences, as described there. And therein, as an agreed fact, details the sentence that was imposed including that in – what's described as suspending the period of imprisonment, certain conditions were imposed by the judge, including wearing an electronic monitoring device and residing at an alcohol rehabilitation facility.

And then at par 11, there's an agreed fact as to the date when he was released from the correctional centre and fitted with the electronic monitoring device. And eight days later, on 29 October 2019, it was discovered he had removed that device and left that alcohol rehabilitation facility. And then you'll see what happened next, in terms of that fact being reported to police.

Paragraphs 12, 13 and 14 set out some other agreed facts. For instance, as to the fact of Mr Walker's relationship with Rakeisha Robertson at the time of his death. And the cause of death, set out at par 14. Towards the bottom of page two, ladies and gentlemen of the jury, you see there's a heading, “Yuendumu.” And then that refers to some further attachments to these agreed facts, to give you an appreciation for the location of Yuendumu, relative to Alice Springs. And a map of Yuendumu, as well as a diagram. Again, being annexures to these agreed facts. Which show relevant house numbers and locations, and when you come to look at it, in your own time, it's a document that Mr Strickland took you to during the opening. For instance, the diagram at attachment D, which is right towards the back of the bundle. So third last page.

That diagram at annexure D, as you'll see, includes an indication as to the location of lot, or House 577, in the top left-hand corner. If you're looking at it in landscape view. And across the oval, the locations of for instance, House 511. And towards the bottom right hand corner, the blue shaded location, which is identified at

Lot 488, being the location of the police station. And members of the jury, the next annexure, being annexure E, if you turn over. Is a sketch plan of House 511. And you may recall, that was shown to you during the Crown opening. So that's there in evidence before you, as annexure to the agreed facts. And if I can take you back to page three of the agreed facts. Page three, there is set out under the heading "Yuendumu Police Station," a list of the officers working at the police station in Yuendumu in November 2019. And you've heard each of those names already during the opening.

Then under the heading, "IRT deployment to Yuendumu on 9 November 2019", that sets out agreed facts, for instance, as to the identity of the officers deployed from Alice Springs to Yuendumu, following a request from Sergeant Julie Frost. Immediately below that, there's a heading reading, "The timing of events inside House 511 on 9 November 2019." And you'll see there, and I hope you find it of assistance, the parties clear and in agreement, as to the time when particular things happened inside that house. And that's recorded there.

So there's an indication, with precision, as to the time when Constable Eberl entered the house, followed by Constable Rolfe. And I'll let – you can read it in your own time what follows, by way of agreed facts, as to the time of events thereafter. And the firing of each of the three shots, up to the point, you might observe, at par 27, as to the timing when handcuffs were successfully applied.

Then the agreed facts set out for instance, par 28, some information or evidence, which is not in dispute, about the gun used by the accused that night. Paragraph 29 again sets out some timing and some evidence not in dispute as to the transportation of Walker to the police station. The provision of first aid, and the time of death. Immediately below that, you see at par 30, there are some agreed facts about individuals who entered House 511. What they saw, for instance, at par 31, par 32, and then par 34 refers to steps taken by that gentleman named in par 34, Jackson Fitzpatrick, along with several colleagues, to gain permission to access the house, and take a number of photographs. And those are the photographs, as indicated at par 37, which appear – or a selection of them, appear at tab 22 of the tender bundle, and Mr Strickland took you to some of those this morning.

Then it's an agreed fact, as set out at par 38, that early in the morning of 10 November, police returned to House 511 and secured the house. Then the series of examinations and investigation was undertaken by police, including as described at par 39, the crime scene examiner, Senior Constable Spilsbury, took a number of photographs. And a selection of those photographs he took are at tab 23.

Now over at page six of the agreed facts, are a series of agreed facts about the way the PROMIS system works. Now the PROMIS system, as stated at par 40, is an information and case management system used by the Northern Territory Police Force, accessible on police force computers. And from par 40 onwards, is information or detail about how that PROMIS system, or database, works. For instance, par 42, it's an agreed fact that each item that's entered into this database is given a unique item number. And each person who uses a Northern Territory Police



Force computer system, including to access PROMIS, uses unique user identification, secured by a password.

Now what that means, and it – this is described at par 44, is that it's possible to conduct an audit of the access to PROMIS records. And so it's possible to for instance, produce an audit report, which indicates a particular PROMIS entry has been accessed, or looked at, by this list of users, at precise dates and times. As you might imagine, those kind of reports are fairly unwieldy, and what's occurred in these agreed facts, for instance, if you turn over at par 45, with the cooperation of the accused, is that we've been able to reduce – avoid you needing to pour over those kind of documents, and we've been able to reduce what's relevant from them into a short form tables. For instance at – as I said, at par 45. Which indicates the audit report for that particular PROMIS entry was accessed at those particular dates and times. And it sets out the user name.

And there are several more paragraphs to like effect, but in relation to other relevant PROMIS records. And you'll hear from time to time, witnesses giving evidence about their use of PROMIS. And they might be referred back to this information. At the bottom of page eight, under the heading 'MDEA', are some agreed facts about what is known as the, "Mobile Data Enquiry Application" which is accessible on mobile devices and used by members of the Northern Territory Police Force. As stated there, it is used for search and access various data bases including PROMIS and so as described in the subsequent paragraphs over the page, it enables members of the Northern Territory Police Force to access PROMIS as it were, when they are on the go, via their phones and there is a similar audit feature and paragraph 51 sets out as agreed facts, the position as to who used that application on their phone to access Northern Territory Police Force Data Bases at particular points in time.

The bottom of page 9 under the heading, "Body-worn video" and over at the next two pages, all the way through to page 11 a series of agreed facts about the way body-worn cameras work and what that means in terms of body-worn video. Mr Strickland took you to some of that content yesterday including from paragraph 59 onwards, about the limitation of such video. I won't repeat it but I just point that out to you that that is the information that is contained there.

Page 11, there is a description of the process that is involved by officers in terms of downloading body-worn video onto the police computers and the way that those videos can then be accessed and watched by other officers through the computers used by the Northern Territory Police Force. Those computers, because they are utilised by officers using unique user names, mean that once again, audit reports can be generated to indicate the precise dates and time that a particular video file has been accessed by a person using that - a unique name. And so you will find at par 69, for instance, that an audit report in relation to the body-worn video that was taken from Constable Lanyon Smith's camera during the axe incident, was uploaded by Smith on 6 November and subsequently the footage was accessed and there is a table which indicates the dates and times and user names as to when that access occurred and over the page, part 70 sets out in hopefully kind of convenient and

readable form, what the audit reports indicate about the access to the Hand body-worn video footage of the axe incident.

Ladies and gentlemen and your Honour, that is all I propose to say about the agreed facts at tab 1. You will also find if you turn to tab 2, a document which is described as, "Continuity agreed facts". And I do not propose to take you through this document in the way I just did with the document at tab 1 but I draw the existence of this document to your attention, it is in evidence before you and what it sets out is details as to what is described as the continuity or the chain of custody of exhibits, from the moment that an item was seized by police, where it was moved and when and these agreed facts indicate, in a sense, that issue is, as I understand it, not in dispute.

Thank you, your Honour, for your time with that.

HIS HONOUR: Yes.

MS CALLAN: I now call Sergeant Robert Kent.

ROBERT KENT: sworn:

XN BY MS CALLAN:

MS CALLAN: Sir, can you tell the jury, who you will find seated to your left and right, your name?---Sergeant Robert Kent.

And it's the case isn't it, that you are an officer - a sergeant with the Northern Territory Police Force?---Yes, that's correct.

And what police station are you currently attached to?---I am attached to the Alice Springs Police Station.

Back in late October 2019 you were attached to Alice Springs Police Station, weren't you?---Yes, Alice Springs general duties.

Sorry, I didn't quite catch that?---Alice Springs general duties.

And were you the sergeant of a particular patrol group?---At that stage, I was patrol group 4.

I wanted to ask you about the way the Alice Springs Police Station works in terms of the use of patrol groups. Is it the case, Sergeant, that there are several patrol groups?---There's five patrol groups - general duties patrol groups, yes.

And does a patrol group comprise a sergeant, such as yourself and then a number of senior constables and constables?---The staffing varies but it is - generally there's two sergeants. One is the shift sergeant. The second one is a custody sergeant and then there's a number of constables or various ranks.

And as sergeants or sergeant of that patrol group, does the sergeant have any command responsibilities or role in respect of the constables or senior constables in that patrol group?---As the shift sergeant you are the supervisor so you are responsible for all things operational, supervising those under you.

You've describe these as, "general duties patrol groups", the term, "general duties" what does that tend to encompass?---Pretty much everything really, so any time there is a call to Emergency Services where it requires a police response, general duties are the ones who do that initial attendance.

Would general duties include, for instance, responding to domestic incidents?---Yes, that's one of the functions.

Dealing with motor vehicle accidents?---Yes.

Can general duties be contrasted with some of the more specialised duties that are undertaken within the police force, for instance detectives investigating particular categories of suspected offences?---That's basically it, it's - general duties will do the initial investigation, some jobs they will keep, other jobs we will hand over to other specialist areas to investigate - normally higher category offences.

As at late October/early November 2019 was Constable Zachary Rolfe in your patrol group?---Not at that stage, no.

You were in patrol group number 4, is that right?---That's correct, yes.

And to your understanding he - that is Constable Rolfe - was in patrol group number 5?---I can't be 100 percent certain on what patrol group he was attached to but another patrol group at that stage.

Could I ask to have – the witness be shown exhibit 1, and it's the document at tab 3.

Sergeant, you understand the document which has been placed before you, which is at tab 3 of exhibit 1, has been prepared for the purpose of these proceedings?---Yes.

And do you see it's a form of organisational chart. And at the middle of the page, there's a blue box that says, "Alice Springs General Duties"?---Yes.

And below that is a list of names, and your name appears third down in that list?---That's correct, yes.

In terms of what this diagram shows as to the command structure, the names beneath yours, commencing with the name of the accused, as at October/November 2019, were any of those individuals in your patrol group number 4?---On that date, no.

Who was it that you reported to, as sergeant in charge of a particular patrol group?---I technically fall under the watch commander for the southern region. And my watch commander was Darryl Kerr.

So do you see immediately above the blue box I took you to, that says "Alice Springs General Duties", there's a blue box that says "Watch Commander"?---Yes, that's correct.

And what appears there is the name "Shaun Furniss"?---Yes.

And was it the case there were a number of watch commanders?---So the same as the patrol groups. There's five watch commanders, responsible for the southern region. But they align with patrol groups.

And the terms of the command structure, above the watch commanders, was the superintendents at Alice Springs. Is that correct?---That's correct. So at that time, there was two superintendents. Pauline Vickery.

Yes?---Who was the Alice Springs Divisional Officer. And Jody Nobbs, who was the Southern Desert Divisional Officer.

And his name appears towards the left hand of the page here?---Yes, that's correct.

Superintendent Southern Desert Division. And then in terms of the command structure above those superintendents, you see there's a commander (southern) and the name immediately below that?---Yes, both those divisional officers report to the southern commander, who at the time was Brad Currie.

And above the southern commander we see assistant commissioner, and then the name Travis Wurst?---That's correct.

And in broad terms, does that accord with the – your understanding of the command arrangements and structure, as at October/November 2019?---Yes.

Sergeant, can I move now to the events of 30 October 2019. And involvement you had that day in searches for Kumanjayi Walker?---Yes.

Now it's the case, isn't it, sergeant, that on that day, 30 October 2019, you were rostered to work a day shift?---Yes that's correct.

And that is approximately 7 am to 4 pm, or whenever you'd finish thereafter?---That's correct, yes.

And the watch commander on shift that day was Senior Sergeant Darryl Kerr?---Yes he was.

And when you commenced your shift that day, were you made aware that Kumanjayi Walker had earlier been reported to police as having breached a suspended sentence of imprisonment?---Yes, that's correct.

Were you made aware that he'd run away from an alcohol rehabilitation facility?---That's my understanding.

And how did you come to have that understanding?---At the start of our shift, things that have been reported in the shift or previous shifts, we do a hand over between shift sergeants. And we prepare a document as such, which relays all that information. We then, at the start of our shift do a muster, where we brief the staff under us that day, with the various tasks, or various outstanding arrest targets.

You said, "Various outstanding arrest targets"?---Yes.

Did Kumanjayi Walker fall in that category, as an arrest target at that stage?---Yes, he was that day.

Did you receive information that morning about a potential location where Kumanjayi Walker might be found?---Yes, about – I think it's about 8 o'clock, the Senior Sergeant Darryl Kerr provided me some information, that he said he'd received from Julie Frost.

What was that information?---Basically that Mr Walker was at House 6, Warlpiri Camp in Alice Springs, or had been seen there.

Now the Warlpiri Camp, is that a location in the Alice Springs vicinity?---Warlpiri Camp is just to the north of Alice Springs. It's just on the entrance in the town.

And the name of the camp, does that indicate something about who lives there?---I can't be a 100 percent certain. I know there's a Warlpiri group of people. There's some certainly some Warlpiri people who live in that camp, but it's a – they're very transient, so they do attract people from other areas as well.

Do – your observations, working as you do in Alice Springs, and have done for some time, it tend to be that Indigenous people live at the Warlpiri Camp?---Yeah, predominantly Indigenous, yes.

Did you decide or consider that your patrol group number four should go to the Warlpiri Camp to look for Walker?---Basically I was told by the watch commander that he's there now and we should make an attempt to arrest. I was told that I should take everyone off the patrol group that I had available, because there was a risk that he may fight, or may attempt to flee. Senior Sergeant Kerr had some experience, I believe, with him.

Had you dealt with Kumanjayi Walker previously?---Not that I'm aware of, no.

Before going along with your patrol group, rest of your patrol group, to Warlpiri Camp, did you conduct any checks on the PROMIS computer system?---Yes, I did.

And did that indicate to you information about Walker that was relevant to your approach, in terms of going to look for him?---I could see from PROMIS that he had a significant criminal history, and the history was both violence, assaults against police, and escape custody.

Now is it usual, or common practise, for you to check PROMIS at points in the day, or when tasked to do particular things?---Generally when you're going to look for an arrest target, you would do checks to ensure that the information you have is current. And you also check for any alerts in the system that may indicate a person has propensity to violence or to escape custody. Things of such.

So if you've still got exhibit 1 before you there, could I ask you to turn to tab 1. Once again, this is a document that's been prepared for the purpose of these proceedings. Could you turn to page eight, to par 47? What's set out at par 47 are some details of an audit report in relation to the access to a PROMIS record for Mr Walker. Do you see that there?---Yes, I do.

Is that sometimes known as a profile of a particular individual? A person - - - ?---Sorry, a PROMIS ID - - -

Yes?---PROMIS ID is a person profile, yes.

And do you see the third entry in the box under the text at par 47, indicates according to the audit records, that on 30 October 2019, at 8.22 am, your user name appears as having accessed the profile for Walker?---Yes, that's correct.

Does that accord with your recollection as to the timing, when you had a look on the PROMIS system?---Yeah it would be around that time, yes. Yep.

Now, having considered that information, did you and the rest of patrol group 4 go out to the Warlpiri camp?---Yes, at about – sometime after 8 o'clock we departed – or I departed from the station and I met the patrol group at the Bunnings car park, which is just south of Warlpiri camp.

And why did you meet the other members of patrol group 4 at that location?---It's a large, clear area where we could all meet up together. It's in close proximity to Warlpiri camp, which allows you to deploy there in a relatively short period of time. At the time of day, there wasn't a lot of people around, so it was a clear spot to meet.

In meeting the other members of patrol group 4 that went with you to the Warlpiri camp that day, you said you met up with them at this car park at the Bunnings. Did you have a discussion with those other members of the patrol group about what you do when you – or how you were going to approach the task of going to look for Walker at the Warlpiri camp?---Yes, so when I arrived at Bunnings, we had a brief

conversation. But then I made contact with Julia Frost first to verify some information that she had provided.

Julie Frost was the Sergeant and the officer-in-charge at Yuendumu?---Sorry, that's correct. Yes.

And what information did you get from her in that phone call?---Basically, I just wanted current information to make sure that Mr Walker was where he was reported to be. Plus, I needed to verify the house number. The initial information of House Number 2 didn't correlate with a house that was at Warlpiri camp.

You were, around that time, aware that there had been some renumbering of the houses at the Warlpiri camp?---That's correct. The numbered had occurred – or renumbering had occurred quite some time before, but people still get confused with the old numbers. Confirmed with Sergeant Frost that the correct location was Number 6.

And did she tell you the source of information or how the police had come upon this information about where Walker had been?---I understand that the information came from ACPO, Derek Williams, who is also based at Yuendumu. I could hear him in the background of the phone call.

An ACPO? Is that an acronym for an Aboriginal Community Police Officer?---Sorry, yes it is.

And while you were at that location at the Bunnings car park, was there any plan or discussion with your patrol group about what you would do upon arrival at House 6 at Warlpiri?---There was an informal briefing, but we discussed putting a cordon in place around the house. So where people would go and a deployment around House 6 to ensure that should somebody run from the house, we could safely contain them. I also coordinated for the Alice Springs drone to deploy – and deploy over Warlpiri camp to assist.

Used the word, "Cordon." For the jury's assistance in terms of police practices, what does that mean?---So a cordon is a deployment of people around an area to slow or prohibit the movement of people from one area to another, into or outside of an area.

In this instance, the area that you were focusing on was a house. When you arrange or coordinate members for the cordoning of a house, what does that mean?---So I just position the cars or members of the unit around Warlpiri camp so that there was some people present behind the house so that should somebody come out one of the back doors, they were in a position to stop them from leaving. And also, around the outside or edges of the camp, so that if people were to try and run away into what is, essentially scrub area, we would have a chance to intercept them before they left.

You said people – on this particular occasion, it was Kumanjayi Walker that you were- -?---Yes.

- - looking to, as it were, apprehend and stop him from running away?---Potentially, yes.

You said you coordinated the deployment of a drone. What was the purpose of that?---So the drone is, essentially, should somebody manage to get through the cordon, they could follow it in an observation capacity and coordinate resources to apprehend.

Information from the drone enabled the police to more effectively go to the location of the person you are trying to apprehend?---It can do, yes. So the drone was deployed across the camp before we entered and we could hear, on the radio, they're saying there's no one moving, there's no one leaving, there's no one visible to them at that stage.

What was the plan, if any, about police entering House 6 at Warlpiri that day?---I don't think I had a specific plan, to be honest. It was just whoever was in a position to enter the property. They're all fenced-off. It just depends on where a person can gain access but still maintain a cordon. But I didn't have a plan as such for entry into the premises.

Did anything else occur, in terms of your activities or discussions at the Bunnings car park, before you then drove to Warlpiri camp?---No, I just relayed on the information that I had already received that Mr Walker was a flight risk. He was a – he had a history of violence, could potentially fight with police. Basic stuff like that.

Now, did you then – you have a recollection as to the approximate time when you arrived at House 6 at the Warlpiri camp?---I don't recall the precise time, sorry. No.

Was it in the morning or afternoon?---It was in the morning. It would have been around 9 o'clock, approximately. But I'd have to review my body-worn video to get the time.

When you got to House 6, did you go inside?---Yes. When I arrived, there was already members from my group who were inside the house, searching for Mr Walker. I entered just shortly after them.

Were other members from your group outside in that cordon arrangement you've described?---Yes. So when I arrived, I parked just near House 6 and I had difficulty entering through – or finding the actual front door of the property. So by the time I got inside, I could see that the cordon was still in place. I could see that there was members inside the house and I entered shortly after.

Did you or any of the other officers find Kumanjayi Walker inside House 6?---No, we didn't.

Was he found in the vicinity?---No.



Were there other people – adults or children – inside House 6 when you were in there?---There was actually a large number of people in there when I arrived. Various ages, children and adults.

Two of those adults individuals who you came to speak to, who identified themselves as Leanne Oldfield and Nathan Coulthard?---Yes, that's correct.

And were you told that Leanne Oldfield was Kumanjayi Walker's mum?---Yes.

And that Nathan Coulthard was her husband?---Yes, that's correct.

Did you ask them about Walker's whereabouts?---I had a conversation with them, yes.

And did they give you information about Walker's whereabouts?---They indicated that he had been at the premises at some stage, but he had left and was – I think they said he was driving around in town or had gone into town with someone.

You recall asking them to give police a call if they saw Walker?---I think that was part of my conversation, yes.

Do you remember telling them that Walker needed to go back to that alcohol rehabilitation facility to finish his time there?---Yes, that was part of the conversation.

To your knowledge, while you were speaking to Leanne Oldfield and Nathan Coulthard, what were other officers in your patrol group doing?---So some were searching the house. We pretty much went through everything to see where people could be hiding. Other officers were going to the neighbouring premises to see if anyone else had seen him or if he was indeed, staying at another house there.

When your tasking out at the Warlpiri camp came to an end, did you go back to the Alice Springs Police Station?---Eventually, yes.

And when you did so, did you send an email to Sergeant Frost advising of your efforts that day to locate Walker?---Yes, I did.

Did you indicate to her, in effect, that you had been unable to locate Kumanjayi Walker?---Yes, that's correct.

I take you back to par 47 of this document and the table. I took you to that entry on the third line down already, the fourth and fifth lines indicate, according to the audit records, that you accessed Walker's PROMIS profile that afternoon, on 30 October around 15:33 and 15:16, do you see that there?---Yes, that's correct.

Does that accord with any recollection you have of looking at that profile towards the end of your shift?---Around 3 o'clock is our shift changeover, we hand over to the other sergeants and update our work during the day, so that would correlate with me updating PROMIS at the end of my shift or handing over to another sergeant.

Is that update likely to have referred to the efforts that had been undertaken that day to look for him?---Yes, so we report on a PROMIS case what we have done during the day, the enquiries we've made, where we've been, so that other patrol groups who are conducting enquiries aren't making the same enquiries or potentially doing the same things we've already done.

Did you have any further involvement in relation to Kumanjayi Walker?---No.

That's the evidence-in-chief, your Honour.

HIS HONOUR: Bear with me.

XXN BY MR EDWARDSON:

MR EDWARDSON: Sergeant, were you a sergeant at the time - that is back on 30 October 2019?---Yes, I was.

And for how long had you been a police officer at that time?---It would've been about 14 years..

Right, so you'd had significant experience?---Yes.

You have no specific recollection of any previous dealings with Kumanjayi Walker before 30 October 2019?---Not that I can recall.

And, as we understand the evidence you have given to the jury, you didn't actually sight him or speak to him that day?---No, I didn't.

I want to talk a little bit, if I can, about the process and the procedure that was adopted by you on this particular occasion. You've told us, I think, that you were involved in a handover?---Yes.

And effectively that meant you took charge of this operation? That was trying to locate Mr Walker?---That would have been one of the number of tasks that we had that day but essentially - - -

Of course, but obviously my attention is focused on Mr Walker for the present purposes?---Certainly.

But this much we did know, didn't we, at the time that you commenced your shift and when you took over in charge, you knew by that stage that Arnold Walker, as he was described then, was an active current target for arrest?---Yes, that's correct.

And consistent with proper police practices, you then consulted what is known as the PROMIS system?---Yes.

And the PROMIS system - and I am just reading from the agreed facts, but I just want you to confirm that you agree, "The Police Real Time Online Information System or PROMIS is the primary information and case management system used by the Northern Territory Police Force accessible on Northern Territory Police Force computers"?---Yes, that's correct.

And items that are recorded in PROMIS include persons entered in profile containing information about a person known to police including any risk alerts, arrest warrants, bail conditions and criminal history?---That's correct.

Case reports, for example, about an event, task, investigation involving police and also case notes about an incident, usually attached to a case report?---Yes.

So this tool is a very important and useful tool to inform police officers who are tasked with the responsibility of arresting an individual?---That is an important tool, yes.

And what can I - can I suggest to you that in the context of this and in fact any other case, the first thing you need to know is how does one evaluate a potential risk to you and other police officers when you approach that individual and if you are going to arrest them?---Like I said, it depends on what is recorded in PROMIS as to the person's history, so their criminal history, history of violence, whether they have previously assaulted police or other people, whether they have previously attempted to escape custody.

Yes, of course?---Yes.

It's all case specific and relevant to each individual?---Yes.

That's why you go to PROMIS to find out what you can about the individual so you can make some sort of assessment if he is confronted or she is confronted?---Yes.

Now, in this case you established, didn't you, that Kumanjayi Walker had a very significant criminal history?---He had a - yes, he had a criminal history.

And not only that criminal history and we've got it in the agreed facts, but it certainly had a - from what you observed and read - a predisposition to violence?---Yes, that's correct.

And indeed, that history informed you that he was a potential risk to police officers who might seek to apprehend him?---Yes. But there is nothing that we do within this job that is without risk as well.

Of course no?---Yes.

But again, when insofar as you are evaluating a potential risk involving Kumanjayi Walker, you were informed by the nature of his criminal record which included violence, assaulting police and the capacity to escape custody?---That's correct, yes.

All right, so it was with that in mind that you then, without a plan nonetheless, tasked various police officers to cordon off firstly, the relevant house?---Yes, that's correct.

And that house was identified because of good information that was provided to police that he was likely there?---Yes.

And then in addition to that we've got the drone which is positioned so that if anybody seeks to flee or escape you can track that individual?---That's correct.

And the cordoning off allows to cut off - potentially police officers cutting off areas of escape?---Yes.

Then the next step is to go inside the house to see if he is there?---That's correct.

Now, you've told us that by the time you got to this house there were other members of the police force under your responsibility who had already entered the house?---That's correct, yes.

So by that stage had they already - do you know the expression, "cleared the house"?---I do know the expression, yes.

What does the expression mean?---To clear a house, so you would go through the house to ensure that an offender isn't present within the house.

Now, were you and the other police officers kitted up?---We were dressed with all police accoutrements for a general duties shift.

And what would that include? What does that include?---So you wear your belt, you have a radio, handcuffs, OC spray, baton, firearm, Taser, some members would also wear a vest as well, body-worn video.

It's a bulletproof vest?---Depending on the set up you've got your vest in, it can be, yes.

All right, you mentioned a firearm. What type of firearm?---It's a Glock handgun.

A Glock. And did you have a firearm on that occasion?---Yes, I did.

Now, the way in which a Glock is holstered on a police officer, it has a method by which it can be secured, if you like, in the holster?---They are secured in the holster yes, but it depends on which version of the holster that people are wearing as to what level of safety they have.

Right, so does that vary?---It does vary occasionally.

If, let's say, you were potentially going to confront a dangerous offender, you might unholster it - is that the right expression?---I wouldn't unholster my firearm, no.

All right. In this occasion when you entered the house were you armed with a Glock?---Yes, I was.

And I assume that - sorry, I withdraw that. I want to ask you a little bit now, if I can, about some training - sorry, before I do. Just to complete the PROMIS information that you had and the like, it certainly - you had enough information to know that whichever police officer entered that house knowing that he was likely, on the information or intelligence that you had, inside it, had to be careful and cautious? ---Yes.

And I think you said in answer to the questions that were put a moment ago by my learned friend, that you actually conveyed to the other police officers - as I expect you would have - the information that you had about him, his criminal history, the sort of hallmarks of violence, assaulting police, escape custody, that sort of thing, so they had a general idea themselves?---That's correct.

I want to ask you a little bit about your training. I appreciate that is a long time ago now, but nonetheless, when you were trained were you trained and taught about an expression known as, "Blade equals gun"?---That's the expression, yes.

What is that expression and what does it mean to you?---It talks about - it's essentially that, that if someone is presenting an edged weapon towards you or making threats towards you with that edged weapon - it has to be like, it has to be an actual threat, it can't be just somebody passively holding an edged weapon. There's different circumstances but if they are actively threatening you with an edged weapon, that we should draw our firearm, (inaudible) firearm.

All right, let me put it this way - - -?---And again, there's an escalation in the use of your firearm as well, so there's generally verbal communication, hand on firearm, withdraw your firearm.

Of course - in a perfect well there may be opportunities for verbal communications but sometimes - as you would well known as an experienced police officer, events happen in a matter of seconds and you don't have that opportunity, do you? ---That's correct.

And the bottom line is blade edged weapon is if an offender presents and edged weapon and is hostile in nature, you are taught to draw your firearm?---Yes. In the basics of it.

And, to deploy it when and if necessary?---Yes.

Thank you.

Nothing further.

REXN BY MS CALLAN:

MS CALLAN: Sergeant you were asked some questions by Mr Edwardson about circumstances if you were confronting – he describes as a potentially (inaudible) violent offender, or potentially confronting a violent offender of unholstering your firearm. And your evidence was that you would not unholster your firearm. Do you recall giving that evidence?---Yes.

What did you understand, or do you mean by the term, “unholster”?---Would be to take your firearm out of your holster.

The case, sergeant, that on the holster that – is located on your belt within which your Glock is kept, there is something called an initial retention device?---I – I don't know it by that name, but there's various safety's, I guess, on the holster, that you have to go through to – in order to be able to remove your firearm.

The – what do you – what's the name that you know it by?---I would call it a safety device on – on my holster.

Have you had training or experience in circumstances where you might potentially confront a violent offender of moving the safety device, so that you might take out your Glock more quickly?---It's part of the movement of removing your firearm from your holster. So if you were drawing your firearm, you would – you have to go through the safety devices. So my holster, in particular, has two safety devices, and I have to remove both of those before I can take my firearm out.

Is it your practise to remove or move either of those safety devices, other than when you're intending to pull out?---I would only do it when I'm removing my firearm from my holster. I can't speak of other people's training in that regards, but that's my training.

You were asked some questions about the term or the notion of blade or edged weapon equals gun, and you were asked whether you were – in circumstances where you were presented with an edged weapon, you talked about it being an actively threatening situation. You were asked whether you were taught to draw your firearm, and you said, “That's the basics of it.” What did you mean by that?---Again, it's – it depends on the circumstance. If a person's just passively standing there with a gun, I would be comfortable at a distance having a conversation with them. But if – sorry, standing there with an edged weapon, I'd be happy just to have a conversation with them and assess, but they're aware of my circumstances, and what they're intending to do. But if they're actively threatening me with an edged weapon, then potentially I'd escalate it to drawing my firearm, or giving them some verbal directions first.

What would the verbal directions be?---It would be a warning that I may use my firearm, or to drop the weapon.

When you say, “Potentially”, what do you mean?---It depends on the circumstances.

In such circumstances, if you draw your firearm, do you always use it?---No. And again, it's an escalation, so verbal commands would be the first you'd go through, hand on your firearm is an escalation. Drawing your firearm is an escalation. Pointing your firearm is an escalation. Firing your firearm is again, an escalation.

Thank you, sergeant.

Those are my questions, your Honour.

HIS HONOUR: Yes, thank you, you're excused, you may go?---Thank you.

WITNESS WITHDREW

MR STRICKLAND: Your Honour, the next witness is Chris Hand. I'm in your Honour's hand as to whether to start that now, or – for 10 minutes or not. It's a matter for your Honour, I'm - - -

HIS HONOUR: I just don't think there's much point in starting.

MR STRICKLAND: Yes, we think so at the Bar table.

HIS HONOUR: And we really must maintain that hard cut-off time of 1.15.

MR STRICKLAND: Yes, no we're content to call him tomorrow morning.

HIS HONOUR: All right.

Well we're going to leave it at that point this afternoon, members of the jury. And you may now retire, and please re-assemble tomorrow morning for a 9.30 start. Thank you.

JURY OUT

HIS HONOUR: Before I adjourn, there is a matter that I'd like to raise with counsel. I've received a number of applications for access to court material from members of the press. Those which I received this morning sought access to material which was effectively part of the Crown's opening. And I was able, through my Associate, and other court staff, to indicate to those members of the press who are seeking access, that the court did not actually have that material at this time, because it was Crown material that hadn't been tendered.

Now I anticipate that I will receive similar requests in relation to material which is tendered into evidence. I would therefore be obliged if counsel could raise with me any concerns that they may have about material which is tendered being made available to the press for publication. If that can be done at the time that the material is tendered, that would be of assistance to me in determining whether to allow access to that material. I mean there may be some reason why one or other party may not want that material published. I don't know.

MR EDWARDSON: Your Honour, we've got no submissions to make on any of the material that's contained in the tender bundle. It's been an open court – displayed in open court - - -

HIS HONOUR: Yes.

MR EDWARDSON: - - - displayed in open court. It's a matter for the court really.

MR STRICKLAND: We agree with that, your Honour.

HIS HONOUR: All right.

MR STRICKLAND: There's just matter I wanted to raise. If your Honour - - -

HIS HONOUR: Yes, certainly.

MR STRICKLAND: Your Honour, I may be wrong about this, but I understand that when we are speaking at the Bar table, and my learned friend's speaking with Mr Officer, that that can be heard at the Alice Springs Court House - - -

A PERSON UNKNOWN: And the media.

MR STRICKLAND: - - - and the media. That is, if I speak to Ms Callan, or my learned friend speaks to Mr Officer, during the course of the proceedings, that can be heard, and if that's the case, that potentially is a problem.

HIS HONOUR: I would think that – I'll have some enquiries made about that, but I would think that they would be able to hear what was said at the Bar table in the same way that anybody else in the courtroom can. Although of course, because you are seated close to the microphone, depending upon the – the power of the microphone, they may be able to hear whispered comments that other people who are present in the court may not be able to hear. So - - -



MR STRICKLAND: I'll be very careful not to say anything unkind about Mr Edwardson your Honour, but - - -

HIS HONOUR: I know in some courts there are – there's the ability to turn off the microphone, I'll see whether that can be done.

MR STRICKLAND: That would be helpful, your Honour. If your Honour could make an enquiry.

HIS HONOUR: So that when one party or the other is using the microphone, we may be able to turn off the microphone for the others.

MR STRICKLAND: That would be very helpful if it's possible, thank you.

HIS HONOUR: I'll have some enquiries made.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: All right, unless there's anything further I'll adjourn.

ADJOURNED 1.09 PM TO WEDNESDAY 9 FEBRUARY 2021

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON WEDNESDAY 9 FEBRUARY 2022 AT 9:31 AM

(Continued from 08/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Now, yesterday afternoon we spoke about the problem with the microphones picking up what was being said by counsel in private conversations. I understand that the suggested remedy of turning off the microphones is not viable.

It has been suggested that the only option available is, in effect, to manually turn the microphones away from counsel but of course you will need to remember to turn them back when you come to speak.

MR STRICKLAND SC: I doubt I will remember, your Honour, but I will - that's what we will do.

HIS HONOUR: That's what one has juniors for. Yes. Now, unless there is anything counsel want to raise I will have the jury brought in. Thank you.

Can you bring the jury in please?

JURY IN

HIS HONOUR: All right, I have received a note from one of the jurors but it is not something that I believe needs to be dealt with immediately. I will take it up with counsel at the break.

Yes?

MR STRICKLAND: Thank you. Your Honour, I tender a volume which contains the following; the transcript of the body-worn video at House 577 on 6 November 2019, there are two different transcripts, some still photographs - I'm sorry - some still body-worn videos - images and some still body-worn - or CCTV images of the Yuendumu Police Station on 9 November 2019. I tender that as a single volume. I tender those, your Honour.

HIS HONOUR: Thank you.

I take it there is no objection to that?

MR EDWARDSON QC: No, your Honour, thank you.

HIS HONOUR: That will be exhibit 2.

EXHIBIT 2 Volume containing transcripts photographs, photo images and CCTV.

MR STRICKLAND: I have a copy for your Honour.

HIS HONOUR: Thank you. And copies are to be distributed to the jury?

MR STRICKLAND: That's correct.

HIS HONOUR: Thank you.

MR STRICKLAND: Your Honour, in due course?

HIS HONOUR: Yes.

MR STRICKLAND: Would your Honour please give the usual warning or the usual direction in relation to the transcript of the body-worn? We are providing the transcript - it will be an exhibit - - -

HIS HONOUR: Well, it was something that did cross my mind. Ordinarily the transcript is not tendered as - - -

MR STRICKLAND: I understand that, your Honour. We are happy for it to be an exhibit provided your Honour gives the warning that really isn't - is - they can change anything on the transcript if what they see on the video doesn't match what they see on the transcript.

HIS HONOUR: Well, the principal or primary evidence - - -

MR STRICKLAND: Your Honour, your Honour has your mask on.

HIS HONOUR: The primary evidence in relation to the material which has just been tendered is the body-worn video. Now, transcripts have been provided to you to assist you in following what is said in the body-worn video. But if something that you hear in playing the recording differs from what you read in the transcript then you proceed on the basis of what you hear when you play the recording - because that is the evidence.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Thank you.

MR STRICKLAND: Your Honour, I call Christopher Hand.

HIS HONOUR: Yes.

MR EDWARDSON: Excuse me, your Honour, just a little practical problem. The copy that was given to us was actually meant to go to the jury and we have already marked it so we just need to make sure the jury have got a clean copy.

HIS HONOUR: All right.

MR STRICKLAND: Your Honour, we're one short on the jury copy.

MR EDWARDSON: Your Honour, I have got one solution. Just bear with me, your Honour. What I will do with the copy that has been marked is I will take the front cover off and I will just replace - the only other one was the highlighting of the transcript, which is in the beginning. I can substitute that.

HIS HONOUR: Or this copy to be provided to the juror and another one can be provided in due course.

MR STRICKLAND: We will do that and I thank Mr Edwardson, but if that could be done, your Honour.

HIS HONOUR: Yes, all right. That is the simplest way.

MR STRICKLAND: I call Chris Hand, your Honour.

CHRISTOPHER HAND, sworn:

XN BY MR STRICKLAND:

MR STRICKLAND: Can I ask you to speak loudly and clearly? Everything you say is being recorded?---Yes.

If you'd like me to repeat a question or you don't understand my question, just say so?---Okay.

What is your full name?---Christopher Phillip Hand.

What is your rank?---Senior Constable First Class.

When did you join the Northern Territory Police Force?---July 1995.

Have you been stationed in remote communities during your time?---Yes, many times.

And which ones?---Mataranka, Yuendumu – gazetted permanently, and then performed relief duties. And also now gazetted at Yulara.

When did you first – when were you first stationed at Yuendumu?---That was about July '97, I think.

How long were you there for?---Two and a half years.

Were you stationed at Yuendumu in 2019?---I was performing relief duties in 2019 at Yuendumu.

From what month?---I think – it was various times. But more recently, November 2019.

Now, did you work at Yuendumu on 6 November 2019?---Yes.

And who were you rostered to work with on that day?---I was rostered to work from 12:00 hours 'til 20:00 hours. And later on that day, I was partnered with Senior Constable Lanyon Smith.

During the course of that day did you become aware that Kumanjayi Walker was an arrest target?---Yes.

Had you heard of Kumanjayi Walker's name beforehand?---Yes.

And did you go to House 577?---Yes, we did.

Why did you do that?---Senior Constable Smith knows Yuendumu quite well and knows that Kumanjayi normally lives at 577.

And did you go there at about 6.25 pm?---Yes.

I'm going to show you some body-worn video and ask you some questions in relation to that?---Yeah.

DVD PLAYED

MR STRICKLAND: Now, I'm going to play you – is that your body-worn video?---Yes.

You passed a – I beg your pardon? You passed an Indigenous man. Who was that?---I believe that – his name's Ethan Robertson.

Are you sure?---Yeah, I'm pretty sure, yeah.

All right. And who is Ethan Robertson?---He's family for Kumanjaya and Eddie and Lottie Robertson.

I'm going to show you the footage now from Lanyon Smith's footage. Just part, okay?---Yes.

For the transcript of what we just played – so members of the jury, the transcript of what we just played is in tab 1. But can I suggest – it's a matter for you, of course – I'd watch it rather than follow on your transcript because you can do the transcript whenever – you can do the transcript whenever you like.

So this is now Lanyon Smith's body-worn.

DVD PLAYED

MR STRICKLAND: Your Honour, I tender both the body-worn of Chris Hand and Lanyon Smith.

HIS HONOUR: Thank you. As a single exhibit, I presume?

MR STRICKLAND: As a single exhibit. It's on a USB.

HIS HONOUR: Yes. It will be exhibit 3.

EXHIBIT 3 Body-worn footage of Christopher Hand and Lanyon Smith.

MR EDWARDSON: Sorry, your Honour. Can I just ask, is that the full version of both body-worns? Because I do want full versions of both body-worns.

MR STRICKLAND: Yes, it's the full version of both body-worns.

MR EDWARDSON: Thank you.

MR STRICKLAND: But I'm not playing the full versions.

MR EDWARDSON: That's fine.

HIS HONOUR: Yes, all right.

MR EDWARDSON: Thank you.

HIS HONOUR: Thank you. That will be exhibit 3.

MS CALLAN: Your Honour, can I just indicate for convenience, in terms of dealing with this electronic evidence, all of the electronic evidence by way of video proposed to be tendered in this trial – and I've discussed this with defence – is contained on one USB. I ask for clarity if the USB, at this stage, could be marked as an MFI and then, as each video is tendered, your Honour – as you do – gives it a marking. And at the end of the trial, the whole of the USB will have been absorbed into the evidence, if that is convenient?

HIS HONOUR: Do you know what is going on the USB?

MR EDWARDSON: Look, your Honour, it's just a proposal that was designed, I think, so that you'd have a collective at the end. From our point of view, I don't mind how they do it, whether it goes in individually or whether it goes in on a USB. But that's a matter for the court, really.

HIS HONOUR: All right. Well, I'll have the USB marked as MFI C.

MFI C USB of video footage.

HIS HONOUR: And if I'm going to give each of the videos an exhibit number, that does then cause a bit of a problem, I suppose. Because ultimately, the USB itself will, presumably, be given an exhibit number.

MS CALLAN: Not necessarily, your Honour. The USB as a collection could continue with its status as an MFI, but each of the- - -

HIS HONOUR: I suppose so. I suppose one could look at it as if it's the electronic equivalent of a folder.

MS CALLAN: Indeed.

HIS HONOUR: Okay, all right.

MS CALLAN: And your Honour, I'll liaise – if it's convenient with your Honour's Associate, to ensure that the files are appropriately identified on the USB.

HIS HONOUR: All right, thank you. Yes.

MR STRICKLAND: Now when you entered House 577, were you carrying your Glock weapon?---Yes.

Were you carrying any other weapons?---OC spray, and an exp baton.



I beg your pardon?---An exp baton. Expandable baton.

What is OC spray – what is an OC spray?---It's called capsicum spray, most people know it as capsicum spray.

Now in both of those body-worn videos, you saw a young woman - - - ?---Yes.

- - - at the door, where Kumanjayi Walker was. Who's that woman?---Rakeisha.

Is that Rakeisha Robertson?---Yes.

Did you understand her to be the partner of Kumanjayi Walker?---Yes.

Now in Lanyon Smith's body-worn, that's the second one we played, it shows you, after Kumanjayi has exited his room with an axe, backing away and moving into the lounge room?---Yes.

Why did you do that?---Just to create some – some space between him and I. Also in that room, where that room was, we're sort of backed into a wall as well, so just to get into some space.

Why did you not draw your Glock when Kumanjayi Walker presented the axe?---We get trained – one of the four operational safety principles with firearms is if you draw your firearm, you never want the – the muzzle to cover - point at anything you're not willing to destroy. Also it escalates the issue, or escalates the situation. Obviously we're trying to de-escalate the situation. And drawing a firearm would be escalating it, and then it's harder to de-escalate.

Did you see or hear what Kumanjayi did with the axe?---I heard it drop on the ground.

Whereabouts?---Somewhere inside the house.

Did you give chase?---Yes.

Did you catch him?---No.

Now the following day, you had some communications with Assistant Commissioner Wurst, is that right? W-U-R-S-T?---I – yes, I don't know if he was Assistant Commissioner back then, but yes, Mr Wurst, yes.

Did you know him?---Yes, worked with him at Yuendumu.

And when was that?---That was during the late 90's, '97 to partway through '98 I think.

You were both at Yuendumu at that stage were you?---Yes, stationed there.

Your Honour, could the witness please be shown exhibit 1, tab 9.

You can see there, there's an email chain on 7 November?---Yes.

I just want to take you to the second email in the chain from Travis Wurst to yourself at 11.52 am on 7 November. He writes "Are you all right, I see Warlpiri's with the surname of Walker are still ours and my nemesis?---Yes.

And you say – you wrote the response you did at 12.26 pm?---Yes.

You said on the third line, "I don't think he wanted to chop us" - - - ?---Yes.

Well "I don't think he wanted to chop us up, he just wanted to escape." Why did you write those words?---Because that's exactly what I believed he was trying to do. He had plenty of opportunity to assault us and he didn't, and he ran out of the house because he didn't want to be arrested.

And you wrote, "No one was injured, and then that's the best result in view"?---Yes.

Why did you write that?---He wasn't injured. We weren't injured. No one in the house were – was injured. There was a lot of young kids in there. And we knew who Kumanjayi – where he lived, and allowing him to run out of the house, we can formulate a plan later on to affect an arrest.

You've given evidence that you've worked in remote communities?---Yes.

In terms of – have you confronted situations before when you've been presented with weapons?---Yes.

What did you learn from your experience, working in remote communities, about that?---Working in remote communities is – can be quite – quite challenging. Not only working there, but you live there, and you want to – if you need to arrest somebody or deal with somebody, you want to do it as peacefully as possible. Without the use of unnecessary violence, because that can have consequences later on with family, and you've got to live in the community, go to the shop, and see, you know, the same people at the shop and their families.

And what about backup? Did you have – what's the situation with backup when you're policing remote communities?---So all of the – the only backup is whoever's at the police station. Whoever's on duty. Obviously there's people in their private homes. But getting them as backup requires a phone call to be made, and then they've got to go to the station and get their accoutrements on, and go to your location. So at that – that time, on the sixth, it was just myself and Senior Constable Smith on duty.

How many people generally are on duty at – so were – sorry I'll start again. Generally, how many people were on duty at – as at November 2019?---It all depends on the day. Obviously we work with a roster. And depends who's rostered

on. Generally, there's usually at least probably three people during business hours. And then later on in day light – sorry, darkness, there might be only just two people working, but it depends.

How does your – how does the evidence you've given about police backup affect your approach to community policing?---Well it's totally different than in an urban environment, say for Alice Springs, where you've got people rostered on duty, many other patrols. So community policing need to be very good with your communication, and try and use your voice to de-escalate situations.

When you say "use your voice to de-escalate situations", what do you mean by that?---Just using what we call verbal dynamic commands. But also just talking to people.

You've - - - ?---And knowing the people.

- - - given evidence about why you said to Travis Wurst, "I don't think he wanted to chop us up", at that time, were you, that is in House 577, were you assessing and re-assessing the threat that Kumanjaya Walker posed to you?---Yes, yes constantly.

Is that part of your training?---Yes.

Now I want to ask you some questions about your training. Do you receive training each year?---Yes.

And who – where do you get the training from?---So we go – do firearms training, which is done with a firearms instructor, once a year. And then defensive tactics also, which is once a year. Once every 12 months with a qualified defensive tactics instructor.

What is a defensive - what is defensive tactics?---Defensive tactics is using open hand, tactics and cuffing procedures - handcuffing procedures, using the baton - the exp baton, also all the while using those verbal commands.

Does it include assessing threats, is that part of the plan?---So the firearms and defensive tactics always training to assess and reassess the threat.

You say "assess" and "reassess" what do you mean by that?---So you assess the imminent threat or whatever is happening and obviously as that situation evolves then you obviously reassess.

In relation to the training you've got about firearms, is that training about how to use it and also when to use it?---Yes, more so how to use it.

You said the training is once a year?---Yes.

How long is that training?---It's an entire day.

One day for defensive tactics - is that one day for the whole training, or?---Yes, so it used to be two days but more recently it's only down to one day every 12 months.

When did it change?---I don't know. I can't remember.

In 2019 was it two days or one day?---Two days. I'm pretty sure it was two days.

So did the training also include when - or the circumstances in which you'd use the firearm, is that right?---Yes.

And was that also part of defensive tactics training?---Or when to - yes, when to use your other accoutrements but you also have a - an inert firearm that's just as plastic firearm that is the exact dimensions of a Glock so it fits in the holster.

During your training did you receive training about what would happen if you were presented with an edged weapon such as a knife?---Yes.

Did you - have you head the expression, "Knife equals gun" or "Knife means gun"?---Yes.

And what did that mean to you?---That's so you - because a subject can effectively stab you with a knife quite quickly, can cover a lot of distance, then you could draw your firearm if you wanted.

You said, "You could draw your firearm"?---Yes.

Were you trained to always draw your firearm if presented with an edged weapon?---No.

What did it depend on?---It depends on the situation that you're in, the person who is holding the weapon, their intent - what you think their intent is and who else is around also.

Did your training include if you drew your gun did you necessarily fire it?---As I said before, the - one of the principles is if you do aim your firearm at a subject then you must, you know, you must be willing to use it. It's not - you don't draw your firearm and point it at someone as a threat.

Have you, in the past, ever drawn a firearm - or should I say - a Glock?---Yes.

Did you fire it?---No.

What was the circumstances in which you drew your Glock?---It was a search of a house where we had information that we were executing a search warrant and the offender had a - a firearm secreted inside the house.

Now, I want to ask you about what happened, you said you gave chase?---Yes.

You didn't catch Kumanjayi Walker and you then go back to the house after the chase?---Yes.

Did Kumanjayi Walker go into particular territory?---Yes.

That way, what was that?---That's called the, "Men's Area" it's a ceremonial area just behind 577.

And are you allowed - were you allowed to go into that area to give chase?---Yes.

So when you came back to House 577 did you speak to Lottie Robertson?---Yes.

Now, I am going to show you a second body-worn video then I will ask you some questions about that. Now, that is also in the volume you have just been given - the transcript of that is also in the volume.

DVD PLAYED

MR STRICKLAND: And you can see an axe in Constable Lanyon Smith's hand? ---Yes.

Is that the axe that you - - -?---Yes.

Effectively. And did you - did you seize that axe as an exhibit?---I believe Senior Constable Smith did.

Thank you.

DVD PLAYED

MR EDWARDSON: Sorry, your Honour, I am just trying to see whether page 2 of the transcript which is in, I think, tab 1, whether that is actually following.

MR STRICKLAND: What I will do is I will rewind it, your Honour and we will just follow it from there.

HIS HONOUR: All right. Thank you.

DVD PLAYED

MS CALLAN: Your Honour, in relation to the tender of videos, my understanding is that you marked both of the axe incident videos as one exhibit – number 3.

HIS HONOUR: Yes.

MS CALLAN: Could I respectfully ask that the Hand video, maintain that marking of exhibit 3, and then the Lanyon Smith video be marked exhibit 4 to ensure that there's no confusion on the record.

HIS HONOUR: All right.

MS CALLAN: And then I tender what was just played to the witness, which is body-worn video from Chris Hand after the axe incident, back at House 577. The file name is, "Chris Hand, Axon\_Body\_2\_Video".

HIS HONOUR: Then the body-worn video of Senior Constable Hand will be exhibit 3. That's the first one.

EXHIBIT 3 Body-worn video of Senior Constable Christopher Hand.

HIS HONOUR: Then exhibit 4 is the body-worn video from Constable Lanyon Smith.

EXHIBIT 4 Body-worn video of Constable Lanyon Smith.

HIS HONOUR: And then exhibit 5 will be the subsequent body-worn video, which we've just been shown.

EXHIBIT 5 Body-worn video of Senior Constable Christopher Hand, Axon\_Body\_2\_Video.

MS CALLAN: If it please the court.

HIS HONOUR: Thank you. Yes.

MR STRICKLAND: I now want to ask you about the events on Saturday 9 November 2019?---Yes.

You were the partner of Julie Frost; is that right?---Yes.

And what was her position?---The officer-in-charge of Yuendumu. So she's rank of Sergeant.

You worked on Saturday 9 November?---Yes.

You were on duty?---Yes.

Did you know at sometime during that day that members of the Immediate Response Team were coming from Alice Springs to Yuendumu?---Yes, I did.

Was it intended that you would be involved in executing the warrant to arrest Kumanjayi Walker?---No.

Why was that?---I specifically asked Sergeant Frost that – to be excluded from any arrest team because of perceived conflict of interest, being that if I was part of the

arrest team and had to use force then I'd, obviously, be heavily scrutinised because of the earlier incident on the 6th.

Now, after 6 November, did you tell Julie Frost what had happened?---Yes.

You go back to the – you've seen the video and you went to Lottie. Did you go back to the police station after that?---I think so, but I called her from the – from 577 from mobile phone.

I want to show you this – could the witness please be given the folder – the most recent folder we've been- - -

HIS HONOUR: Yes.

THE WITNESS: Thank you.

HIS HONOUR: Yes?

MR STRICKLAND: Now, go to – there will be a number of photographs – sorry, a number of stills from CCTV. Can you see that? That's in tab – I don't have the folder in front of me. Tab 4?---Yes.

And if you go to photograph number 5, please?---Yes.

Can you see yourself in that still?---Yes, I can.

Where is that?---That's the muster room of the Yuendumu Police Station.

So that's taken at 6.12 pm on the 9th. Does that jog your memory that you were in the muster room about that time?---In the muster room, yes.

And did you see members of the Immediate Response Team coming into the muster room from time to time that evening?---Yes.

And do you remember who they were?---I remember there was Zac Rolfe.

Yes?---Kirstenfeldt – I don't recall his Christian name. The dog handler, Donaldson – Adam Donaldson. And I don't – oh, Adam Eberl and I can't remember the other guy's name.

Another guy?---Yes.

You see in that still there's a man behind you?---Yes.

What's his name?---Constable Alefaio. Felix Alefaio.

Can you spell that?---A-L-E-F-A-I-O?

Was he what's known as an ACPO?---No, he's a Constable.

Constable, right. And do you know if he was going to be involved in arresting Kumanjayi Walker?---Yes, he was.

Now, what did you do after you came into the muster room?---So I was completing my statement from the 6th from the incident at 577. So I hadn't had an opportunity to do it prior to then.

Did you have a particular station in this muster room?---Yes.

Or an area where you worked?---Yes. Yes, I had a desk. So in that – that still image shows the front counter area. There's a bottom-right of that picture, that's a doorway that leads to the witness - - -

Sorry, I'm just pointing to – you mean this bottom right here?---Yes, the – that's a statement taking room. That's a door that leads to a statement taking room.

Yes?---And then below that, or next door to that room is the sergeant's office. And my desk was up against that wall of the sergeant's office, facing the OIC's office.

And were you – when you said you were taking your statement, did you have access to the body-worn video of the axe incident on nine – on 6 November?---Yes, so I was – as I was taking my – I'm watching the body-worn footage and had some headphones to listen to the audio.

You had your headphones on?---Yes.

Were you present when Sergeant Julie Frost gave a briefing to any of the members of the IRT?---Yes.

Were you, at that time, still engaged in preparing your statement?---Yes, so the headphones I had were the earbuds, Apple earbuds. So you could still hear ambient sounds, but yeah, I was taking my statement while she was talking to members of the IRT.

At that time, do you recall what Julie Frost was saying to any of the members of the IRT?---No. The only part I had to play in that was I could see they were – had – they had a map out of the community, and I was showing, I think it was Donaldson, the area for – see he's the dog handler, and showed where the – where – where Kumanjayi ran on the – on the sixth.

Do you remember anything that Julie Frost said to the IRT members?

MR EDWARDSON: Well he said he couldn't recall hearing anything that was said, and the only involvement that he was as he's just explained. So I object.

MR STRICKLAND: Is there anything else you can remember Julie Frost said?---No.



Did you see the IRT team members leave the station at that time?---Yes.

And do you remember if they said anything, any of them, when they left?---Yes.

Which – which person did you hear say something?---I believe it was Kirstenfeldt and he said he was going to – or they knew what – what they needed to do. And that they were going to – you know, they've done this sort of thing before, and they were going to check all the known places that he would – he may be at. And until – you know, be here basically in Yuendumu until the – the family either gave him up or they were able to arrest him.

Is there anything else you can remember any of them saying, as they were leaving?---No.

Did you understand – did you know that a plan to arrest Kumanjayi Walker at 5 am on the Sunday morning?---Yes.

And when did you know about that plan?---That was on that Saturday.

And who did you hear about that plan – where did you (inaudible) about that?---From Sergeant Frost.

And when did she tell you that?---I don't recall.

Was it in the muster room?

MR EDWARDSON: Don't lead, thanks.

THE WITNESS: Yes.

MR STRICKLAND: Was anyone else present when she told you that?---I don't remember.

And did she tell you that before or after the members of the IRT team came?---Before.

Thank you, your Honour, that's my examination-in-chief.

XXN BY MR EDWARDSON:

MR EDWARDSON: Senior Constable, for how long had you been a police officer before 6 November 2019?---If my maths is any good - - -

Roughly?---About 24 years.

About 24 years. And of that time, for how long had you worked within the community?---Of Yuendumu?

Yes?---Over two and a half years.

You, yourself had not had any direct dealings with Kumanjayi Walker before the events that we've seen on the body-worn video on 6 November 2019?---I have had a dealing with him before.

You had?---Yes.

Had you personally arrested him?---No.

But you understood that Mr Smith had had some – Constable Smith, I should say, had had some dealings with him?---Yes.

Now I want to ask you a little bit about general procedure and the way that things operate?---Yes.

The PROMIS system is the mechanism by which what we call a case management system of sorts for police?---Yes.

And it's a system by which police officers can access whatever information might be available about an individual?---Yes.

And the reason the police officers access information before an arrest, can I suggest, is so that the police are informed, as much as they can be, about that individual, and specifically what risks, if any, they might pose?---Yes.

It must have been part of your job to check the PROMIS system before you and Constable Hand – Smith, embarked on the journey to room – House 577?---We didn't check PROMIS.

Did you know about his criminal record?---I was aware he was a property offender.

Right. So you had no idea as at 6 November, that he had a very extensive criminal history?---I knew he had a criminal history, yes.

But an extensive criminal history, that involved multiple offences of violence?---I was aware he did assault a youth worker.

Assaulting police officers?---I wasn't aware of that.

Escaping custody?---Yes, I was aware of escape custody.

So are we to understand therefore, that you were not put on notice, that he was potentially a very dangerous individual?---I wouldn't call him dangerous.

No. And so is that why you tell us, or at least you tell this jury, that from your perspective, there was no need to draw your weapon?---No.

And you basically were never in a position where you thought he might act by actually deploying the axe against you or your partner, is that what you're telling the jury?---Yeah that's right.

And so certainly, Sergeant Julie Frost did not suggest to you, before you were both deployed to arrest him on 6 November 2019, you were never told that he was potentially, a very dangerous individual, who might assault police?---No, she was off duty.

He might deploy weapons, if confronted by police?---Sorry, can you say that question again?

That he might confront police with a weapon?---No.

So really, this was, if I can put it simple terms, from your perspective at least, a fairly stock standard simple arrest of an Indigenous individual?---Yes.

All right. Now when you were speaking to Lottie Robertson, Rakeisha was also present wasn't she?---I believe so, yes.

And if we turn to, just for convenience, I might play it if need be, but if we can turn for the present purposes to the transcript?---Do I have that transcript?

Sorry.

I wonder if the witness can be shown, it's exhibit 2.

HIS HONOUR: Exhibit 2.

MR EDWARDSON: I want to take you to page four on tab 1.

Excuse me, your Honour.

Sorry, can you just turn to tab 1, page four. Actually start at page three if you don't mind. Do you have that in front of you?---Tab 1?

Tab 1, page three. The first sentence should be, Smith, "I thought you were separate from him." Rakeisha "Separate." I presume that means separated from Rakeisha. Rakeisha, "Still your boyfriend, girlfriend", do you see that?---No I don't have that one.

It should be the transcript on 6 November 2011 of a recording commencing at 18.49 hours for six minutes and four seconds, between you, Constable Smith, Lottie Robertson, Rakeisha Robertson and Janice Burns.

MS CALLAN: Your Honour, behind tab 1 is a transcript and then a blue piece of paper and the second transcript.

HIS HONOUR: I see. All right. Okay.

MS CALLAN: I understand Mr Edwardson (inaudible).

HIS HONOUR: Okay, yes.

MR EDWARDSON: Thank your Honour. I'm grateful, thank you.

Do you have that? The second transcript?---Yeah.

Right. Can you turn to page 3?---Yes.

And it should commence at the top: "I thought you were separate from him, Rakeisha. Still boyfriend/girlfriend?" Do you see that?---Yes.

All right. If we can move down to the – about point four of that page, you'll see that you say – sorry, Rakeisha Robertson says: "No, I thought he went to get his shirt." And you said: "No, you tried to stop us from getting in, but we'll talk about that later?"---Yes.

I'll come back that shortly. But moving on down the transcript, Lottie Robertson said:

"Your life was in danger, too." Smith: "Yeah, it's on Camera 1."

Smith: "The whole time, just remember that."

Lottie Robertson: "And they can see what's going on?"

Smith: "And you're all right?" Lottie Robertson: "I'm a bit shaken-up."

Smith: "Yeah, okay."

Do you see that?---Yes.

Lottie Robertson: "When I saw him with that axe, I started."

Smith: "You saw that one too, did you?"

Lottie Robertson: "No, when I came out of the room."

And so on. Now, if I could take you now to, specifically, what you say at about point four on page four of six. You said this to Lottie Robertson, as the transcript reveals:

"So next time he does that he might – he might get shot?---Yes."

All right. So it must have come as a complete surprise to you when he presented himself with this axe as we have seen on that video – body-worn video, in an

extremely confronting way. And probably, it's unlike anything that you've experienced before?---No. I have experienced it a few times before, yes.

You have experienced that before?---Not – not in that same manner, but obviously, situations are very different. But I have been threatened with weapons before.

All right. But in this case, it was not what you were expecting?---No.

Because you had no idea that he was, potentially, so dangerous?---No, we weren't expecting that.

And you've told us already that, from your perspective, you had no information that suggested that he had a predisposition to violence, let alone to police officers?---No.

And you certainly weren't expecting him to arm himself when you attempted to arrest him?---That's right.

All right. I just want to run through the events as you perceived them. And we've seen it on the body-worn video. But can I ask you this, before giving evidence in court today, you provided a record of interview on oath, did you not, on Thursday 14 November 2019 at the Alice Springs Police Station?---A statement? Yes.

Yes. And it was a statement taken by Detective Sergeant Kieran Wells(?)?---Yes.

And I presume you would have read that statement before coming to court today and you would have read that quite properly to refresh your memory about what you told police about these events?---Yes.

And you solemnly and sincerely declared to that police officer that the information that was contained in that statement was true and correct?---Yes.

All right. I want to ask you a few questions now, if I can, about your perception of the events as you saw them, captured on body-worn video?---Yes.

Firstly, would you agree that body-worn video can have certain limitations?---Yes.

Let me just put that into perspective. The body-worn camera is positioned on the body and it might capture an image which is different from what you actually see?---Yes.

The camera might be pointing in one direction, but you might be looking elsewhere?---Yes.

There are potential differences in the capacity of the camera to capture an image in poor lighting, for example, which might not be as obvious to you as an individual?---Yes.

And of course, it's easy for us to look on the video now and frame-by-frame slow it down and have a look and see. But that, of course, is not real, is it?---No.

It's certainly not the way in which you would have perceived the situation?---That's right.

And as you've said to Lottie at one point – and I can take it to you if you like – it happens so quickly. It happened very quickly, indeed?---Yes.

And you didn't see it coming?---No.

No. All right. So I want to ask you about – from about the point where the door has been opened, Rakeisha has stalled police, it would seem, on the face of the video?---Yes.

And that gave Kumanjayi sufficient time to arm himself, as we now know, with this tomahawk?---Yes.

Which he then deploys – as we saw quite graphically – in the two body-worn videos?---Yes.

And you said, didn't you – as we heard on the video – words to this effect, "We'll put handcuffs on you first, then you can talk to Lottie"?---Yeah.

And he says, "No, no, no. I want to talk to Lottie"?---Yes.

That right?---Yes.

And you were making it plain that was going to happen- -?---That's right.

- - -until such time as he surrendered to police and he could be handcuffed?---Yes.

And you told Rakeisha to get out of the way so that you could do your job?---Yes.

Otherwise, she might get arrested as well?---Yes.

Did you physically handle her to get her out of the way in any way?---Yes.

How did you do that?---With – just grabbed her by the arm and just moved her out the way.

Sure. I mean, she was clearly hindering your responsibilities in attempting to properly arrest Walker?---Yes.

Now, at the time that you went to arrest Walker, there was a warrant for his arrest?---A warrant of apprehension, I believe.

Warrant of apprehension.

I wonder if the witness could be shown the folder – I think it's number 6 in exhibit 1. Tab 6 in exhibit 1.

Do you recognise that document?---No, I haven't seen it before.

Did you know of its existence?---I knew of – the warrant was in existence, yes.

Right. So is this the warrant you're referring to?---I believe it is, yes.

Which is dated, as we can see, 5 November 2019?---Yes.

And it commands the apprehension of Kumanjayi Walker and that he be brought before the court to be further dealt with, according to law?---Yes.

And although you didn't cite the warrant, you would certainly would have been informed by Sergeant Frost, I take it, that there was a warrant in existence that permitted you and your partner to lawfully apprehend Kumanjayi Walker?---Wasn't from Sergeant Frost, but from the intelligence unit in Alice Springs, put out to bulletins, of people to arrest. That sort of thing.

Right. So either way – sorry, it wasn't from Sergeant Frost that you became aware of the existence of the warrant?---No.

But certainly, she's the person that tasked you and Smith to conduct the apprehension?---No.

Who did?---It was myself and Senior Constable Smith.

All right. Now, when you say that you physically moved Rakeisha out of the way so that she wouldn't continue to hinder your task of trying to apprehend Kumanjayi Walker?---Yes.

You said something like, "You're going to have to get out of the way"?---Yes.

And did Walker accuse you of hitting his wife?---Yes.

How did he do that?---He yelled out, "You fuckin' touched my wife."

Was it this: "You've been fuckin' hittin' my wife, hey"?---Yes.

All right. And that's before he presents the axe?---Yes.

Were you aware of a violent domestic relationship between Rakeisha on the one hand and Kumanjayi Walker before you attempted to arrest him on 6 November?---Not before, no.

You only found out afterwards?---Yes.

All right. So that, again, is part of his background and history that you were not aware of at the time that you went to apprehend him- -?---Yes.

- - -on 6 November. But it's plain from what you told us though, isn't it, that he picked up the axe?---Yes.

Where did he seem to retrieve the axe from?---I couldn't be sure, but – as it was quite dark – but there appeared to be some blankets, so. And I couldn't see it before that so it may have been under some blankets.

Was Rakeisha, at that stage, still blocking or not?---I think she had been moved by that stage.

He was shirtless, as we can see on the body-worn video?---Yes.

In any event, he picked up the hatchet?---Yes.

And that's how you described it, isn't it, in your interview? A hatchet?---Yes.

He was very angry, from your perspective?---Yes.

And the first thought you had was, "Shit, I've got to get out of here"?---Yes.

There was a lot of shouting, wasn't there?---Yes.

You saw Smith, didn't you, up against the wall?---Yes.

And where was Kwementyaye Walker in relation Smith at that time?---He was in front of him, I think.

And he was holding the axe in his right hand, wasn't he?---Yes.

He was holding it above his head?---Yes.

"And he was gonna, you know, you know, hit him in the head." That's how you described it, isn't it?---Yes.

That's the way it was perceived to you?---Yes.

So the impression you had was this man, in a very short space of time, had armed himself with a hatchet?---Yep.

You agree that that's an edged weapon?---Yes, has an edge.

You'd agree, wouldn't you, that it has the capacity to cause enormous damage, if not death to anybody with it if it's deployed?---Yes.



And you'd agree that he was angry, he was aggressive?---Yep.

He'd accused you of hitting his wife or his partner, I should say?---Yes.

And indeed, he was actually focussing on the fact that he or you, from his perspective, or at least he was alleging that you had hurt his wife?---Yes.

And you froze, didn't you?---Momentarily, yes.

Well, that's what you said, didn't you, "I froze"?---Yes.

You became fixated on the weapon?---Yes.

And the whole thing happened very quickly, didn't it?---Yes.

You've told us that you conversed by mobile telephone with Sergeant Frost from House 577?---Yes.

And quite properly, you reported to her as the officer in charge, I think?---Yes.

About what had happened?---Yes.

This was a very serious escalation in terms of Kwementyaye Walker?---Yes.

It was a serious escalation, because from your perspective, this was really a stock standard arrest. Sure, there had been a basis upon which he was to be arrested, but it wasn't against the background, from your perspective, of him being a violent, dangerous individual?---No, that's right.

But things had changed very significantly as a consequence of him deploying this hatchet towards you and your partner, Smith?---Yes.

You told Sergeant Frost, didn't you, that he's attacked you with – that he attacked you both with a hatchet?---Yes.

And she said, as a consequence, that notifications would be made?---Yes.

She would call herself onto duty?---Yes.

And work out how to best deal with the matter going forward?---Yes.

As we know, to cut to the chase, this was so serious, and his potential threat to police was now so much more significant, that the IRT, that's the Immediate Response Team, were ultimately deployed?---Yes.

And indeed, you know, although you may not have had any direct involvement, it was indeed your partner, Sergeant Frost, who asked for the IRT to be deployed or

permission, sanctioning, if you like, for them to be deployed in these circumstances?---I believe it was.

Now, you've said a little bit about your training. I want to ask you a little bit more about that, if I can. When Mr Strickland was asking you questions about your training, and in particular, the deployment of a weapon, he said, "Have you ever heard of the expression 'knife, knife mean to gun or knife equals gun,'" was the words he used?---Yes.

The actual phrase that was used in your training and is used, as you understand it, right across the board is that "edged blade equals gun"?---If you say so, but yes, I've heard of "knife equals gun," shortening it in police jargon, as we do.

But what I'm getting at, it's not confined to a knife, is it?---No.

And part of your training and part of the really important aspect of this training is the distance between you and the individual who's armed with an edged weapon?---That's right.

Now, if somebody's 20 metres away or more, even if they might have a knife which has the capacity to kill or maim, that's a very different scenario, isn't it, from somebody who spontaneously produces an edged weapon in the close confines of a police officer?---Yes.

And one of things that you're taught and trained is exactly that. There is a distance, isn't there, where it's almost the point of no return?---Yes.

What is that distance?---Believe it's 6 metres - - -

Six metres?---Six/7 metres.

So in other words, if the individual presents in a hostile fashion with an edged weapon and they move within 16 metres - - -?---Six.

Six metres, sorry, your training is pull your firearm?---Well, you don't have to.

Of course, not. But if you think this person's going to deploy that edged weapon, your training is that you are entitled to pull your firearm, correct?---Yes.

And as you said in answer to the questions put by Mr Strickland, "If you pull your firearm, you've got to be prepared to pull the trigger"?---Yes.

The other thing that you're taught is where to shoot?---Yes.

And you're taught to shoot to the centre mass of the body, aren't you?---Yes.

You want to eliminate the threat?---Yes.

Stop them in their tracks?---Yes.

And one way in which you might be taught, and were taught, can I suggest, about producing a weapon and deploying a firearm is they're in close proximity to you, you unholster the gun and you fire into the body mass?---Yes.

I want to ask you a little bit about the holstering of a Glock. A Glock's the stock standard pistol that police officers carry in the Northern Territory?---Yes.

It has a safety mechanism, doesn't it, on the holster?---Some holsters do. The newer ones do, the older ones don't.

Insofar as they do, when you say "the newer ones," I mean the purpose, in part, is to ensure that somebody doesn't get access to your firearm?---Yes.

But you're also trained and taught, aren't you, how to unholster the weapon so that it can be used very quickly?---Yes.

You mentioned before at one stage an example of where you had actually gone into a house with your weapon drawn?---Yes.

And I think you said that, "In that case, there was intelligence that the perpetrator might be armed inside the house"?---Well, there was evidence, because we had a warrant.

Sorry, there was evidence what?---So that he had a – so was executing a search warrant - - -

Yes?--- - - - a 117 warrant for *Police Admin Act*.

Yes?---So to get that warrant, there's obviously some evidence there that the gun was there.

Right, so the intelligence was there was a gun inside the house?---Yes.

Well, it makes sense; if somebody's inside the house and they've got a gun, you're going to make sure that you are adequately prepared, and if necessary, you might have to shoot your gun. So when you entered that house, were you with other police officers?---Yes.

Was the house cordoned off beforehand?---I don't recall. It was a long time ago.

Long time ago. You know what I mean when I say, "cordoned off"?---Yes.

I used the "eliminate," it should have been incapacitate. That's what you're taught, in terms of to incapacitate the individual by shooting into the body mass of that person?---Well, that's what you said, but yes.

That's what I should have said, but yes.

Now, back to this occasion where you went into the house. You were with other police officers?---Yes.

And you've told us that you remember this much, that you had your weapon drawn?---Yes.

Did you go into the house with the weapon drawn?---No.

Why did you draw it?---Was a very junior officer, and my partner, my senior partner, told me to – he had his firearm drawn, and he said, "Have – be prepared. Have your firearm drawn."

Thank you. And the firearm was drawn in those circumstances because there was a real potential for this individual to be armed with a firearm and, indeed, use it against police?---Yes.

So it was a precautionary measure?---Yes.

And one hopes, as a police officer, that you never have to pull the trigger?---Yes.

But you are trained that you can and should in certain circumstances?---Yes.

You mentioned something about verbal commands?---Yes.

In terms of your training, and there are different ways in which you might deal with an individual, but so much depends upon the circumstances, doesn't it?---Yes.

It depends upon how immediate the threat is?---Yes.

How quickly you have to react?---Yes.

The extent to which the individual has deployed a weapon against a police officer, and if so, in what context?---Yes.

I mean, obviously, split-second timing might preclude, for example, verbal commands?---Yes.

Now, when we looked at the body-worn video, it would have been plain to everybody that neither you nor Smith, I don't think, actually gave any verbal commands to Kumanjaya Walker, did you?---There was a lot of shouting, but I can't – I can't remember, yes.

No. Well, hardly surprising, given how quickly the events unravelled?---Yep.

And how quickly and confronting the situation was?---Yes.

And how terrifying it must have been?---Yes.

There was no arrest plan in place in this case, before you went to arrest Kumanjayi Walker was there?---No.

No. Now when, after the events of this – had occurred, and we know that you go back and ultimately Sergeant Frost has arranged, through the command structure, the IRT to be deployed?---Yes.

We know that the IRT are going to be ultimately responsible for the arrest of Kumanjayi Walker?---Yes.

And you've identified in part at least, what you saw and heard, before their deployment - - - ?---Yes.

- - - to the Yuendumu Community. You asked Sergeant Frost to be excluded from any arrest because of the perceived conflict?---Yes.

Perfectly proper can I suggest. I would have been inappropriate for you to attend, and be part of the arrest team, given what had happened three days before on the sixth?---Yes.

And the same would apply to Smith?---Yes.

Because if Kumanjayi Walker behaved in the way that he did in your case, and produced an edged weapon in whatever form, and actually sought to deploy it, there was always the real prospect of a firearm being deployed or used?---Possibly.

Well you said as much to Lottie didn't you? You said to her, "If he does that again, he could get shot"?---In Alice Springs.

I'm sorry?---In Alice Springs.

I don't - - - ?---If you read the next sentence.

Yes?---It says "If this were to occur in Alice Springs", then that's - - -

Why does it make any difference whether it's in Alice Springs or Yuendumu?---Community – it's a different way of policing on Indigenous communities. We always like to be as non-violent as we can with arrests, because we have to live in those areas, in those communities. And we you know, were trying to build partnerships with the people of the communities. Obviously if force needs to be used we will use it, but we police differently on Indigenous communities.

I quite understand that as a general rule, you might police different. But surely you would accept that if he behaved in the way that he did, the terrifying experience that we've seen on this video, there was every possibility that another police officer, consistent with his or her training, might use the weapon and deploy it against

him?---That's possible.

Regardless of whether it's in Alice Springs or in Yuendumu?---That's possible, yes.

The location doesn't determine whether a weapons drawn and shot – and fired, does it?---No. Depends the police officers involved as well.

I want to ask you a little bit more about what was going through your mind - - - ?---Yes.

- - - at the time of this incident, as opposed to making a conscious decision not to draw your weapon. You thought, didn't you, that he was going to assault you with that axe or hatchet?---There was a possibility, yes.

Well you said expressly in your interview didn't you, that that's what you thought?---Yes.

And you're immediate – that was your immediate thought, and that's why you froze, and you thought shit?---Yes.

You explained, did you not, your training?---Yes.

Defensive tactics?---Yes.

An edged weapon?---Yes.

You draw a firearm, edged weapon, "You can you know, Taser spray or firearm, but until that actually happens, you go, you don't even think of anything like that. It's you know, a bit of self-perseveration. So in that room, I retreated from that room, I call it tactical disengagement, but I retreated"?---Well that's a legitimate – a legitimate option in – in our defensive tactics.

Yes, it depends on whether he's going to use it or not though doesn't it?---Yes.

You were fixated on the weapon?---Yes, momentarily.

Well you said, "I became fixated on the weapon", did you not?---Yes.

You were frightened?---Yes.

You couldn't turn around and run out of there?---I was backed up against a wall.

That's right. So you were in a corner, you had nowhere to go?---Yep.

You were concerned that he was going to use that axe, particularly towards your head?---Yes.

And this is what you told the police isn't it. "I froze, which I'm not proud of, but it is what it is. I was yeah, frightened, you know, fear. Fearful that you know, we're going to hit, not necessary killed, but you know, severe damage, probably to your head." That's how you described it to police isn't it?---Yep.

And quite understandable, can I suggest. It must have been a truly terrifying experience?---Yes.

One that you never expected to happen?---Didn't expect it, no.

And that man, Kumanjayi Walker, as he presented himself to you, as we've seen on that body-worn video, is a far cry from what you thought was going to happen?---Yes.

And that's why there was no arrest plan?---Sorry, say that again?

That's why there was never an arrest plan?---No we – we just went there to see if he was there. We didn't actually know he was there.

Exactly. You went there to see if he was there. It was the last you expected was this man to come flying out of a room, armed with a tomahawk, or an axe, or a hatchet, whatever you want to call it - - - ?---Yep.

- - - as we've seen on the body-worn video?---Yes.

Excuse me, your Honour. I have nothing further, thank you, your Honour.

HIS HONOUR: Is there any re-examination?

MR STRICKLAND: Yes, thank you, your Honour.

REXN BY MR STRICKLAND:

MR STRICKLAND: The interview that Mr Edwardson taken you to occurred on 14 November, is that right?---Yes.

That's after the email you sent to Travis Wurst?---Yes.

Where you said words to the effect of you didn't think he was going to chop up?---That's right.

Do you remember you did another interview after 14 November - - -

MR EDWARDSON: Well I object to this, your Honour. It doesn't entitle my learned friend to re-examine on other interviews.

HIS HONOUR: Depends upon the content of the other interview.

MR STRICKLAND: We'll have to debate that in the absence of the jury then.

HIS HONOUR: Members of the jury, we'll probably take the morning adjournment at this point anyway, so would you retire please.

JURY OUT



HIS HONOUR: Are you happy to have this discussion in the presence of the witness?

MR EDWARDSON: I think not, your Honour.

MR STRICKLAND: I agree.

HIS HONOUR: Would you wait outside for a moment please.

WITNESS WITHDREW

HIS HONOUR: Now so that we can have a discussion in which I'm fully informed, what do you propose taking this witness to in the other interview?

MR STRICKLAND: I'll mark and hand up a copy of the record of interview on 17 December 2019 - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - can be marked for this application.

HIS HONOUR: I'll have that marked for identification. That'd be MFI D.

MFI D: Record of interview 17 December 2019.

MR STRICKLAND: Sorry, your Honour, MFI D?

HIS HONOUR: D.

MR STRICKLAND: And I am not sure what's in that.

HIS HONOUR: Now, where are you taking me to?

MR STRICKLAND: If your Honour goes to page 7.

HIS HONOUR: Yes.

MR STRICKLAND: The witness says:

"There was a point where I was, you know, I froze, when he came at me with the axe. He would've had - he would've had ample opportunity to strike us both at some point - didn't, so, you know, on the footage you can see I tried to grab his left arm, so once I got over the initial fear, which lasted a very short time - a very short time - then I knew that, you know, he wasn't trying to probably hurt us, he could've if he wanted to. That's when I grabbed his arm - his left arm - and tried to apprehend him."

That's the part - it's that answer, your Honour.

HIS HONOUR: The cross-examination was directed towards how the witness felt or perceived occurring at the commencement of the attack, not after a certain period during which the witness apparently came to the conclusion that he was not going to be physically attacked with the axe. I don't really see where this goes.

MR STRICKLAND: Well, your Honour, I think the questions weren't so confined - they were confined with his feeling of him freezing at the time the - Kumanjayi was in the act - was in the room, holding the axe.

HIS HONOUR: Yes, and you propose to take him to this interview in order to say what his state of mind was after he ceased freezing.

MR STRICKLAND: Yes, but I - that is, the evidence he gave in cross-examination was that he froze momentarily.

HIS HONOUR: Yes.

MR STRICKLAND: This answer - and it is what was put to him in first record of interview, was - the effect of it was that he froze - he has frozen in fear for the period of time that Kumanjayi Walker was in House 577 holding the axe. This answer, in my submission - and he was taken to what he said in the first record of interview.

HIS HONOUR: I don't think it was put to him that he was frozen in fear throughout the whole period.

MR STRICKLAND: Well, I don't think it was specific as to when - - -

HIS HONOUR: The witness said he momentarily froze. In any event, how is it relevant to anything in this trial that this witness subsequently, during the incident, formed an opinion about whether the deceased was going to use the hatchet - how is that relevant to anything in the trial?

MR STRICKLAND: Well, your Honour, both party - neither party are objection to questions on that very topic.

HIS HONOUR: Well, there has been an objection to this question.

MR STRICKLAND: Yes, but not on the basis of relevance.

HIS HONOUR: Well, I will hear what - now that I understand where you are going with the question I will hear from - - -

MR EDWARDSON: Your Honour, I embrace everything that you have just said. I mean, my questions were obviously very much focussed and specific on the contraposition between the way in which he went to that location, the limited information that he had and, of course, what is really important is how that all transposed into the minds of the IRT before they went there, and so I do object to

this question. In my submission trying to establish a previous consistent statement to bolster the credibility of a witness in these terms is not only inadmissible but it is also not a proper matter for re-examination.

HIS HONOUR: I must say, Mr Crown, I agree. Do you have any further re-examination for this witness?

MR STRICKLAND: I do.

HIS HONOUR: Well, I have already told the jury we will take the morning adjournment so we will do that.

MR EDWARDSON: Your Honour, it might be worth - rather than having them go back out again, we are going to have a similar problem of going back, we may as well know now what the re-examination is likely to be.

MR STRICKLAND: I don't intend to do that, your Honour.

MR EDWARDSON: All right.

HIS HONOUR: All right, then I am going to take the morning adjournment.

ADJOURNED

## RESUMED

MS CALLAN: Your Honour generally provided us (inaudible) with the folder which has been marked exhibit 2. Can I – we've now got the copy we need, and can I provide that to the court, along with two copies of the index to exhibit 2.

HIS HONOUR: All right, thank you.

If we could have the jury brought back in.

JURY IN

HIS HONOUR: And the witness may be recalled.

CHRISTOPHER HAND:

HIS HONOUR: Mr Strickland, whenever you're ready.

MR STRICKLAND: Yes, thank you, your Honour.

REXN BY MR STRICKLAND:

MR STRICKLAND: Senior constable, you said in answer to a question from Mr Edwardson, that you believe that Kumanjayi Walker was going to hit Lanyon Smith on the head with the axe?---Yes.

How long did you hold that believe for?---A split second.

And what did you believe after that split second?---That he wasn't going to hurt us.

Why?---Because he just wanted to escape.

You said in answer to a question from Mr Edwardson, that you froze momentarily?---Yes.

When did you get over that freeze?---When I knew that he wasn't going to assault us.

And when was that?---As he had – oh well when he had Smith against the – the wall.

You were asked some questions about your training and shooting in the centre mass?---Yes.

What do you understand the centre mass to be, and can you demonstrate that location?---Yes, centre of scene mass is the torso. So it's where all the vital organs are of the body. And it's the largest target.

Do you know why you were taught to shoot at the centre mass?---Again, it's the largest target. It's where all the vital organs are, so if you need to stop the threat, that that's where you aim your firearm.

What do you mean by the vital organs?---The heart, lungs, kidney, liver.

I just want to read you a question and answer that you were – you were asked this. And you were asked some questions about what difference would it make – sorry, I'll go back a step. You were taken to that part of the body-worn video where you told Lottie Robertson, the next time he might get shot. And then you said, the next line was, "In Alice Springs. Like community policeman are different to town policeman" - - - ?---Yes that's right.

- - - remember that part? And then you were asked this question. "Surely you'd accept that if he behaved in the way that he did", that's during the axe incident, "There is every possibility that another police officer, consistent with his training, might draw his Glock?---Possible." And then Mr Edwardson said "The location doesn't determine" - - - ?---Yes.

And you said "No, no, it depends on the police officer involved as well"?---Yes.

What did you mean by it depends on the police officer involved as well?---Depends on their experience, having worked in Aboriginal communities. Because it's a different dynamic and different way of policing on Indigenous communities, where there are just possibly two of you working and you have no backup. So you don't want to use – well you want to use as less force as – as you can, because you don't have the benefit of having other police officers coming to your aid within five or 10 minutes.

Thank you, your Honour, they're my questions.

HIS HONOUR: Thank you.

You may go?---Thank you.

WITNESS WITHDREW

HIS HONOUR: Yes.

MR STRICKLAND: I call Lanyon Smith.

LANYON MARK SMITH, affirmed:

HIS HONOUR: Yes.

XN BY MR STRICKLAND:

MR STRICKLAND: Can I ask you to speak slowly and clearly. Everything you say is being recorded. If you'd like me to repeat a question, or you do not understand it, please say so. What's your full name?---Lanyon Mark Smith.

And what's your rank?---Senior constable.

How long have you been a police officer?---Since 26 June 2006.

And have you been stationed in remote communities, apart from Yuendumu?---Yes.

Which ones?--- Hermannsburg, Papunya, Imanpa, I think, Santa Teresa, Kintore. There's probably a couple of others. I can't remember.

So for approximately how many years during the time you've been a police officer have you been stationed or posted in remote communities?---Since 2010 onwards.

Okay, thank you. November 2019, you were posted at Yuendumu Station?---Yes.

How long had you been there as at that time?---I think I commenced on 17 August 2017.

Okay. And do you think you knew the members of the community quite well?---Yes.

How many members – sorry, how many people lived at Yuendumu, roughly, in November 2019?---Six to 800.

Did you have a good working relationship with most of those people?---Yes.

You were working on Wednesday 6 November 2019?---Yes.

And did you receive some information about a warrant for the arrest of Kumanjayi Walker?---Yes.

Okay. And you acted on that information and went to House 577; is that correct?---Yes.

Okay. What weapons did you have when you went to House 577?--- You mean accoutrements?

I beg your pardon?--- Accoutrements?

Sorry, did you have your Glock?---Yes.

Did you have any – when you say accoutrements, what do you mean by that?---OC spray, baton, handcuffs and Glock.

Okay. OC spray is the capsicum spray?---Yes.

Did you have your body-worn video at that stage?---Yes.

And did you film what happened when you went into House 577?---Yes.

Now, I intend to play some footage, your Honour and members of the jury. I'm just going to play the footage of Chris Hand, because that shows Mr Lanyon Smith. So I'll just play that footage, your Honour. That's exhibit 3. Excuse me for one moment, your Honour.

DVD PLAYED

MR STRICKLAND: Now before that day, 6 November, had you had dealings with Kumanjayi Walker?---Yes.

On about how many occasions? Approximately?---At least five.

Okay. Had he ever run away from you before?---Yes.

How many times, approximately?---Once, I can think of.

Okay. You can see in that footage Kumanjayi Walker approaching you with the axe held such as this above his head?---Yes.

What did you think when Kumanjaye Walker approached you with the axe?---I was shocked, somewhat scared. Everything was processing extremely fast in a short period. I had adrenaline going through me, but I didn't feel that he was going to hurt me. It was more of an intimidation to get out of the room.

Why did you think that?---From previous – I knew him, he knew me. Kumanjayi, being a Warlpiri man, it was more of a show to his partner, who was in the room, and his family. But he just wanted to get away.

Why didn't you draw your Glock?---There's a – it's a not a simple yes or no answer as to why I didn't draw it. It's a combination of training and knowledge of Kumanjayi. I didn't know what was still in the room behind Kumanjayi. There might have been another person. I was fully aware that, to the right of me, there was Lottie Robertson and Rakeisha Robertson. There was a wall and by me drawing my Glock, there was a possibility that that may escalate him as opposed to de-escalating. And I could've – if I'd fired the shot, I didn't know where the shot would go. There was a potential for other people to get hurt.

When you say escalate him, what do you mean by that?---If I had drawn – so, it could have made him violenter (sic) or more angrier and then want to use the axe or the force upon me.

You say that you knew Kumanjayi as a Warlpiri man. What significance did that have in your mind at that time?---From previous dealings with Warlpiri people, a lot of it is for show.

I beg your pardon?---A lot of it is for show.

When you say, "A lot of it," what do you mean by it?---Force. They brandish nulla-nulla sticks, trampoline poles, whatever. And if in the presence of their family, to show, "I would want to hurt this person, but because police are here I can't." But in their minds, they're trying to impress upon their family that they're a strong person. So given the fact that his partner and his mother and father-in-law were in the house – or mother-in-law was in the house, that's what I was thinking also.

Have you also policed in Alice Springs?---Yes.



In your experience, is community policing in remote areas different from policing in Alice Springs?---I would say yes.

In what way?---In community policing you have to live with these people, your community. You see them down at the shop, you see them at the clinic, they come to the police station other than reporting crimes, to register motor vehicles and so forth. You're on a more on-on-one basis as opposed to Alice Springs where you may not see that person again.

How does that affect what you do when you are faced with a weapon?---I feel that if you're well known in the community and it - I don't think situations like that one would've occurred because he knew me.

Was one of the other officers - - -

MR EDWARDSON: I missed that last bit, was it - - -

MR STRICKLAND: "Because he knew me."

MR EDWARDSON: Thank you.

MR STRICKLAND: Is that what you said sir?---Yes.

Was one of the other officers at Yuendumu at that time Felix Alefaio? Was he one of the officers stationed in Yuendumu in November 2019?---I - no - I - he was on a separate rotation - - -

I see. Okay. Now, I want to ask you about your training in relation to firearms and defensive tactics. Did you receive annual training in relation to the use of firearms and the circumstances in which you would draw a firearm and use it?---Yes.

You received training in defensive tactics?---Yes.

Was that every year?---It was every year up until COVID.

Yes. And what was the training you received where a person presented with an edged weapon such as a knife or axe?---The training is knife or edged weapon equals gun.

And what does that mean to you?---It means if you're - if someone presents a knife or an edged weapon to you and you would draw your gun.

Okay, and would you necessarily fire the gun?---No.

Were you trained to - what was your training about assessing and re-assessing threats in such a situation?---It's a continual ongoing - you - by drawing, for example, by drawing the firearm he may drop the axe, so then you would de-escalate.

So in your situation on 6 November you were presented with an edged weapon?  
---Yes.

Do you believe you acted in accordance with your training in not drawing a firearm?  
---Yes.

Why is that?---Because there's other options, such as tactical disengagement.

Is that what you did?---Yes.

How did you tactically - what was the thing you did that was tactical disengagement?  
---I stepped - I stepped back out of the room and Chris - Senior Constable First Class Hand who was with me on the day. He stepped back and I pushed him into the lounge room, however, I was cornered so I put myself in a spot where I couldn't go any further.

Now, is it the case that after - did you see or hear Kumanjayi Walker drop the axe?  
---I heard the axe drop, I ran over to the axe because it was dropped outside the house, on the porch.

Now, Chris Hand then gave chase, is that right?---Yes.

He didn't catch him, correct?---Correct.

And then later you returned with Chris Hand to speak to Lottie Robertson, is that right?---Yes.

Did you then, after you left House 577 did you then go back to the station on 6 November?---Yes.

And did you debrief Julie Frost about what happened?---Yes.

Did you record the event anywhere?---No.

Do you know of anyone else did?---No, I don't.

Now, you then went back again to House 577 a third time that day, is that correct, with Julie Frost?---Yes.

You and Chris Hand were in the background, is that right?---No, but - - -

Tell us what happened the third time you went there?---The third time we - the three of us went and we spoke with Lottie and Rakeisha and at that time I believe Eddie Robertson was present. He was upset with us for chasing Kumanjayi and he made comment that we could've gave him a heart attack. I think I replied back, "We're the ones going to get the heart attack, chasing him" and then Lottie spoke to Eddie in language, explaining to him that - what had happened, and then Eddie apologised for his behaviour towards us.

Now, were you on duty on 9 November? That's a Saturday?---No.

That is my examination-in-chief, your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Senior Constable Smith, I just want to start, if I can, with picking up on this topic of training?---Yes.

When you first trained to be a police officer you were taught about a particular term or expression which we have heard a lot about in this case, which is "edged" or "blade equals gun" or "edged weapon equals gun" something like that?---Yes.

That is an expression you are familiar with?---Yes.

And is that part of the training that you received when you first became a police officer?---Yes.

What was the actual description, as best you can recall?---I think it's "Knife equals gun".

Well,. You say "Knife equals gun" - it's "blade" isn't it, because it could take any form of edged weapon it would still be exactly the same, surely?---I think 15 - 16 years ago when I first joined that was probably the terminology and now it's more "edged weapon" to cover a lot more sharp objects.

I mean, it makes sense, doesn't it, obviously there is not much difference between a knife, some form of other edged blade, even as you say, this particular axe you acknowledge was an edged blade?---Yes.

And the training that you have received and police officers have instilled in them is that if an edged blade is presented to a police officer, it might warrant the drawing of a firearm?---Yes.

Now, one thing you would have been taught is distance is a relative thing to that concept?---Yes.

In other words, the closer the individual is to the police officer and is posing that edged blade, it is obviously much more significant?---Yes.

What is the distance that you were taught?---I think it is 6.3 metres.

Six point three metres. And what happens if that person who is armed with an edged blade, moves inside that 6.3 metres?---They generally have the ability to get to you before you can draw your firearm.

Before you can draw your firearm? Which is why - and that's the point, isn't it - that's the training that's instilled. Once they become inside of 6.3 metres, the capacity to draw a firearm is limited?---Yes.

And you are taught, aren't you, that inside of 6.3 metres it is highly likely that the individual - if they were so minded - can deploy that blade against the police officer? ---Yes.

So in other words, obviously every case is different and scenarios are different and no doubt - and I suggest that is what you are taught - that distance becomes a very important factor as to whether a firearm is or is not drawn?---Yes.

If a person is, say, 20 metres away you might look at other alternatives to simply pulling a firearm and deploying it?---Yes.

For example, verbal commands?---Yes.

You might think about a Taser, not at that length, 20 metres - - - ?---No - - -

- - - but - - - ?---Yes.

- - - obviously as they got proximate. Incidentally, were you and your partner armed with Tasers on this occasion?---I wasn't. I'm not too sure on Senior Constable Hand.

Thank you. But as they come closer, and once they get to that important point of 6.3 metres, the clear instruction is, edged blade or knife equals gun?---That is probably not how it is presented. We're also taught tactical disengagement and other options.

Yes, you're taught tactical disengagement and other options, if they are realistic to the circumstances that presents – that is presented?---Yes.

I mean there were no verbal commands or any attempt to – no verbal commands given to Kumanjayi Walker when he took to both you and your partner with that axe where there?---Not from me, no.

No, and nor from Smith in your presence – Hand, I'm sorry, in your presence? He didn't issue any verbal commands that you can recall did he?---No.

No. Had you yourself had any reason to believe that he would be armed, or was likely to arm himself when you went to arrest him on this occasion?---No.

So it must have come as a great surprise and shock?---Yes, I did state that.

And would it be fair to say, that the whole thing happened very, very quickly?---Yes.

And certainly, both you and your partner, made it clear to Lottie Robertson, and indeed I think Rakeisha as well, that if he does that again with police, he might not be so lucky?---I don't know if it's in that context, but we did have a conversation.

Well, along the lines of "He could have been shot"?---I don't remember that being said.

He could be shot?---I can't recall that conversation.

You didn't say anything of that nature?---Not that I'm aware of, no.

The other thing you're taught in the context of blade equals gun is that if you present a weapon, a Glock, whatever it might be, you have to be prepared to pull the trigger?---There's four safety principles on drawing a weapon, I don't know if that's true, I have to think about that.

Well let me put it this way. Consistent with your training, let's say you don't have the knowledge that you've told us about in the context of Kumanjaya Walker. You've told us that because of your previous dealings with him, you've told this jury that you didn't think he was going to actually deploy the axe against you. That's what you've said isn't it?---Yes.

And so, you say, that's the explanation for you not drawing your weapon?

MR STRICKLAND: I object.

MR EDWARDSON: We'll I'm asking you.

MR STRICKLAND: No, I object. He said – the question is, "That is your" – "That is the explanation as" – he's given more than one.

HIS HONOUR: It may be confusing. You might be – the witness - - -

MR EDWARDSON: I'll rephrase it - - -

HIS HONOUR: - - - may take it that you are putting to him that that was his evidence.

MR EDWARDSON: I'll rephrase the question.

Do you agree – well is it the case, that you did not deploy the weapon because you didn't think he was going to actually deploy the axe against you or your partner?---It was a combination of reasons why I didn't deploy my weapon.

Yes, they were?---One of them that he knew me, and I knew him.

Yes?---Two, there was other people in the room, and I wasn't – I didn't safely know that no one else was going to get injured other than Kumanjaya - - -

If you did deploy the weapon?---If I did deploy the weapon.

Yes?---I didn't know where the bullet was going to go, or bullets that I fired.

Yes?---So there's a combination of things. If I can't safely control where the bullet is going to go, then how can I deploy it?

Understood. So there was a whole lot of variables that presented themselves to you on this occasion. The first is the number of people that were around the place?---Yes.

That potentially could have been caught in the cross-fire, if I can put it that way, if you pulled – pulled your weapon?---Yes.

In other words, you made an informed decision, so you say, not to deploy your weapon in these circumstances, the combination of those factors presenting themselves as they are?---Yes.

Did you - - - ?---A combination of many factors.

- - - did you think that he was going to chop you?---At one point, yes.

When?---When he came through the door, and it was just me and him for that half a second, or whatever it was.

When you thought he was going to chop you, how far was he from you?---Half a metre to a metre.

So he's well within the 6.3 metres that you'd been trained and taught about?---Yes.

But despite the fact that he was within that timeframe, and could have easily deployed the weapon, if he'd chosen to, your assessment was, after initially thinking he was going to chop you, that ultimately he wouldn't?---That was one of the factors, yes.

And so you chose not to in those circumstances?---Yes.

But, had you not known about his background, and if other people had not been present, your decision obviously might have been quite different?---Had it not been Kumanjaya and another person, who I didn't know, decisions may have changed.

Right. So it was very important to your decision, that you'd had this previous relationship with Kumanjaya. He knew you, and you knew him?---Yes.

And that was certainly a factor that played heavily in your decision not to escalate the matter by drawing your firearm?---That's one of the – one of the options, yes.

And the other thing that must have been very important in your mind is the fact that as it turned out, you were right about one thing, he did not deploy that axe against either one of you?---That is correct.

Had he deployed that axe against you, or your partner, your response might have been quite different?---Yes.

And so as we can see from the explanation that you've given to this jury, everything turns on the time, place and circumstance of a particular incident?---Yes.

How one matter might present to one police officer on a particular day might be quite different to another police officer?---Very much so.

The extent to which the threat is imminent and deployed might be different on one occasion from another?---Yes.

Every case is different, and it's different from the perspective of the police officers who's confronted with the threat?---Yes.

Excuse me.

I'm going to ask you a couple of questions.

I wonder if we could play please the body-worn video of Mr Hand, which is on 6 November 2019. It is now – sorry, exhibit 3 MFI C.

And members of the jury, perhaps if you could follow the exchanges that we see from tab 1, the transcripts in tab 1 of the body-worn video and CCTV folder. It will play the whole incident through, but I want to go through to continue on after the incident itself.

DVD PLAYED

MR EDWARDSON: We can hear on that tape that you're saying to your partner that you were stuck in the corner, and then you just begged for mercy, basically?---I didn't hear that, but- - -

Well, we'll replay it.

Can you just quickly play a little bit, please?

DVD PLAYED

THE WITNESS: Yeah, I hear that.

MR EDWARDSON: And you go on to say, "And then he went towards the kitchen and he went for – he came for – he raised it," and you wrestled with him at the door for a bit. And he got through and threw the axe down?---Yes.

All right. Now, there's nothing to be embarrassed about this. This is a- - -?---Oh- - -

- - it's a terrifying experience, no doubt, for you?---It would have been expression of speech.

Sorry?---It would have been expression of speech.

Of course it was. Begging for mercy but, at the same time, you must've – in that split second when he came towards you with that axe – seen your life flashing before your eyes?---Yes, there was a combination of many things happening in that second, along with the adrenaline.

But the fortunate part, in this particular case in this particular incident, is that the combination of those factors that made you decide not to draw and fire your weapon, as it turned out, was the correct decision on this occasion?---Yes.

Thank you.

Nothing further, thank your Honour.

REXN BY MR STRICKLAND:

MR STRICKLAND: Senior Constable, you said – you had given evidence about the range of matters you were thinking about which led you not to draw your Glock. One of them that there was other people in the room?---Yes.

Was one of those people you were thinking about your partner, Chris Hand?---I knew he wasn't in my peripheral vision at the time, when the potential was for me to draw the Glock.

Do you know if Chris Hand had his Glock at the time?---Had drawn his Glock?

No, not drawn it, but he was carrying it?---Yes, it's- - -

He had it?---I can't recall.

That's fine?---I'm assuming yes.

Nothing further, your Honour.

HIS HONOUR: Thank you. You may go.

WITNESS WITHDREW

MS CALLAN: Your Honour, I might explain. The video which comprises exhibit 3, which is the Hand body-worn footage that was just shown to that witness.

HIS HONOUR: Yes?



MS CALLAN: It might not have been apparent, but when the officers left the house, they ran – as they described in their evidence – the video has been edited, so as to save everyone from watching seven minutes of the officers running through the bush.

HIS HONOUR: Yes.

MS CALLAN: And that if the jury looks at the time clock in the right-hand corner, it's apparent when that editing has occurred and the times- - -

HIS HONOUR: Thank you.

MS CALLAN: - - -are accurate.

MR EDWARDSON: And there's no issue with that, your Honour.

HIS HONOUR: No, thank you. Yes, now.

MR STRICKLAND: Ms Poole is taking the next witness, if we could just have a short time.

MS POOLE: Yes, your Honour. I call the next witness, Evan Kelly.

HIS HONOUR: Thank you.

EVAN KELLY, sworn:

XN BY MS POOLE:

MS POOLE: Sir, can you tell the jury, please, who are seated to your left and right, your name?---Evan Kelly.

And it's the case, isn't it, that you're a Sergeant in the Northern Territory Police Force?---Detective Acting Senior Sergeant at the moment, yes.

Detective, how long have you been a member of the Northern Territory Police Force?---About 18 years.

What police station are you currently attached to?---Alice Springs.

Now, in late October or early November 2019, were you working at Alice Springs Police Station?---Yes.

And what was your rank at that time, do you recall?---Sergeant. I was a shift supervisor.

And how long had you been stationed at Alice Springs at that point in time?---Only about two months.

Detective, is it the case that at Alice Springs Police Station, there are several patrol groups?---Yes, there's normally five.

And those patrol groups comprise a number of constables and senior constables and a sergeant; is that correct?---That's correct, yes.

Now, holding the rank of Sergeant, did you have command responsibilities in relation to a particular patrol group?---Yes.

And which patrol group was that?---I don't recall the patrol group number. At the time, we'd change supervisors quite regularly of patrol groups. But it's the patrol group that Mr Rolfe was in.

What did your command responsibilities as the Sergeant of the patrol group involve?---Basically, the day-to-day running of all of their investigations, PROMIS audits, overseeing domestic violence audits, ensuring that members are tasked appropriately to conduct enquiries. We often have handovers from other patrol groups that require investigation or follow-up. Basically, the day-to-day running of a patrol group of what can be between six to 10 people, depending on rostering at the time.

Could I ask that the witness be shown exhibit 1, please. So that's the folder of documents.

Now, at tab 3 – could I ask you, please, to turn to tab 3. Now, Detective. The document which you should now be looking at – which is at tab 3 of exhibit 1, has been prepared for the purpose of these proceedings, you understand that?---Yes.

Do you see it's a form of an organisational chart?---Yes.

And in the middle of that chart there is a blue box which says, "Alice Springs General Duties"?---Yes.

And below that is a list of names? And your name appears the second down in the list?---Yes.

Do you see that?---Yes.

And you will see there are other names listed below yours commencing with the name of Robert Kent?---Yes.

Now, as at late October early November 2019 were any of the individuals in addition to the accused, listed in that box there with the organisational chart that I have asked you to look at? Were they in your patrol group?---I don't believe Antony Hawkings or Adam Eberl were members of our patrol group at the time. Mitch Hansen, Breanna Bonney and Luke Crotty certainly were and I think Michael Hickey(?) may have been watchhouse keeping at the time.

Who did you report to as Sergeant in charge at that time of your patrol group?  
---The watch commander. I don't recall who the watch commander was at that time though. They often change as well between a patrol group.

So if you look at - if I ask you just to look at that tab and just above the "Alice Springs General Duties" box I have taken you to there is a box there that says, "Watch Commander" with the name, Shaun Furniss?---Yes.

Do you recall whether he was your watch commander at the time?---He could have been but he is a watch commander and was at that time, yes.

Okay, and just for those members of the jury who are unfamiliar with the term of "watch commander" what is the role of a watch commander?---Basically the watch commander has oversight of everything that happens in the Southern Command from Elliott down to the southern border, they are responsible for oversight of the patrol group that they have. They are also responsible for any custody issues, incident response to critical incidents, major incidents and they report through the chain of command to the Territory duty super.

Can I now move to the events of 30 October 2019 and some information you became aware of regarding Kumanjayi Walker on that day. Is it the case that on 30 October 2019 you received some information that Mr Walker was an arrest target?---Yes, I received an email from Sergeant Kent.

And what was your understanding at that time of why Mr Walker was an arrest target?---From memory at the time there was a breach of suspended sentence or parole.

Is it the case that at that stage, on 30 October 2019, you did not specifically task anyone in your patrol group to take any specific action in relation to Mr Walker?  
---No, I don't recall as a result of that email tasking anybody to conduct enquiries.

I am going to move on now to 6 November 2019. On that day, on 6 November 2019 were you rostered on a day shift?---Yes.

And when you are working a day shift what time do you usually start?---0700 hours is our rostered time to start but as a supervisor you normally have to get there a bit early to conduct a briefing and handover with the outgoing shift supervisor.

And when you came on duty that day, did you receive a handover sheet?---Yes.

Can you tell the jury please what a handover sheet is?---Basically it's a list of PROMIS jobs that require further enquiries or investigation. There will also be a potentially a list of stolen motor vehicles that are outstanding, any current arrest targets, basically anything that needs further enquiries conducted, any specific incidents that occurred overnight that you need to be made aware of.

Did the handover sheet that you received on that day say that Mr Walker was an arrest target?---Yes.

Do you recall, having received that information, that Mr Walker was an arrest target, then accessing a PROMIS record about Mr Walker called a "breach report"?---I don't specifically remember accessing the job that morning, however I assume that I would have because it was on the handover. In saying that we - as a supervisor you access multiple - multiple jobs a day to look at, so I don't specifically remember accessing that one but it is likely that I would have.

Okay. Could I ask you please to turn to Tab 1 of the folder in front of you and it should be some agreed facts. You should see a document there called "agreed facts". Could I ask you please to turn to page 7 of those agreed facts. Now, this again is a document says "agreed facts" that's been prepared for the purpose of these proceedings. Can you look at par 45 on page 7? Now, what is set out at par 45, some details of an audit report in relation to the user name that accessed a PROMIS record for Mr Walker being a breach report and it also shows when they accessed that record, so do you see that there at par 45?---Yes.

Do you see the first two entries in the box under the text at par 45 which indicate, according to the audit records that on 6 November 2019 at 6:36 am and at 7:37 am - at 6:37 am - sorry, according to those records, your user name of "Evan Kelly" appears as having access to PROMIS breach report of Mr Walker. Do you see that there?---Yes, that's correct.

And does that now accord with your recollection as to the timing of when you looked at Mr Walker's breach report?---Yes, that would have been prior to the muster briefing while I was doing the handover with the outgoing shift sergeant in the sergeant's office.

And it appears that you did, in fact, arrive earlier than your shift formally began on that day?---Yes.

Now, do you recall on that day, 6 November 2019, tasking Constable Rolfe to have a look at Walker?---Yes.

What did you mean by "have a look at Walker"?---Basically have a look at that job, find out what the job involved, have a look at Mr Walker's prior criminal history, his links, his links in town, basically when you give a constable or another member a job to have a look at, they go and do their due diligence, find out any alerts, any active alerts, locations of interest for them, basically through PROMIS you can have a look at premises that the person is linked to, known associates, his criminal history, alerts of violence and that sort of thing, so yes, it's basically doing your due diligence when you ask somebody to have a look at them.

And if you look again at the table that appears at par 45 on page 7 of the agreed facts you can then see two entries, again on 6 November 2019, 7:09 am and 7:11

am where it appears that the user name "Zachary Rolfe" has accessed the breach report. Now, do you recall asking Constable Rolfe to look at the Breach report?  
---Not specifically look at the breach report, just saying, "Can you have a look at him" would have been - and I would have given him a PROMIS number and that would have been Constable Rolfe conducting his due diligence.

Okay, and when you asked, or tasked Constable Rolfe to have a look at Walker, was that for the purpose of police finding and arresting him?---Yes.

Now I'm now going to move to the – the next day on 7 November 2019. Is it the case also that as a matter of practice at the beginning of a shift, a patrol group comes together for what's called a muster briefing?---Yes.

And where does that muster briefing occur in the police station, or where did it occur in Alice Springs at that time?---Strangely enough, there's a small room off the muster room in Alice Springs that's got a number of chairs in it, and the door can be closed so that it's private, and that's where we hold our muster briefings.

Again, for the benefit of the jury, can you explain what a muster briefing typically involves?---Basically the handover briefing from the previous shift involves any outstanding matters that need to be followed up. It can be an information session also where we have information about stolen cars, and locations of stolen cars. Any active arrest targets that we have. Basically it's so that the – the oncoming patrol group isn't left in the dark as to what's happened on the previous shift, and any urgent enquiries are followed up.

That day, 7 November, you again worked a day shift, is that correct?---No, I believe we were on evening shift.

And what time would you have started if you were working an evening shift?---1500 – 3 o'clock.

And as per the usual practise you've just described, did you have a muster briefing at the start of the shift?---Yes.

Was the whole patrol group in attendance at that briefing?---I can't recall, but imagine anybody that was on my PG would have been in the – in the muster briefing.

At that muster briefing, did you discuss with the patrol group the fact that Mr Walker was an arrest target?---I would of, because he would have been still on the – the handover from the previous shift, so any arrest targets would have been discussed.

Okay. And at the time you conducted the muster briefing that day, were you aware of an incident that had occurred the previous day, on 6 November, involving police, Mr Walker and an axe at Yuendumu?---No not at the time of the briefing.

Did you become aware of that incident?---Yes.

When did you become aware of that incident?---Shortly after the muster briefing, my patrol group went out into the muster room, and they generally start by logging onto the computer and seeing if they've got any outstanding tasks for the day. I believe as a result of conducting enquiries in relation to Mr Walker, it was identified that he'd had an involvement the night before in Yuendumu, and attached to that involvement was some body-worn video. And that body-worn video was then opened in the muster room. And I recall being in the shift sergeant's office and being asked to come and have a look at it. And that was the body-worn video of the axe incident that had occurred the night before.

Do you recall which officers brought the axe incident to your attention?---I believe it was Zach.

Now do you recall then accessing a PROMIS record about the axe incident?---I don't recall specifically going and logging on to, but I would have, as a result of me doing my due diligence to find out exactly what had happened. It was my belief at the time that – that an incident similar to that should have been brought to our attention in Alice Springs. But at the time, we were unaware.

When you say it should have been brought to your attention, when should it have – in your view, when should it have been brought to your attention?---Pretty much as soon as it happened, because of the ease of which people can travel in and out of Yuendumu, there was a potential for this Mr Walker to come into Alice Springs. Then that's something that we should have known about.

All right. Now again, we'll continue on the agreed fact at page seven. Again, this time par 46. If you could take a look at that. Now what is set out at par 46 are some details of an audit report in relation to who accessed a PROMIS record for Mr Walker about the axe incident, and when they accessed that record. So do you see that there at par 46, the table?---Yes.

And if you look about a third of the way down the table there, lines nine and 10, if you want to count, you'll see your name there, Evan Kelly, do you see that?---Yes.

And those audit records suggest that you accessed the PROMIS record case report about the axe incident on 7 November at 15.59 and again at 16.01?---Yes, that's correct.

Does that now accord with your recollection of when you accessed the record?---Yes it would have been about that time.

And at around the same time, you looked at the case report on the – did you look at the case report on the axe incident?---Yes I would have.

So we're just going to go to – if you turn the page please to page eight, par 47. Now you may see in that table, this is an audit report in relation to access to Mr Walker's PROMIS profile. And about halfway down that page, your name appears there at

15.58 and 14 – sorry, 16.15. Now does that accord with your recollection of when you accessed the PROMIS profile for Mr Walker?---Yes it would have been.

Now it's correct, isn't it, that the body-worn video of the axe incident was also available for the members of your patrol group to look at that day?---Yes, it had been downloaded, yeah.

And where had that been downloaded from?---It is when the member who's body-worn it is finished a shift, they generally dock their body-worn and it downloads automatically. So it's available on our Axon system for anybody to – to view, unless it's locked down specifically for a purpose.

Did you watch the body-worn video of the axe incident?---Yes.

Did you watch it with anyone else?---Yes.

Who did you watch it with?---I believe that the majority of the patrol group were there at the time and watched it.

Can you be more specific than that as to who was there?---There was Mitch Hansen, Zach Rolfe, Shane King, I believe, Bree Bonney, James Kirstenfeldt, Luke Crotty, and I'm unsure of who else. And there may have been other members from another patrol group that we were changing over with that viewed it at the same time.

Now there was footage of the axe incident from both of the officers that were involved in that incident, Smith and Hand. To your recollection, did you watch one or both sets of the body-worn video?---I'm unsure. I don't know who's – who's body-worn it was when I was watching it.

And when you're watching it, just to be clear, you're watching it together with the other members of the patrol group at the same time, is that right?---Yes.

Do you recall who opened up the footage on the computer and played it?---No. I think I was in the – when they started watching it, I think I was in the shift sergeant's office.

Sorry, I didn't hear that?---When – when they initially started watching it, I believe I was in the shift sergeant's office, and was – was called out to view it, basically.

Okay. Now who called you out to view it?---I can't recall.

If you can turn through that document now please to page 11. Again this is the agreed facts documents at tab 1. If we go to par 69 on page 11. This sets out some details of the relevant audit reports – results, sorry - - - ?---Sorry, I think I've - - -

Sorry, I'll give you time to get to that?---You said number 11?

Page 11?---Still on the audit report?

Sorry, we're back at – yes, tab 1. Page 11, par 69?---Yes.

Do you have that before you?---Yes.

Okay. Now, the table in par 69 sets out some details of the audit results, showing the usernames that accessed the Smith body-worn video of the axe incident after it was uploaded by Lanyon Smith the day before on 6 November. And those records indicate, I suggest to you – the first two lines – that Constable Rolfe accessed that body-worn of Smith on 7 November, twice, at 15.16. Then further down that table and on to the next page, that on the same day on 7 November, you accessed the Smith body-worn video of the axe incident three times at 16.09. Constable Rolfe thereafter accessed the Smith body-worn video of the axe incident five times at 19.55, 20.02 and twice at 20.14. Can you continue on to – now, do any of those times accord with when the patrol group was watching the video of Smith – Smith's body-worn video of the axe incident?---I imagine it would have been the 15.16 one, because that would have been about the time that we came out of mustering and everybody would have had time to sit down and log on.

Can you continue now to par 70 of the document, just below that. Again, on page 12. The table at par 20 sets out relevant audit report results indicating who accessed the Hand body-worn video of the axe incident after it was uploaded by Chris Hand, again, the day before on 6 November. If you look at the table there, those audit results or records indicate that Constable Rolfe accessed the Hand body-worn video of the axe incident on 7 November 10 times from 15.16 onwards that afternoon. Now, again, in terms of the timing of when you and others in your patrol group were watching the body-worn video together, do any of those records accord with the time when you were watching that footage together?---Yeah, I believe it would have been the 15.16 record. Once again, that's just after our muster would have come out.

Detective, how many times did you watch the footage?---I wouldn't be able to tell you, to be honest. I watched it a number of occasions but an exact number, I wouldn't be able to tell you.

More than 10? Less than 10?---Probably less than 10, I would think.

Now what, if anything, did you say whilst you were watching that body-worn footage of the axe incident?---I don't recall the specifics of what was said at the time. Obviously, it was a critical incident. It could have ended in a different way than it did. And basically, we had – there was comments made about the situation itself and situational awareness and that sort of thing. I didn't specifically give my patrol group and further information about dealing with an armed offender or edged weapons. It's a common occurrence in Alice Springs and that patrol group at the time, as far as patrol groups in Alice Springs were, was a relatively senior and experienced patrol group.



I just want to ask you a couple of questions, then, about the information you've just provided. You mentioned that it's a relatively common in Alice Springs, dealing with edged weapons. Was that what you said?---Yes.

And how common? What do you mean by common?---I would say that if you're on a PG and you don't go to some sort of weapons incident once every two shifts that something would be out of the ordinary. Not necessarily an axe or a knife, but a stick or a star picket or a broken bottle, quite often knives. This is a – one of the, you know, it's up the scale as far as weapons incidents goes. But they're a regular occurrence in Alice Springs.

You also referred to a term that you raised with your patrol group when you were watching the footage about situation awareness? Can you explain what you meant by that?---Basically, it's being aware of your surroundings, where you are, the potential to have an escape route should something happen, the proximity to offenders with edged weapons, their ability to approach you are far quicker than you realise. So basically, it covers quite a few things. But basically, it's being aware of your surroundings, where you are. You know, where your partner is and where a potential offender is.

Why is an escape route a relevant matter in relation to your – an officer's situation awareness?---Well, depending on what sort of weapon the person has, you may need to seek cover. If it's a firearm, you may need to tactically withdraw from an area. So it's always good to know your surroundings, you know, know what's behind you.

Did anyone in the patrol group who was watching that footage with you, did they have anything to say about it?---There were many comments made, but in saying that, there was also, you know, between six to 10 people there watching it at some stage. So specific comments, I don't recall. Everybody was, you know, of the same opinion as me. It was a dangerous incident.

Did you talk about the axe incident with your patrol group in the context of any of your own training or policies in relation to use of force?---No, not specifically. As I said, the patrol group that I had I considered to be relatively experienced. We cover that in our initial training and the guys have ongoing training in Alice Springs in dealing with what we deal with down there. It's a regular occurrence, as I said, so I didn't feel the need to lecture them on their job.

So it's a regular occurrence, even being confronted with an axe as an edged weapon?---Axe is not so regular, but regularly knives. Star pickets, which can do the same damage as an axe, tree limbs, broken bottles, shards of glass.

Now, I take it then, you don't – do you recall whether Constable Rolfe said anything in particular about the footage?---No, I don't. There was a lot of chitchat and general conversation there. I don't recall specifically anything that anybody said.

Having looked at those records and discussed the muster briefing and the viewing of the axe incident, I'm now going to move on to ask you about your involvement in searching for Mr Walker at Warlpiri camp that same day, on 7 November 2019. Now, it's the case isn't it, that on that day – 7 November – you went to Warlpiri camp to look for Mr Walker?---Yes.

Why did you go to Walpiri camp?---There had been some information and I am unaware of where the information came from, but there was some information passed to a member of our patrol group that he may have been residing at a house in Warlpiri Camp.

Do you recall which house specifically?---I don't know the number. It was the first house in as you turn left, and on your right hand side.

Okay. Did you go directly from Alice Springs Police Station to Warlpiri?---No.

Where did you stop on the way?---At a bus crash on Gregory Street. I got tasked to attend that. We – we were all out doing our regular duties prior to finding the time to go to Warlpiri Camp. The – the guys in the patrol group said that they were going to have a briefing at the car park at Bunnings, which is just south of Warlpiri Camp. I made it there for the last part of the briefing. Because I was tied up with the bus crash. When I got there, they had a mud map drawn on a piece of paper of the premises, and basically the briefing was that we were going to go and place a cordon around the target premises. And then determine whether anybody was home.

When you say "they", who do you mean? Who was there at Bunnings car park?---The members that I mentioned in the muster earlier, and Zach was conducting the briefing.

So you mentioned a plan that was put into place. Who devised that plan?---I assume Zach had devised the plan before we got there, or before I got there. And he was – he was giving the briefing.

What if any, consideration was given during that briefing to the risk posed to police officers, or others, by Mr Walker?---I'm unaware of what was said prior to me getting there, but I don't think that there needed to be anything said, given that the – the entire patrol group had just watched the axe incident. So I think we were quite privy of the risks.

And so Constable Rolfe devised the plan. You as the sergeant, with command responsibilities for the patrol group, did you approve that plan?---Yes.

You referred to part of the plan being to set out a cordon. Was there any discussion about going into the house?---I don't believe so. A part of the – we do what's called a cordon and call, so you get your – get a cordon in place around the house so that you can determine and view if anybody escapes the place. And once your cordon is

in place, you generally send somebody to the door to knock and determine if anybody's home.

And if someone is home? What was the plan going to be if Mr Walker was home?---That depends on multiple – multiple scenarios. If we knocked and Mr Walker opened the door, and he was there and unarmed, he would have been arrested at the time. If the door opened and he was in the lounge room, and he appeared to be unarmed, and it appeared to be safe to do so, he would have been arrested at the time. If he opened the door and was armed, we would have probably maintained the cordon, and potentially called negotiators. There's any number of scenarios. The plan, when we say you develop a plan and do a risk assessment, it needs to be dynamic and adaptable, because it's a rarity that you develop a plan and you go somewhere and that plan plays out exactly as you intended it to.

What do you mean by the terms "dynamic and adaptable"?---Well it's no – there's no point having a plan that is absolutely rigid, so that members – if you're expected response changes, or the subjects expected response changes, your plan needs to change with that.

So in your mind, what's the purpose of the cordon?---To ensure initially that – that the target doesn't escape. If you move in rapidly, get a cordon in place, then you can be assured that if the person is in a premises, that they're going to remain there without escaping.

And how important a part of the plan, in your mind, was the cordon and contain aspect of this plan?---Very important, to ensure that we're able to determine whether or not a subject is in a premises, and leave either a, with the subject, or b, satisfied that he's not in there, is the most important aspect. If you don't ensure that you have a proper cordon in place, the subject may escape and run into the scrub and commit further offences.

And if you have determined that the suspect is there, how do you then determine if they're armed or not armed?---That's difficult. Sometimes you can look through a window, which is easy. An open door. Potentially you can call them out. Sometimes the subject will give up and walk out, and give himself up to police. Once again, a number of scenarios could play out.

And what do you mean by calling the person out?---Just ask them to exit the premises. Quite regularly we have – have that happen. You'll put a cordon in place, yell out that you have the cordon in place, and the person will see a number of police officers outside and give up.

Was that part of the plan here, to call him out, if you found him there?---It's generally part of every plan when you – when you implement a cordon. That's the easiest – probably the easiest method of resolution.

And if the person refuses to come out, when you're calling them out, what is – what was the plan going to be then?---Don't know, it didn't happen. As I say, your plan

needs to be adaptable, and you'll change your plan depending on the needs. You can't – you can't plan for every possible scenario. That's just impossible.

How many officers generally are required for a cordon?---Normally four. Sometimes you can put a, you know, if it's an open space, and you can put a cordon in place on each corner of a building, you could potentially have two officers on the cordon and two attend the front door.

If somebody refuses to come out of the house, in your experience, is there ever a process of negotiation to try to bring them out?---Yes. We have negotiators in Alice Springs. And they're – they're used occasionally when we have a situation where we can't get people out of a house for various reasons.

Are they trained specifically - - - ?---Yes.

- - - to negotiate in that situation? And as at November 2019, did you have negotiators available, trained negotiators available in Alice Springs?---Yes.

How many did you have?---I don't know the total number of qualified negotiators that were there at the time.

Now I'm going to show you some footage now of your attendance at the house at Warlpiri Camp. Now what I'll show you first is footage of Hansen taken, and it's the body-worn footage at Warlpiri Camp, Alice Springs. Roughly duration of about three and a half minutes.

So, for the members of the jury, this – this is taken from the perspective of Constable Hansen, who attended with Detective Kelly that day. Excuse me.

DVD PLAYED

MS POOLE: Now, I just want to pause it at that moment. Is that Constable Hansen knocking on the door there at the house?---I assume so, yes.

Yes, okay and do you recognise yourself in that footage?---Yes.

DVD PLAYED

MS POOLE: Now, just there we can see that's you again standing there?---Yes.

Now, what accoutrements did you have with you at the time - can you see?---All of them and a party pack.

Okay so what is a party pack?---It's a MK-9 oleoresin capsicum spray canister - a large one.

Capsicum spray?---Yes.

And is that - where is that?---I normally have it in the back of my belt or in my hand.

Yes, excuse me. Did you have any other accoutrements?---Yes, I had a firearm, baton, a smaller OC spray and handcuffs and a Taser.

And what sort of firearm?---A Glock.

DVD PLAYED

MS POOLE: Now, Detective, you can see in the background there behind you, across the footage there is another - what appears to be another officer standing there. Is that part of the cordon plan?---Yes, there was an outer cordon around the fence line.

And that was all around the property, was it?---Yes.

DVD PLAYED

MS POOLE: Detective, do you recognise who that officer is that just walked in? ---Yes, that's Constable Rolfe.

DVD PLAYED

MS POOLE: Okay, you refer there to, "keeping the cordon" can you explain what was actually happening at that point in time?---I think we had identified a couple of males had run - from Warlpiri camp, over towards the hills at the back of Warlpiri camp and there was potential that either one of those males could have been the target, so we - a couple of the guys went and chased them.

And in the meantime you are maintaining the cordon back at the house in case he was in the house?---Yes.

Your Honour, I am just conscious of the time. I wonder if that might be an appropriate point at which to finish for the day.

HIS HONOUR: Yes, all right. So we can turn the cameras off there.

MS POOLE: Your Honour, we should tender the video that was just played to the witness.

HIS HONOUR: Yes.

MS POOL: Which is the witness - the video Hansen, BWV Warlpiri camp 7 November 2019 6:37 pm.

HIS HONOUR: That will be exhibit 6.

EXHIBIT 6 Video Hansen BWV Warlpiri Camp dated 07/11/2019.

HIS HONOUR: Thank you, you can stand down?---Thank you, sir.

WITNESS WITHDREW

HIS HONOUR: Now, members of the jury, we are now going to break for the day so again I would ask that you reassemble tomorrow morning for another 9:30 start. So you may now retire.

JURY OUT

HIS HONOUR: I neglected at the morning tea break to mention that note that I received earlier from the juror. It simply reads,

"I work in pathology at Royal Darwin Hospital. I didn't hear the name of the forensic pathologist on day one last," sorry, "but I would expect that they might be an expert witness. I don't work with the pathologists and we have only spoken once that I recall. I have no strong feelings regarding the pathologist professionally or otherwise."

It did not seem to me that that requires any action to be taken.

MR STRICKLAND: I agree, your Honour.

MR EDWARDSON: I agree, your Honour.

HIS HONOUR: I will simply have that marked again for identification under the, "Notes from the jury". All right. Is there anything then before I retire?

MR EDWARDSON: No, your Honour.

HIS HONOUR: Then I will adjourn.

ADJOURNED 1.08 PM TO THURSDAY 10 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 10 FEBRUARY 2022 AT 9:33 AM

(Continued from 09/02/2022)

Transcribed by: EPIQ



MS CALLAN SC: Your Honour, there's one matter. I've spoken to Mr Officer, for the accused, about, which I want it clarified for the jury's appreciation, and I'm in your Honour's as to when I do so. In the agreed facts at tab 1 at exhibit 1, there's reference to instances of individuals accessing certain videos.

HIS HONOUR: Yes.

MS CALLAN: I wanted to, at an appropriate time, point out to the jury – so the jury didn't misunderstand - that an access doesn't necessarily mean watching either all or part of that particular file. And it's almost self-evident when you look at the timing that – given the length of the files - an individual might access something five or six times, but in fact, potentially only watch it none of those times or only some of those times.

HIS HONOUR: Well, what you're saying is that the fact that the evidence shows that it was accessed at a particular time, does not establish that it was either watched or watched in total, at that time.

MS CALLAN: Not necessarily, there's an inference of that - - -

HIS HONOUR: Not necessarily, yes.

MS CALLAN: - - - exactly, there's an inference, but that's the - - -

HIS HONOUR: Yes.

MS CALLAN: - - - extent of the evidence.

HIS HONOUR: All right. Well look perhaps that can be dealt with at the end of the evidence of this witness.

MS CALLAN: Yes.

HIS HONOUR: If that's convenient.

All right, then we'll have the jury in please.

JURY IN

HIS HONOUR: Can I have exhibit 2 please.

One of the jurors has brought to my attention that in exhibit 2, under tab 1, after the blue divider, there is a transcript of the body-worn video, and the date on it purports to be 6 November 2011. Now presumably that should be 2019?

MR STRICKLAND QC: It should be.

HIS HONOUR: Yes.

MR STRICKLAND: I thank that observant juror.

HIS HONOUR: All right, thank you.

I'll have that marked. And we're ready then to proceed, thank you.

We'll have the witness returned.

MS POOLE: Yes, could Detective Kelly be recalled please.

HIS HONOUR: Yes, thank you.

EVAN KELLY, on former oath:

HIS HONOUR: Yes.

XN BY MS POOLE:

MS POOLE: Detective, I'm just going to ask you when you answer questions today, if you can just speak up and speak – make sure that you're close to the microphone so that everyone is able to hear you, thank you. Where we left off yesterday, you may recall you told the jury about a canister that you had in your hand when you went to the door at the house that you searched at Warlpiri Camp. I just want to go back to the footage of that, please, and we'll just show that for a moment.

#### DVD PLAYED

MS POOLE: Okay, so this is just – we've just paused at the point towards the end of the footage, you may recall. It's exhibit 6. You – now is that the canister that you were referring to, whatever is in your hand there?---Yes, I believe so, yeah.

And what is that?---It's a mark 9 capsicum spray canister.

Why were you carrying that?---It's an extra to our standard accoutrements. We generally have a small capsicum spray cannister, but they're sometimes ineffective. So there's a number of these cannisters at the station. The supervisor will generally take one out. Members can also take them out as well.

And that's something that you find effective, is it?---Generally, yes.

Effective for what?---We can use them for deterring attacking animals and also for hostile subjects.

And how do you use that?---It's like normal spray, normal OC spray, except it delivers a larger dose and is a – has a more effective range.

So in relation to a subject, where would you spray it?---Towards the eyes.

What effect does it have?---It creates disorientation and pain in the eyes so that the subject is able to be apprehended.

And in your experience, how quickly does it take effect?---Sometimes straightaway. You do build up a resistance to it though, if you've been sprayed a number of times.

All right. And just going back to where we finished off, you then said that a couple of males had run – or had been observed to have run – and a couple of officers went off to chase those males and you maintained the cordon?---Yes.

All right. Now, did the officers that went out to the bush return back to the house where you were?---Yes.

And what did – had they apprehended Mr Walker?---No, they spoke to two – the two fellows that they were chasing and identified that they weren't Mr Walker, so they returned to the premises.

Who were those officers, do you recall?---One was Constable Hansen, I believe. I don't recall who the other one was.

Okay. Now, did you knock again at the house?---I believe when – once they came back, I knocked a few times on windows and tried to see if I could observe anything through those windows. But without – without specific information, we didn't have reasonable grounds to believe there was anybody in there.

So did you ultimately enter the house?---No.

And who made the decision not to enter the house?---Me.

Was it discussed between yourself and others in the patrol group?---I think there was a conversation about whether or not to go in but, as I said, we didn't have reasonable grounds. The information we had that he was there was – was not confirmed. And without those reasonable grounds, we didn't have a lawful reason to go into the house.

Again, can you please just speak up?---Sorry.

I think we're having some difficulties hearing you. Do you recall actually – specifically who you discussed – who you were discussing this with, whether or not to enter the house?---No.

Now, you had no involvement with the actual shooting incident on 9 November 2019; that's correct, isn't it?---Yes.

Were you actually working that day, or- -?---Yes. I had come into work early again, and was directed to attend a tourist bus rollover a couple of hundred K's south of Alice Springs.

All right. After the shooting incident on 9 November, did you speak with Constable Rolfe?---Yes.

When did you speak with him?---I believe it was about 11 pm, once he had returned back to Alice Springs. I attended the Alice Springs emergency ward and spoke to him there.

Did you attend there with anyone else?---Yes. There was Constable Bonney and Constable Afam(?).

What did you discuss at that time?---Nothing specifically in relation to the incident at Yuendumu. It was basically, for me as a supervisor, it was a welfare check. And I made a specific effort not to discuss, obviously, anything about the incident itself.

Now, did you go to Constable Rolfe's house in the days after the shooting incident?---Yes.

When did you go there?---I don't recall exactly how many days after the incident it was. But I think it was, possibly, three or four days after.

All right. And why did you go there?---Once again we were, basically, having a barbecue and a couple of beers as a welfare check on Constable Rolfe.

Who else was there?---There were a number of people. Constable Bonney, Constable Hawkings, Constable Kirstenfeldt, Constable Eberl. I'm not sure of who else.

At the barbecue did you discuss, with Constable Rolfe or anyone else that was there, the shooting incident?---No. I made, once again, a specific effort to ensure I didn't discuss anything about it.

Did you hear anyone else talking about it?---No.

Your Honour, that's the examination-in-chief for this witness.

HIS HONOUR: Thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: Detective, can I just start by dealing with this topic that was raised a moment ago. That is, whether you had a lawful basis to enter the house on 7 November 2019. And you said that – that was there was no evidence that he was – that is, Kumanjayi Walker – was, in fact, in the house?---Yes, that's correct. We could call it loose information.

So loose information was the extent of your intelligence, if I can put it that way?---Yes.

And the house appeared to be secure?---Yes.

We know from the video footage that there were knocks on the door and no one responded initially?---That's correct.

We know that two people took off but not from that house, but somewhere else?---Yeah. I think they were across the road.

Across the road? But they were subsequently stopped and identified and neither one was Kumanjayi Walker?---That's correct.

Of course, leaving aside the position that you were faced with, another way in which you could legitimately enter a house is if there's somebody actually at the house. You seek permission from that individual and they say, "Yes, you can come through and look"?---That's correct.

That wasn't available to you on this occasion?---No.

Now, I want to turn, if I can, to 30 October 2019. That's the day, I think, that you received information by way of an email from Sergeant Kent?---That's correct.

And your understanding, at that time, was that Kumanjayi Walker was then an arrest target?---Yes.

Because a breach of a suspended sentence or parole?---That's correct.

When you received that email, nobody had put you on notice about what I'll call the axe incident, which had occurred on 6 November 2019?---No.

All right. So you then commence your duties at about 0700 and you're rostered as a supervisor on that day?---On the 30th?

Yes?---I believe so, yes.

And you had received a handover sheet?---I believe the email from Sergeant Kent came later in the afternoon on that date.

Right?---It was on the – it was on the 6th when we started that I received the handover sheet with Mr Walker on it.

All right. So is it the 6th – is that the time that you, effectively, ask Zachary Rolfe to do his due diligence?---Yes.

His due diligence in the form of having a look at Walker?---Yes.

To use your words?---Yeah.

And what you were directed him to do – and what you understood he did – was to get as much information as he could about Kumanjari Walker in advance of the attempted arrest?---That's correct.

And that involves going through PROMIS and looking at his profile?---Yes.

And looking at his criminal record, identifying to what extent he might have, for example, a predisposition to violence?---Yes.

Whether he was a potential danger to police officers in the event that he was confronted for the purposes of arrest?---Yes.

The likelihood of him deploying a weapon?---Yes.

All of those matters are very important, aren't they, in advance of performing an arrest?---Yes.

Have you had a great deal of experience, over some years, in dealing with various communities?---Yes.

And have you yourself, on many occasions, had to deal with the problem – potential problem – of a target deploying a weapon?---Yes.

And what type of weapons?---On Groote Eylandt, quite regularly, we were engaged with spears. Large, homemade machetes, purchased machetes, edged weapons. Alice Springs is the same. Quite often large sticks, nulla nullas, rocks, the list of weapons that have been used against police is endless.

Right, well the point of all this though is that it's part of the day to day fact of the matter that police officers are regularly confronted by arrest targets who can and do on occasions, deploy a whole variety of weapons?---Correct, yes.

And that's why it is so important to gather as much intelligence as you can before the arrest takes place?---Yes.

And that is what you were asking Zachary Rolfe to do in terms of, "Have a look at Walker, do your due diligence"?---Yes, there would've been - on that same day there would've been a number of arrest targets on that handover sheet and other members

of the patrol group would have been doing exactly the same due diligence for their arrest targets or their enquiries.

Now, at that stage, when you asked Zachary Rolfe to conduct his due diligence you were oblivious to the events that had happened on 6 November, the axe incident?  
---Yes.

MS CALLAN: I object. I object to that, your Honour because I understand that the - that Constable Rolfe - there may be a difficulty in the timing - the chronology here - just to clarify, Constable Rolfe was asked - - -

HIS HONOUR: I think the question was that, at the time that he asked Constable Rolfe to undertake his due diligence, that this witness was unaware of the axe incident?

MS CALLAN: Yes, that the question is whether the axe incident had occurred either at the time that the witness was asking Constable Rolfe to have a look at Kumanjayi Walker. That was the morning of 6 November.

HIS HONOUR: Well, it may be that he was unaware of it because it hadn't happened, that's a different issue.

MS CALLAN: Yes, your Honour.

HIS HONOUR: Continue.

MR EDWARDSON: I will ask the question again.

Detective, at the time that you asked Zachary Rolfe to do his due diligence, at that stage you yourself had not done due diligence on Kumanjayi Walker?---No.

No. All you knew was, at this stage, he was simply an arrest target. You asked Zachary Rolfe to take a look at Walker and do his due diligence?---Yes.

At that time, that is at that point in time when you asked Zachary Rolfe to perform that task, you were oblivious to the events which had happened on 6 November 2019 - the axe incident?---That's correct.

That only came to your attention later?---Yes.

And it came to your attention because other members of the patrol effectively called you in because they were looking at this video footage?---Yes.

And was that the first time that you saw the video footage?---The following day, yes, on the 7th.

So that's on 7 November?---Yes.

Now, when you saw the footage I think you said something yesterday along these lines, that you were surprised or concerned about the fact that you had not been put on notice about the events that occurred on 6 November?---That's correct.

Why was that?---Given the significance of the incident and what had occurred during the axe incident, I would've assumed that the Alice Springs Police Station and the Central Desert Stations in general would have been informed of that incident occurring because these community members from Yuendumu and all the other Southern Desert communities quite regularly frequent Alice Springs.

Yes?---So, obviously as a part of a risk assessment mitigation we should have been informed that this had occurred, just in case he came to Alice Springs.

Now, I want you to use your words - not mine - but can I suggest to you that it is self-evident from the video that this is a very confronting and extremely volatile and potentially dangerous event that is captured on that body-worn video?---Yes.

You accept my description of that?---Yes.

And it gives you some insight, does it now, when you view the video footage, of the potential danger that Kumanjayi Walker posed to police officers who came to arrest him?---Yes.

And you look at that in conjunction with his previous criminal history for violence and the like? Sorry, you have to answer?---Yes - sorry.

All of which - all of which, again, informs the patrol of how they need to deal with this individual?---Yes.

Now, we can see on the video footage - the body-worn video footage - the way in which Kumanjayi Walker presents this axe to the two officers, Hand and Smith? ---Yes.

You've seen that video?---Yes.

I think your evidence was you can't now remember whether you saw the body-worn video of both Hand and Smith or one of them?---That's correct.

But you certainly saw that image that we have had presented and played in court? ---Yes.

I want to play a portion of the video which is after the axe event and I want to ask you some questions about it.

Exhibit 5, your Honour, and the transcript, your Honour, is exhibit 2. Behind tab 1, after the blue sheet, starting about page 5 and if we can have the video played from about 509 on the scroll? And I am grateful to the prosecution for facilitating this video for me.



MS CALLAN: Exhibit 5? Was it exhibit 5?

MR EDWARDSON: About 509 - exhibit 5.

Just while my learned friend is trying to find the correct portion I will just ask you a couple of preliminary questions if I may. On 7 November, before you attended this particular house with the intent of arresting Kumanjayi Walker, he was, for all intents and purposes, a fugitive at that stage?---Yes.

He was an arrest target and police wanted to find him?---That's correct.

There was a warrant for his arrest because of his breach of the suspended sentence?---I believe so, at the time, yes.

And certainly - and you knew also that inevitably when he was arrested, if he was to be arrested, he would be charged with aggravated assault, the aggravated assault against Constables Hand and Smith?---Yes.

And it is aggravated because of the deployment of a weapon or the use of a weapon and, as you know as a matter of law, it doesn't matter that there is no physical contact, it is still nonetheless an assault and a very obvious one?---Yes.

And the weapon in that case, of course, is the axe?---Yes.

Hence, "the axe incident" as we have described it. All right, I want to ask you some questions now about this part of the transcript if I may.

Can that be played possibly?

A PERSON UNKNOWN: (Inaudible).

MR EDWARDSON: Yes, that will do, thank you.

DVD PLAYED

MR EDWARDSON: Could you just play that last bit again please, so that the jury can - it's very difficult to hear but also follow the transcript. Thank you.

DVD PLAYED

MR EDWARDSON: All right, now hopefully you were able to hear there the two police officers directing Lottie Robertson to the what is known as "the axe" or that particular axe?---Yes.

And specifically saying that they are going to take a photograph, give it back to them use it, "Do you use it for chopping wood?" and the like?---Yes.

What I want to ask you about is police training and protocol. Surely if an offender uses a weapon such as an axe, as we have seen in the body-worn video, it is not police protocol to simply hand that back from whence it came?---No, not normally. For a serious incident we would - we would normally seize a weapon and exhibit it, photograph it and upload the photographs to the PROMIS log of the job.

And aren't there additional concerns here, Walker's – Kumanjaya Walker's is a fugitive?---Yes.

It's always a real possibility that he'll return to that very house where he'd armed himself with the axe on 6 November?---Yes.

And yet it would seem that these two officers thought it was prudent to simply photograph it and leave the very exhibit that was used in the aggravated assault, back in the community?---Yes, on occasion we do simply photograph some weapons and immediately destroy them, but that's when they're not descript weapons like a stick that can't really be identified from other sticks and things like that. But when it's a specific weapon like that, in my experience, I would be seizing that and exhibiting it.

Have you ever heard of the notion of simply leaving a weapon such as that in the community in circumstances where an offender is still a fugitive?---I haven't done it. I would always seize the weapon.

I want to ask you a little bit now about the plan. You said that Constable Rolfe devised the plan, but you were the sergeant with command responsibilities for the patrol, and you approved that plan?---That's correct.

And you said yesterday that it's what's called a cordon and call. So you get a cordon in place around the house so that you determine and view if anybody escapes the place?---That's correct, yes.

And once the cordons in place, you generally send somebody in – somebody to the door to knock and determine if anybody's home?---Correct.

You went on to say, the plan, "When we say you develop a plan, you do a risk assessment, but it needs to be dynamic and adaptable, because it's a rarity that you develop a plan and you go somewhere, and that plan plays out exactly as you intended it to"?---That's correct.

Well inevitably, can I suggest, with all the best will in the world, you can have a plan, but I think you were saying effectively to the members of the jury, that things don't go according to a plan?---Yes, that's correct - - -

It has to be dynamic, and so much depends on the way in which the target responds to police presence?---Correct.

I mean you could have a completely compliant offender, for example. Or as we know here, for example, in the 6 November axe incident, a completely dangerous and non-compliant offender?---Correct.

As you said yesterday, "There's no point having a plan that is absolutely rigid so that members, if you're expected response changes, or the subject's expected response changes, your plan needs to change with that"?---Yes.

All right. I want to turn now to the topic of training. In this court, different ways have expressed the people – the officers have expressed the same thing. But I want to put two alternatives to you. Edged blade equals gun, or knife equals gun. Are you familiar with that terminology?---Yes.

In what context?---I started my first lot of training in 2001 in the NT Police, and every bit of training I've done so far involving defensive tactics, the training we are given, is that the response to an edged weapon is a firearm, initially.

Now when you did extensive training on defensive tactics, in the beginning and then throughout your career as a police officer, were you trained with specific items?---Yes. We use – during training we use what they call red guns and red knives. They're imitation plastic firearms. It's an imitation Glock and an imitation knife. And we play out scenarios with the knife, the scenario involves maintaining a reactionary gap between the subject and yourself - - -

Can you just pause there. You maintain a reactionary gap between the subject and yourself. What does that mean?---There's a specified distance between – that you should maintain between a subject, an armed offender.

What is that distance?---It's between six and seven metres. It started off in America as the 21-foot rule, so it's 6.5 metres basically.

And what's the purpose of maintaining that distance?---While it's not – it's not a safe distance, that's the minimum distance. That is the distance, on average, that it takes a well-trained member of the police force to identify a threat. Draw his firearm, and effectively put a firearm shot to the centre of body mass.

Now you say, "Put a firearm shot to the centre of body mass." Is it part of your training, that if the weapons deployed in those circumstances, as you've described them, that you should shoot for the centre body mass?---That's correct.

Why is that?---In a critical incident, your fine motor skills are affected, so the ability to – to aim at smaller parts, you'll see in the media quite regularly about why didn't they shoot the gun out of his hand, or shoot him in the knee or something, in a critical incident, and incidents of high stress, your fine motor skills are affected. So shooting at the centre of body mass is the most effective way of gaining subject control by immediate incapacitation.

Immediate incapacitation. In your training, back then, and throughout your time at the – in the police force, were you trained as to how many shots should be fired?---During training we – we do several scenarios of one shot drills, two shot drills, three shot drills. But the training is that generally two shots will be fired, and you reassess and if you have not gained subject control then it may be necessary to fire further shots.

When you say, “Gained subject control”?---That the subject is no longer a threat to your life, or to anybody else’s.

So in other words, is it your evidence, that as long as the threat is ongoing, you continue to shoot?---Yes. And it’s an ongoing risk assessment also of – of the threat.

I want to ask you a little bit about the retention device in the Glock – on the Glock holster. Are you familiar with what I’m talking about?---Yes.

So what is that?---There’s two retention devices on the Glock holster. One of them is a shield that covers the front of the Glock, and the retention strap. And that prevents somebody reaching from in front of you to try and remove your Glock. We then have the retention strap. Which involves pushing a button straight down, flicking the retention strap forward, and then pulling your Glock straight up out of the holster.

You have to pull it straight up out of the holster, you can’t push forward or backwards?---Yeah, if you try and push forward or backwards, it won’t come out of your holster, which prevents people in front of you, or people behind you, pulling your Glock out.

Now in terms of – you’ve told us about this training that you received about the presentation of – or the drawing of the Glock, and its discharge. How quickly can you remove a holstered Glock?---Obviously it depends on the individual, but from the – the training and reading, it’s normally about, from the time you identify the threat to pulling it, to having your sights on target is about 1.5 seconds.

Right. And did you, or have you done training exercises that assist you in being able to remove your Glock from its holster as quickly as possible?---Yes, that’s a part of your – your yearly firearms re-qualification. We now do – we now do time shoots.

Now have you gone into houses in your career with being armed and with your weapon drawn?---Yes on one occasion I have.

What was that?---It was a – a drug warrant.

And why did you have your gun drawn when you went into the house?---We had specific information about outlaw motorcycle gangs with firearms.

So it was wise to have a gun drawn in those circumstances?---In my opinion, yes.

Now I want to ask you a little bit about the expression clearing a house. What does that mean to you?---It means identifying all areas of the house and ensuring that there's – there's nobody present in any of the rooms. So generally that'll involve entry into the house. Members will enter the house in a line, peel off into rooms either side of the hallway per se. The members that peel off into those rooms will search those rooms quickly. The cupboards, under the bed and that sort of thing. And then identify to other members that the room's clear. This continues on through the entire premises until all the rooms are clear, and then generally you'll muster at a centre point and ensure that everything else is correct in the house and that the house is clear.

So when you're clearing a house in the way that you've described it might be, for example, to identify whether a potential arrest target is hiding within the house?---Correct.

That potential arrest target might have a predisposition for violence?---Yes.

There may be intelligence to suggest that that individual, if confronted by police, may harm himself or herself?---Yes.

May deploy a weapon against police?---Yes.

For example – take Kumanjayi Walker for example – we saw that happen on 6 November on the body-worn video?---Yes.

From your perspective, if you were a police officer going into a house to clear that house – along with others – and you had this sort of intelligence that we're talking about here involving Kumanjayi Walker – from your perspective, would you be ready to draw your Glock if necessary?

MS POOLE: I object, your Honour. How is the relevance – what is the relevance of Detective Kelly's opinion as to what he would have done in that situation?

HIS HONOUR: Are you challenging his ability to give an expert opinion in this regard?

MS POOLE: Yes, your Honour.

MR EDWARDSON: Your Honour, the prosecution put this in issue. The prosecution are contending that my client, for example when he goes into House 577, it was completely inappropriate for him to, effectively, be ready to draw the weapon.

HIS HONOUR: Yes.

MR EDWARDSON: Now, I'm asking this officer about his experience over many, many years as to how he approaches this task and whether that's consistent with his training.

HIS HONOUR: Yes. I'm going to allow it.

MR EDWARDSON: Thank you.

Right, I'll start again. If you had the sort of intelligence that we now know is in existence, that you were armed with – for example, in the case Kumanjayi Walker – and you had determined to clear a house along with other police officers. Would you expect – or would you yourself be ready to draw your Glock if necessary?---Yes, and on an occasion like that you would be prepared and ready to draw at a moment's notice, if necessary.

And how do you do that, to ensure that you're not compromised by having difficulty in withdrawing the Glock from its holster?---Some people – some officers will walk with their hand on their firearm. Some officers don't. It's just a matter of personal preference, I suppose. But having your hand close to your firearm will allow for a faster draw if something presents itself.

Thank you.

Nothing further, thank your Honour.

HIS HONOUR: Is there any re-examination of this witness?

REXN BY MS POOLE:

MS POOLE: Yes.

Detective, you were asked by my learned friend about your training in relation to the holstering – your holster for your Glock. And you gave some evidence about the safety devices on the holster?---Yes.

Are you trained to remove or move either of those safety devices other than when you're intending to draw the weapon out of the holster?---No, normally it's one fluid action.

I have nothing further, your Honour.

HIS HONOUR: Thank you. You may go?---Thank you, your Honour.

WITNESS WITHDREW

HIS HONOUR: Yes.

MS CALLAN: Your Honour, the next witness is Lottie Robertson, who is to give evidence by audiovisual link from Yuendumu.

HIS HONOUR: Yes.

MS CALLAN: I appreciate it may take a few moments for the link to be established. I'm in your Honour's hands. There's matter I wanted to clarify for the jury's understanding in relation to the agreed facts. Perhaps I could do that whilst we are- - -

HIS HONOUR: Yes.

MS CALLAN: - - -hopeful of the technology working smoothly.

HIS HONOUR: Yes.

MS CALLAN: Ladies and gentlemen, in the agreed facts at tab 1 of exhibit 1, for instance at par 11 – sorry, page 11, par 69. Several witnesses have already been taken to this portion of the agreed facts. I want to make – draw to your attention the words in that first sentence on par 69. The term used is that, “The footage was relevantly accessed,” and then the table is set out. And you'll see in the table the date and time and the username of that access.

The position is that what the audit report shows is instances of access. It's a matter for you, based on that evidence and any other evidence, what inferences you draw about whether and to what extent that user may have viewed or watched the file that they accessed. And you might observe, for instance when you look at the timing of access – for instance, for the body-worn videos – that in those first two occasions in that table at par 69, the access time is a mere 10 seconds, one after the other.

And you might – matter for you what inferences you draw, but it's not – as to how much, if any, if one or either of the videos could be watched, for instance, in such a short period of time. But the point is, I spoke to counsel for the accused about this and I did want to make sure that you didn't misunderstand the effect of this evidence. It doesn't necessarily establish that, on each of those occasions, all or part of that particular video was watched. It's the – that's the limit and ultimately, it's a matter of inference – again, by reference to the whole evidence that comes before you.

HIS HONOUR: Thank you.

LOTTIE ROBERTSON, sworn:

XN BY MS CALLAN:

MS CALLAN: Ma'am, are you Lottie Robertson?---Yes, I am.

Can I ask you, Mrs Robertson, to do your best to keep your voice as loud as you can so that we can hear you in court?---Yeah, I will (inaudible) but I'll try the best I can.

Thank you, Mrs Robertson. Are you married to Eddie Robertson?---Yes.

And do you- - -?---(inaudible) promise.

Could you say that again, please?---Not actually married, but a promise. Tribal marriage.

Do you and Eddie live at House 577 in Yuendumu?---Yes, we do.

Is Ethan your son?---Yes, he's my only son.

Is Rakeisha your granddaughter?---Yes, she is my granddaughter.

Is Shamar a grandson of yours?---Yes, that's my youngest grandson.

I want to ask you about some things that happened in November of 2019. At that time, were Ethan and Rakeisha and Shamar living at House 577?---We were all residing at the house that was 577.

Do you know Kumanjayi Walker?---Yes, I do know him very well.

Was he in a relationship with Rakeisha?---Yes they were in a relationship, yes.

For how long was that relationship?---Could have been five to six years, because they was only young when they met.

Could you say that again?---It could have been (Inaudible) because they were only young when they met.

They were only young when they met?---Yes. (Inaudible).

Did Kumanjayi stay at House 577 with Rakeisha sometimes?---Yes he'd stay there.

When he was in Yuendumu, did he also sometimes stay with the Brown family?---Yes.

And what - - - ?---Yes.

- - - what house was that?---I don't recall the lot number, but I know it was one of the houses that his grandmother and the family had.

And what is the grandmother's name?---Margaret Brown(?).

I want to ask you about the day that police came to House 577 and Kumanjayi had the axe?---Yes.



You were at the house that day, yes?---I was in the house that day taking a nap because it was a hot day.

Did you see – you saw the police at the house?---My young grandson woke me up from my nap and told me there were police at – inside the house.

Did you know - - - ?---And then I - - -

Sorry, you go?---Then I – then I – yeah then I saw the police in the house, yeah.

Did you know either of those policemen from before?---I only know one of them, the Senior Constable Lanyon, but I don't recall the other one's name.

You know, don't you, that police make – made a video on their body-cam of what happened with the axe in the house?---Yes.

In that video you are in the lounge area, and you are shouting at Kumanjayi when he's holding the axe. You remember - - - ?---Yes.

- - - you remember shouting at him?---Yes I remember that.

What - - - ?---I remember that I told him to put it down. I told him to put it down, he would only cause trouble for himself. I told him to put it down. But he didn't listen.

Did you see Kumanjayi run away from the house?---I (inaudible) behind him when he was walking towards the door, he was (inaudible) at the police in front (inaudible) trying to scare him away so that he can be able to go out the door. And he dropped the axe right just outside the veranda, and then ran off.

What area did he run towards?---He dropped the axe on the veranda but ran to the gate. I thought he ran in the back, but he was running towards the other gate, through the ditches.

So it's towards the other gate and through the ditch?---Yeah.

The area that he ran to, is that the men's place?---Yes. Yes it is.

Was your husband – or was Eddie at the house when this axe event occurred?---No he was with – with the men at the men's shelter, just across from the house on the east side.

You remember the police came back and talked to you afterwards? The two policemen?---Yes. Yes they came back and talked to us, yeah.

In the video of that conversation, you say to the police, you were a bit shaken up?---Yes I was. I was.

What did you mean?---Because I – I was – I saw him with an axe, and you know, I thought there was gonna – something was going to happen in our house, and that was – I was a bit shaken up.

I think the witness said she was a bit shaken up. But I'll get her to confirm.

You said – you're explaining what – why you're a bit shaken up. Could you say that again?---Yes. (Inaudible) young fella with an axe, and because the police were there and I thought something was going to happen and then I was feeling bit shaken up. Because something could have happened.

Were you scared that Kumanjayi might hurt you?---No, I wasn't – I wasn't scared of him.

Do you remember later that same day, the boss lady police officer named Julie, came to talk to you?---Yes, I remember that clearly.

Was Eddie there?---Eddie came after. Eddie came after.

What did that police lady named Julie say to you?---She didn't say anything to me but she said – said something to my granddaughter about her, "You will be standing in the court for not letting the police come into the house". And that's when I started (inaudible).

You've just explained that Julie was talking to your granddaughter. Do you mean Rakeisha?---Yes.

And did she say to Rakeisha, you, Rakeisha will be standing in the court, because you were blocking the police in the doorway?---Yes. Yes.

Did the police lady Julie say anything to you about Kumanjayi?---I think the other police explained to us later on about the brace, or whatever, monitor.

Yes?---The other police I think they explained to us family that he has taken his braces off, or whatever it is, a monitor, on their – what they have on their – attached to the leg.

Yes?---I think that's taken off, that's the one they explained us about. But we didn't know about it.

Did the police talk to you about Kumanjayi handing himself in to the station?  
---I think that was made where - we were trying to get the men to talk to hm about that.

MR EDWARDSON: That we were trying to get the men to talk - - -

MS CALLAN: That's what I heard. "We" - - -

HIS HONOUR: She said, "We were trying to get the men to talk to him about that.

MR EDWARDSON: I think so.

MS CALLAN: So you were trying to get the men to talk to Kumanjayi about him handing himself in to police?---Yes. And that's - my (inaudible), my partner also talk to the police about it, to be able to give himself up.

We are having a little bit of difficulty hearing what you are saying. Who did you say you talked to - - -?---I think it was my partner, Eddie Robertson, was trying to talk to him to try and give himself up.

Did you talk to Kumanjayi about giving himself up?---We tried. We tried, we tried very hard to talk to him.

Did he stay at your House, 577, after that axe incident?---After that incident happened at my house I told him to go and stay with families. Because I think it was not safe for him to stay at my house any more.

A few days later there was a funeral in Yuendumu wasn't there?---Yes, there was a funeral, yes, for one of our family members. Kumanjayi's uncle.

Who - who was that family member the funeral was for?---Jean's young brother, Jean Brown's young brother.

Is that also Margaret Brown's brother?---Yes. And Kumanjayi's uncle.

Did Kumanjayi come to Yuendumu for sorry business for that uncle?---I think some family have brought him to Yuendumu for the funeral.

HIS HONOUR: I didn't hear that.

MS CALLAN: Thanks. Did you say, "Some family had brought him to Yuendumu for the funeral"?---Yes, they had - yeah, family have brought him to our house from Alice Springs to Yuendumu for the funeral.

Can you explain, are funerals important in your community?---Yes, it is. It is very important for us to be able to attend the funeral for a family members.

What is "sorry business"?---Sorry business also is the same thing, like, when a person pass away we all come together and, you know, just grieve and come together as family.

Are there responsibilities or obligations to come together?---(Inaudible) our family members have to come to the - (inaudible) like that for sorry business (inaudible) obligation.

I'm sorry, it is hard to hear you, could you say that again?---It's very - for sorry business we have all families attend, wherever they may be from far or near, that's the reason why we as family come together for sorry businesses.

The funeral for Jean's brother?---Yes?

Was that service held at the big basketball court at Yuendumu?---Yes, it was held in the WYDAC hall, yes, basketball court. Many attended.

It's for the transcript, the witness I think said, "WYDAC" - Y-D-A-C hall. How many people came to Yuendumu for the funeral?---Many - I don't recall how many there were, there were many people from other communities that were neighbouring communities where families reside, and plus the community at Yuendumu.

At the funeral did they use microphones so everybody could hear?---Yes.

How long did the funeral go for?---(Inaudible) I think it went for two or three hours - or could be four.

Did you see Rakeisha at the funeral?---No.

Did you see Kumanjayi at the funeral?---No.

Were you there with Eddie?---I was there with Eddie, yes, because we are also pastors in our own rights, so we have run funeral services and the church services in our community.

Were you running the funeral service on this day?---There was couple of us people, yes, there were many people returning to help with funeral service.

After the funeral service, later that day, did you go to the burial site?---Yes.

Was there time - - -?---Yes, we all (inaudible).

Was there time between the end of the funeral and driving to the burial site?  
---Yes.

During that - - -?---There was just - - -

You go?---Like during that time, yeah there's time - time following the funeral but there were so many, like family members - peoples - that we had to, you know, wait 'til the traffic was a bit short.

Did you go to your House, 577, before driving - - -?---Yes (inaudible). Yeah, bit more we drove out to the cemetery, we went back to the house to get some water because we were - we were still, it was going to take a bit longer out there.

Were you driving with Eddie in your car to the cemetery?---Yeah, Eddie - Eddie drove our vehicle to the cemetery, yeah.

Did you see Kumanjayi before you went to the cemetery?---We drove past the oval not – yeah, we passed the north oval and we seen him with his friend and also Rakeisha and her friend. They was just walking and yeah, round the oval. On the side of the oval I mean.

Do you remember what time of day that was?---It was an hour later in the afternoon when we – after the funeral service has finished in the hall, then we had to drive out to the cemetery late in the afternoon, somewhere around 4.30 or so.

Where were you when the police shooting happened?---I was at (inaudible).

Were you at the cemetery?---Yes.

Had you – were you about to come back to Yuendumu when you got a phone call saying there had been some shots fired?---Yes, my daughter-in-law gave me a call on the phone to let me know there were shots. She heard some shots and that's when we panicked and drove towards (inaudible).

Thank you. Those are my questions Ms Robertson. Could you please wait because another lawyer may have some questions for you too?

XXN BY MR EDWARDSON:

MR EDWARDSON: Ms Robertson, can I just ask you some questions about the police officers who spoke to you after the axe incident. You said you knew one of the police officers, is that right?---Yes.

And that - - - ?---That was Senior Constable (inaudible).

Which police officer was that?---Senior Constable Lanyon.

Thank you, Senior Constable Lanyon. In any event, both police officers spoke to you and your partner Eddie after the axe incident, didn't they?---Yes I think so, yeah.

And - - - ?---The incident that happened in our house.

Sorry?---Was that the incident that happened in the house?

Yes. Once the incident happened in the - - - ?---I - - -

- - - once the incident happened in the house, they then came and spoke to you, didn't they?---Yes.

And they told you, didn't - - - ?---Yes they spoke (inaudible).

- - - they told you didn't they, that this is very, very serious?---Yes, they told you didn't they, that somebody could have been killed?---Yes.

And they told you that it was very, very important, that Kumanjaya Walker handed himself in?---Yes.

And they said that to both you, and Eddie, your partner?---Yes.

And also Rakeisha?---Yes.

Because Rakeisha was with you and Eddie when the police spoke to you, didn't they, about Kumanjaya Walker handing himself in?---Yes.

Now you told us that you had told Arnold that he couldn't stay at your house anymore, he'd have to stay with family?---Yeah well I told him – I told him because of this (inaudible) you have to go and stay with your family.

When did you tell him that?---After he came back in the evening.

I'm sorry, I didn't catch that?---After he came back in the evening - - -

Right, so - - - ?---With Rakeisha.

So did Kumanjaya Walker come back that evening, that's the evening of the axe incident, back to Yuendumu?---Back to Lot 577.

So he came back to - - - ?---In Yuendumu.

- - - he came back to 577 that night?---Yes.

And did you speak to him then?---Yes I spoke to him. I told him, for your safety you have to go and stay with your family now.

Well did you tell him that he had to hand himself in to police?---That's what my husband told him.

Right. But you were there when your husband told him that?---Yes.

And what did Kumanjaya Walker say when your husband told him that he must hand himself into police?---He's not a man of many words. He never spoke anything.

He never spoke anything. Did - - - ?---(Inaudible).

- - - he say to you or your husband that he was going to hand himself in?---He never (inaudible), he never spoke to me. He could have spoken to my husband, but I don't know. Because I know the young fellow, he never spoke too much.

Did you, yourself, say anything to him, about him having armed himself with an axe and waved it around in front of the police officers that you saw?---I told him to stop it because it was dangerous, for him.

You told him it was dangerous for him. Why was it dangerous for him?---And he'll get – because he'll get himself into more – big trouble, more trouble, after running away from CAAAPU.

And what did he say to that?---He never said anything.

Did he - - - ?---Like I said, he's a young fellow who can't speak much.

Did he stay at 577 that night?---No. He never stayed there. He stayed with his family.

So he came to see Rakeisha, you and Eddie spoke with him - - - ?---Yes.

- - - as you've told us, and then he left?---Yeah, with Rakeisha.

He left with Rakeisha?---Yes.

So he and Rakeisha went and stayed with family?---Yes, his family.

All right. Now you've told us about the funeral. You've told us that Kumanjayi Walker did not go to the funeral, but you did, and Eddie did?

MS CALLAN: I object.

HIS HONOUR: Yes, she said that she didn't see him there.

MR EDWARDSON: Quite right, sorry, I withdraw that.

You told us that you did not see Kumanjayi Walker at the funeral?---No I didn't see him at the funeral, but I – he could have been there. I don't know.

All right?---But, yeah.

Okay. How many people were at the funeral?---There was so many people, from so many neighbouring communities there (inaudible). And families from (inaudible).

I think you said, at one stage, that family members bought Kumanjayi Walker back to Yuendumu from Alice Springs, for the funeral?---Yes, I did say that.

How did you know that - - - ?---Some - - -

- - - how did you know that he'd gone to Alice Springs?---Because he was in CAAAPU. He was in CAAAPU at the time. And family had been in Alice Springs. During that time, so he must have gotten a lift with them back to the community.

Right. On the night of the shooting, do you know whether Kumanjayi Walker, that day, was ever at your House Number 577?---The night of the shooting, no I don't – I don't know, because I was – I was at the funeral.

Right, thank you.

Nothing further, thank you, your Honour.

HIS HONOUR: Is there any re-examination?

MS CALLAN: Just one matter - - -

MR EDWARDSON: I'm sorry, my apologies. I did overlook one thing.

I forgot to ask you about the senior police officer Julie Frost, or Julie, you remember you were asked some questions about that?---Yes.

On the day of the axe incident, that's 6 November, that's the first time that Julie Frost spoke to you and your partner Eddie?---Yes.

And did she tell you that this was very, very serious?---Yes, she told – yeah, she told us that it was very, very serious.

And that Kumanjayi Walker- - -?---And we was aware- - -

Sorry?---We was aware that it was very dangerous.

Yes?---Holding an axe.

She told you it was very dangerous, holding an axe?---Yes.

And that you can't do that to police officers?---Yes.

She was quite angry, wasn't she?---She was angry. She was really angry, yes.

She came back the next day, didn't she?---Yes.

And that was at about 9 o'clock in the morning?---9 o'clock.

Yes?---It was – I think the day she came back to my house was after the shooting.

Yes? After the shooting, that's on the 6th. But the following morning – that's the 7th – sorry, my apologies. The axe is on the 6th. The following morning, 7 November, Ms Julie Frost – Sergeant Julie Frost came to spoke to you and Eddie at House 577 at about 9 am?



HIS HONOUR: This is the day after the axe incident. You understand that? Not the shooting, the day after the axe incident?---After the axe incident, yes.

MR EDWARDSON: And when she came and spoke to you, she told you and Eddie, didn't she, that the actions of Kumanjayi Walker were totally unacceptable?---Yes, she said that. Yeah.

And she told you also, didn't she, that Kumanjayi Walker could have severely – could have been severely injured by – could have severely injured members of police?---Yes.

And she went on to say, did she not, that he was very lucky that he wasn't shot by members?---Yes.

She told you that she understood that Kumanjayi Walker was going to attend the funeral that day?---Yes.

Sorry, on the Saturday?---Yes.

And she said, didn't she, that he needed to present himself to police at the police station immediately after the funeral?---Yes. That is why me and my husband have agreed on doing – to be able to take him to the police station to be able to give himself up.

Did you speak to Kumanjayi Walker again after Julie Frost had told you this, to tell him he must hand himself in after the funeral?---No, that's my husband. He could have – he said – he might have said something to him, yeah. Because I have – for cultural reasons, I can't be able to talk to the young fella.

For cultural reasons, you couldn't talk to the young fella?---Yes.

That's for the men to do?---Yes.

Thank you.

Nothing further, thank your Honour.

HIS HONOUR: Now, is there any re-examination?

REXN BY MS CALLAN:

MS CALLAN: A few short matters, your Honour.

Mrs Robertson, you said the funeral was held in the WYDAC Hall?---The (inaudible) was in the WYDAC Hall, yeah. It's a big hall where we – where the youth play basketball (inaudible) sometime when we were (inaudible).

Mrs Robertson, I have to ask you to say that again. The youth play basketball there and what else?---After school program. After school programs and when there's funerals, if it's going to be a big funeral, we use the hall. The WYDAC Hall.

Are there seats in the WYDAC Hall like bleachers? Long benches on the side?---Yeah, there are benches on the side of the wall. Like, there was the seats that have been used are from the church.

And at the funeral for Jean's brother, was there enough room on the seats for everybody who came?---Not really, because there was so many people that was sitting on the floors and on the mats.

Were there people standing up to watch the funeral service?---Yeah, standing up and sitting down as well. Sitting down on the carpets that were laid out on the floor.

When the policewoman, Julie Frost, came to speak to you, did you know her from other times? Had you spoken to her previously in Yuendumu?---I had seen her around, but never had spoken to her.

When she came to talk to you and Eddie the next day, after the axe incident?---Yes?

Was Derek Williams there too, the Aboriginal Community Police Officer?---I can't remember. I can't remember (inaudible) I just don't really know. Might – what really – they know that I – I know that Julie came back to say something to me, but I haven't – I could've seen Derek but, you know.

Is Derek related to Kumanjayi in some way?---Yes, yes. Their mothers are – his mother is a grandmother, grandmother for Kumanjayi, Derek's grandmother was (inaudible) Derek's grandmother he was the eldest sister of Derek's mother.

There's a relationship, your Honour.

HIS HONOUR: Yes.

MS CALLAN: If I can move on.

The last question, Mrs Robertson, when the police – Julie – said to you that Kumanjayi Walker should hand himself in after the funeral, did they say when after the funeral, that should happen? Like, the same day or another day?---She hasn't spoken to me about that, but I think she spoke to my husband about it, yes. Because my husband was so concerned about him as well to, you know, try and get him to give himself up.

Okay. Thank you, your Honour. Those are my questions for the witness.

HIS HONOUR: Thank you, Mrs Robertson. That concludes your evidence and we'll now close down the audiovisual link.

WITNESS WITHDREW

MS CALLAN: Your Honour, the next witness is Julie Frost. Does your Honour have a preference as to whether we could make a start with that witness before morning tea?

HIS HONOUR: Look, it's probably just as well we take the break now, and continue with that witness continuously.

MS CALLAN: Yes, your Honour.

HIS HONOUR: All right. So members of the jury, would you retire, please.

JURY OUT

HIS HONOUR: I'll adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Yes, please bring the jury in.

JURY IN

HIS HONOUR: Yes.

MR STRICKLAND: I call Julie Frost.

JULIE SHEREE FROST, sworn:

XN BY MR STRICKLAND:

MR STRICKLAND: Can I ask you to speak loudly and clearly, apparently sometimes people can't hear at the back of the court?---I will, yeah.

So if I ask you any question you don't understand, or you'd like me to repeat, just say so?---Okay, thank you.

What's your full name?---Julie Sheree Frost(?).

And how long have you been a member of the Northern Territory Police?---Nearly 17 years now.

What's your rank?---Sergeant.

Before you joined the police force, what did you do?---I was a registered nurse.

How long were you a registered nurse for?---About 16 years.

And of those 16 years, did you spend any time in remote Aboriginal communities?---Yes I did about four years.

And where was that?---Port Keats, Palumpa, Peppermintari, Daly River, and the Tiwi Islands.

And when you joined – since joining the Northern Territory Police Force, have you been – have you served at any remote Indigenous communities?---Yes I have. I spent about three months out on the Tiwi Islands, about six months in Minyerri.

In November 2019, you were the officer-in-charge of Yuendumu?---Yes I was.

And how long had you been stationed at Yuendumu in any capacity for?---Nearly two years.

Were you the officer-in-charge for two years?---Yes, I was.

Were you a sergeant for those two years? Yes, I was.

And your partner, that is your romantic partner, was Chris Hand?---Yes, that's correct.

What - how many towns or places does Yuendumu include - your posting?---It includes the community of Nyirripi and the community of Yuelamu as well as the Tanami Gold Mine.

How far is - can you spell Yuelamu?---Y-U-L-U-A-M-U.

How far a drive is that away from Yuendumu?---A 45 minute drive.

And how far is Nyirripi away?---Two - two and-a-bit hours drive.

In November 2019, about how many people lived in Yuendumu?---Around 800.

I want to take you to 6 November 2019. As at that date were you aware that there was a warrant for Kumanjayi Walker's arrest?---Yes, I was.

And was that before the axe incident?---Yes, it was.

And did you know who Kumanjayi Walker was at that time?---Yes, I did.

Had you had previous dealings with him?---Yes, I did.

About on how many occasions?---Three or four occasions.

Were you aware then that he had a criminal history?---Yes, I was.

Including for offences of violence?---Yes.

Now, on the evening of 6 November did you receive a call from your partner, Chris Hand?---Yes, I did.

And did he tell you about what we now call "the axe incident"?

MR EDWARDSON: Your Honour, I would ask that my friend not lead (inaudible).

HIS HONOUR: Yes.

MR STRICKLAND: Sure.

What did Chris Hand tell you when he called you?---He told me that they had just gone to arrest Kumanjayi Walker and that he had come at them with an axe.

Were you on duty at the time of that call?---No, I wasn't.

What did you do after you received that call?---I called myself on duty. I contacted the watch commander.

Who was that?---Which was Senior Sergeant Michael Milde.

M-I-L-D-E?---M-I-L-D-E.

Yes?---And I went back in to the station and I waited for both Senior Constable Hand and Senior Constable Lanyon Smith to come back to the station.

And they came back to the station that evening?---Yes, they did.

Did you watch the body-worn video of the axe incident?---Yes, I did.

What did you then do at that point?---After I saw what had happened I said to Senior Constable Hand and Senior Constable Smith that we would go back to Eddie and Lottie's place where I would have a conversation with Lottie.

Did you know Lottie?---Yes, I did.

Did you get on with her?---Yes.

Was she and Eddie respected in the community?---Yes, they were, they were community elders.

So you went to House 577 that evening?---Yes, I did.

And who was there when you arrived?---Lottie was there, Rakeisha was there and there were a number of other people - other females who I don't recall. I believe there may have been another one or two females that I don't recall.

What did you say to Lottie?---I said; "Lottie, what happened tonight here as very serious. I had a robust conversation with Lottie. I said, "What happened here tonight was very serious. What Arnold did was very serious, it could have resulted in either the police getting shot" - sorry - "It could have resulted in Arnold getting shot or police could've got hurt."

Did you have a discussion with Lottie or Eddie - did you say that Eddie - was Eddie there when you said those words?---Eddie came later, he had been looking for Kumanjayi Walker in the bushes. And when he came back we had a bit of a conversation with him along the lines of, "Why are you always chasing Arnold?" And then I said - I believe it was Lottie that actually said, "No, no, Arnold came at the police with an axe" and Eddie then said, "Okay, that sorry - I'm sorry about that."

Did you have a discussion with Eddie and Lottie about Kumanjayi handing himself in? ---Yes, I did. I said to him, "Right, we're going back to the station. We will give him two hours. I want you to hand him in. We will deal with him in a fair way, you know that, we are your community police officers." I tried to negotiate that he would bring himself back to the station and we would arrest him.

And what did either Eddie and/or Lottie say about that?---They said, "We can't guarantee we can get him. We will try."



And why did you take that approach at that time?---Well, we wouldn't - we would not have found him in the bushes for a start. I would rather negotiate a peaceful arrest where possible.

Now, did you return to the station after that?---Yes.

And did you do anything else that night in relation to this incident?---I did some - did a lot of computer work, put some alerts on the PROMIS system, I created a case note entry to flag to management of the incident that had happened. I directed Senior Constable Smith to do a police - his police statement. I told Chris - Senior Constable Hand - to do his - start a statement of facts and start his police statement as well and I believe I contacted Superintendent Nobbs to let him know what had happened.

Let me just ask you about - you said you created some alerts, is that correct?---Yes.

On PROMIS?---Yes.

And what do you use PROMIS for?---It's an information system where we document everything that happens in each job.

And what is an "alert" on PROMIS?---It's an alert - an alert is attached to potentially a person or a vehicle and it flags - if I was to look at Arnold Walker's profile it would flag that something had happened with Arnold Walker.

It allows other police to look at what you've included in PROMIS?---Yes.

I am just going to show you a part of a document?---Thank you.

Do you recognise the document that I have shown you?---Yes, I do.

What is it?---It's an intelligence document that contains the alerts and warnings attached to a person.

If you go to the - what is called - page - and this - that relates to Charles Walker - if you go to the first page?---Yes.

Which is - and you understand that to be Kumanjayi Walker, given the birth date, is that right?---Sorry, can you repeat that?

The reference to "Charles Walker" is a reference to the person we know are calling "Kumanjayi Walker"?---Yes, correct.

Thank you. And if you go to the next page, it's called "page 5 of 66" do you see that?---Yes.

There are some entries on the left-hand side called an "alert type" and on one of the columns it's got - page 5 of 66 - and if you go on the third or fourth-last column it's got where the creator is of that alert. Do you see that?---Yes, I do.

I just want to take you to - on the sixth - at the last two on 6 November you've entered - you've made two entries, is that correct?---Yes, that's correct.

Can you just read out what those - the content of what the title of those entries are? ---The first one is "An active target, can be arrested for assault police." And the second one is, "May be violent - may be violent towards police."

And are they the two PROMIS entries that you made that evening?---They are the two alerts that I made that evening.

Alerts - I am sorry?---Yes.

Yes. Did you then populate a narrative for the violent alert?---Yes, I did.

Do you now recall approximately - not word for word - how you populated that narrative for the violent alert?---Yes, I do. It was something along the lines of "If Walker is to be arrested may hide weapons in order to facilitate escape."

Okay, thank you. Your Honour, could that document be marked please?

HIS HONOUR: That will be marked - - -

MR EDWARDSON: Your Honour, (inaudible) be tendered.

MR STRICKLAND: I have no problem with it being tendered. I will tender it.

HIS HONOUR: Do you want to tender that now?

MR STRICKLAND: Yes, I will tender it.

HIS HONOUR: That will be exhibit 7.

EXHIBIT 7 PROMIS violence alert re Kumanjayi Walker.

MR STRICKLAND: I'll show you another document. Now you mentioned just a few minutes ago that you created a case management entry, is that what you said?---A case note entry.

Case note entry. Is this the case note entry you created?---Yes it is.

If you go to the second page, there's a - there's a case ID, and it's got a title, case created by JF6H?---Yes.

That's you?---That's me.

On 6 November at – and it's got 20.01, but then it's also got 21.26 in the other – in the last column. Do you know when you created it?---21.26.

Okay, so 9.26 pm?---Yes.

Want to just have a read of that and be satisfied that's the document you created on that day, 6 November?---Yes, that's what I created.

I tender that document.

HIS HONOUR: That will be exhibit 8.

EXHIBIT 8: Case note entry 6 November by Julie Frost.

MR STRICKLAND: Good, I'll make sure that the jury get copies for themselves of exhibits seven and eight.

HIS HONOUR: Yes.

MR STRICKLAND: Sometime today.

HIS HONOUR: Yes, certainly.

MR STRICKLAND: Did you, that evening, contact any superior officer?---I contacted Superintendent Jody Nobbs.

Yes, and who's he?---He is my divisional officer.

What did you say to him?---I told him, what had happened to Constable Smith and Lanyon, and I told him that something the lines of, we have – we were going to trying and negotiate him – for Mr Walker to present himself to the police station. And negotiate a peaceful arrest in that way.

So did Kumanjaya Walker attend the police station that evening?---No, he didn't.

Well I'll ask about the following day, 7 November. You were rostered on that day?---Yes, I was.

And did Kumanjaya Walker turn up that morning?---No, he didn't.

Or that day?---No.

You were rostered on that day with Chris Hand, Lanyon Smith and ACPO Derek Williams, is that right?---I certainly recall Chris Hand and Lanyon Smith. I'm not entirely sure about Derek Williams.

Was he the ACPO at that time?---Yes, he was.

What does ACPO stand for?---Aboriginal Community Police Officer.

What's their role?---Their role is to bridge the gap between the community and the police, and they are valuable in terms of finding information as historic events that cause disturbances, give us cultural guidance, and that type of stuff.

And did you find Derek Williams an important resource for your office?---Very important.

Did he also communicate in language with any of the people you were trying to speak to in the community?---Yes.

Now did – do you remember at some point that day, were you told that Kumanjayi Walker was going to a funeral?---I'd been told that Kumanjayi Walker actually came out to Yuendumu in order to go to a funeral, even before he was arrested.

Do you remember who told you that?---I believe it was ACPO Williams.

And as at 6 – 7 November, when did you understand the funeral was going to take place?---ACPO Williams told me it was going to take place on the Friday.

That's 8 November?---Yes.

So on 7 November, did you go back to House 577?---Sorry is that Wednesday night you're talking – sorry.

So that's the 7 November is the Thursday, so the axe incident occurs on the sixth, which is a Wednesday and then the following day, did you go back to House 577?---Yes, I did.

And why did you do that?---I went back there with Derek for the purpose of having another conversation with both Eddie and Lottie. And I'd – I'd found out on that morning that the funeral – there was a funeral for one of the community members on the Friday. I said to Derek, we will go around to Eddie and Lottie's, and we will try and negotiate – again I reiterated the fact that what had happened to my members was very serious, and it could have - - -

Just pause for a moment, sorry, I just asked your purpose, you did actually go then to House 577?---Yes.

And you had another conversation with Lottie, is that right?---Yes.

Okay, can you tell us what you – what was said by you, in that conversation?---Yes, so I reiterated how dangerous that situation was the previous night. And I also then told her that we will – we'll try and negotiate an arrest in – I will allow – I said something along the lines of, I will allow Kumanjayi Walker to go to the funeral, and

then I want him to present himself back to the police station, and we will arrest him in a safe manner.

And why did you – also, first, what did Eddie and Lottie say to that?---Yes, okay, that sounds good.

And what was your understanding of the importance of the funeral?---The funeral's for Aboriginal people are extremely important. And there's a lot of cultural responsibilities and significance placed on funerals.

What – why did you come to that arrangement with Lottie and Eddie that day?---I needed to – I wanted to resolve the arrest at the lowest possible means.

What do you mean by that?---I want – I didn't want to have to use force if possible. I also had to consider the resource implications so – where we had really no resource – resourcing to be able to effect arrests on that day, even if we could find him.

And what were the particular resource issues you faced then?---Constables – Senior Constable Smith and Hand were both involved in the incident. Therefore, I didn't want them to have any part of the arrest. That left just myself to do that - - -

What about Mr Alefaio?---Mr – Mr Alefaio was at Nyriippi at the time. There'd been a series of – a lot of community unrest out there, and I had two members, Constable Alefaio, and Constable Parbs out at Nyriippi dealing with that.

So that left just you?---Me.

I see. What was your assessment of whether there was any danger to the community in Kumanjayi Walker being out in the community between time you spoke to Eddie and Lottie on the seventh, and when the funeral was supposed to finish?---I believed he – there was very little concern for his – for the safety of the community.

Why do you say that?---Kumanjayi was not one to attack community members.

Now at some point did you learn that the funeral date had been changed?---Yes, Thursday night.

I beg your pardon?---Thursday night.

And what did you – what communication did you receive on Thursday night?---I received a text from ACPO Williams saying something along the lines of "Hey boss, the funerals been pushed back to Saturday."

And were you rostered on duty on Friday, 8 November?---Yes I was.

Now I want to ask you about 9 November.

Could the witness please be shown exhibit 1.

If you go to tab 11 please. Now I'll just get you to read – read by yourself, or to yourself, that email. Tab 11, 9 November, 5.46 am?---Yes, I've got that.

Got that? Tell me when you've finished reading that?---Yeah, I'm finished.

It's sent to JESCC. What does that stand for?---Joint Emergency Services Communication Centre.

Now, in your second paragraph, you tell JESCC that two of your members, being Mark Palms and Felix Alefaio will be returning to Yuendumu at 10:00 to 10.30 am?---That's correct.

Do you know if they did return on that Saturday?---Yes, they did.

Thank you. Now, did you speak to Jody Nobbs again on the Saturday?---Yes, I did.

If you just – still with that, if you go to tab 5. That's a list of call charge records – reverse call charge records. And the first entry – if you just accept from me – you got that? You got that there? A Party is the calling party and B Party is the receiving party, okay? That shows that at 1.09 pm on 9 November, you called Jody Nobbs and spoke to him for 293 seconds, IE, about five minutes. Does that sound about right?---Yes.

And it also shows, by the way, that same entry – I won't take you back to it – you called – you and Jody Nobbs spoke several times that day. Does that sound right to you?---Yes, that does.

So what did you say to Jody Nobbs when you spoke to him in the early afternoon of the 9th?---I told him that there were some issues with the Yuendumu clinic leaving the community. And I also told him that the funeral was that afternoon and that we will be seeking the resources from town in order to affect the arrest in the – the following morning.

So resources. Did you specifically ask for the deployment of any particular officers?---I specifically asked for the deployment of the dog operation – the dog unit.

Why is that?---Because Kumanjayi had run from police at the time and a dog unit is considered a safe option – safe tactical option.

Okay. Did you ask for anyone else apart from the dog unit?---The IRT team.

Okay. And why did you ask for the IRT team?---It was an additional set of resources that I could utilise. And I was under the – I believed they had a higher level of training in relation to high-risk apprehensions.

At that – on that day or around about that day, did you receive any information about clinic nurses at Yuendumu?---Yes, I did.

What information did you receive?---At about 10 o'clock, I believe it was, I received a text from - - -

You mean – sorry. Do you mean that morning?---Yes. I received a text from Constable Palms saying he had spoken to the clinic nurse – nurses. And they had been advised that they were to prepare to leave the community.

Okay. And what affect did that have on your police resources?---A significant effect if they – if we are expected to accompany them to call-outs overnight.

So if they left Yuendumu, was there any medical staff at Yuendumu?---No, there was no medical staff in Yuendumu. Yuelamu clinic staff were covering Yuendumu. There was an expectation that they would come across to Yuendumu to cover.

Did they want some escort if you – if that happened? That is, to escort them to Yuendumu?---The advice I received from the Yuendumu clinic – one of the Yuendumu clinic nurses was that there was an expectation that Yuelamu be called to Yuendumu Clinic, we would accompany the Yuelamu clinic staff to Yuendumu to assist in any medical – for any medical requirement.

So suffice to stay, you had resource problems on the 9th?---Huge resource problems.

Okay. I think you said one of the reasons you wanted the IRT was to assist in the arrest of Walker, Kumanjaya Walker?---That was one, yes.

Did you consider the arrest of Kumanjaya Walker to be high-risk?---Yes, I did.

Based on what?---Based on the fact that, on the previous – on the Wednesday night on the 6th, he had come at my two members with an axe when they went to arrest him.

And what did Superintendent Nobbs say to your request?---He said, "No problems, I will get it sorted."

Did you have to create any paperwork?---He asked me to do up an operations order.

What's an operations order?---It's a document that outlines an operation with the parameters that we refer to as SMEACC, which effectively means, Situation, Mission, Execution, Administration and Command and Communications.

Okay. Now, can I ask you to go to tab – you've still got that folder there?---Yes.

Go to tab 12, please. Now, have you – you know a person called Shane McCormack?---Yes, I do.

And what did he do? What was his role as at 9 November?---His role was to provide me with some information that I could add into my operations and my operation order such as the staff, and the equipment that they are going to bring out.

Okay. And did you ask him to send you an email with such information?---Yes, I did.

If you have a look at the first email in this chain from Shane McCormack to you, 9 November, 4.22 pm. Does that refresh your memory as to receiving this email?---Yes, it does.

Okay. Did you use that information in your operational plan?---Yes, I did.

Can you go to tab 13, please. You recall sending an email to Jody Nobbs on 9 November at 4.49 pm?---Yes.

And is this what you described as the operational plan?---Yes, it is.

And did you discuss with Jody Nobbs what would go into that plan?---Sorry, I - - -

Before you wrote this email to Jody Nobbs, did you – had you had discussions with Jody, apart from the one discussion at 1.05 pm?---Yes, I did.

And did you discuss with him the content – or what should be in the operational plan?---I don't recall exactly what was discussed. It was a lot of – a lot of conversation around the arrest and the team that was coming out. But I can't recall exactly what that was.

Okay. Now, if you go to tab 14. Is that an email you sent to various watch commanders, Adam Hawkings – I beg your pardon, Adam Donaldson, Anthony Hawkings, Adam Eberl, Zachary Rolfe, James Kirstenfeldt, Felix Alefaio, Christopher Hand and Alice Springs supervisors; is that correct?---Yes.

And what was the purpose of this email?---The purpose of it was to let everyone know that there was a planned operation occurring out at Yuendumu, to ensure that everyone knew exactly what was going to happen. Everyone was on the same page. It also included the detectives who were going to take carriage of the arrest, once arrested, so they knew what was going to happen.

So I'll take you to the second page of that. You see in red, it's recorded "Please be advised of numerous alerts for may, try to escape" – sorry, I'll start again. "Please be advised of numerous alerts for, may try to escape custody, may be suicidal, violence alerts", you wrote that?---Yes, I did.

What was the purpose of putting that in red?---To highlight the high-risk nature of the arrest.

You then listed the members, is that correct?---Yes.



You've included local member Felix Alefaio, why did you include him?---Because he was going to be part of the arrest team.

And why did you want him to be part of the arrest team?---He had local knowledge. He'd worked out at Yuendumu for about a year and a half. He had local knowledge of the community. He also knew Kumanjayi Walker by – very well. He knew the locations where Kumanjayi Walker would often be at. And he knew the entry and exit points of those locations.

Now you then got, "Plan day 1, Saturday 9 November", did you anticipate the IRT would come to Yuendumu on 9 November?---Yes, I did.

And you've got "11 pm IRT commence duty, conduct high visibility patrols." What did you mean by that?---I wanted them to drive around the community and saturate the area where a number of unlawful entries had taken place. And be present in the community. That's what I meant by high visibility policing.

And it says, "And respond to call-outs." What's a call-out?---If there was a job that had happened either in Yuelamu, Nyirripi, or Yuendumu, such as a domestic, or a general disturbance, the communication centre would call the on-call phone and say we're going to despatch you to a job. We're going to send you to a job. So that meant that they would take the on-call phone, while Chris and I could actually have a sleep.

What's an on-call phone?---It's just mobile phone that communications centre uses to make contact with whoever's on-call for that night.

Do I take it from your answers that you expected the IRT to go to places other than Yuendumu?---Yes.

Including Nyirripi?---No, because Constable Alefaio and Constable Palms were at Nyirripi, so that Nyirripi was covered.

But Yuelamu?---Potentially.

Now you've next written, "Sunday 10 November 2019, 5 am, SDOU", that's the dog unit, correct?---Yes.

"Donaldson and Yuendumu Alefaio commenced duty along with IRT members to effect arrest of Walker"?---Yes.

Why did you want your operational plan to involve an arrest at 5 am on Sunday?---A early morning arrest like that is a far safer time to arrest people. We know that they will be sleeping, and it gives the element of surprise.

Now did you – you said you were the officer-in-charge?---Yes.

You expect the IRT to comply with this order?---Yes.

You've said that you regarded them as having some degree of specialisation in high risk incidents, is that correct?---That's what I was advised of.

Now was the first person – who was the first of the IRT, who was the first of the members to arrive?---The first members to arrive were Constable Kirstenfeldt and Constable Rolfe.

Did Donaldson arrive before or after them?---My apologies. Donaldson had arrived before.

So before they arrived, did you do anything to prepare for their arrival in terms of documentation or maps?---I printed out the operations order. I wasn't sure whether the IRT team would have had access to the order before coming out here.

Why not?---Because they may have left before I sent the operations order through.

When you say you printed out the operations order, you're referring to this tab 14 email, 4.59 pm email?---Yes.

Yes. You printed it out. Where did you put the print-out, do you recall?---I put the print-out on the – the print-outs on Constable Wether's(?) desk.

Okay. And how many copies did you have?---Five.

And did you say you had some maps as well?---I printed out a map of the Yuendumu Community.

Why did you do that?---So when the IRT team were driving around the community, they could easily identify locations of interest.

And where did you put the maps?---On the same place.

Now you say Donaldson arrived first, is that right?---Yes, that's right.

I'm just going to show you –

I wonder if the jury could have exhibit 2 please.

Now members of the jury, if you go to tab 4 of exhibit 2. There should be a whole range of still photographs. If I could just ask the jury if they have that. And they should be numbered, one through to I think 87, I hope.

I'll just – so if you go to the first one, is that – that's the one at 9/11 2019 at 5.49.07 pm. Do you have that?---Yes.

And what is that an image of?---That's an image of the muster room.

Okay?---A part of the muster room.

Thank you. And do you see yourself in that?---Yes I do.

I'm just going to show you a diagram. So just – do you recognise that as a sketch plan of the Yuendumu muster room, not suggesting it's to scale, but?---Yes.

So in this –

I tender that sketch plan.

HIS HONOUR: One moment. That'll be exhibit 9.

EXHIBIT 9: Sketch of Yuendumu muster room

MR STRICKLAND: A copy for you – I have a copy for – a working copy for your Honour, plus the jury.

So you've got that plan?---Yes – no, not – thank you.

So I just want to quickly orient this plan to the CCTV image. In the image you can see a – I think it's a window, is that correct?---Yes.

Is that the front desk?---Yes, it's front counter.

Where's that – and that's represented in a plan by the top left front counter desk, is that correct?---It says where?

Blue – the one in the blue, top left?---Service window?

Yes, is that right?---Yes.

That represents the window that you can see in the CCTV?---Yes.

Okay. And there are various desks, is that correct?---Yes.

In the plan? And you can see some, but not all, of those desks in the image, is that correct?---Yes.

So, if you go please to still number - I am now looking at exhibit 2, tab 4, do you see at both still image 2 and 4, do you recognise who that person - that officer - is?---It looks to be Adam Donaldson.

And did you talk to him when he arrived?---Yes, I did.

Now, if you then go to still 10, do you see there's a - this appears to be CCTV from a different angle?---Yes.

So I will just - I don't know if you can see that from here, this is the one I am looking at, number 10 - you can't see that from there. It's got - it's in a corridor, is that correct?---Yes.

And who are those two people there?---Constable Kirstenfeldt and Constable Rolfe.

Now, Constable Kirstenfeldt is entering somewhere - is that the muster room?  
---That's correct.

Okay, thank you. And at 6:33 pm, is that right?---That's correct.

And does that accord roughly with the time you understood they arrived?---No, I believe that was - - -

If you can recall?---No.

You don't recall?---I don't recall.

I am just going to play you the actual video, just for a minute, from 6:33 pm. While it is being worked out I will just ask a couple of questions. You said that you recall Kirstenfeldt and Rolfe arriving together, is that right?---Yes, that's correct.

Did you have any discussions with Kirstenfeldt about what was going to happen or what his mission was?---Not the formal briefing.

All right?---But a lot of discussion centred around lots of different things which I can't exactly recall.

And how did you find Constable Kirstenfeldt?---I found him to be very dominating.

In what way?---He was trying to - it appeared he was trying to take over the conversation and would not listen to me.

Do you recall later on Constable Eberl and Hawkings arrive?---Yes.

Okay, now I will play you the - I will play you the video, if we can get it on the screens - from about 6:33, just for a minute so we can orient where people are.

There is no sound, ladies and gentlemen.

DVD PLAYED

MR STRICKLAND: Just pause there for a second.

So just to assist us, have you still got that diagram, exhibit 9?---Sorry, is that exhibit 9?

Yes, that's it?---Yes.

The diagram. See where you're - you can see yourself coming into the muster room in that image?---Yes.

Did you see - were you able to see the video from there?---I could see the legs by the table.

No, no, did you see what was being played - or you couldn't see from there?---I can see up there.

No, my question is could you - when it was played just a moment ago did you - were you able to see it from your position?---Yes.

Right, and you saw yourself coming into the muster room?---Yes, I did.

And do you see where you stood next to a desk?---Yes.

Where is that in the muster - in this exhibit - 9 - where is it?---Marked by number 1.

Number 1, I see, okay. Thank you. Was that your desk?---No.

Whose desk was that?---Constable Layla Wethers.

Constable Layla?---Layla Wethers.

Okay. You mentioned before that you had printed out the operations orders, five copies and a map - or some maps and you said you put them on Constable Wethers' desk, is that right?---Yes.

So that's - you can see that on exhibit 9 and that is not visible from that angle, is that correct?---That's correct.

Okay, thank you.

Just continue just a little bit.

#### DVD PLAYED

MR STRICKLAND: Could you see Constable Rolfe coming into the muster room?---Yes.

And there seems to be another officer that came in from the side, did you notice that or not?---No, I didn't.

Didn't note, okay. Now, could I - going back to these stills, could I ask you please to look at still 18? That shows again from the angle of the corridor, two other officers

coming in. Can you recognise those officers?---Constable Hawkings and Constable Eberl.

Did you have a - did you - I think you mentioned earlier on, this was about Kirstenfeldt you had about a briefing? Did you hold a briefing after the four members arrive?---After the four members arrive, yes.

What - did you want to wait until then?---Yes, I did. I - it was very important that everyone heard exactly the same thing.

All right. Now I will just - I am just going to play from 6:59 on, I am just going to get you to pause at particular points.

DVD PLAYED

MR STRICKLAND: Pause there. 6:59:31.

Do you see yourself handing something to someone?---Yes, I do.

And what did you hand?---The on-call phone.

And to whom?---To Constable Rolfe.

And why did you do that?---Because they were going to be doing on-call for us that night.

Thank you.

Just continue on please?

DVD PLAYED

MR STRICKLAND: Just pause it there. So at 30 seconds past 7 pm, did the four IRT members appear to be in that muster room?---Yes.

And did you commence your briefing then?---Yes, very shortly thereafter.

Okay, thank you.

Can you continue on, please.

DVD PLAYED

MR STRICKLAND: Just pause.

So again, orienting yourself on this diagram – I'm flicking between the two – where were you at this stage?---I was around near table 2.

Okay, thank you. And you were still talking?---Yes.

Thank you.

Continue on.

DVD PLAYED

MR STRICKLAND: Just pause.

You see there was a man who, about a minute or so – or a minute and a half left – and he just came back in there?---Yes, he did.

Do you know who that was?---Adam Donaldson.

Thank you.

Just continue on.

DVD PLAYED

MR STRICKLAND: Pause.

I don't know if you can see that, but did you see someone picking up a piece of paper there?---I did see a piece of paper flying somewhere.

Okay. Do you know what that was?---No.

Continue on, please.

DVD PLAYED

MR STRICKLAND: Pause, thanks.

So at about 7.05.16 it appears the IRT members left the muster room?---That's correct.

And they then left the police station, to your knowledge?---Yes, I do.

So in that approximately five minutes, when you began your talk, do you remember what you said to them?---Yes, I do.

What did you say?---I took them through the events of what had been happening in Yuendumu and Nyirripi. I told them that there had been a spate of unlawful entries, there had been a number of – a lot of community unrest over at Nyirripi. I told them that the clinic staff had left the community. I told them that there had been a funeral and there was a ceremony afterwards that was taking place at that time. And we discussed – we discussed Kumanjayi Walker and his history.

Okay. And did you discuss the operation – any part of the operation plan?---Yes, I did. I discussed with them that what I wanted them to be doing is conducting high-visibility patrols around Yuendumu. I wanted them to saturate the area around where all the unlawful entries had been taking place. And I wanted them to be on-call and I wanted them to familiarise themselves with community and the layout of the community.

And did you discuss anything to do with the arrest of Kumanjayi Walker?---At that – it was going to take place at 5 o'clock – at 5.30 the next morning.

And did you tell them where they should meet up?---At the muster room.

At what time?---Five o'clock.

On the next morning?---Yes.

Did you have any discussion with them about if they happened to come across Kumanjayi Walker, what they should do?---They – one of them – and I don't recall which one – had asked me, "What do you want us to do if we come across him?" And I said, "By all means, lock him up."

Do you know which one of those – which one of the officers said – asked that question?---No, I don't.

Do you recall whether any of the officers said anything to you or to one another during that briefing?---One other question I recalled was Constable Kirstenfeldt asking me whether there were any firearms in the community, to which I replied, "Very little."

Do you recall, at any time after the IRT officers arrived, whether any of them watched body-worn video of the axe incident?---Sorry, can you repeat that?

Yes. Did any of the IRT officers watch the body-worn video of the axe incident in the muster room?---Yes, they did.

Okay. Now, can I ask you to go – I'm still on these still images – can I ask you to go to image 78. 7.06 and 20 – 23 seconds past 7.06 pm?---Yes, I've got that.

The corridor. And can you see who that is?---Constable Rolfe.

And he appears to be holding something in his hand?---Appears to be the A3 map of the community.

Okay. I just want to show you just a small section of a video that has been played. It's Rolfe – just for my learned friend's benefit – Rolfe, one of four at 7.10 pm.

DVD PLAYED



MR STRICKLAND: Just flick back just a little bit, if you don't mind. Just a tiny bit. Pause there. So that's in central standard time, that is 7.10 pm. Z time, 9.40. Do you recognise that?---Yes, it's an A3 map of the community.

Is that one of the maps you had provided? Arranged for the provision of? Do you recall?---No, it's not. It – that one appears to be laminated. It – I believe that came from Layla Wether's – under her keyboard.

Okay, thank you. Thank you very much.

Could your Honour excuse me just for one moment, please?

HIS HONOUR: Yes, certainly.

MR STRICKLAND: In that briefing, between about 7.07 pm and 7.05, 7.06 pm, did you mention Felix Alefaio?---Yes, I did. I mentioned him on two accounts. One, that because the IRT team were doing the call-out for us, if they needed local knowledge or anyone to take them to Yuelamu, if there was a job out there, Felix Alefaio would have been called on duty to do that and the second thing I mentioned in relation to Felix Alefaio was that he was going to be rostered on, or come on at 5 o'clock in the morning, ready for a 5.30 arrest.

That's being the 5 am the Sunday morning?---Yes, that's correct.

Okay, thank you. Now, when did you first learn about the shooting that happened at 511?---I don't recall the exact time, but it was shortly after they had left.

Okay. And what was – what did you do after you learnt of the shooting?---The first thing I did was to contact the Yuelamu Clinic. We needed medical assistance out there urgently. So I knew it was going to take quite some time for them to get there. So – and I believe the second thing I – I know the second thing I did was to contact Superintendent Nobbs.

Thank you. Now, at some point in time, did the IRT officers arrive back at the police station with Kumanjayi Walker?---Yes, they did.

Now, I'm just going to show you a very short part of the body-worn video about that.

But before I do so – so your Honour, I will – I tender the CCTV footage that I have played before the jury.

HIS HONOUR: You're doing that now?

MR STRICKLAND: I'll do that now, your Honour.

HIS HONOUR: Exhibit 10.

EXHIBIT 10 CCTV footage.

MS CALLAN: Your Honour, I note that's one of the files contained on the USB, which has marked MFI C.

HIS HONOUR: All right, thank you.

MR STRICKLAND: So I'm now going to play you, as I said, just a short segment from the body-worn video of Constable – Senior Constable Hawkings.

DVD PLAYED

MR STRICKLAND: So does that show the entry from the outside of the station, walking along the corridor that you can see in the stills, is that right?---It shows the entry from the compound.

Okay. And then you're going down the corridor which you can see in the stills, is that correct?---Yes.

And then into the muster room?---Yes.

And can you see there's a –

Can you just rewind it may be just a couple of seconds or two.

DVD PLAYED

MR STRICKLAND: Yes, and perhaps just a bit more, and just freeze it.

DVD PLAYED

MR STRICKLAND: There, there.

Now, you can see the photograph of the desk there?---Yes.

And where is – is that – where is that on – in exhibit 9?---Number – desk number one.

Desk number one. And is that Constable Wether's – Layla Wether's desk?---Yes it is.

Where the – where you say you put the operational plan and the maps, is that right?---Yes.

Yes, thank you.

Yes, I tender that – I tender that part only of the Hawkings body-worn video.

MS CALLAN: Your Honour, I can indicate for the courts assistance and the record, that the file, which has just been shown, being the video, is named "BWB Hawkings, Anthony, 3 of 10 part 4." It's a 40 second video.

MR STRICKLAND: Three of 10 - - -

MS CALLAN: Part four.

MR STRICKLAND: Part four.

HIS HONOUR: That'll be exhibit 11.

EXHIBIT 11: Video named BWB Hawkings, Anthony, 3 of 10, part 4

MR STRICKLAND: Now I'm going to show you finally, one last clip, or part of the body-worn video, involving a discussion between yourself, Mr Hawkings, and the accused, okay.

DVD PLAYED

MR STRICKLAND: So - - -

DVD PLAYED

MR STRICKLAND: Well we just - - -

A PERSON UNKNOWN: (Inaudible), your Honour.

MR STRICKLAND: Very well.

So that's body-worn video six of 10.

And I tender that clip as well, your Honour.

HIS HONOUR: It'll be exhibit 12.

EXHIBIT 12: Body-worn video six of 10.

MR STRICKLAND: Now you saw yourself in that body-worn clip?---Yes I did.

And you spoke to the accused as heard on that body-worn video?---Yes I did.

That's my examination-in-chief, your Honour.

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour, I'm going to ask for the court's indulgence. And

I do apologise for this, your Honour, but there are some aspects of the video footage that I need to go over with my legal team before I commence cross-examination. Your Honour would understand that this witness is very important.

HIS HONOUR: Yes.

MR EDWARDSON: And I want to get it right. So I'm going to ask for an early minute.

HIS HONOUR: You're asking that we adjourn until tomorrow.

MR EDWARDSON: I am indeed, your Honour.

HIS HONOUR: All right.

Then you can stand down. Your cross-examination will commence tomorrow morning?---Thank you, your Honour.

WITNESS WITHDREW

HIS HONOUR: Members of the jury, you've heard what was said. I'm going to accommodate Mr Edwardson. So we'll now break for the day. I'll ask that you again reassemble tomorrow morning for a 9.30 start.

JURY OUT

HIS HONOUR: Yes, unless there's any matters then I'll adjourn.

MR EDWARDSON: No, thank you, your Honour.

MR STRICKLAND: I think Ms Callan has one, your Honour.

MS CALLAN: Your Honour, the image that was just played, your Honour's marked exhibit 12, is on a separate USB. Can I provide that to the court?

HIS HONOUR: Yes.

And I will adjourn.

ADJOURNED AT 12.42 PM TO FRIDAY 11 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 11 FEBRUARY 2022 AT 9:32 AM

(Continued from 10/02/2022)

Transcribed by: EPIQ

MS POOLE: Your Honour, just a couple of transcript corrections from yesterday.

HIS HONOUR: Yes.

MS POOLE: Your Honour, just – I'm sorry, your Honour, just – if I can just have a moment just to pull up the document.

HIS HONOUR: Yes, certainly.

MR STRICKLAND QC: Your Honour, in the meantime, your Honour, I just have a few more questions – if I could reopen my examination of Sergeant Frost. I've got just two minutes' worth of questions.

HIS HONOUR: Yes, that's all right.

MR STRICKLAND: Your Honour, with the transcript errors, is your preference to do it at the beginning of the day or at the end, we're easy?

HIS HONOUR: I don't have a preference. So I'm quite happy to do it at whatever time is convenient.

MR STRICKLAND: Well might do it – we'll do it at the end of today, if that's (inaudible) with you.

HIS HONOUR: All right.

MS CALLAN: And your Honour, before the witness resumes, I've got some copies for the jury when they return of some exhibits that were tendered yesterday.

HIS HONOUR: All right, thank you.

Now can we bring the jury in then please.

JURY IN

HIS HONOUR: Just one moment. I've received a note from one of the jurors simply indicating that she wanted to advise that she has police officers in her supporting – in her sporting community. She doesn't know anything about their jobs and never discusses them, and doesn't believe that her decision in relation to the matter will be affected by that.

MR STRICKLAND: That's fine, your Honour, we have no problem with that.

MR EDWARDSON QC: Likewise, your Honour.

HIS HONOUR: Yes, I don't think I formally said in relation to the note that I received either yesterday or the day before as well, in a similar vein, that in relation to a pathologist, that there is no issue about that either.

So thank you very much for bringing that to my attention, but there is no problem with it.

Now we'll have, I believe, the witness recalled, is that the case?

MR STRICKLAND: Yes, your Honour.

MS CALLAN: Yes, your Honour, I just have some copies of documents for the jury - - -

HIS HONOUR: Yes.

MS CALLAN: - - - that were exhibits tendered yesterday, but I've had copies made for each juror, your Honour. Could I provide a copy of exhibit 8, which was an extract from the profile of Charles Walker, that was the subject of some evidence from Sergeant Frost. And there's a working copy for your Honour if - - -

HIS HONOUR: Thank you.

MS CALLAN: - - - (inaudible) yesterday.

A PERSON UNKNOWN: That's 7 here.

MS CALLAN: Sorry, your Honour, I've got that around the wrong way. It's exhibit 7 we're providing to the jury now.

HIS HONOUR: All right, thank you.

MR STRICKLAND: Members of the jury, can I just make one suggestion. Because of there'll be references to exhibit numbers, you may decide to write the exhibit number on the document if you want.



MS CALLAN: And your Honour, I also provide the jurors with, and your Honour with a working copy of exhibit 8, which is the case note entry, about which Sergeant Frost gave evidence yesterday.

HIS HONOUR: Thank you.

MS CALLAN: And finally, your Honour, we have for the jury's assistance, an index to exhibit 2. Your Honour may recall it comprises several tabs.

HIS HONOUR: Thank you.

Yes. Now, I understand the witness is to be recalled?

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: Thank you. You're still subject to the oath that you took yesterday. You may be seated there, now.

JULIE SHEREE FROST, on former oath:

XN BY MR STRICKLAND:

MR STRICKLAND: Yes, your Honour. I apply just to ask a few more questions of this witness.

HIS HONOUR: Yes, certainly.

MR STRICKLAND: Thank you.

Sergeant, yesterday you gave evidence that you spoke several times to Superintendent Jody Nobbs on 9 November about the operational plan?---Yes.

Being the plan at the 4.49 pm email?---Yes.

Which is exhibit 1 tab 14. Did you talk to Jody Nobbs specifically about the plan to arrest Kumanjayi Walker after the funeral, at 5 am on Sunday?---Yes, I did.

Did he express any disagreement or concern to you about that aspect of the plan?---No, he didn't.

You gave some evidence yesterday about the on-call phone?---Yes.

And you said that you expected the IRT to go to places other than Yuendumu?---Yes.

And I asked you, "Including Nyirripi" – is that how I pronounce it? Nyirripi?---Nyirripi.

Including Nyirripi. And you said, “No, because Constable Alefaio and Constable Palms were at Nyirripi.” So that Nyirripi – so that Nyirripi was covered. Was that answer correct?---No, it wasn’t.

In what way was it not correct?---Constable Alefaio and Constable Palms were at Yuendumu at that time.

When you say at that time, on the Saturday?---On Saturday.

9 November?---9th of November.

Thank you. And finally, you said yesterday that you printed out the operations plan because you believed the IRT may have left before you sent that – you emailed that plan to them. Do you remember saying that?---Yes, I do.

When you – left where?---Left Alice Springs.

Have you ever driven from Alice Springs to Yuendumu?---Yes, I have.

And what was the internet or phone coverage like after you left Alice Springs?---It was pretty good for a distance.

Well, what distance?---I’d say 20 minutes away from Alice Springs. I couldn’t tell you in kilometres.

And then there was no internet, to your knowledge?---That’s correct.

After 20 minutes of leaving Alice Springs. Approximately?---I think there was some at Tilmouth Well.

Okay. Does the internet coverage resume when you get to Yuendumu?---Yes, it does.

And does it resume before you get to Yuendumu?---Yes, it does.

About how far before?---About 10 kilometres.

And was there internet coverage at Yuendumu on 9 November?---Yes, there was.

Thank you, your Honour.

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: I want to start by asking you some questions about what you read in preparation for giving evidence before this jury. Firstly, am I correct in saying that the first statement that you provided to – in relation to this matter, was a

statement on 13 November 2019 by Detective Sergeant Kieran Wells at the Alice Springs Police Station, between 1.03 pm and 3.02 pm?---There was a statement taken not at the Alice Springs Police Station.

Sorry, where was that taken?---At my place.

At your place? I'm sorry. But that is the first statement that was taken?---Yes.

And presumably, you've read through that statement before giving evidence in court today?---Yes, I have.

And it's a statement consisting of some 67 pages?---I don't recall.

Could you have a look at the statement which is now produced to you?

Your Honour, there are a series of documents that I'm going to put to the witness. I'll ask that they be marked for identification sequentially.

HIS HONOUR: Thank you.

THE WITNESS: Thank you.

MR EDWARDSON: Firstly, can you confirm that that's a statement consisting of 67 pages, taken on 13 November 2019 by Detective Sergeant Kieran Wells?---Yes.

And that is the first statement that you provided to police- -?---Yes, it is.

- - -in relation to this investigation?---Yes.

And you read through that statement to refresh your memory as to what you told Detective Senior Sergeant Kieran Wells on that day?---Yes.

Could I ask that that statement be marked for identification please, your Honour.

HIS HONOUR: It will be marked for identification with the letter E.

MFI E Statement of Julie Frost 13/11/2019.

MR EDWARDSON: Thank you.

You subsequently provided a statement, I suggest, on 5 December 2019, this time at the Alice Springs Police Station. A statement taken by Detective Sergeant Paul Morrissey on that day?---Yes.

And that's a statement consisting of 18 pages?---Not sure how many pages.

If you look at the document which is now produced?---Thank you.

Is that the second statement that you provided on 5 December 2019?---Yes, it is.

And it's a statement consisting of 18 pages?---Yes.

And the conversation occurred between 12.32 pm and 1.02 pm?---Yes.

I would ask that that statement be marked for identification, please, your Honour.

HIS HONOUR: That will be marked for identification with the letter F.

MFI F Statement of Julie Frost 05/12/2019.

MR EDWARDSON: On 1 September 2020 you gave evidence, did you not, in the Local Court of Alice Springs at the committal proceedings in relation to this matter before His Honour Judge Birch?---Yes, I did.

Have you been provided with a copy of the transcript of those committal proceedings?---Yes, I have.

And have you read through the transcript of the evidence that you gave in the committal proceedings for the purposes of refreshing your memory in the same way that you did with the two previous statements that I've just identified?---Yes, I have.

Would you look at the transcript which is now produced to you. And can you just confirm that that is the transcript that you read – or a copy of the transcript that you read to remind yourself about what you'd said in preparation for giving evidence at trial?---Yes.

I'd ask that that be marked for identification, please, your Honour.

HIS HONOUR: That will be marked for identification with the letter G.

MFI G Transcript of Alice Springs Local Court committal proceedings 01/09/2019.

MR EDWARDSON: Thank you.

I want to ask you some questions firstly, if I can, about the first time that you provided the statement on 13 November 2019 to Detective Sergeant Kieran Wells. You've told us that was at your house?---Correct.

And obviously, the conversation was recorded and then transcribed, as is the custom in the Northern Territory?---Yes.

And you were asked, were you not – or you were told, were you not, that the aim of the exercise was for Detective Sergeant Kieran Wells to say as little as possible and leave you to do that?---To do?

In other words, you do the talking?---Yes.

And you were told weren't you, quite clearly, that Sergeant Wells was looking for as much detail as possible in regards to timings, who was around at various times, what your observations were?---Yes.

And you were also told by Sergeant Wells that that officer understood that you'd had some time to try and put together a bit of a chronology of events?---Yes.

And you were asked specifically, were you not, "Have you been able to look at your diaries or notebooks"?---I don't recall that.

Would you have a look at page 2 of the document which is now produced to you, the last three exhibits. Can I direct your attention to page 2 at the bottom. Were you asked, "Have you been able to look at your diaries or notebooks"?---I was asked that.

And did you say that your diary - your big diary - you had left in Yuendumu?---Yes.

And your little notebook was with you?---Yes.

But you'd made very little notes?---Yes.

And you said primarily you were relying on what I will call the, "PROMIS base entries" and emails to bosses and things of that nature for the purposes of providing the chronology?---Yes.

Thank you. Could you just return that to the usher please? Now, when you gave evidence at the committal, as I have asked you here, you, likewise before giving evidence in court, refreshed your memory from the two statements that you had provided that is dated 13 November 2019 and 5 December 2019?---Yes.

And you were asked, weren't you, whether you had had the opportunity to read through both transcripts of both interviews before giving evidence in court and you said you had?---I don't recall but if that's in the transcripts.

Could you have a look at the transcript please? Again, I would ask that the - it might be easier if I just leave the transcript in front of you, just the first few pages if I may?

HIS HONOUR: MFI G, yes.

MR EDWARDSON: Could you turn to transcript page 29 where the cross-examination by me commences?---Sorry.

Do you see that?---Yes.

Of course you were giving evidence on oath, were you not?---Yes.

At the committal proceedings?---Yes.

And, like here, you had read through those two statements, refreshed your memory before giving evidence in court and that's what you told the court?---Yes.

Which is what police officers do, obviously, in preparation for giving evidence. Before giving evidence in court you were asked to bring any diaries or notes that might have any relevance to this particular matter, weren't you?---Yes, I was.

I am talking about the committal?---Yes.

And you said as much, didn't you, at the bottom of page 29?---I said that I'd brought it - I had brought my diary.

I will just direct you specifically to the question because it is important. Question: "Before giving evidence in court" - I am now addressing the committal proceedings, your Honour - "Before giving evidence in court today were you asked to bring any diaries or notes that you might have relevant to this particular matter?" Answer, "Yes, I was." You were then asked by me, "Did you bring them?" And you said, "Yes, I did." Do you agree?---Yes.

And you will see that I then called for them to be produced in court. Can you see that?---Yes.

And his Honour then said to you, "Do you have them with you Sergeant?" Do you see that?---Yes.

"Do you have them with you?" And you said, "Yes, I do, your Honour, just the small diary". Is that right?---Yes.

And then I said, "Your police book, will you identify the number and the pages that refer to this matter?" And you responded, "45497 in relation to this matter, I made no notes"?---That's correct.

And then I said, "Sorry, in relation to this matter you made no notes?" And you said, "No notes, that's correct"?---Yes.

So that was the sworn evidence that you gave at the committal proceedings was it not?---Yes.

And the matter proceeded throughout on that day with questions being asked by me on the basis of that evidence that you gave, namely, that other than what you produced, the limited diary entries, there were no notes in existence. That's what happened at the committal?---Yes.

Now, before you provided the first statement to Detective Sergeant Wells, on the 11 November 2019 you had a conversation with Detective Wells, did you not? You, in fact, called Detective Wells?---Sorry, what date was that?

11 November 2019?---I don't recall.

Did you not call Detective Wells and advise that you would be making a statement on Wednesday 13 November 2019 - in other words contact Detective Wells for the purposes of arranging a time, place and meeting spot for the purposes of giving your statement?---I don't recall that. It may have happened. I don't recall that.

Did you go on to tell Sergeant Wells in that telephone conversation which I suggest occurred on 11 November 2019, did you advise Detective Wells that you had sought legal advice and that you would be preparing a chronology to assist you in making a statement?---I don't recall that. It is likely.

Thank you. On Wednesday 18 November 2020, well after the committal had been and gone, did you receive an email from Detective Sergeant Wayne Newell?---I don't recall.

Specifically in these terms, "Hi Julie. I have a couple of questions for you. In the statement of Kieran Wells he mentions that he spoke to you on the phone on 13 November and you advised him that you would be preparing a chronology to assist you in making a statement. Do you have a copy of that chronology? What happened to it and can I please have a copy? Is the chronology annexure annexed to your statement JF3 attached? Do you have any notes made between 6 November and 13 November 2019? If so can you pass them to me. If not, can you provide a brief explanation. Defence are asking." Did you receive that email? ---Yes.

I want you to look at the document which is now produced to you. Is that the email that you received from Detective Sergeant Newell?---Yes, it is.

And is Detective Sergeant Newell sitting in court - or he has gone now - he was here earlier, I think, but he was sitting in court before. You've seen him around the court precincts?---Yes, I have.

Thank you.

Your Honour, I tender that email, and copies for the jury, your Honour.

HIS HONOUR: Thank you. It is exhibit 13.

MR STRICKLAND: No objection, your Honour.

HIS HONOUR: Thank you. Exhibit 13.

MR EDWARDSON: My apologies, sorry, was that exhibit 13, your Honour?

HIS HONOUR: Yes, it was.

EXHIBIT13 Email received from Detective Sergeant Newell to Julie Frost.

MR EDWARDSON: Thank you.

In response to Detective Sergeant Newell's email on 18 November 2020 did you subsequently provide him a chronology of events - a typewritten document?---I believe I did.

Can you look at the document which is now produced to you and can you please confirm that this is the chronology that you provided in response to the request of Detective Sergeant Newell?---It looks to be, yes.

And it's a document consisting of five pages?---Yes.

And that document was produced by you, was it not?---Yes.

And indeed, it's a document that you had prepared, a chronology to assist you in making the statement that you ultimately provided to Sergeant Wells, on 13 November 2019?---Yes.

I'd ask that that document be marked for identification please, your Honour.

HIS HONOUR: That will be marked for identification with the letter H.

MFI H: Chronology prepared by Julie Frost 13 November 2019.

MR EDWARDSON: So that document was created before you provided the first statement to Detective Wells?---Yes.

And you've confirmed, have you not, that Detective Wells asked you to produce all your notes?---I don't know.

You were certainly asked, unequivocally, and unambiguously by me at committal, were you not, and you gave evidence on your oath, that there were other notes in existence?---No, that's not correct.

Why is that not correct?---I had a big diary as well, which I think was seized by the investigators.

Yes, I know. But other than the – the diary that you produced, which had been seized, you certainly did not identify the existence of this chronology, did you, to me, in answer to the questions that I put to you, at committal?---So can you repeat that question please?

I will. That chronology was in existence, as you well knew, when you gave evidence in the local court, at committal?---Yes.



And you were asked specifically, weren't you, about what notes, if any, existed in relation to your involvement in this matter?---Yes, I think, yes.

Would you want me to go back to the transcript again?---No, that's fine.

You were asked(?) unequivocally, and you said there are no other notes. That's the evidence that you gave on oath, isn't it?---No other official police notes.

Where did you say no other official police notes?---I was referring to no other official police notes.

That's not what you said is it?---I'd like to go back to the transcript thanks.

Yes, could the transcript be produced. Page 29.

HIS HONOUR: I believe it's still in front of the witness, but MFI G.

MR EDWARDSON: I'm going to take you through to – sorry, take you through to pages 29 through to 30. The very first question I asked you was this, was it not sergeant. "Sergeant I think" – "Sergeant, you I think, participated as you've told us in two records of interview. The first, I think, was on 13 November 2019, and the second on 5 December 2019?---Yes." Did I ask that question, and did you give that answer?---Yes.

Question, "And you've had the opportunity to read through both transcripts of those respective interviews before giving evidence in court today?---Yes I have." Did I ask that question, and did you give that answer?---Yes.

Question, "And you did that obviously to refresh your memory as to what you told the police officers when you were interviewed?---That's correct." Did I ask that question, and did you give that answer?---Yes.

Question, "You mention in the first one, and I need to take you, I have got the two statements here." And then the two statements – the two statements that you provided were presented to you. Have a look at the transcript?---Yes, no.

And your attention was directed specifically to portions of that first statement?---Yes.

And I asked you, I'm now referring to the bottom of page 29, "Mr Edwardson, 'Sergeant, can I direct your attention to the last question and answer that we see on that page, and then over the page'?---Yes." Did I ask you that question - - - ?---Yes.

- - - and did you give that answer?---Yes.

And at that time, did you have in front of you, your first statement?---Yes.

Question, "You there identify I think what you call your big diary, and also your little notebook, and you also make reference on page three to PROMIS entries?---Yes."

I asked you that, and you gave that answer?---Yes.

Question, "Before giving evidence in court today, were you asked to bring any diaries or notes that might have relevance to this matter – particular matter?---Yes, I was."  
Did you – did I ask you that question and did you give that answer?---Yes.

Question, "Did you bring them?---Yes, I did." Did I ask you that question - - - ?---Yes.

- - - and did you give that answer? I then called for production, before his Honour, did I not?---Yes.

And his Honour then asked you specifically, "Do you have them with you sergeant"?---Yes.

You were asked again, "Do you have them with you?---Yes I do, your Honour, just the small diary"?---Yes.

Question, "The police notebook, will you identify the number and the pages that refer to this matter?---45, 497 in relation to this matter, I made no notes", is that the evidence that you gave on oath?---Yes it is.

"Mr Edwardson, 'Sorry, in relation to this matter, you made no notes'?---No notes, that's correct." That's the evidence that you gave on oath?---Yes.

In truth, when you were sitting in the local court, and giving evidence, and being asked specific questions about what existed or didn't exist by way of notes, you knew perfectly well, didn't you, that you had prepared a chronology about exactly what had happened on the relevant days, including the day of the shooting, before you gave that first statement on 13 November?---Sorry, can you repeat that again?

Sure. You knew when you gave evidence in the local court, and when you answered those questions to me, and indeed the questions that were asked of his Honour, you knew that in truth, you had prepared that chronology, before providing your statement dated 13 November 2019?---Yes.

Now you're an experienced police officer, aren't you?---Reasonably.

You'd certainly understand, wouldn't you, the fundamental principle of what we call disclosure?---Yes.

And you know that every day of the week, prosecutors and defence lawyers ask for the production of any original notes that are made by any police officer that are in existence?---Yes.

You know perfectly well too, don't you, that when you commit pen to paper, and you set out what you say you did on a particular occasion, that is disclosable material?---Yes.

And so you knew that this chronology existed. You knew that you'd put pen to paper, or typed it up, in advance of providing a statement on 13 September, but you – November I'm sorry, but you said nothing about it when you were asked those questions at the committal, did you?---Can you repeat that question please?

Sergeant, you knew, didn't you, that that chronology was disclosable material?---I didn't. I believed these were my aide-memoires.

Your aide-memoires? A police officer that makes a record of what actually happened, even for your own purposes, you know perfectly well, is disclosable?---I don't know about my own aide-memoires in producing my statement.

Sergeant, you were asked, not only by me, but indeed by his Honour in the committal, whether there are any other notes in existence. And you said, "No?"---I didn't consider them to be the notes that you were chasing.

So what happens is this, you don't disclose to anybody their existence, but then suddenly you get this email in 2020 from Detective Sergeant Newell, correct?---Yes.

And Detective Sergeant Newell then required you to produce them, and that's what you did. And that's why now, the defence have in their possession, your first account in writing, about the relevant events?---Yes.

Indeed, the chronology was prepared before the very first statement that you gave in relation to this matter, wasn't it?---Yes.

Where did you prepare it?---I went to the Alice Springs Police Station and typed it up.

And you typed it up because you knew, didn't you, this was a very serious matter?---Yes.

Was inevitably going to be the subject of an investigation, in one form or another?---Yes.

But because you were the officer-in-charge at the time that the IRT were deployed, that is, the officer-in-charge of the Yuendumu Police Station, you would have to give your account, and involvement, in detail, about everything that occurred?---Yes.

And that's why it was so important for you to get the chronology right?---Yes.

And you put all of that in writing?---Yes.

And that's ultimately what was produced in response to Detective Sergeant Newell's email?---Yes.

But you never disclosed of its existence, until you were required to produce it by him?---Correct.

And that was only after Sergeant Wells had provided a statement, as you now know, saying, look, Sergeant Frost said to me that she was preparing a chronology in advance of taking the – the statement being taken on 13 September – November?---Yes.

And yet you said nothing?---I didn't consider – because I'd prepared these as an aid memoire to prepare my formal statement, which is my evidence, and it wasn't taken by the investigators, after my statement, so I didn't consider them to be necessary.

All right. What I'm going to do is this. I'm going to ask that you have in front of you your original notes. And I'm going to get you to turn to the third page of your notes. And I want you to direct – direct your attention to the last paragraph. I don't want you to read it out at the moment. Do you see that?---Yes.

The very last paragraph on the third page. I want you to now look at the document which is now produced to you and I want you to just confirm, firstly, that that document is a copy of the last paragraph on page 3 of your chronology?---Yes.

It faithfully and accurately replicates what's in the original – the whole document – the whole chronology. Just check it?---Yes.

Thank you.

Could that document be marked for identification, please, your Honour.

HIS HONOUR: Be marked for identification with the letter I.

MFI I Copy of notes of Julie Frost.

MR EDWARDSON: Thank you.

What I'm going to do now, sergeant, is to remind you from the transcript exactly what you told this jury yesterday in response to questions asked by Mr Strickland of Senior Counsel who, as you know, is prosecuting this case.

I'm referring your Honour to transcript page 183 and 184.

You'll remember when you gave evidence yesterday, sergeant, your attention was directed to some CCTV footage and the various police officers in the muster room. And although the – whatever was said by whomever, including yourself, was not recorded ultimately, you were asked questions about the so-called briefing before the IRT members were dispatched to Yuendumu?---Yes.

And specifically at page 183, Mr Strickland asked you, "So at about 7.05.16, it appears that IRT members left the muster room." Answer: "That's correct." You remember being asked that question- -?---Yes.

- -and you gave that answer. Question: "And they then left the police station, to your knowledge?" Answer: "Yes, I do"?---Yes.

Question: "So in that, approximately five minutes, when you began your talk, do you remember what you said to them?" Answer: "Yes, I do"?---Yes.

So you understood that you were being asked to give evidence, on oath, about what you told the various members of the IRT at that particular briefing before they were dispatched to Yuendumu?---Yes.

And he asked you this, didn't he, explicitly, "What did you say"?---Yes, he did.

And this is what you said: "I took them through the events of what had happened in Yuendumu" – and I'm sorry, is it Nyirripi? Is that the right pronunciation?---Nyirripi.

Nyirripi. Yes, thank you. "Nyirripi. I told them that there had been a spate of unlawful entries. There had been a number of – a lot of community unrest over at Nyirripi. I told them that the clinic staff had left the community. I told them that there had been a funeral and there was a ceremony afterwards that was taking place at that time. And we discussed – we discussed Kumanjayi Walker and his history." That's the evidence you gave?---Yes.

Question: "Okay. And did you discuss the operation? Any part of the operation plan?" Remember that was asked of you?---Yes.

You understood specifically that you were being asked to explain to the jury exactly what you said, as best you could recall- -?---Yes.

- -about what you told them in relation to that arrest plan that you say they were obliged to comply with?---Yes.

This was your answer: "Yes, I did. I discussed with them what I wanted them to be doing in conducting high-visibility paroles" (sic)- - -

HIS HONOUR: "Is conducting."

MR EDWARDSON: Sorry? I'll start again.

"I discussed with them what I wanted them to do – to be doing is conducting high-visibility patrols around Yuendumu. I wanted them to saturate the area around where all the unlawful entries had been taking place. And I wanted them to be on-call and I wanted them to familiarise themselves with community and the layout of the community." That's the evidence you gave?---Yes.

Question: "And did you discuss anything to do with the arrest of Kumanjayi Walker?" Answer: "At that, it was going to take place at 5 o'clock – at 5.30 the next morning"?---Yes.

Question: "And did you tell them where they should meet up?" Answer: "At the muster room." Question: "At what time?" Answer: "5 o'clock." Question: "On the next morning?" Answer: "Yes." That's the evidence you gave?---Yes.

Question: "Did you have any discussion with them about if they happened to come across Kumanjaya Walker, what they should do?" Answer: "They – one of them, and I don't recall which one – had asked me, 'What do you want us to do if we come across him?' And I said, 'By all means, lock him up'?"---Correct.

All right. When you prepared your chronology, is this what you said: "The basic plan was for that night that the arriving teams would provide a high-visibility policing service in the community whilst collecting intelligence as to the whereabouts Walker was"?---Yes.

"If they did happen to locate him along the way, they were to arrest him, otherwise the plan was to wait"?---Yes.

"They were advised that, whilst Arnold had warrant outstanding, he was to be arrested on the fresh offences, aggravated assault, assault police and criminal damage, following Wednesday night's incident"?---Yes.

"They were also advised that the plan was for the 5.30 am start for Felix, who would give a briefing about possible locations, given his local knowledge"?---Yes.

"I was not going to be part of the arrest team in order to minimise any chance of conflict of interest or perceived conflict of interest. However, once they had arrested Arnold, they were to call me and I would run the watchhouse and prepare for his transport in town"?---Correct.

That's what you recorded – the very first note that you ever made?---That's what I've put in my aide-memoire to provide a statement.

Yes. It's the first time you committed in writing to what you say was actually said at this particular meeting? This briefing?---This – this is a very basic aide-memoire- -

That's not my question?---Sorry, can you repeat the question?

I'll grapple with the question, please, sergeant. I'll say it again. This is the first time that you committed, in writing, to what you say you told these people at this particular briefing?---Yes. It was committed in writing for my memory.

It was the first time you'd committed to writing what you say happened and was said?---Yes, but it was very basic account of what had happened.

Why are you qualifying this?---It was a – it was a basic – an aide-memoire – what we considered to be an aid-memoire. I was writing down notes as I was thinking of them. They weren't exactly what I would put in a statement. They were an aide-

memoire to make the statement. It wasn't an exact account. It was notes for myself to jogged when I'm making my statement.

Sergeant, the truth of the matter is, I suggest, you never thought the defence would see this – these notes?---I – I didn't think they would, no. I didn't – I didn't – it didn't bother me that they would.

It didn't bother you? What, that the defence didn't have these notes?---I – again, they were my aide-memoire. It was notes I used to make my statement. I didn't consider them to be necessary to – they were my notes for the purpose of making a statement.

What I'm suggesting to you, sergeant, is that you knew perfectly well that these notes were disclosable, and you deliberately chose to conceal them?---Incorrect.

All right, let me ask you this. This plan that's been created, it's true, isn't it, that at the time – or at least – at the time that these men from the IRT were despatched, there was no solid intelligence as to precisely where Kumanjaya Walker was?---No.

And indeed, there were mistakes in your plan in that you had put the wrong houses on the plan itself, hadn't you?---There was one mistake.

And that mistake was never corrected in writing was it?---No, it was corrected at the briefing, in the muster room.

Why don't we find that in your notes?---Sorry, I don't know what you mean.

Well you said it was corrected in the briefing, right?---Yes.

Did you tell the jury that yesterday when you were asked to explain what was said at this particular briefing?---No, I wasn't asked about that though.

Weren't you asked to explain exactly what was said in that briefing, by Mr Strickland yesterday?---Again, it's a long time ago. I don't recall exactly, other than the principles of what I had told them, what I wanted them to do.

What was the mistake in the briefing note - - - ?---The mistake in the briefing note was that I – can I have a look at the plan please so I can get this right?

Yes, your Honour, can the witness be shown exhibit – just bear with me, I think it's – no – exhibit 1, tab 14, thank you.

HIS HONOUR: Thank you.

MR EDWARDSON: And members of the jury should have that.

Have you got exhibit 1, tab 14 in front of you?---Yes.

This is the plan that you say was meant to be complied with by the members of the IRT?---Yes.

And while we're on it, I'll just ask – sorry, I should let you finish. You wanted to look at the plan to respond to my last question?---Yes, I've found the mistake.

What was the mistake?---Where – on page three, where it says "Implementation of the plan, the locations of interest." I had House 512 instead of House 511 – sorry, instead of House 511, which it should have been.

All right, but the – let me say this. See if this is common ground. Leaving aside that error, which you say now that you corrected in the briefing. You just simply identified possible houses where he might be located?---Yes.

Without any specific intelligence as to where, in fact, he might be?---Well no one knew where he was.

Sorry?---No one knew where he was at any given time.

Exactly. No one knew where he was, and so it was impossible to direct that an arrest would take place at 5.30 in the morning, unless you actually had intelligence of precisely where he was?---The two primary locations that we believed he would have been at, was 511 and 577.

I'll – try and concentrate if you could please sergeant, on the question. You've already told the members of the jury that you had no actual intelligence of precisely where he was located in Yuendumu when the IRT left the police station?---That's correct.

And so when this plan was created, and it contemplated the possibility of arrest – an arrest at 5.30 am, that would – could only happen, if in fact you had intelligence, of precisely where he was?---We don't know precisely where he was.

Exactly. So that's why it's impossible to direct the IRT that they must arrest at 5.30 am, because you need to know where he is?---I don't understand what you're trying to say, sorry.

I'll put it another way. When they left, around 7 o'clock that night, they were on duty, weren't they?---Yes.

They were on duty as IRT members?---Yes.

They were going to Yuendumu to conduct intelligence gathering, that much you knew?---Yes.

And that meant they had to mix in the community, and try and identify where Kumanjayi Walker might be?---They were to drive around at that time and familiarise themselves with the locations of interest, and the community.



Where do we find that in your chronology?---It's – I don't know, is not there?

You've got it in front of you. This is what you said. "The basic plan was for that night that the arriving teams would provide a high visibility policing service in the community, whilst collecting intelligence as to the whereabouts Walker was." Do you see that?---Yes.

That's exactly what you told them, isn't it?---Yes - - -

So in other words, when they left at around 7 o'clock from the police station, they were going, as you knew, directly into the Yuendumu Community?---Yes.

They were going to conduct high visibility policing. So they would know, the community would know, that the police are there?---Yes.

And, at the same time, they would collect intelligence as to the whereabouts of Walker?---Yes.

Collect intelligence as to the whereabouts of Walker, necessarily required them to speak to members of the community?---It's – could be part of the intelligence collection.

It's what you would expect the IRT to do?---Yes.

Indeed, that's what they were told that they should do?---They were told to familiarise themselves with the layout of Yuendumu, and collect intelligence in relation to the whereabouts of Kumanjayi Walker.

Where do find anywhere in that chronology, that they were to familiarise themselves with the layout of Yuendumu?---It's not written there, but again this is my aide-memoire, which is a basic account so I can provide my statement.

Where, yesterday, did you tell this jury, that you told the IRT members that they were to familiarise themselves with the layout of Yuendumu?---It's the same thing to my mind as collecting intelligence as to where Kumanjayi Walker is.

What, the layout?---The layout of the community, yes.

Sergeant, you're obviously not a member of the IRT?---No.

They're a specialist team, aren't they?---I believed they were, yes.

Well they are, aren't they, that's what you wanted?---Yes.

Specialist team?---Yes.

Just bear with me a minute please. Felix – how do you pronounce his last

name?---Alefaio.

Alefaio. Felix Alefaio was, in fact, on duty and at the Yuendumu Police Station when the IRT team members presented themselves, wasn't he?---Yes, he was.

So he was there, and amongst the IRT members at the time that you gave that briefing?---Yes, he was.

And he was at the police station when the IRT left, leaving him behind, and they were going to Yuendumu to conduct this intelligence operation?---Yes, he was.

So he was present at the briefing?---He was sitting at his desk.

And it's true, is it not, contrary to the evidence that you gave yesterday, that he was to remain at the Yuendumu Police Station, and assist in the event that Kumanjayi Walker was arrested?---No, incorrect, if that's - - -

I suggest to you that he was never ever told that he was to go to Yuendumu the following morning with the IRT members?---It's written in my plan.

Well whatever you might have written in your plan, let's logically think about it. We've already established that when the plan was written, you didn't know where Kumanjayi Walker?---Mm mm.

You've told us that Alex Alefaio – Felix, sorry, Alefaio, was a person who had had previous dealings with Kumanjayi Walker?---Yes, that's correct.

And he certainly – he might have some information, that might assist?---He would have a lot of information that would assist.

He was there and present when the IRT members presented themselves?---Yes.

On 9 November?---Yes.

So if he had anything to offer, that was the time to offer it, before they left?---The arrest wasn't going to – was not meant to take place until 5.30 the following morning, when Felix Alefaio could be present.

But how could - why couldn't he be present now? Why couldn't he have gone with the IRT members and helped them with their intelligence gathering? Why couldn't he have done that?---They weren't meant to be looking - actively looking for him so therefore Felix Alefaio didn't need to be with them.

When you say "They weren't to be actively looking for him, where do we find that in your briefing, in your chronology or indeed in your briefing evidence yesterday?---I think the fact that I have stipulated that I wanted a 5:30 arrest in the morning is clear enough that that wasn't going to take place. Any active looking for him was not going to take place that night.

Would you agree that the most logical starting point would be House 577?---Yes, when you go to actively arrest him.

Well, wouldn't you go there first of all, 577, because that's where the axe attack occurred on three days before?---Not necessarily.

Well, that was his last known residence wasn't it?---Yes, it was.

And so isn't that the first place you'd start?---When you actually actively go to arrest him, yes.

Well, the first step is find out where he is?---Correct.

Once you find out where he is then you can work out how you are going to arrest him?---Yes.

And you would understand, as a police officer, wouldn't you, that an arrest is a dynamic situation?---Very dynamic.

It can change in a matter of seconds?---Yes.

And the most obvious and graphic example we have all seen on video, is indeed what happened when Kumanjayi Walker presented himself - armed himself and presented an axe against your partner and his colleague?---Yes.

You've watched that video, haven't you?---Yes, I have.

A number of times?---A handful of times.

Well, it's pretty clear, isn't it that it's, on any view, it's an incredibly confronting piece of footage?---Yes, it is.

It is certainly, in the case of Kumanjayi Walker, an extreme escalation of his violent disposition?---Towards police yes, definitely.

Not just towards police generally. It shows that the man is extremely dangerous? ---It shows how - how much he wanted to escape, yes, and it's very violent.

You knew, didn't you, before your partner and his colleague went to House 577 on 6 November, you knew about Walker's extensive criminal history? Kumanjayi Walker?---Yes, yes.

You knew that he had many offences for violence?---He had some offences of violence, yes.

Can you have a look at exhibit 7 please?---Thank you.

You will see that this is a portion of a document which in its entirety is a document of some 66 pages?---Not this document.

No, no, I said, "a portion of"?---Yes.

You can see at the bottom of the page - if you go to the second page you can see we are look at page 5 of 66?---Yes.

Now, first of all it is described as - on the front sheet as a, "Person entity profile report"?---Yes.

What is that?---It's an intelligence document that has - contains all of Kumanjayi Walker's dealings with police.

Yes. If you go to the table of contents, which we can see on page 2 of 66 it lists different topics that are obviously canvassed in the entire document?---Yes.

For example, criminal history?---Yes.

Alert warnings - alerts and warnings. Things of that nature?---Correct.

And what we do - what police do, I should say, is that they go into PROMIS, they go into a person entity profile report of an individual to find out who they are dealing with?---Correct.

Because that is the only way you can conduct a proper risk assessment of the potential dangers to police when they seek to arrest that target?---Yes.

So you would expect anybody who was deployed and tasked to arrest - in this case Kumanjayi Walker, to go to PROMIS and look at the person entity profile report of him?---Yes, I would.

In the same way that you would have expected your partner, Constable Hand and his partner Constable Smith, to have done the same thing?---I - yes, yes.

And what we do know though, is that because of the axe incident, the fact that he had armed himself with an axe whilst his partner, as you understood it, Rakeisha, had stalled the police - or stopped their entry into that room, he then arms himself with an axe and then we see it all on body-worn video?---Yes.

And as you have conceded, that was a dramatic escalation in his violent disposition?---Yes, it was.

So much so that you immediately created two alerts that you identified yesterday that we see on page 5 of the 66 page document in its entirety?---Yes.

And that was to warn police of the fact that this man was capable of arming himself with a lethal weapon?---Yes.

And that he had the capacity to deploy that weapon if confronted by police?---Yes.

Which made him extremely dangerous? Potentially?---Potentially.

What you were trying to do, as I understand the evidence that you gave, was to see if there could be a peaceful resolution - that is by him surrendering himself without the necessity of force?---Yes.

And that is why immediately after you were told about what had happened by your partner who rang you, I think, at the police station immediately afterwards, is that right?---Yes, he did.

And that prompted you to immediately go down and see Eddie and Lottie at House 577?---Yes.

Because that's where the axe incident had occurred?---Yes.

That's where you understood Kumanjayi Walker had had been living until he had decamped into the bush after threatening both officers with the axe?---Yes.

And when you spoke to Eddie and Lottie was Rakeisha there too?---Yes, she was.

And you knew, didn't you, from what Constable Hand had told you, that Rakeisha Robertson had obstructed Chris and Lanyon?---Yes, I did.

In other words, she had obstructed them which, as you can see from the body-worn video, enabled Kumanjayi Walker to be able to arm himself with that axe?---Yes.

You told Rakeisha, didn't you, that she would be going to court for what she did? ---I did.

And that her actions could have got your members killed and Arnold killed?---Yes.

And indeed, that's what you recorded in your chronology isn't it?---I don't recall.

Have a look at page 1 of MFI I please. MFI I is the complete chronology?---Sorry what page?

Do you have that in front of you?---Sorry, what page?

Page 1?---Yes.

You approached Rakeisha and told her that she would be going to court for what she did and that her actions could have got your members killed and Arnold killed? ---Yes.

And that accurately reflects, does it not, what you said to Rakeisha?---In a roundabout sort of way, yes.

What do you mean, "in a roundabout sort of way"?---That's around about what I said, again this document is an aide-memoire for me.

Sergeant Frost, unless you, unlike most of us, your memory doesn't improve with time, does it?

MR STRICKLAND: I object.

HIS HONOUR: I will allow you to re-word the question.

MR EDWARDSON: I beg your pardon?

HIS HONOUR: I will allow you to re-word or rephrase the question.

MR EDWARDSON: Would you agree that police officers - basic police training of police officers is to try and record as contemporaneously as you can, the events that you might have to recall subsequently?---Yes.

And the reason for that is that people's memories do not improve with time?

MR STRICKLAND: I object.

HIS HONOUR: Why? What is the objection?

MR STRICKLAND: Your Honour, I think that should be done in the absence of the jury. It's - in my submission it is not an accurate statement of memory at all. And - and this - and - - -

HIS HONOUR: You are not giving evidence - - -

MR STRICKLAND: - - - well this – this witness - - -

HIS HONOUR: - - - about it.

MR STRICKLAND: - - - this witness doesn't have the expertise to give evidence of her own memory.

MR EDWARDSON: I'll approach it another way. I don't want - - -

HIS HONOUR: Doesn't have the expertise to give evidence of her own memory?

MR STRICKLAND: That's what she's been to do. Does it – she's being asked - - -

HIS HONOUR: She can certainly be asked whether in her experience, her memory improves as time goes along.

MR STRICKLAND: That's not the question she was asked.

HIS HONOUR: Well I know that.

MR EDWARDSON: I'll ask it that way, your Honour.

In your experience, does your memory improve with time?---Some parts of it does, and some parts of it doesn't.

Let me ask you this. Would you agree that police officers are taught about the importance and significance of making contemporaneous notes with the events in question?---Yes.

And the reason for that is that if the events are recorded, whilst the facts are fresh in your memory, the court will permit you to refresh your memory from that document, down the track, when you're called upon to give evidence?---Yes.

And the whole idea of recording it, at the first opportunity, is to accurately record what in fact happened, so that if called upon later, you can use that document?---Yes.

All right. Did you tell Eddie and Lottie that you – well I'll put it this way. "We are their community police officers who treat the community in a fair manner, and that the actions of Arnold were totally unacceptable, and to use deadly weapons against armed members of the police force, could have got my members killed, and that Arnold was very, very lucky he didn't get killed"?---Yes.

And that's what you said?---Yes.

And that's true?---Yes.

You then put an opportunity, in the hope that it would be conveyed to Arnold, that is, that if he presents himself to the police station within the next two hours, you would guarantee that he'd be dealt with in a fair manner?---That's correct.

And that if Rakeisha was able to get him to the police station, you would consider not prosecuting her for hindering police?---I don't actually recall saying that. I don't actually recall saying that.

Well, see if your memory was better when you recorded the chronology. Could you have a look at the last paragraph on page one. Did you record this? "I stressed to them that this does not need to escalate further than it has, and that if Arnold was to present himself to the police station within the next two hours, we will guarantee that he will be dealt with in a fair manner. I then turned to Rakeisha and told her that if she was able to get him to the police station, I would consider not prosecuting her for hindering police. All understood, and Eddie stated that if he could, he would get

Arnold to the station.” Is that what you recorded in your chronology?---Yeah, that’s what I recorded in my chronology.

Were the facts fresh in your memory, in your mind, at the time that you recorded those details in your chronology?---Yes, they were, yes.

So much better then than now?---Again, some parts of my memory are much better, and some parts are not as good.

All right. In any event, you returned to the station and began preparing the file for aggravated assault, didn’t you?---Yes.

And that required, by your direction, you wanted Constable Smith and Hand to complete their statements as soon as possible?---Yes.

And the reason for that of course was that you knew that the next step was going to be the arrest of Kumanjayi Walker, either by him surrendering himself, or alternatively, if necessary, by police force?---Yes.

The following day you were on duty?---Yes.

That’s Thursday, 7 November 2019?---Yes.

And you commenced at 0800 hours?---I don’t recall what time.

No, but your memory was better can I suggest, back on seventh – or at least back on the time you prepared your chronology. Did you record a note of what you did on Thursday, 7 November 2019?---Whereabouts?

Page two?---I haven’t looked at this for a long time.

That’s why I’m giving you the opportunity now?---Yes. Now that I’ve seen that, yes  
I - - -

This is the chronology you prepared, in advance of the first statement that you gave on 13 November 2019?---Yes, so now that I’ve seen that, I recall that I’ve started at 8 o’clock.

So you started at 8 o’clock and you finished at 1600 hours?---Yes.

And you were on duty with Hand, Smith, Frost and Williams - - - ?---Yes.

- - - or that’s you, sorry. And at 9 o’clock you and Derek went to House 577 to speak with Eddie and Lottie?---Yes.

Who’s Derek?---Derek Williams, to ACPO.

Thank you. They were sitting outside on chairs?---Yes.



And it's at that time, is it not, that Eddie apologised profusely for what happened the night before?---Yes.

What was he apologising for?---About Kumanjayi Walker coming at Chris Lanyon with an axe.

Thank you. And you apologised to him for raising your voice?---Yes I did.

I mean, quite understandable, can I suggest, you might have had a raised voice, because this was a very, very serious matter. It was a very serious matter for all police, but as it happened, coincidentally, one of the two happened to be your partner?---It didn't matter whether he's my partner or not.

What was self-evident though, as you've told us, is how terrifying that whole thing was?---Yes.

You again reiterated, did you not, that the actions of Arnold were totally unacceptable, and that he could have severely injured your members, and that he was very lucky that he wasn't shot by your members?---Yes.

Now originally the information you had was that the funeral was going to be held on the Friday?---Yes.

Obviously by the following day, 7 November, when you returned to House 577, Kumanjayi Walker had not surrendered himself within the two hours that you'd contemplated the day before?---No.

So you were going to give him another chance?---Yes.

And that chance was that you understood that he was going to attend a funeral?---Yes.

That you wouldn't actively chase, or have police chase him, as long as he presented himself to the police station immediately after the funeral, and hand himself in?---That's what I told Eddie and Lottie, yes.

If he did not, you told them, you would be seeking resources from Alice Springs, including the dog and specialist team, and that they would go – be taking a zero tolerance approach?---That's – yes.

That's what happened, and that's what you said?---I don't recall saying to them about a zero tolerance approach, however, I've put it in here, again for my memory, as an aide-memoire. I think I said something along the lines of they would go a bit harder than what we would.

Why wouldn't you use those words in your chronology, if that's what you

said?---Again, this is an aide-memoire, and I only – this is not my statement. This is an aide-memoire to jog my memory for – the most pertinent points that I need to get across in my statement.

Well what you recorded in your chronology, is if he did not do this, “I would be seeking resources from Alice Springs, including the dog and specialist team, and that they would be – they would go – be taking a zero-tolerance approach.” That’s what you recorded in your chronology?---Yes, it is.

And I suggest to you, that’s what you told them?---Again no, I don’t recall that but – no I don’t recall that.

You might not now, but you did then, when you typed this chronology?---I told them that they would – the Alice Springs members would go in harder than what the Yuendumu members were.

Sergeant Frost, you might not now remember the words that you used when you spoke to Lottie and Eddie on the morning of 7 November 2019. But when you prepared your chronology, you’ve already told us, you did have those facts in your mind?---Again, this is an aide - - -

Grapple with the question?---Can you – can you please repeat the question?

Yes, I will. When you prepared the chronology, were the facts fresh in your mind?---Yes.

And you recorded that detail in the chronology?---Yes.

Because it accurately reflected what you had said to Eddie and Lottie on 7 November 2019?---I didn’t – I didn’t – this is not word for word.

You knew that Kumanjayi Walker was not going to present himself after the funeral, didn’t you?---I felt that he wouldn’t. I wanted to give him the opportunity.

But you knew that he was not going to present himself, didn’t you?---I felt that he wouldn’t, but I did want to give him the opportunity.

Indeed, you put that in writing, didn’t you? “I knew that Walker was not going to present himself after the funeral, so I went to work around 11 am on 8 November”?---Yes. Sorry, can you repeat that date? 8th – 11 am on the 8th?

On the 8th?---Is that Friday?

Yes?---I don’t recall what day – on the 8th I went to work – I don’t recall what time, sorry.

Just have a look at your notes, your chronology that you recorded before your first statement, when the facts were fresh in your mind. And can I direct attention to the

very last sentence on that page. It might be Saturday morning, I'm not sure. But you've recorded this, have you not: "I knew that Walker was not going to present himself after the funeral, so I went into work around 11 am"?---Yes, so that's Saturday.

Saturday, all right. So not the Friday?---No.

Your Honour, is that a convenient time to have a morning break? I just need to reorganise a few things before we- - -

HIS HONOUR: Well, it is a little bit earlier than normal, but it's a convenient point.

So members of the jury, would you retire, please.

JURY OUT

HIS HONOUR: I'll adjourn.

WITNESS WITHDREW

ADJOURNED

RESUMED

HIS HONOUR: Have the jury in, please.

JURY IN

JULIE FROST:

XXN BY MR EDWARDSON:

HIS HONOUR: Yes.

MR EDWARDSON: Sergeant, despite your best endeavours to have a peaceful outcome – that is by the surrendering of Kumanjayi Walker – as it happened, it didn't work?---That's correct.

You gave him, through his close relatives and friends in the community, ample opportunity to surrender himself?---Yes.

Not just once, but twice?---Yes.

And over successive days?---Yes.

You must have been under immense pressure over the course of this weekend?---Yes.

You had been up many, many hours?---Yes.

You had had little sleep?---Yes.

You had tried, as a community police officer – if I can – if that's the right expression – to do what you thought was the best outcome?---Yes.

And as a last resort, you finally had to make that very difficult call to police officer – Superintendent Nobbs?---Yes.

And when you phoned Superintendent Nobbs you said, did you not, "Get me every resource now, we need it"?---After the – after I heard the – about the shooting, yes. That's exactly what I said.

Sorry, after?---After I heard that Kumanjayi had been shot, that's exactly what I said.

No, can I suggest to you that you knew that you were heading for a police shooting, didn't you?---No. Incorrect.

You knew that you were heading for a police shooting and because you knew that Kumanjayi Walker was not going to surrender, you knew that the IRT were going to be deployed and that's why you said to Sergeant – Superintendent Nobbs, "Get me every resource now, we need it"?---Incorrect.

All right. Did you provide a statement dated 13 November 2019?---Yes.

And is that the statement that was provided to Detective Wells?---Yes, it was.

Can you turn – do you have it in front of you?---Yes, I do.

Can you turn to page 39 of that interview?---Yes.

Did you tell Detective Wells – and I quote: “I knew we were heading for a police shooting, um, so um – which is why I said to Superintendent Nobbs, ‘Get me every resource now, we need it.’”

MR STRICKLAND: I object.

HIS HONOUR: Yes, the objection?

MR STRICKLAND: The objection is that the context of that has not been put. It may require some legal argument.

HIS HONOUR: All right.

Members of the jury, would you retire, please, while we have this argument.

JURY OUT

HIS HONOUR: Sergeant, could you wait outside, please?---Yes, your Honour.

WITNESS WITHDREW

HIS HONOUR: Yes, Mr Crown?

MR STRICKLAND: Your Honour will need to have look at MFI E.

HIS HONOUR: All right. Well- - -

MR STRICKLAND: MFI E is 13 November 2019 – unfortunately, there's a bit of reading. I'll give your Honour the short – the very short point and then I'll ask your Honour to read a few documents.

HIS HONOUR: Yes.

MR STRICKLAND: The exact answer that my learned friend is referring to which began, "I knew we were heading for a police shooting" is preceded by the words - - -

HIS HONOUR: What page is this on?

MR STRICKLAND: 39 - I am sorry, your Honour, 39.

HIS HONOUR: Just one moment. Yes?

MR STRICKLAND: So, your Honour, it requires your Honour to go back a bit but I will just give your Honour the short point and then ask your Honour to read these bits. The question began with the second line of that entry, "I knew we were heading for a police shooting" but it's what precedes those words that put that in a misleading context - sorry - unless the preceding context is put it's misleading and that's the basis of the objection.

So what she says is, "Knowing all that, I suppose when I heard those words, knowing what can happen with a Facebook post." Now, that relates back to what she said at - beginning at page 37 when she is referring to an entirely different incident where there was a Facebook post - this is beginning at about the last entry at page 37.

HIS HONOUR: Yes.

MR STRICKLAND: "There has been - Yuendumu is very volatile. It takes one Facebook message to set off a whole community." And then she goes on at some length over the next page to say that there was a Facebook post which then led to significant community fighting.

HIS HONOUR: Just one moment while I read this.



MR STRICKLAND: Certainly, your Honour.

MR EDWARDSON: Your Honour, I am going to withdraw that. I think he is right.

HIS HONOUR: Sorry?

MR EDWARDSON: I am going to withdraw - sorry, I withdraw the question. I think in fairness when I look at the passage that follows right at the bottom of page 39 in particular, "So I knew when it was a police shooting they had a lot of reason to direct their anger towards me." Question, "So you contacted Superintendent Nobbs, you told him what had happened, 'Police shooting, I need resources here' and what did he say to you?"

So I think in fairness my learned friend is correct. I withdraw the question.

MR STRICKLAND: I am indebted to my friend and the court.

HIS HONOUR: All right, thank you. We will have the witness recalled and when the witness is back in the witness box the jury can be brought back in.

JULIE SHEREE FROST:

JURY IN

MR EDWARDSON: Your Honour, I withdraw the question.

Sergeant, I want to turn if I can now to a few matters that lead up to this briefing that we have discussed. I would like you to have a look at Tab 11 of exhibit P1 which is an email from you to Jody Nobbs and also to - sorry - she - he, sorry, is cc'd in. It's JS cc"?---Thank you.

Do you have that in front of you?---Yes.

What is JESSC?---Joint Emergency Services Communication Centre.

What do they do?---It's the communication centre where all phone calls come in to be despatched.

And you included in that email - or you cc'd in Jody Nobbs?---Yes.

And Jody Nobbs was a superintendent?---Yes.

And that is the person that you ultimately requested Alice Springs - resources anyway, for the purposes of affecting an arrest?---Yes.

In that email you say - and we can see that the email is sent at 5:46 am on 9 November 2019 and you said:

"Please be advised that myself and Chris Hand have been up now since 12:30 am and we will be knocking off in the next 20 minutes after attending three jobs overnight. Whilst we are rostered to start at 10 am we will now be starting our rostered shift at around 2 pm due to fatigue levels from being up all night and following on from a heavy workload throughout the week. We ask that you do not contact us on the on-call phone other than for an emergency situation. There are no other members in Yuendumu at the moment that can assist with the workload and call-outs."

Now, what you were effectively - it was reflecting the sentiment of what I put to you a moment ago, that is that by the time you get to 9 November 2019 you are exhausted?---We were exhausted.

There is a very volatile atmosphere in the township of Yuendumu at that time?---Yes.

There had been a large number of unlawful entries, crimes committed in that township over the course of that weekend?---I don't recall any over that weekend but leading up to it there had been.

All right. Leading up to it, including the forced entry of what is the clinic, is that right?---No, that's incorrect

That's incorrect, is it? Was there an entry into the clinic?---No.

Did the nurses leave?---Yes, they did.

The medical staff?---Yes.

Why was that?---The nurse-in-charge at Yuendumu had had her house broken into.

Right, so the consequence in any events was that there were no medical staff that were around the place within the township on the 9 November 2019?---That's right.

So you came on duty on 9 November at what time? Back on duty?---Yeah, I think it was around 11 o'clock.

Around 11 o'clock. Now, when you contacted Superintendent Nobbs requesting Alice Springs Police Station resources, is that right?---That was part of the conversation I had with Superintendent Nobbs, yes.

Including the dog unit for the purpose of affecting an arrest?---Yes.

And you sought a what is called a "brief ops order" in place for his arrest, which was ultimately approved by Superintendent Nobbs?---That's correct.

I just want to ask you about the way in which that came about. Can you have a look please, at tab12 of exhibit 1? You can see that that is an email initially, from you - sorry, from Shane McCormack to you on 9 November 2019 at 4:22 pm?---Yes.

Now at about that time, you would have understood that the IRT members are en-route from Alice Springs to Yuendumu?---I don't recall whether I knew that at the time.

But you know that now?---I don't actually recall what time they left.

All right?---Yep.

But certainly you knew that around about this time, you knew that they had been approved?---Yes.

And you knew that they were going to be coming to Yuendumu?---Yes.

Along with a dog handler?---Yes.

For the purposes – the mission was, to arrest Kumanjyi Walker?---That was one of – one of the two purposes, yes.

Well the ultimate mission was to arrest Kumanjyi Walker. That's the reason they were there?---Yes, along with providing support to the local members.

But there were no local members who were assisting them, in – at

Yuendumu?---There was going to be a local member to assist with the arrest when it came to time – came the time to arrest Kumanjayi Walker.

Look, do you agree with this proposition, that any arrest plan has to be dynamic and adaptable?---Yes.

And the reason for that is there are so many different unknown variables, not the least of which is trying to work out where this person might be?---Yes.

And so everything's about timing, place and circumstance?---It can be, yes.

And that's why it's so important that any plan is dynamic and adaptable?---Yes.

And of course, if you're a specialist team, you are a specialist team for a particular purpose. In this case, a specialist team that had the training and skills to deal with somebody who was potentially, on your own evidence, a man of extremely violent disposition?---Yes.

A man who was capable of arming himself and using a lethal weapon against police?---Yes.

And that's the very reason why it was so important to have skilled police officers in this case, what's called the Immediate Response Team?---It wasn't the Immediate Response Team I don't think, it was the – I don't think it's called the Immediate Response Team.

What's it called?---I think it's the Instant Response Team, I'm not sure.

The what, sorry?---Incident Response Team.

Well I suggest to you it's the Immediate Response Team?---May – look, may be, I'm sorry.

You're not sure who you've deployed?---I know what the basis of what they were.

All right, in any event, looking at tab 12. This document appears to have been created by Shane McCormack, this email?---Yes, yes.

Who is Shane McCormack?---He is a senior – he was a senior constable in Alice Springs Police Station.

But why was he creating that email to you in its terms?---Superintendent Nobbs asked him to provide certain information to me.

Was that for the purposes of you creating the ultimate plan that you did?---Yes.

Because you used this document in part, to cut and paste into your plan?---Yes, I did.

So you can see that it sets out, "IRT call-out, arrest of violent offender", that's the mission?---Yes, that's what it says here.

"Walker is an active target for breach suspended sentence." And there's a number?---Yes.

That's a PROMIS reference is it?---That's correct.

So if we go into the PROMIS – we can put that number in, it'll call up the details of identifying him as an active target for breach of a suspended sentence?---Yes.

And then we have "Active target to be arrested for assault police" and a number again?---Yes.

That's the aggravated assault, what we call – have called the axe incident?---Yes.

And the number's the PROMIS number?---Yes.

"Multiple alerts for violent behaviour"?---Yes.

And by that stage, the authorisation for the deployment of the IRT, even before any plan was in existence, had been approved by Superintendent Nobbs?---Yes.

And the situation is, that on 6 November 2019, Yuendumu members Hand and Smith, attended House 577 Yuendumu Community, to arrest Walker. Walker came at members while holding an axe and fled the location?---Yes.

"Of note, funeral is taking place in the community this weekend"?---Yes that's - - -

And the task of the IRT, The Immediate Response Team, is as we can see in black and white, "Provide a local presence of armed police to uphold law and order in the community. Provide support to local members. Arrest Walker and transport back to Alice Springs"?---Yes.

And then he identifies, does he not, the members of the IRT and the dog handler. So we've got Rolfe, Kirstenfeldt, Eberl, Hawkings and the dog handler, Donaldson, and GP the dog?---Yes.

"And hours to be confirmed", at 9 November 2019, "2.30" or "1430"?---To be confirmed, yes.

Yes. And equipment includes bean-bag shotguns by two. Two AR15s, swags and safety equipment?---Yes.

And vehicles. And we find don't we, that then finds its way into what you call the arrest plan, which is tab 13 of exhibit 1?---Yes, some of that information did, yes.

Yes. Now you've agreed that any arrest plan has to be dynamic and adaptable?---Yes.

Because things change very quickly?---Yes.

You sent an email, we know that, because that email – sorry I said tab 13, but it's – the email that actually goes to a whole host of people, including the members of the IRT team, is tab 14 of exhibit 1. And we can see that it goes out at 4.59 – 16.59 or 4.59 on Saturday 9 November 2019?---Yes.

And the recipients of the email are identified on page one?---Yes.

And that documents exactly the same as tab 13, isn't it, except that it's different recipients. The earlier document goes out at 4.49. This one's 4.59?---Okay.

So what we know is that Superintendent Nobbs had given approval for the deployment of the IRT before you had created the arrest plan?---Yes.

All right. Now let's just have a look at the arrest plan. Like all plans, we have to be flexible?---Yes.

We know don't we, that the IRT left the Yuendumu Police Station at around seven o'clock thereabouts?---I believe it was a bit later than that.

I'll check the time exactly, I think Mr Strickland put it to you yesterday. Just bear with me. 7.05, orabouts?---Yes.

So they're on duty, as IRT members, having left the briefing at 7.05 pm on 9 November?---Yes.

But your plan contemplates that they won't start until 11 pm. We can see that on the second page?---That's correct.

So obviously, when they left, they were to show presence?---Yes.

Intelligence gather?---Yes.

Intelligence gather to try and identify the location of where Kumanjayi Walker might be?---Yes.

One of the actual places, a potential place, is 577, because it's expressly identified as a location of interest. In fact it's the very first house that's identified as a location of interest on page three of your plan?---Yes.

So hardly surprising that they might go directly to 577, having left the Yuendumu Police Station?---I don't know where they went after leaving.

Because of course, they're the specialist team. They knew the parameters of what was required, presence, law and order, because of all the carry on that was happening within the community, but most importantly, the ultimate mission, as we've now agreed, was to arrest Kumanjaya Walker?---Correct.

And you can't arrest him until you know where he is?---Correct.

So we now know, although you didn't, that the first place they went to was 577, where they gathered intelligence about where he had been only minutes before they got there?---Right.

You weren't present, you don't know?---No.

Of course, that was their job. They were running their own destiny in terms of how they went about intelligence gathering. How they went about trying to identify where he would be and making their own assessment, their own risk assessment, of the most appropriate way in which he could or should be apprehended. They were in charge of all that themselves?---Their – their duties, after leaving the police station, was to cover call, collect intelligence, not to actively look for Kumanjaya Walker.

"Not to actively look for Kumanjaya Walker"? Where do we – we keep coming back to this. Where do we find that in your chronology?---You don't.

You don't. Where do we find that in your evidence yesterday?---You – I didn't say it.

No. So it's come up for the first time today has it?---The – I wanted an arrest to take place at 5.30 in the morning.

Was that because you wanted a bit more sleep?---No, that was because it's the safest time to make an arrest.

Is the truth of the matter it was nothing about a 5.30 am arrest? It was – that was the time that Felix was coming back on duty? Or he was coming on at 5 o'clock in the morning on duty?---That's correct, for the arrest.

And the last thing you wanted, given that you had had no sleep – very little sleep – the last thing you wanted was this whole thing to blow up in the middle of the night?---I certainly didn't want anything to blow up.

Now, can you – you've already mentioned the other day that there was a – sorry. You mentioned this morning that there was one error that was contained, you said, in page 3 of the, "Locations of Interest"?---Yes.

Which one was that again?---On page 3, down the bottom, it was – I wrote in the plan that it was House 512.

And what should it have been?---511.

511, right. Well, after you sent that ops order by email, you realised that the locations, plural, of interest were wrong?---I realised that 512 was wrong.

Did you make a note in your chronology – the first note you made – about this particular issue?---No, I don't think I did, but I'd have to a look.

Can you have a look at page 3. In the context of you contacting Superintendent Nobbs – do you see that at point five?---Yes.

"I then contacted Superintendent Nobbs requesting ASP – that's Alice Springs Police – resources, including the dog unit for the purpose of affecting an arrest"?---Yes.

That's correct?---Yes.

"I put a brief ops order in place – a brief ops order in place – for this arrest"?---Yes.

"Approved, Superintendent Nobbs." Yes?---Yes.

"After sending the ops order, I realised that the locations" – plural – "of interest were wrong"?---Okay.

That's what you recorded?---Yes, I did.

Is that correct?---Yes.

So what were the other errors?---No, I – again, there was no other errors. It's House 512.

All right. "I knew that I would correct this once members arrived and that Felix also knew where he would be." You recall that?---Yes.

So what happens is this. It's gone out, we know that the IRT are on their way to Yuendumu. They arrive at different times, correct?---Yes.

I think the dog handler, Mr Donaldson, was the first to arrive?---Yes, he was.

And then, I think, it was Mr Rolfe and Mr Kirstenfeldt?---Yes.

Followed by the other two?---Yes.

And we know that Felix was on duty at that time when they arrived?---Yes, he was.

We know that because you've told the jury that he was in the police station and he was around the place at the time of the briefing?---Yes, he was.

And according to this, it didn't matter that you'd made a mistake in the plan, because you could correct it when they arrived at the police station?---That's correct.



And also, Felix would know where he would be? He – that is in, Kumanjayi Walker?---Yes.

So I assume – because we now know that when they left the Yuendumu Police Station at about 7.05, no one had any idea where Kumanjayi Walker was?---No one would have had any idea, no.

Well, according to your chronology it didn't matter, because they were turning up and Felix would know where Kumanjayi Walker would be. That's what you've recorded in your chronology?---So again, this is an aide-memoire where it was rough notes.

How does one interpret that in any other way than the way you've recorded it?---I don't understand what you mean.

According to your chronology, Felix also knew where he – that is in, Kumanjayi Walker – would be. That's what you've recorded in your chronology?---Like I said yesterday- - -

Can you just grapple with the question, please, Sergeant. Is that what you recorded in your chronology?---That's what's in my chronology.

And what that means to anybody reading it is that Felix had some knowledge of where Kumanjayi Walker would be?---Yes, he did.

Did he have any such knowledge when the IRT members arrived?---Yes, he did.

What did he say? Where did he say they were – he was?---I don't recall whether he said anything at the briefing at that time.

Can you really – please try and concentrate on the questions, Sergeant. It's really important. Felix didn't know where Kumanjayi Walker was, did he?

MR STRICKLAND: I object. I don't think that question can be asked in that form.

HIS HONOUR: She can't answer- - -

MR EDWARDSON: All right, I'll put it another way.

HIS HONOUR: - - -for what he may or may not have known.

MR EDWARDSON: Did you ask Felix where Kumanjayi Walker was?---No, I didn't. Felix wouldn't know exactly where he was.

Well, if Felix wouldn't know where he was, why did you record in your chronology: "Felix also knew where he would be"?---Because it was a statement, again, in a rough manner to say Felix knew the community and he knew the locations of interest where he may be, would be, maybe, no one knows where he was going to be.

If Felix had intelligence, it was fundamental that you find out what that intelligence is?---Felix had as much intelligence as I did.

So in other words, he didn't know – like you didn't know – where Kumanjayi Walker was?---No one knew where he was.

So Felix couldn't advance the case anymore than you could?---Correct.

Thank you. Now, Donaldson. He's the first to arrive, you've told us, of the team that are to be dispatched to arrest Kumanjayi Walker, correct?---Yes.

Just bear with me a moment, please, your Honour.

When he arrived, did you have a conversation with him about the so-called arrest plan?---Yes, I did.

You remember that?---Yes.

So you spoke to him expressly about it?---I told him along the lines that I wanted the dog to be used in the arrest.

Yes. But you actually, can I suggest, handed him a copy of your arrest – the email – your arrest plan, didn't you? At the police station?---I don't recall, but it would have been a practice that I would have done.

He's the only one that you handed the copy to specifically, isn't he?---No, they all access to – they all had the plan.

When you said they all had plans, you haven't yet given evidence – I don't think – that you physically handed a plan to the other officers?---I don't – I had the plan on the table for the members and I was standing there when I knew they had grabbed the plan.

You gave evidence yesterday that you printed out – how many copies?---Five.

Five copies of the plan and you placed them on a particular desk?---Yes.

The desk of?---Constable Wethers.

Constable Wethers. First of all, where's the printer?---Next to Constable Wethers. Sorry – it's next to my office.

So are we able to see, on any of the footage, you holding these items and moving them towards the direction of that particular desk?---No, I don't think you'd be able to see that.

In fact, we can't see anything on the CCTV footage that supports the notion that you printed five copies and placed them on that desk, can we?---No.

If we go to your chronology, which is the first document that you compiled what you did. And you've already accepted that when you were told by Sergeant Wells it was fundamental and important that you have every bit of detail you could, do we find anywhere in the chronology you asserting that you printed five copies and placed it on that desk?---I didn't think that level – that detail was necessary to put in an aide-memoire.

Grapple with the question, please?---Sorry.

The question is this: can we find anywhere in your chronology the notion that you printed five copies and placed it on that desk as you've told this jury today?---I don't know. I haven't seen this document for a long time.

Read it, please?---No, it's not in the chronology.

Thank you. The two statements that you provided, one in December, and one in November, you read those and refreshed your memory before giving evidence in the committal, and again, before giving evidence in this court?---Yes.

We won't find any assertion by you, will we, in either of those statements, that you printed five copies of the arrest plan and placed them on that desk?---I don't think so, no.

That's because you didn't?---I disagree.

If we look at the video footage, put Mr Donaldson to one side, I'll come back to him in a minute, as far as the other IRT members are concerned, you will not see them carrying what appears to be the arrest plan, will you?

MR STRICKLAND: I object.

HIS HONOUR: The objection?

MR STRICKLAND: This – I'm sorry, there's an objection. Your Honour, this witness is being asked – it's obviously okay for her – this witness to be asked what she saw, but she's being asked to comment, or to recall what's on the footage.

MR EDWARDSON: I withdraw that. I'll withdraw, I'll approach it another way.

I said to you that Mr Donaldson had arrived independent of the members of the IRT?---Yes, that's correct.

Mr Donaldson's the dog handler?---Yes he is.

Different role. He's not an Immediate Response Team member?---No.

You had a conversation with him, you've confirmed that?---Yes.

I suggested to you that you provided him with a copy of the plan, or the email of the plan?---Yes.

And I'm going to suggest this to you. He actually went outside of the building with that plan, and when he comes back into the building, he doesn't have it in his hand. Now do you have any recollection of that happening?---No, I don't.

Do you actually now have a specific recollection of having provided him with a copy of that plan?---I had five – five copies printed out, one for each of them, because I wasn't sure whether they would have – whether all the team would have had access to it prior to leaving Alice Springs.

Sergeant Frost, I'll ask you the question again. Please deal with the question, and nothing else. The question I'm asking you is this. Do you now have a specific recollection of physically handing a copy of that plan to Mr Donaldson before the other IRT members arrived?---Yes.

You do have a recollection?---Yes.

Where were you when that happened?---In the muster room.

What did you say to him when you did that?---I don't recall.

You don't recall?---I don't recall exactly what I would have said to him.

Presumably, because he's not an IRT member your focus, in his case, would have been very much on his skill as a dog handler?---Yes.

So what did you say to him about being a dog handler?---I wanted him to – I wanted the arrest to include the dog.

Yes, I understand that. What did you say to him?---I don't recall.

Right. So you don't recall what you said to him about his role as the dog handler?---No.

Do you recall what you might have said to him about, for example, the potential danger of Kumanjayi Walker, given his history?---Again, I don't really recall the exact conversation. There was a lot of general conversation around what had happened.

Yes, I'm talking now about the conversation you had with Mr Donaldson, before the other IRT members arrived. You don't recall?---No.

Officers Kirstenfeldt and Rolfe arrived at the Yuendumu Police Station, I suggest, at approximately 6.30 pm. I don't expect you to remember the exact time?---Okay.

But does that accord generally with your recollection?---Yes.

And Constable Zachary Rolfe met you for the first time when he arrived?---Yes  
I – correct.

And you let Officers Kirstenfeldt and Constable Zachary Rolfe, into the police station, didn't you?---I don't exactly recall, but possibly.

You need to access key card to get in and out don't you?---Yes, you do.

All right. At that time, your partner, Chris Hand, was present?---Yes.

He greets both Kirstenfeldt and Rolfe?---I saw that on footage yesterday, yes.

You saw that on the footage yesterday, and that's obviously what happened, because we can see it?---Yes.

And we've already confirmed that Felix Alefaio – Alefaio, thank you, Alefaio, was also at the station?---Yes.

And he engages with them does he?---I don't recall what he did.

In any event, when they arrived, Chris Hand was at his computer in the station muster room, completing his statement in respect of the axe incident?---Yes, that's right.

And when they arrived, Kirstenfeldt and Rolfe, they jumped, I suggest, straight into a conversation with you, about the reason for them being there?---Yes, possibly.

And you told them, did you not, that you wanted them to arrest Walker in the morning at about 5 am, due to the fact that she was tired and wanted to rest?---No, that's incorrect.

You told them, did you not, that you were going to knock off shortly, "But that if we arrested Walker during the night to call her, and she and the local police would come into the station and take over the custody of Walker"?---I don't recall saying that.

You don't deny saying that?---I don't recall it.

So you don't know one way or the other whether you said it?---No I don't, that's right.

Constable Zachary Rolfe had a conversation with you, at about that time, asking you what intelligence you had regarding Kumanjaya Walker?---I don't recall the conversation.

That would be consistent with the sort of exchange that you'd expect?---Yes.

Can I suggest that you informed Constable Rolfe, that over the past three days, you and other police officers have mainly remained locked inside the police station, and

therefore did not have any additional intelligence on his whereabouts?---No that's incorrect.

You deny saying that?---I've never said that.

Did you tell him, as I suggest you did, that you had attempted to negotiate with Walker's family to hand him into police?---I'm sure I would have told him that.

But you don't have a specific recollection of it?---No.

I suggest that you also said that you informed Walker's family that if he failed to hand himself in, then he would get Alice Springs police officers in to affect the arrest?---Sorry, can you repeat that question please?

Yes. I'm suggesting that this is what you said in this conversation with Zachary Rolfe, in the presence of Kirstenfeldt, you informed – you told him, that you had informed Walker's family, that if he failed to hand himself in, then you would get Alice Springs police officers in to affect the arrest?---I don't recall that conversation.

But that's consistent with what happened?---Yes.

And it wouldn't be surprising if you did tell them about - - - ?---No, it wouldn't be.

- - - the background of your negotiation attempts?---That's correct.

You went on to say, I suggest, that because you were tired, you would prefer that the arrest of Walker occur at 5 am, so you could have a night off?---I don't recall saying that, no.

You deny saying that?---I don't recall saying that.

That's the truth of the matter though isn't it? You did want a night off. You've told us that already?---I certainly did, if I could have it, yes, definitely.

He then asked you where you believed Walker would be at 5 am, in order for them to start creating a plan?---I don't recall that.

It's an obvious question to ask though isn't it?---It is an obvious question, and that's why I've got House 577 and 511 in my plan.

But you said you had no idea where he would be?---I don't recall saying that, I'm not sure.

You did not have any idea where he would be at 5 am, did you?---I – I did not have any idea where he'd be at any time.

That's right. And I mean, it makes absolutely sense, doesn't it, that these members of the IRT team, would want to know as much as they could?---Yes.

And the obvious starting point is where's he likely to be?---Yes.

And you might have had a preference for a 5 am arrest, but that's futile if you don't know where he's going to be at 5 am?---That's correct.

And so it makes sense, doesn't it, that they would have asked you, well where's he going to be at 5 am, and you say, look I've got no idea?---I'm sure they did ask me.

And you would have said "I've got no idea"?---That's correct.

Thank you. Zachary Rolfe then told you, I suggest, in order to make a plan, they needed to gather intelligence, and since they had no intelligence, he and the other IRT team members would go and introduce themselves to the community. Get the lay of the land, and attempt to gather intelligence before they could start to make any kind of plan?---I don't recall, but yes.

Thank you. He went on to say "The way IRT - or the Immediate Response Team works is that we arrive at the community and go and introduce ourselves. We tell the community why we are there and concurrently attempt to gain intel and community assistance for our purpose"?---I don't recall him saying that.

He suggested to you, I suggest, that this approach should be adopted at Yuendumu because there was no intel and you agreed?---The - we had intel again, the houses that he is likely to frequent. That's as much intel as we had.

Of course, as you told us, you had no idea where he would be at any point in time?---No one would have.

And so it makes sense, doesn't it, that the IRT members could be saying to you - in this case Zachary Rolfe - "We need to get intelligence, we need to find out where he is and that's how we can frame what we do next once we know that"?---Yes.

So it's highly likely that that type of conversation would and most likely did occur?---Most likely.

Thank you. I am suggesting to you that at that point you provided a map of Yuendumu?---Yes.

And told them about approximately 10 houses that Walker and his friends were linked to within the community?---I don't think there were 10 houses.

Remember I took you back to your chronology and I said, "plural locations" as opposed to just 511?---Yes.

If you think about it - and it's not a criticism. Do you think it might be that your memory is failing you now and there may have been more houses that were of interest?---No, House 577 and House 511 were always the primary - - -

Of course?--- - - - locations of interest. He has - - -

We've found that. I am talking about other houses apart from those two?---I don't recall.

All right. Constable Zachary Rolfe took a photo of the map and a piece of paper with a number of potential houses of interest on that paper?---I don't know.

It was not a piece of paper that was handed to him but it was one that was pointed out by you?---I don't know.

Indeed, it's that part of the plan that you directed his attention to - the houses of interest?---Yes.

You agree?---Sorry, can you repeat that question?

Have a look at your plan - I will come back to it in a minute. Can you have a look at tab 16, item - sorry, exhibit 1, tab 16, page 5 and 6. Do you have page 5, which has got "photographic index"?---Yes, I do.

If you look at one - the first one is from a distance and then there is a close-up on page 6?---Yes.

I want you to assume that they are photograph images that have been taken from Constable Zachary Rolfe's mobile phone?---Okay.

And I want you to - now, if you look at those, if you look particularly at page 6, you can see, can't you, that that is a portion of the arrest plan that you mentioned earlier? Identifying locations of interest?---Yes, yes, yes it is, yes.

Thank you. I suggest to you that he - sorry, that you told him some extra house numbers which he wrote down?---There were some extra house numbers there, yes.

Not on the plan but you told him about extra house numbers which he wrote down? ---I - I don't know if he wrote them down.

But you did tell him about extra house numbers?---I don't recall telling him exactly about house numbers other than the fact that there were extra house numbers on that plan.

Could there have been extra house numbers that you conveyed to him but you now can't recall?---There may have been, I can't recall.

Thank you. He asked you if any local police could come and assist the IRT because they only had an old mug shot and they didn't know Kumanjaya Walker's family?---I don't know - Constable Alefaio was always going to be assisting in the arrest.



You said, I suggest in response to that request that you and Chris Hand would not be assisting due to a conflict of interest?---I would have said that, yes.

Thank you. You also said that Alefaio would not come out with the IRT members? ---He wasn't going to come out while they were providing high visibility policing, no.

All right. I don't need to go to the video footage I don't think but I will just for the record, put it in - read into the transcript, your Honour. At 6:53:03 I suggest - which is about 53 minutes into the video CCTV footage, I suggest that you can see on the Yuendumu Police Station at the front counter - sorry - that you showing the members of the IRT a map where House 577 was?---I don't know exactly what I was showing at that time, no.

But you did - or do you have a recollection - you may not - at that time, do you have a recollection of producing a map and identifying House 577?---Yes.

And you have also identified by reference to that map, I suggest, men's business area?---I do recall that, yes, I do recall that.

Thank you. And you said that was a likely area where Kumanjayi Walker would run if he saw the police?---Yes, I do recall that, yes.

Thank you. At 6:59:32, for the record, we saw yesterday, you hand Constable Zachary Rolfe the on-call mobile phone?---Yes.

And you said that you were going to knock off shortly?---Yes.

Constable Rolfe also asked you before they were despatched if you had any radios that would be in the station?---Yes.

He was - and you said in response to that request, "They don't really take radios out with them when they work" but you showed - but you did show them where the radios were stored?---I recall giving them radios and I had a radio on my desk as well but we don't ordinarily use them out there, no.

Thank you. You also said, did you not, in the course of this briefing, that if they come across Kumanjayi Walker during their intelligence gathering "obviously arrest him"?---Yes, and what I meant by that was if he is walking along the street and they see him - arrest him.

Well, you didn't say "If he's walking along the street - arrest him" did you?---That's what I meant by it.

That's not what you said, is it?---I said, "By all means if you come across him - arrest him."

You said, "Obviously arrest him" - they are the words you used?---Yes.

Thank you. Constable Zachary Rolfe asked you specifically, did he not, if Alefaio could come out and assist them because of his previous knowledge and dealings with Walker?---No, I don't recall that.

Could that have happened?---No, I don't think so.

Why wouldn't it make sense? I mean they're going out on this intelligence gathering exercise, they're leaving at 7:05, they're going into the community, the first step is to try and identify where Kumanjayi Walker is. Why wouldn't Felix have gone with them?---I had already told them that Felix was going to be available in the station at 5 o'clock in the morning ready for the arrest.

Why wasn't he available there and then?---Because they weren't meant to be making an arrest at that time.

All right.

Excuse me, your Honour. That completes the cross-examination, thank you, your Honour.

HIS HONOUR: Re-examination?

MR STRICKLAND: Yes, thank you.

REXN BY MR STRICKLAND:

MR STRICKLAND: Have you got the chronology that you've been asked many questions about?---Yes, I do.

MFI H?---Yes.

You've referred a number of times to it being an aide-memoire. What do you mean by that term?---Just – it's just a written – a written document that I can refer to when I produce my statement. It was rough.

You were asked some questions about exhibit 13.

Could the witness please have exhibit 13?

THE WITNESS: Thank you. Sorry.

MR STRICKLAND: That's an email from Wayne Newell to you, dated 18 November 2020. There's a reference there to Kieran Wells. Who do you understand Kieran Wells to be?---Kieran Wells was an investigator.

In relation to this matter; is that correct?---Yes.

And it says – he mentions he spoke to you on the phone on 13 November. Is that

13 November 2019 or '20?---That would be '19 – '20. Sorry, I don't recall – I don't know.

Well, did you speak to Kieran Wells a couple of days after the shooting incident?---Yes, sorry. 2019.

So that that reference is to 13 November 2019?---Yes.

And is the case that you advised Kieran Wells you would be preparing a chronology on that date?---Yes, I think I told him I – I don't recall exactly what I told him, but I said I'm getting my – my recollections together.

Okay. And if Kieran Wells had asked you for a copy of that chronology, after you had done it, would you have given it to him?---Absolutely, yes.

Now, you were asked some questions about what was – you were asked at the committal by his Honour and my learned friend Mr Edwardson. Do you recall that?----Yes.

Can you have a look at MFI G, please?---Thanks.

And you were asked to go to page 30. You were asked – Mr Edwardson reminded you of this question at the committal: "In relation to this matter, you made no notes?" And you said: "No notes, that's correct"?---Yes.

But I will read you the next question that wasn't read out: "So when you conducted this briefing, are we to understand that no notes existed of briefing by you?" Your answer was: "I made no notes in my notebook about this. The briefing was based on what I had known in relation to the Wednesday night's incident and the events that have happened during the day on Sunday"?---Yes.

Sorry, on Saturday. I beg your pardon. When Mr Edwardson asked you: "In relation to this matter, you made no notes?" Why did you answer, "No notes, that's correct"?---Because I made no police notes in my – in my police notebook.

Did you intend to tell – not tell the truth in that answer?---Not at all.

You asked a number of questions about the immense pressure you were under and the Yuendumu Police are under on 9 November?---Yes.

You were asked questions about the very volatile atmosphere in the township?---Yes.

In your experience of policing and in the communities, when there were large funerals in town, was that a factor in it being volatile?---Yes.

Why is that?---Sometimes at the funerals, there can be a lot of volatility. Not on every occasion, though.

Okay. You were asked some questions about your discussions with Lottie and Eddie Robertson on 7 November. That's after – the day after the axe incident. And you were asked about the arrangement you made with Lottie and Eddie, giving Kumanjayi a further opportunity to turn himself in?---Yes.

Correct?---Yes.

And you've given evidence that what you've said in your chronology was you did not believe he would turn himself in?---That's correct.

Why did you then give him a second chance to turn himself in on 7 November?---I wanted to use negotiation as – in preference of any other tactical option and give him the chance, while I could also prepare and utilise resources that I had in the community.

What kind of resources?---Local resources, such as Constable Alefaio.

And why did you want to use Constable Alefaio?---Constable Alefaio had been in the community. He knew the community very, very well. And he knew Kumanjayi Walker very well.

Now, you had been asked about the operational plan. That's the 4.59 pm email. And you were asked about that aspect of the plan which said that the IRT were to commence at 11 pm?---Yes.

You know that the IRT left the station at 7.05, 7.06 pm?---Yes.

Did you tell them to do that?---They said that they were happy to not have a sleep and go and provide high-visibility policing in the community and I was happy with that.

Thank you. Now finally, you were asked some questions about printing out the operation order on five different times. Sorry, I'll start again. You were asked some questions about your evidence that you had printed out the operation order five times?---Yes.

And you were asked whether you had given that information in either of your interviews?---Yes.

Can you please have a look at MFI F?---Thank you.

And if you go to page 6?---Yes.

At about halfway down the page, the officer Paul – you were interviewed by Paul Morrissey; is that right?---Yes.

And you – Mr Morrissey asked you, “And what happened when the other two arrived?” Do you see that?---Yes.

That’s the – and you understood that to mean the other two IRT officers?---Yes.

And you said, “When the other two arrived, we had another conversation. I gave a briefing. A minimal – not minimal briefing. It wasn’t a formal briefing, I suppose it was: ‘This is the situation. This is what we are – what I’m expecting you guys to do.’ This is map, these are the locations of interest. And I reiterated the fact I think I gave them a copy of the email, each of which I laid out what I expected or what I wanted, and that was to provide high-visibility policing in the community overnight. At 5.30 am in the morning I will then – Constable Alefaio will start duty and then he will arrest” – sorry – “then he will assist with the arrest because Felix had known Arnold, so I wanted that local knowledge to be with the team when they did the arrest.” Is that what you – is that what you said?---Yeah, yes.

And when you said, “I gave them a copy of the email,” and then- - -

MR EDWARDSON: “I may have given them a copy of the email.”

MR STRICKLAND: I’m sorry. I’ll read it precisely. When you said, “I think I gave them a copy of the email,” which email were you referring to?---The email with the operations order.

And just to be sure, that’s – do you have exhibit 1, tab 14 in front of you?---Yes.

Is that the email you’re referring to?---Yes.

Thank you.

They’re my questions, your Honour.

HIS HONOUR: Thank you. You may now go?---Thank you, your Honour.

WITNESS WITHDREW

MS CALLAN: Your Honour, I call Superintendent Jody Nobbs.

HIS HONOUR: Yes.

JODY NOBBS,  
affirmed:

XN BY MS CALLAN:

MS CALLAN: Superintendent, can you tell the jury your name, rank and current station?---Superintendent Jody Nobbs, Superintendent Northern Division, presently stationed at Alice Springs Police Station.

As at November 2019, what was your rank and position?---Superintendent, Superintendent of Southern Desert Division, also situated within Alice Springs Police Station.

As a Superintendent of the Southern Desert Division, what did that role entail, in terms of your command responsibilities?---So Superintendent Southern Division, essentially my portfolio had operational responsibility for the 11 police stations, the remote police stations that effectively are operated within the east, west and south borders, up to about 350 Ks north of Alice Springs. So 11 police stations, remote police stations, including Yuendumu Police Station.

And when you're talking – when you mention borders, is that the borders with Western Australia and Queensland?---Western Australia, Queensland, and South Australia.

Encompassing the command responsibilities you have in respect of, as you say, there's 11 remote police stations. Does it include the Alice Springs Police Station itself?---No. So my portfolio responsibility was purely police operations within the remote policing district.

But in terms of your – where you were generally located, for the purposes of your day to day work with that position, you were located at the Alice Springs Police Station?---Correct. Physically situated within Alice Springs Police Station.

Could the witness be shown exhibit 1, tab 3?

Superintendent, do you understand this document has been prepared for the purpose of these proceedings?---Yes, I do.

And do you see, amongst other things on this document, on the left-hand side, in blue – in a blue box, your name appears, and above that, Superintendent Southern Desert Division?---Correct.

Take a moment to consider the contents of the document, in terms of confirming its relevant accuracy. Do you see beneath your position, as the Superintendent of the Southern Desert Division, there's reference to a senior sergeant, and then below that, there are the names of three stations?---Correct.

Is it the case – they jury's just heard, the full picture in terms of the stations that fall under your command responsibility total 11?---Correct.

And one of them is Yuendumu?---Correct.

And as at November 2019, Sergeant Julie Frost was the officer-in-charge of Yuendumu?---Correct.

And her holding that position as officer-in-charge, did she have occasion to deal with you on a regular basis?---Correct.

And was that in relation to staffing issues at Yuendumu Station?---One of many issues, but certainly yes.

You say one of many issues. Did you have regular, perhaps even daily communication with Sergeant Frost about the challenges or events that occurred at Yuendumu Station?---As is the case with all my stations. I had, you know, I won't say daily, but certainly very frequent interactions with all my officers-in-charge of police stations, around a manner of – all manner of things. Governance, resourcing, operations, et cetera.

And would it be fair to say, that was to provide – for you to take command responsibilities, so you knew what was going on at those stations?---Correct.

And to the extent, it was required under police procedure, for you to approve decisions that were contemplated by officers-in-charge of those stations?---Certainly, yes.

And more generally, to provide a sense of support to those officers-in-charge, that is, for them to be able to relay to you the challenges they were facing, and together, for you to discuss the way of addressing those challenges?---Certainly, my intent – or my position was about providing a strategic and governance oversight of the police stations, to help shape the operational landscape.

Was the Yuendumu Community familiar to you, as at November 2019?---Yes, I'd been in the Southern Desert role for I think maybe two and a half years leading up to November of 19. And quite frequently would attend Yuendumu Community, in person.

Did you have particular reason to attend Yuendumu on a fortnightly basis, from around December 2018 to March 2019, because you established something called the Community Safety Committee?---Yes, correct.

And did you chair meetings of that committee at Yuendumu, on a fortnightly basis, during those – that period of time?---Correct.

Now the closest police station to Yuendumu is Papunya, about a 100 kilometres away, is that right?---Yes, 100 kilometres to the south – south east of Yuendumu.

And otherwise, in terms of the position of surrounding police stations, the next closest at Alice Springs?---Potentially Ti Tree Police Station.

Prior to November 2019, were you aware, or did you know of Kumanjayi Walker?---Yes.

On 30 October 2019, did you receive information Kumanjaya Walker had absconded from CAAAPU, an alcohol rehabilitation facility, in breach of a suspended sentence?---Yes.

On 6 November 2019, did you receive a phone call from Sergeant Julie Frost in relation to an incident at Yuendumu that day, involving Kumanjaya Walker?---Yes, correct, about 9.30 pm that evening.

What did she tell you?---She told me a number of things. Specifically, that – so just to go back a step. One of the roles within the Yuendumu portfolio was also the chair of the Family Safety Framework.

Yes?---And that I guess was predominantly the reason that I had ongoing involvement, indirectly, with Kumanjaya Walker.

So in your role as chair of the Family Safety Framework, you had reason to understand, first of all, who he was, and that he was in a – in a relationship with Rakeisha Robertson?---Correct.

And was the particular attention of the Family Safety Framework in respect of that relationship?---Correct. So the Family Safety Framework is effectively an integrated interagency framework, looking at complex domestic violence issues through an end to end type process. So engagement all the way through to enforcement Victim engagement, et cetera. So just through that forum, I had extensive knowledge of Kumanjaya Walker, and Rakeisha.

So when you heard on 30 October 2019 that Kumanjaya had left the alcohol rehabilitation facility, amongst other things, was it on your mind, for instance, that it might be appropriate for Rakeisha Robertson to be told about that fact?---Correct. So the notification to me was through the Family Safety Framework reporting processes.

Yes?---And it was in that we collectively identified the importance of reassessing the safety of Rakeisha, assessing the currency of any sort of safety plans in place, forward engagement and then obviously assessing from the enforcement perspective, the whereabouts of Kumanjaya Walker.

I come back to the evening of 6 November 2019 when Sergeant Frost called you and told you and you said a number of things and you started to say "specifically" and then diverted, may I just ask you to focus on what she told you that night?---Okay. Specifically a number of things. One, that Yuendumu police, specifically Senior Constable Smith and Senior Constable Hand had cause to attend an address known to be associated with Kumanjaya Walker. On attending they identified that Rakeisha was present, in addition as was Lottie and Eddie Robertson, grandparents for Kumanjaya Walker. Kumanjaya Walker was also in attendance. They - as I am advised - made an attempt to engage and arrest Kumanjaya Walker. In doing so Rakeisha hindered police in their attempts. We didn't get into the specifics of what that looked like but in the ensuing situation Kumanjaya Walker produced a machete



or an axe and threatened the police officers before absconding from the house and throwing rocks at police as they pursued him. She further advised that the police officers concerned - there was no injuries sustained - had done a general welfare conversation with Sergeant Frost in respect to the members and she was comfortable that they were shaken but in relatively good spirits.

Yes?---She further advised that both Eddie - specifically Eddie was somewhat embarrassed and apologised for the conduct of his grandson and he gave an undertaking that he would contact police should he return back to the residential address. That was broadly the matters discussed.

Had you met or dealt with Eddie Robertson before?---A number of times within that Community Safety Forum, he was a respected elder, a member of NIAA, so someone that we relied on to assist in, you know, local decision-making and broad community engagement.

What is NIAA?---National Indigenous - sorry - I'm having a blank at the moment.

That's all right?---It's a Commonwealth Government agency - advisory agency.

Okay. Is it your understanding that Eddie Robertson was a prime minister and cabinet representative in that community?---Correct, and that's now referred to as NIAA.

That is a recognised representative of that Yuendumu community?---Correct.

You spoke about the role that he played in police engagement with the community? Could you explain to the jury the importance of that from a policing perspective? ---Can I - sorry?

Could you explain - - ?---Yes, it's critical. Police operating within remote indigenous communities in isolation, it's a challenging job and when we've got the broad support of the community, you know, a cohesion and integration with the community in terms of a collective intent, it obviously makes our job so much easier. The local community members and particularly the elder group and particularly those that operate within government agencies have a better appreciation as to what the needs are on the ground and the complexities within remote indigenous communities so tapping into that valuable resource is imperative from a policing perspective, not only Yuendumu but across the Territory.

Is an example of that situation of achieving the broad support of the community but also fostering it, seeking to discuss with community representatives an individual handing themselves in to police?---Correct.

Did you know or had you dealt before with Eddie Robertson's wife, Lottie Robertson? ---I met Lottie a number of times, I don't think in any official context.

Did you speak to Sergeant Frost either that evening, on 6 November or the next day on 7 November about arresting Kumanjayi Walker?---So I've outlined the conversation of 9:30 pm on the 6th there was no further conversations that night. I then had a subsequent conversation with Sergeant Frost at some stage - I think it was the morning of the Thursday the 7th.

Yes?---We discussed a number of things including, but not limited to, the welfare of the members involved in the incident the night before, then indicating that they were in relatively reasonable spirits. We discussed the whereabouts and status of Rakeisha, the whereabouts of Rakeisha were still unknown to police at this stage. We discussed the whereabouts of Kumanjayi Walker. They were also unknown to us at this stage. We then discussed what does an operation or an action look like to arrest Kumanjayi Walker not only, for now the outstanding CAAAPU warrant, but also the fresh offending arising from the night before. In this conversation Sergeant Frost detailed that she had been in regular engagement with Eddie Robertson and the nature of that engagement was around Eddie Robertson's assertions that Kumanjayi Walker had absconded from Alice Springs to attend a funeral on Friday - a family funeral. Eddie Robertson's assertions that he would have Kumanjayi Walker surrender to police after the funeral, on the Friday and then I guess myself and Sergeant Frost discussed the pros and cons of that, all the things considered and deemed - and which I approved - that police wouldn't engage or actively attempt to arrest Kumanjayi Walker until after the funeral, giving them opportunity to surrender in accordance with the undertaking provided.

Did you and Sergeant Frost discuss the notion of police seeking to arrest Kumanjayi Walker at the funeral?---We did discuss that as an option insofar as knowing where he will be at a particular point in time and decided that that wasn't an appropriate course of actions, all things considered.

At the point in time that you had that conversation with Sergeant Frost, had you watched the body-worn video of what is described as "the axe incident" that had occurred on 6 November at Yuendumu?---No, and I still haven't 'til today.

Based on the description you were given of that event by Sergeant Frost did you form a view as to the level of risk Kumanjayi Walker posed in terms of affecting an arrest?---Certainly. That descriptor - or description from Sergeant Frost coupled with my knowledge that I had of Kumanjayi Walker in terms of his antecedents and extensive criminal history.

You say antecedents, do you mean his criminal background?---Criminal history, correct.

And what police knew about him?---Correct.

And what was your assessment, if you could put it in words for the jury as to the risk that he might pose in terms of police undertaking an arrest?---Obviously a high-risk from our perspective and the concern that we had that a risk that myself and

Sergeant Frost - certainly I - concluded would be mitigated if he did surrender in accordance with the undertaking from Eddie Robertson.

Were you told or did you - either by Sergeant Frost or by any other source of information when the funeral was to occur?---Just at some stage Friday afternoon. I may have been told specifics but I can't recall.

To your knowledge did the funeral occur on the Friday afternoon?---No, it didn't.

Did you – were you told about a change of the – a postponement of the funeral?---Correct. So I had a subsequent conversation with Sergeant Frost again the following day, being the Friday.

That is 8 November?---Correct. This conversation was, effectively, similar to the conversation the day before. Sergeant Frost indicated that the funeral had been postponed. She may have indicated the reasoning why, I can't recall. Certainly, indicated that it had been postponed to the following day, being the Saturday afternoon. She indicated that the situation, as it relates to Kumanjaya Walker, had been unchanged. He's still outstanding. Similarly, the situation as it relates to Rakeisha, still unchanged. She was still outstanding. And that the engagement with Eddie was ongoing in relation to a surrender. But at this stage, that had not occurred. But I accepted that that was obvious, given that the funeral hadn't occurred.

Did you discuss with Sergeant Frost the implications of that postponement of the funeral in terms of the approach police would take to the arrest of Kumanjaya Walker?---No. I may have, but nothing remarkable from my perspective. It was a replication of the discussion the day before.

If you've still got exhibit 1 there – that's that folder – could you turn to tab 11?---Yes, thank you.

Superintendent, you see that's an email from Julie Frost, 9 November 2019, 5.46 am. And you're listed as a CC or you're – that is, you're copied on this email?---Correct.

Were you on duty on 9 November 2019?---No, rostered off duty.

Did you see this email that morning of Saturday 9 November?---Yeah, correct. I can't recall what time I woke up, but as is ordinarily the case, I checked my work emails and found that email at about 8.30, I think, that morning.

The first paragraph of Sergeant Frost's email might be described as giving the JESCC – so that's the communication- - -?---Correct. Joint Emergency Service Communication Centre.

- - -centre an appreciation for the, as it were, the current position at the Yuendumu Station in terms of the policing who were – police members who were available and those who were going on leave – on off-duty?---Correct.

In short, this alerted you to staffing limitations at Yuendumu at that point in time on Saturday 9 November?---Correct. Based on fatigue arising from their involvement in a series of unrelated responses throughout the preceding 24 hours coupled, I guess – which I knew at the time – to be a very long week of incidences with Yuelamu and Nyirripi, which I knew at the time to have compound – would have likely to have compounded their fatigue levels.

The second – beginning of the second paragraph, Sergeant Frost indicates having said this, “I have two members, Mark Palms and Alex Alefaio, who will be travelling from Nyirripi this morning to help out.” That gave you an appreciation for the arrangement she had made as the officer-in-charge to mitigate the staffing difficulties?---Correct. There was a redundancy framework and obviously, they were going to go there in any event to – given the likely funeral.

Why was that?---Just additional police resources within Yuendumu.

Is the event of a funeral, a number of people from the immediate and extended community gathering in a place for a funeral, something that causes police to plan for in terms of extra numbers?---Correct.

Why is that?---For a number of reasons. Obviously, there’s additional people within a particular community burdening infrastructure and, you know, limited residential addresses. We often find that that could be precursor to, you know, increased domestic violence. Emotions are high. So, you know, we – as best we can – try to plan to provide surge capability into locations to make sure that, you know, we are sufficiently placed to respond to any issues that may or may not occur.

This email was sent on 9 November at 5.46 am. Did you have a telephone conversation with Sergeant Frost during that day on 9 November 2019?---Yes, I did. Obviously, I saw this at 8.30. I didn’t intend to call Sergeant Frost. It was my intention to call her at 2 pm. She indicated they were going to recall themselves to duty at that time. However, I received a call from Sergeant Frost at about 11.35 am. And in that telephone call, she advised me of a number of things.

You said, “Obviously, I saw this email at 8.30.” Is that your – terms of your usual practice? You didn’t see it at 5.46 am when it was sent?---No. When I woke up – I can’t exactly say what time that was but, as a matter of course, I checked my emails and saw that there but didn’t think too much of it. It was my intention to call her when she come back on duty at 2 o’clock. I didn’t want to unnecessarily wake them up and further compound any fatigue issues.

Okay. But you just explained before 2 pm, she called you?---Correct. At about 11.35.

And what did you talk about in that call with Sergeant Frost?---Okay. Sergeant Frost advised me of a number of things and most specifically – so the situation in respect

to Kumanjayi Walker was – remained the same. Equally, as it relates to Rakeisha was also the same.

That is, he remained outstanding in the community?---Correct, yes. Well, outstanding. I'm not sure if it was the community, but certainly outstanding and presumably within the community. Sergeant Frost indicated that she had received a call from clinic – the clinic management within Yuelamu. And they indicated to Sergeant Frost their intention to evacuate – sorry, their intention to evacuate from the community that day, under the basis of perceived safety risks. They asserted that they were the victim of series of unreported property crime that preceding night. Sergeant Frost suspected that Kumanjayi Walker may have been a part of that although, had no definitive evidence to support that assertion. Sergeant Frost expressed that that was going to be of concern to police insofar as she reasonably believed that – sorry, she believed that that would result in a burden on police resourcing for the period of time that medical staff were absent, insofar as we would receive the calls to respond to the community for not only police-related matters, but also medical-related matters. I had a tendency to agree with her assessment of that. She indicated that the funeral was still occurring, as far as she was concerned, that day. And she requested some additional resources be sent out from Alice Springs to not only assist with the funeral, but to predominately provide additional capability for the likely overflow of police calls through the next period of time that the medical staff were away.

Did she nominate any particular capability from Alice Springs Police in her request to you?---I don't think she did. But once I hung up, I had some consideration myself as to the suitability of any sort of deployment. I considered a number of things in that consideration.

Was it your assessment that the appropriate source of police for the deployment would be from the IRT, or the Immediate Response Team?---Correct. Subject to the approval granted required for the deployment of an IRT.

Okay. I'll come to the process that you followed in terms of getting that command approval for such a deployment of the IRT. What was it in your assessment that caused you to consider that the IRT would be the source of that additional capability?---There was a lot of moving parts occurring at this time. So albeit unreported, I had a potential series of property crime occurring within Yuendumu. I had - - -

Can I just pause you there. You say it "Albeit unreported", is that because there did yet – or it had not been reported to police until the clinic staff indicated they were leaving and this was why?---Correct.

All right, so you had that. You now had been appraised of this potential series of instances of property crime?---Correct.

And next?---So the property crime, the impending funeral that day. The whereabouts of Rakeisha being outstanding, and some concerns lingering in relation

to her welfare. Equally, Kumanjayi Walker still being outstanding, albeit, still somewhat optimistic that he would surrender as – as indicated. But likely, or possible, that that wouldn't occur, and then it would result in – in an arrest. The need to reassure the community, particularly around the property crime issues. So I guess it was - - -

Okay, I'll pause you there. When you say reassure the community around the property crime issues, is a notion of high visibility policing relevant to that?---Correct. That was – so my intention I guess, was two-fold in terms of a deployment of resources. So it was that reassurance element, whereby I wanted to send police out at a general support capacity to assist the local police. To reassure the community. High visibility patrolling throughout the course of the night. Lights on. All the things that are inherent within giving reassurance and comfort to the community. I wanted to convey that to the medical staff as well, to hopefully appeal to them to stay – stay in community.

High visibility policing, also have, or have the aim of deterring further instances of such criminal conduct?---Correct.

In your – the various matters that you had in your mind, you said there's a lot of moving parts, did that include the safety of police, in terms of the most effective way of arresting Kumanjayi Walker?---Correct.

And your view that the IRT would be an appropriate source of capability, was there some – anything about the IRT that caused you to consider that would be the appropriate unit?---Yes certainly, as opposed to, and no disrespect, but a general policing, pulling resources from wherever, and putting them together and sending them out. My intention was to send out highly skilled, highly trained, highly disciplined, highly competent capability from – from Alice Springs, that work together frequently. Recognising that not only did I have the mandate around high visibility deterrent activities, but also likely prospect, whether it was by surrender, or by an operational action, that there would be likely an arrest, post the funeral of Kumanjayi – Kumanjayi Walker. And it wasn't just the IRT within the IRT additional elements of drone and dog capability. So a dog asset. So a dog and a dog handler, was my intention as a more fulsome cadre capability.

So the cadre capability, your terms, were IRT officers, and the dog handler. What was it about a dog handler, or someone from the police dog unit that you considered was warranted?---It's just a specialist additional capability. Any – any specialist support function or capability I have is obviously better. I knew that Kumanjayi Walker was a person known to run. I know that not only is the dog a good deterrent, but it's also good in the case of a fleeing offender.

Is the inclusion of a dog, with the dog handler, a factor which informs the use of force by police, if and – if an individual is trying to escape?---Sorry, I don't understand the question.

In the assessment that occurs by – by a police officer in – in relation to the use of force, is the presence of a dog and a dog handler, a relevant consideration?---Certainly it's a relevant consideration in terms of the application of force. It is a – it's no different than any other accoutrement that a police officer has at its disposal at any given time. The mere existence of a dog and dog handler doesn't automatically mean force, but certainly it's like any other accoutrement, it – it could result in force being applied.

In your conversation with Sergeant Frost, had you discussed – did you discuss the deployment of a police dog and dog handler?---I don't think I did in the 10.30 conversation. It was after I hung up the phone I gave some personal considerations to the extent of capability required. I then had a conversation with the Senior Sergeant Watch Commander within Alice Springs - - -

Yes?---To attempt to assess logistically, practically, whether we could recall a IRT and dog capability for deployment into Yuendumu.

I'll come in a moment to your conversation with Watch Commander Senior Sergeant Furniss, can I provide you a copy of a document entitled "Standard Operating Procedures Alice Springs Immediate Response Team." Superintendent do you recognise that as a document by its title being the Standard Operating Procedures of the Alice Springs Immediate Response Team. If you turn over to page two, there's a date 30 June 2017?---Correct.

Your Honour, I tender that document, and I have a working copy for your Honour. And we'll have copies for the jury.

HIS HONOUR: That'll be exhibit 14.

EXHIBIT 14: Standard operating procedures Alice Springs Immediate Response Team.

MS CALLAN: Superintendent, you see on page two of that document the Standard Operating Procedures for the IRT states "These instructions are issued under the authority of the Commander, Southern Command." As at June 2017, was that your position? Or is that a different role?---No that's my immediately direct line supervisor or manager. The Commander of the Southern Command.

Commander Currie?---Correct.

As at June 2017 were you aware that, or around that time, that the Immediate Response Team had been created and that a set of standard operating procedures had been reduced to writing?---I was stationed in Darwin in June of 2017, so no.

But subsequently, when you took up your responsibilities as the Superintendent Southern Desert Division, stationed at Alice Springs, did you become aware of the existence of the Immediate Response Team?---Correct.

Were you told about the purpose of that team?---Correct.

Did you have access to this document, the Standard Operating Procedures?---Yes I was aware of the Standard Operating Procedures. I had reviewed it and utilised the IRT in the past.

To your understanding, was this Standard Operating Procedures document in effect, as at November 2019?---Yes.

See at page 4 it commences'

"The Alice Springs Immediate Response Team has been established in recognition of the need for Alice Springs and Southern Command to have a capability that is able to respond to critical incidents when accepted tactics of cordon, contain an negotiate have failed or been unsuccessful and the Territory Response Group are not able to respond within a suitable time frame."

Do you see that ?---Yes.

What is a Territory Response Group?---That's the tactical group that operate throughout the Territory but are situated within Darwin.

And the responsibility and skills of the Territory Response Group, what are they? ---A multitude of high-end tactical skill set - I'm not sure how far into the methodologies I will go but certainly tactical capability, the sniper capability, high end cordons, siege type situation, active shooter - things such as that.

So, again, in broad terms, is it the case that within the Northern Territory Police Force if and when an incident develops which is assessed to be of a particular kind of high-risk - that is to police and/or members of the public, the Territory Response Group is there to respond with the benefit of their specific training and skill set? ---Correct.

And you mentioned, for instance, as an example, a siege situation?---Correct.

Now, what I read to you from this document indicates that the IRT at Alice Springs had been established in short because there might be a time sensitive situation and it would take too long for the TRG to get there from Darwin, so there was a role for officers with additional training to be able to respond to situations?---Correct. Not that in isolation but certainly as a middle position too between a general response and some of those high-end tactical responses that we talked about, so a middle skill set as well.

In this document there is reference - about the middle of page 4, to a high-risk deployment - indicates any high-risk deployment of the IRT requires Assistant Commissioner approval. Do you see that?---Yes, I do.



And over the page, at page 5, par 1 - or .1.12, there's a heading, "General Support Operation"?---Yes.

And beneath that, "IRT are available to assist other units" and then there is a list of other support that the IRT might provide?---Yes.

Is there a distinction when IRT officers were deployed between whether it was a high-risk deployment and whether it was a general support deployment?---Well, it's subjective but certainly the distinction, in this case, is that the general support determination that I consider to be appropriate at the time was relevant as it outlines support to other units for assistance in the arrest of violent offenders; arrest of persons evading police who may escape lawful custody; and things such as that, as opposed to the high-risk detailed on page 3 which is around sieges where hostages have been taken, active shooters, barricaded persons and things such as that.

Is this the position, you described Kumanjayi Walker as posing a high-risk as an arrest target?---Yes.

Did that make this deployment a high-risk deployment as this document defines these concepts?---Not in my mind, it's not reaching the threshold of high-risk in this case.

Where something has been designated as a high-risk deployment does it require specific and more senior approval within the Northern Territory Police Force structure?---Correct. So Assistant Commissioner approval and consultation with the TRG OIC, officer-in-charge.

On page 4, still under that heading that appears at 1.1, there is a reference, for instance, to an immediate emergency action capability IEA?---Yes.

Do you see that there?---Yes.

Is that a particular concept known - or in policing, particularly tactical policing, for the planning that occurs in high-risk situations such as a siege?---Correct.

And for the purpose of a high-risk deployment is it the case that on or more types of plans are required in certain form addressing certain criteria for approval by command?---For a TRG, IA or - - -

A high-risk deployment?---Sorry?

If there is a high-risk deployment?---Yes.

By TRG?---Yes.

Does that include one or more plans being formulated in a particular format and approved by command?---Yes, certainly, so generous support application or high-

risk support application outlining the general situation, the request for the assistance - what parameters the assistance is required, et cetera.

HIS HONOUR: Madam Crown, is it correct as appears to be the case, that you will not finish your examination-in-chief by 1:15?

MS CALLAN: Correct.

HIS HONOUR: All right, then we will take the break now.

MS CALLAN: Yes.

HIS HONOUR: Members of the jury, would you retire now please and we will reassemble on Monday for a 9:30 start.

JURY OUT

HIS HONOUR: Yes, all right, then - - -

MS CALLAN: Your Honour, before you rise, I wonder if it is a convenient time to do those few transcript corrections?

HIS HONOUR: Now is not convenient I must say.

MS CALLAN: As your Honour pleases.

HIS HONOUR: We can do it on Monday.

MS CALLAN: Yes, your Honour.

HIS HONOUR: All right, thank you.

Then I will adjourn.

WITNESS WITHDREW

ADJOURNED 1.08 PM TO MONDAY 14 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 14 FEBRUARY 2022 AT 9:33 AM

(Continued from 11/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Ms Callan.

MS CALLAN SC: Your Honour, at the end of the day yesterday, we foreshadowed some proposed transcript corrections for the transcript from last week.

HIS HONOUR: Yes.

MS CALLAN: Can I hand up a schedule. I've provided a copy to counsel for the accused. If there's any dispute, we could deal with it, otherwise I'll let your Honour consider that in – as convenient.

HIS HONOUR: All right, thank you.

Have you had an opportunity to consider those yet, Mr Edwardson?

MR EDWARDSON QC: I did, your Honour, we don't take issue with any of it – we don't take issue with any of it.

HIS HONOUR: All right, thank you.

Then I'll direct that those changes be made.

MS CALLAN: Yes. And your Honour, we've provided to your Honour's Associate a copy of the proposed trial schedule of witnesses for week two and week three.

HIS HONOUR: Yes.

MS CALLAN: On Wednesday, 16 February, it's proposed to call a number of witnesses from the Yuendumu Community. The witness at number four on that list, Ethan Robertson, I'm instructed is currently located at DCC, and so I request your Honour make a call-up order for him to attend court in person on that day.

HIS HONOUR: Yes, I'll do that.

MS CALLAN: Those are the only housekeeping matters.

HIS HONOUR: All right, thank you.

Then we'll bring the jury in.

MS CALLAN: Yes.

JURY IN

HIS HONOUR: Yes.

MS CALLAN: Your Honour, we return to the evidence of Superintendent Nobbs. Perhaps whilst he's coming in to resume his evidence, I have a copy of exhibit 14 to provide for the jury.

HIS HONOUR: Yes, thank you, that can be distributed.

MS CALLAN: Yes.

JODY NOBBS, on former oath:

MR EDWARDSON: Your Honour, before we proceed, we take no issue with Superintendent Nobbs' evidence, so if it's of assistance for my learned friend if she wishes to lead this officer, to cut to the chase, as it were, we have no difficulty with that.

HIS HONOUR: All right, thank you.

MS CALLAN: I'm grateful for that indication, your Honour.

XN BY MS CALLAN:

MS CALLAN: Superintendent Nobbs, towards the end of your evidence yesterday, you told the jury about a telephone call that you had with Sergeant Frost on 9 November 2019, in which, and this is from transcript 253, "She requested some additional resources be sent from Alice Springs to not only assist with the funeral, but to predominantly provide additional capability for the likely overflow of police calls through the next period of time, that medical staff were away. And she also referred to the task of undertaking the arrest of Kumanjayi Walker." You recall that being the case during that call?---Agreed.

And your evidence for the jury is that it was your assessment that the appropriate source of deployment was the – an IRT team?---Agreed.

I took you to –

And if the witness could be shown exhibit 14 the, "Standard Operating Procedures" of the IRT.

HIS HONOUR: Yes.

MS CALLAN: Page four of that document refers at .1.1 to a high-risk deployment. And over the page, page five at point – at 1.2 refers to a general support operations. What type of deployment was the IRT being sent on when you made that decision they should go to Yuendumu, subject to approval by command?---Subject to approval it was a general support application.

You then had a conversation with Senior Sergeant Watch Commander at Alice Springs, didn't you?---Yes, 11.45 am.

In your - so that was the Watch Commander, Shaun Furniss - in your conversation with Watch Commander Furniss did you brief him in relation to emerging priority at Yuendumu which covered off on five basic things that were on your mind indicating there ought be an IRT deployment?---Correct.

And those five things were first, the health staff withdrawal at Yuendumu?  
---Correct.

The alleged increase in property crim impacting those medical staff?---Correct.

That Kumanjayi Walker remained outstanding?---Correct.

That although there is no evidence to confirm this, it was possible Walker was linked to that property crime?---Correct.

And there had been this critical incident involving Walker and the police on 6 November?---Correct.

That is the axe incident? What, having told Furniss about those five emerging priorities at Yuendumu, did you request that Watch Commander Furniss start to coordinate a plan for an operational deployment of the IRT?---Well, certainly assess the capacity for us to send an IRT deployment.

So the question was, was Furniss in a position to identify four IRT members who had the capacity to undertake that deployment?---Correct. It was a request for IRT times four, one dog and dog handler and a drone operator.

So when you say, "times four" that's four members?---Sorry, yes, correct.

Did you give him any indication as to the likely length of the deployment?---No, subject to a discussion with the Assistant Commissioner and an approval but certainly a protracted deployment.

Did you discuss with Watch Commander Furniss what uniform the IRT members should deploy in?---Correct, general deployment is a general duties police uniform, although we did discuss the benefits of the IRT taking their tactical kit with them, should we have to leverage their skill set for a more complex action.

The general duties police uniform. That is blue?---Correct.

The discussion about the sense in taking, the IRT, taking their tactical kit, to your mind does that include a tactical uniform?---Correct.

And that is more a camouflage material?---Correct.

And in terms of the tactical kit, to your mind did that include other tactical weapons and other items?---Yes, weaponry, munitions, lethal - non-lethal munitions, AR15's bean bag rounds et cetera.

So AR15, that's an assault rifle?---Correct.

A bean bag round - is that a non-lethal?---Correct.

And how does - what does it mean in short form?---It's effectively a munition that's an ammunition that is utilised within a long arm - fires a bean bag, to subdue an offender - or subject, sorry.

The effect of a bean bag round is to subdue rather than deliver any potential for lethal force?---Correct.

At the end of that phone call with Watch Commander Furniss, did he tell you he would work with Senior Constable McCormack to put together the IR Team for a deployment?---Acting Sergeant McCormack at the time, and correct.

And you were, at the same time, needing to seek approval up the chain, weren't you?---Correct.

You spoke to Assistant Commissioner Travis Wurst to obtain that approval?---Only in the absence of Commander Currie where the delegation sat for general support.

So just in relation to that answer, coming back to the SOP document, exhibit 14, page 4, under that heading, at 1.1, high-risk deployment, states that; "A high-risk deployment requires Assistant Commissioner approval"?---Correct.

Over at page 5 there is a heading 1.2 "General Support Operation" then at par 1.2.1, beneath those bullet points there's a paragraph which commences, "Approval for deployment of the IRT is through the Commander Southern and TDF"?---Correct.

At the time - that is 9 November 2019, the Command of Southern was Brad Currie?---Correct.

As it happened on that date, was he available to you in terms of seeking approval?---No, he was on a personal, uncontactable phone.

In those circumstances did you, as it were, go further up the chain to Assistant Commissioner Wurst?---Correct.

When you spoke to Assistant Commissioner Wurst did you outline to him that whilst the command's delegation for the IRT approval in this instance - the general support deployment was with Commander Currie, he was on leave and uncontactable and so that's why you were speaking to Assistant Commission Wurst?---Correct.



Did you apprise him of the general situation at Yuendumu, those five emerging priorities that you had also told Furniss about?---correct.

Did you tell him what was proposed for the deployment?---In broad terms, yes.

That is, it was proposed to deploy four IRT members plus the dog unit member for a general duties support deployment to Yuendumu?---Correct.

What was Assistant Commissioner Wurst's response to your request for authorisation of that deployment?---After hearing the broad situation and the broad framework in which the IRT would be operating in, he approved - agreed with the assessment that it was a general application and ultimately approved the deployment.

Did you tell Assistant Commissioner Wurst what it was it was proposed the IRT would do?---Not the nuance of the action, so the operational plan, the high visibility respite imperative and the action that would ultimately result in hopefully the arrest of Kumanjayi Walker.

At that point in time when you spoke to Assistant Commissioner Wurst. You were yet to refine details of an operational plan?---Correct.

When you - is it the case that Assistant Commissioner Wurst approved the proposed IRT deployment and requested to be updated on any significant matters?---Correct.

Between that conversation and the shooting that occurred later that day, did you have any further communications with Assistant Commissioner Wurst?---Not that I recall.

After receiving that approval from Assistant Commissioner Wurst did you speak to Watch Commander Furniss acting sergeant McCormack and Sergeant Frost in relation to the various tasks they were undertaking that day?---Correct. I did neglect to say that Assistant Commissioner Wurst approved the IRT deployment until Monday and it would be reconsidered beyond that period of time.

Okay, so at that stage what was approved was a deployment from Saturday to Monday?---Correct.

When speaking to Watch Commander Furniss, you confirmed the IRT deployment had been approved by Assistant Commissioner Wurst?---Correct.

And you asked - did you ask that the IRT be briefed in preparation for their deployment?---From an administrative perspective, yes.

What do you mean by that?---Well, in terms of the general situation. I tasked specifically Acting Sergeant McCormack to provide – and it was more for the benefit of Sergeant Frost – but an administrative order that outlined the broad circumstances, the operational detail in terms of capability. Broadly – and broadly, at

this stage – the functions. And then that would then inform Sergeant Frost's further consideration as to the nuance of the plan.

Could I ask the witness be shown exhibit 1.

Superintendent, if you might turn up tab 12. Sergeant, do you see that's an email – sorry, Superintendent – that's an email trail. Putting to one side the top email, there's a line – still on the first page – and then there's an email indicating it's from Shane McCormack, 9 November 2019, 4.22 pm. It's addressed to Julie Frost and you're amongst various people named in the CC line?---Agreed, yes.

Was that the administrative order that you tasked McCormack to prepare?---Yes.

And you see in that email that the – immediately above the word, "Situation," which is appears in capitals and bold, there's reference to, "Auth," A-U-T-H, "Superintendent Nobbs"?---Correct.

So that's a short form indication that this had been authorised by you?---Correct.

Under the heading, "Situation" is a brief account of the axe incident that had occurred on 6 November 2019?---Correct.

There's reference then to the funeral taking place in the community?---Correct.

And then do you see under the heading, "Task," it reads: "Provide a local presence of armed police to uphold law and order in the community, provide support to local members." New line: "Arrest Walker and transport back to Alice Springs"?---Correct.

Does that accord with the conversation you had with Watch Commander Furniss and Acting Senior Sergeant – or Acting Sergeant McCormack that afternoon as to what the IRT was tasked to do at Yuendumu?---Correct.

Did you speak to either Watch Commander Furniss or Acting Sergeant McCormack about what they would provide by way of information or briefing to those IRT members at – when they – whilst they were still at Alice Springs?---No.

Whilst Acting Sergeant McCormack undertook the task of putting together or identifying for suitable members of the IRT available to deploy, were you updating Sergeant Frost that afternoon about what was being arranged for the IRT deployment?---Yeah, correct. The next conversation with Sergeant Frost was at 12.15 am.

Perhaps PM?---I'm sorry.

Yes?---PM.

And that conversation – in that conversation, you told Sergeant Frost that Wurst – that is, Assistant Commissioner Wurst, had approved the deployment of IRT comprising four members, plus a dog unit, for a general support deployment to Yuendumu?---Correct. At this stage it was quite apparent that there was no drone capability approved and that was taken out of my consideration at that point in time.

At that stage, the names of the IRT members were not yet known?---I don't think so. They – certainly not to me.

Did you speak with Sergeant Frost about establishing command and control of the IRT and plans for the deployment?---Correct.

In this scenario of a general support deployment by the IRT, on their arrival at Yuendumu, who was in command?---Sergeant Frost.

Did you task Sergeant Frost to provide you with a written operational plan for your consideration and endorsement?---Yes.

Could you turn to tab 13? Superintendent, do you recognise the email at tab 14, which was sent by Sergeant Frost to you, on 9 November 2019 at 4.49 pm – sorry, tab 13 – as being the operational plan for your consideration and endorsement?---Yes.

You considered that email when you received it?---Yes.

Did you endorse it?---Yes, correct.

The task – do you see in bold on the first page? The first line of the bold text commences, “IRT call-out, arrest a violent offender, Arnold Charles Walker (sic).” Then there's reference to the authorisation by yourself, Superintendent Nobbs, and then the task is described as: “Arrest Walker and transport back to Alice Springs. Provide a local presence of armed police to uphold law and order in the community and provide support to local members”?---Correct.

That was consistent with the information that you'd given to Acting Sergeant McCormack, Watch Commander Furniss and your understanding of the nature of this deployment?---Correct.

The – this operational plan sets out, under the heading, “Situation,” what might be described as some relevant background – and key background information, including that Walker had absconded from the alcohol rehabilitation facility and details about the axe incident?---Correct.

It included several photographs of Kumanjayi Walker?---Yes.

This is on page 2. Beneath those photographs there is, in red, the advice of numerous alerts in relation to Walker?---Correct.

Then it identifies the members of the IRT that were being deployed?---Correct.

And the member from the dog unit, being Adam Donaldson?---Correct.

Under the heading, "Plan Day 1," you see under the date Saturday 9 November 2019, there's a line which commences: "11 pm, IRT commence duty and conduct high-visibility patrols and respond to call-outs"?---Correct.

Had you discussed with Sergeant Frost what the IRT would – her expectations or her plan for what the IRT would do that evening of 9 November?---The – no. Not in terms of what they would do the evening. But my assessment or my – was that they would be working with Sergeant Frost to formulate a plan for the following morning – or the Monday morning.

When you say the following morning, that's the Sunday morning?---Correct.

If you turn over the page at page 3, you see under the heading, "Sunday 10 November, 5 am – 5 am, Donaldson and Yuendumu – Alefaio commence duty along with IRT members to affect arrest of Walker." Had you had a – any conversations with Sergeant Frost about the – a plan to seek to affect the arrest of Walker at 5 am or thereabouts on the Sunday morning?---Yes.

And you endorsed this operational plan in its entirety?---Yes.

Insofar as you endorsed that part of the operational plan, that is for the arrest of Walker, if it could be done at 5 am or thereabouts on the Sunday morning, what was your – why did you endorse that approach?---Well I guess more than endorsed, I articulated it as being my expectations in terms of the preferred course of action.

Why was that your expectation that that was the preferred course of action?---The 5 am element I guess, is a tried and tested framework that utilised, you know, my 24 years' experience with the police service in terms of risk mitigation, effecting an arrest with someone that has such violent antecedence.

What was it about affecting an arrest at 5 am that meant, from your experience, there was risk mitigation?---Well it tips the opportunities in our favour. It gives us effective time and the cover of darkness to establish our – our cordons, our containments, put our negotiation elements in – in order. Walk up to a door and commence a conversation with presumably a house that are asleep at that given time. It reduces things such as intoxications and other sort of factors that might be precursors to violence or things such as that nature.

Does the possibility of the subject being asleep play into that, in terms of risk mitigation?---Certainly.

How – in what way?---Well it's – if they're asleep at the time, it obviously docile makes it easier for us to engage them, less opportunity for access to weapons,

fleeing. And, again, it just gives us the element of surprise, for lack of a better term, and.

Superintendent, having approved the operational plan, as set out in that email at tab 13, were you then diverted to another significant task because a tourist bus had collided with a vehicle outside Alice Springs. And that required immediate police response?---Yeah, correct. At about 2.40 pm I received a call of a tourist bus rollover and then had to deal with that matter as well.

Is it the case that the next communication or involvement you had, in terms of the IRT deployment to Yuendumu, occurred at about 7.30 pm when you received a call to tell you about the shooting?---No. At about 4.48 I received a call from Sergeant Frost relative to the production of this plan. Where we then discussed, I guess, some of the nuances of the plan in a little bit more detail as well.

The nuance you discussed, can I just clarify, had you already look – seen this email at tab 13 when you had your conversation with her?---Not at 12.15. It was – that was the task to Julie to prepare it.

Yes - - - ?---And it was received later that day, in the afternoon.

Yes?---So it was a – a written representation of our earlier conversations, in terms of my expectations. And then I was satisfied that that broadly aligned with my command intent. But that was ultimately approved later that afternoon at 4.40 something that day.

And apologies, I may have misunderstood an answer you gave in evidence a few minutes ago. Do you say that you had a telephone call at or around 4.48 pm with Sergeant Frost, to discuss some nuance of the plan?---Correct.

That conversation, did that occur before this email was sent to you?---No that was immediately after receiving the email. So we discussed earlier in the afternoon the broad parameters.

Yes?---What my broad expectations of the – in – in the weeds aspects of those parameters would look like. Julie – Sergeant Frost then went away, drafted the operations order, and sent that through to me. I received it, reviewed it, called Sergeant Frost, approved it and had a broader further conversation in relation to some of the specifics that may not have been captured within the plan.

You – what were those specifics that may not have been captured in the plan?---Things like leveraging the opportunity that we had with the dog. Knowing that Kumanjayi Walker was a person known to run. If he was to run, let the dog chase him down, and that would be our response. The use of Alefaio as someone who had great regard and respect with the family, in terms of negotiating, and things such as that.

Thank you, Superintendent.

Those are my questions, your Honour.

HIS HONOUR: Thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: Superintendent, yesterday you were asked this question at page 254. "In your view that the IRT would be an appropriate source of capability, was there some – anything about the IRT that caused you to consider that would be the appropriate unit?" And your evidence yesterday – sorry on Monday, my apologies – Friday, I mean, my apologies. "Yes certainly, as opposed to, and no disrespect, but a general policing, pulling resources from wherever and putting them together and sending them out. My intention was to send out highly skilled, highly trained, highly disciplined, highly competent capability from Alice Springs, that work together frequently. Recognising that not only did I have the mandate around high visibility deterrent activities, but also likely prospect, whether it was by surrender, or by an operational action, there would likely be an arrest post the funeral of Kumanjayi Walker. And it wasn't just the IRT, with the IRT additional elements of drone and capability. So a dog asset. So a dog and a dog handler was my intention as a more fulsome capability"?---Correct.

Now you've described what you had hoped would be achieved by the deployment of these highly skilled, highly trained individuals, members of the IRT?---Yes.

And one expectation, or one hope, was the he might be arrested, for example, at 5 am on the Saturday morning - - - ?---Correct.

- - - Sunday morning?---Correct.

Were you informed by Sergeant Frost that at the time of the creation of that plan, and indeed at the time that these men were deployed, nobody had any idea where Kumanjayi Walker was?---No, the plan indicated – you're correct insofar as definitely, but the plan did have some locations of interest.

There were identified houses which were possible locations that he might be found?---Correct.

One, for example, is what we call House 577?---Correct.

House 577 being the last known location where he had been sighted by police?---Correct.

And indeed the house where the axe incident occurred?---Correct.

It seems to be common ground, I think, that Kumanjayi Walker was regarded by you and other members of police associated with this deployment, as a highly dangerous, violent individual?---Correct.

Who certainly had demonstrated a predisposition to violence by reference to the axe incident, for example?---Correct.

You know, don't you, that the axe incident was captured on body-worn video?---Correct.

Have you, yourself, ever seen that video?---No.

But no doubt you've had it described to you in detail, by Sergeant Frost, by example?---On the night in question.

So you were fully apprised of how serious that incident was?---Correct.

And how important it was to your assessment to seek approval for IRT to be deployed for the arrest of Kumanjayi Walker?---Agreed, yes.

Now the plan. The plan, if one looks at it, and if you've got exhibit 1 folder, tab 13 in front of you. It contemplates, for example, the IRT members would be deployed at start at 11 pm on that evening?---Correct.

Were you aware that Sergeant Frost had actually deployed the IRT at 7.05, not 11 pm?---No.

Did she convey that to you?---No.

You were not party to, or privy to any briefing that she gave to the IRT members?---No.

You'd agree, wouldn't you, that certainly when one's using such a highly trained and skilled team, such as the four men who were deployed over the course of this weekend, that any plan has to be dynamic and adaptable?---Agreed.

And the reason for that is that there are so many unknown variables to the apprehension of an individual?---Correct.

Much might depend, for example, on how that person responds to police presence?---Correct.

In other words, they might capitulate and put their hands up and that is perfect but on the other hand, he might do, as he did for example on 6 November, armed himself and then seek to use that weapon against the arresting officers?---Agreed.

And insofar as in a perfect world it would be preferable if he could have been apprehended for example, at the time that he was sleeping in the house, to use the example I think that you have given, that of course is always contingent upon that situation actually presenting itself to the relevant officers?---Correct.

You certainly had an expectation that the IRT officers would what we call, "intelligence gather"?---Potentially.

Well, intelligence-gathering in a sense that you knew that they were going to be deployed into the community, they were going to be seen by the community and indeed, that was what they were instructed, or you understood the instruction that you would be - that they would have a strong visible presence within the community?---Yes, from an overt high visibility , general duties perspective -not intelligence gathering.

Were you aware, or did Sergeant Frost tell you, for example, that she intended to instruct these men that they were to intelligence gather for the purposes of identifying his location?---Knowing that would have been contrary to my - certainly not explicit but certainly implicit instructions to Sergeant Frost in the first instance.

So if they had been specifically instructed by Sergeant Frost that they were to be deployed at 7 o'clock as opposed to 11 pm, that would be contrary to the information - and indeed, your expectation by reference to this plan?---Yes.

And likewise, if these men were instructed that they were to go out and intelligence gather for the purposes of identifying his likely location that, again, would be different from what you had contemplated?---Yes.

And not in accordance with the discussions that you had with Sergeant Frost?  
---Correct.

And in addition to that were you aware or was it your understanding that these men, the IRT members, would be instructed by Sergeant Frost that should they come upon him at whatever point in time over the course of their deployment, their job was to arrest him?---Common sense would dictate that if there was a chance discovery they would have to act.

It might be more than a chance discovery though might it not? Because information might be gained from community members as to where he was likely to be?  
---Correct.

And you would certainly expect the IRT members - if that information was conveyed to them - you would certainly expect the IRT members to act on it that information?  
---Not necessarily.

All right. Let's assume - just for argument's sake - let's assume that there are conversations that are captured on body-worn video between IRT members and the members of the community. For example, even at House 577 that would be an important source of identifying the location of the individual who was to be apprehended in accordance with the warrant and for the offences that he had committed on Wednesday 6 November?---Correct.



The specialist team are the best equipped - because of the nature of training - to determine the best way to apprehend the individual?---Potentially.

Certainly the plan itself does not in any way constrain how they could or should, arrest or apprehend Kumanjayi Walker?---And nor does the law, no.

Because everything is contingent, of course, upon how the individual presents at the time of the effect of the arrest?---Correct.

In other words, if the offender - in this case Kumanjayi Walker - has secreted or armed himself with a weapon - a potential lethal weapon - and seeks to deploy it, then of course the response is going to be completely different to what might have been contemplated in an ideal world in the plan of your crew?---Correct.

Nothing further, thank you, your Honour.

REXN BY MS CALLAN:

MS CALLAN: Superintendent, was it your understanding and expectation that the IRT would follow the plan outlined in the email Sergeant Frost sent you, which appears at tab 13?---Correct.

Was it your understanding and expectation that that they would set out to seek to effect the arrest of Kumanjayi Walker commencing at 5 am on the Sunday morning? ---Correct.

It's the case isn't it, that all members of the Northern Territory Police Force that trained initially and then annually in relation to - amongst other things - the use of force and operational safety?---Correct.

That includes what is known as the 10 operational safety principles?---Yes.

Is it your understanding that the IRT is subject to any other principles with respect to the use of force?---Correct.

So they are subject - - -

MR EDWARDSON: Your Honour, I am sorry to interrupt my friend but I do object to this line of re-examination, this goes way beyond.

HIS HONOUR: It doesn't seem to arise out of cross-examination.

MR EDWARDSON: It doesn't arise from cross-examination at all.

MS CALLAN: In my submission what was put to the witness in cross-examination, was his description and his understanding of the IRT being highly skilled, trained and disciplined. This is the confined topic upon which I was proposing to ask the

witness, that is as to whether they - in that context - were subject to principles or standards that were different to any other member.

HIS HONOUR: But it wasn't suggested otherwise.

MS CALLAN: I will move on, your Honour. Thank you, your Honour. Those are my questions.

HIS HONOUR: Thank you, you may go?---Thank you, your Honour.

WITNESS WITHDREW

MS CALLAN: Your Honour, the next witness is Senior Constable Shane McCormack.

SHANE ANTHONY MCCORMACK, affirmed:

XN BY MS CALLAN:

MS CALLAN: Could you tell the court your full name and your rank and current station?---Yes, Shane Anthony McCormack, currently Acting Sergeant of Casuarina Station.

As at 9 November 2019 is it the case that you were a senior constable at the Alice Springs Police Station?--Correct.

And your role at that time was in the point of sales intervention?---Yes I was the acting sergeant at the time, yes.

And that was part of the Alice Springs police work that was focussed on alcohol sale?---Correct.

In addition to your duties as an acting sergeant in relation to point of sales intervention, are you also a member of the Immediate Response Team?---I was.

You had been a member of the IRT for about one and-a-half years at that stage?---Yes, roughly, yes.

At that point in time there were about 15 members of the IRT?---I think so, yes, 15 or so.

And the officer-in-charge of the IRT was Lee Bauwens?---Correct.

You were working on 9 November 2019?---I was, yes.

And was Lee Bauwens?---No, I believe he was on leave.

That afternoon on 9 November, did Watch Commander Shaun Furniss come in to your office and say that Superintendent Nobbs was requiring some IRT members to go to Yuendumu?---Correct.

Did he ask you, "Who do we" – or "What do we do to arrange that call-out"?---So Shaun Furniss asked me to speak to Superintendent Nobbs directly so he was no longer the middle man.

Okay?---So I spoke to Superintendent Nobbs.

Did it fall to you to organise the IRT deployment?---It did, yes.

Had you done – ever done so before?---Organised an IRT deployment?

Correct?---No.

You just mentioned, rather than involving a middle man, is it the case that you spoke directly to Superintendent Nobbs about – when you had some questions about what was required?---Yeah.

You sought from Superintendent Nobbs details, for instance, how many members are required, how long is this deployment going to be for?---Correct, yes.

And he told you that – he indicated he wanted four IRT members to go out to Yuendumu?---Yeah.

Did he tell you he also wanted a member from the dog unit?---Possibly, yeah. I can't really recall that.

In that conversation with Superintendent Nobbs, did he tell you anything more about the purpose of that IRT deployment to Yuendumu?---It was to go out for an arrest target in Yuendumu. I then asked whether four members going in blues or greens.

Yes?---So in the past, we've went there in blues. So a normal blue uniform, like I'm wearing today.

Yes?---Or whether we'd wear our green camo equipment.

Did the – your blue uniform, is that – would that be described as- -?---A police uniform, yes.

- - -a police general duties uniform?---Yeah, standard police uniform.

And greens or camo- - -?---Yeah.

- - -is that more of a tactical form of uniform?---It is. And that's normally what the IRT wore when we went to much bigger events.

Superintendent Nobbs told you that the IRT should go in their blue uniform?---Correct.

Did you yourself undertake any form of risk assessment in relation to the deployment?---In what way?

Did you – were you given any further information about the deployment, that is what tasks the IRT were to go and undertake?---Yeah, to – it was for an arrest target in Yuendumu. And I was informed that the nurses had left the community as well.

Did you find out who the arrest target was?---I was, yes. I was told it was Mr Walker.

And was – did you confirm that that was the individual who had been involved in the axe incident in Yuendumu a few days earlier?---I knew it was him, yes.

In your mind, what was the level of risk for this deployment?---It was high-risk.

When you say high-risk was that because Kumanjayi Walker, amongst other things, had demonstrated a potential for violence during the axe incident?---Sure, yeah. Definitely.

And was that a level of potential violence that, in your experience, police officers in the Northern Territory deal with on a regular basis?---To that extent, I'm not too sure. The fact I was able to see a video of it, it just showed what a high level of violence – sorry, how violent the situation was. But, as police officers, we do experience – regularly experience violent events.

Do you regularly undertake high-risk arrest?---Yes. Any arrest has the potential to turn into high-risk, even when you think it's going to be an easy arrest.

Having spoken to Superintendent Nobbs, did you then start the process of ringing around IRT members- -?---I did, yeah.

- - -to determine who was available to deploy?---Yeah.

You first spoke to Tony Hawkings?---Yeah. I – yeah. He could've been one I spoke – he might not have been the first one I called, but I did speak to Tony Hawkings, yeah.

Okay. Did you first of all ascertain whether he was available to deploy to Yuendumu?---Yeah. Well, first of all, I checked the roster. I wasn't going to ring anyone who was nightshift. I know there was a – one of our members whose kid was having a christening, so I knew there'd be a lot of guys at that.

Yes?---I wasn't going to ring them, because they probably would have had a few beers, so. So I went through the roster and I thought, "Who can I ring?"

Okay. You confirmed that Tony Hawkins (sic) was – Tony Hawkings was available. Did you- - -?---Yeah.

- - -tell him he should wear his blues and bring a swag?---Yeah.

Did you tell him what the purpose of the deployment was?---Yeah, an arrest target in Yuendumu.

Did you then have a similar conversation with Adam Eberl and Zachary Rolfe?---I did, yes.

What about James Kirstenfeldt?---Possibly. I can't remember if – if I had that conversation with him, but they all knew why they were coming in.

Did all four of – that is, those four individual individuals – come to the Alice Springs Police Station?---They did, yes.

And did you speak to them when they arrived?---Yes.

Did you give the four of them a briefing as to the nature of the deployment they were going to undertake?---Yes, I did.

And where did you conduct that briefing?---It would have been in the muster room.

And how long was the briefing in duration?---A couple of minutes, maybe.

What did you say to them?---Basically, what the plan was. To go out to Yuendumu. Assist, obviously, the local members out there. Go find Mr Walker and bring him back.

Who did you regard was in command of the IRT when they got to Yuendumu?---In command of – within those four members? Or in command of the IRT? Because technically, when we go out to community, you have a sergeant of the community.

Yes?---It's their community. They normally, on paper, be the supervisor.

And so the- - -?---But as for the IRT, you want me to pick one of them?

No, I'll just pause there. So in this instance- - -?---Yeah?

- - -you said on paper?---Yeah.

Was that – is it Superintendent – sorry, Sergeant Frost?---Correct, yeah.

That means she was in command position in relation to those IRT members whilst they were at Yuendumu?---Well, she's the highest ranking officer, yeah.

As between the four IRT members, was there a command – internal command structure?---No. Not necessarily. Each one of those four members could bring something unique to the team.

Did you say anything to those four IRT members, while they were at Alice Springs, about Sergeant Frost being in charge?---Well, more the fact that to go out and liaise with Sergeant Frost.

When you said, “More go out and liaise with Sergeant Frost,” what did you- - -?---Yeah, so go to the – when you arrive, got to the police station. Because I was liaising with Sergeant Frost over the phone and via email.

You regarded her as the highest-ranking officer there, as being in command?---Correct. We have a rank structure, so that’s how it works, yeah.

Did you have any expectation about who the four IRT members would regard as being in command?---I couldn’t really answer that. I don’t know what their expectation would be.

Well they’re subject to the same - - - ?---Yeah.

- - - overarching command structure that you work within?---Yep.

Was it your expectation that Sergeant Frost would brief the four IRT members when they arrived at Yuendumu?---Yes, I believe I had that conversation. Also had conversation with Sergeant Frost.

During the briefing, was there any discussion of a plan for the arrest of Kumanjayi Walker?---No, that would have been too early in that sense. Because they – they were going to Yuendumu, so I couldn’t really make a plan of what they were going to do when they got to Yuendumu.

Did they tell you what they intended to do when they got to Yuendumu?---Well no, because they – in what way sorry? I’m a bit confused.

Did any member of the IRT state an intention about what they would do, that person would do, when they got to Yuendumu?---No. They – the whole thing was is to go out to Yuendumu, and the fact they were going to obviously find Walker and bring him back. So he was an arrest target. He – guys went out to arrest him.

Was the level of risk posed by Kumanjayi Walker discussed during the briefing?---Yes, I believe it was, yeah.

What was that – what did that discussion involve?---The whole station was aware of the axe incident.

That being the case, is it your recollection that during the briefing, when there was discussion about the level of risk posed by Kumanjaya Walker, reference was made to the axe incident?---Correct.

MR EDWARDSON: I object to that your Honour. It's my understanding that this officer wasn't present during the briefing.

MS CALLAN: He delivered the briefing in Alice Springs, that's - - -

MR EDWARDSON: I'm sorry.

MS CALLAN: - - - the - sorry?---The earlier briefing.

MR EDWARDSON: The earlier briefing, right.

THE WITNESS: Yep.

MS CALLAN: To be clear, Acting Sergeant, you - you didn't go to Yuendumu yourself?---No.

We're only talking about what occurred at Alice Springs - - - ?---Yes that's - - -

- - - Station?---Yep.

On the afternoon of 9 November?---Yep.

Before the IRT members left?---Yep.

On that, just to return to my question, you said that the level of risk of Kumanjaya Walker was discussed at the briefing?---Mm mm.

You said the whole station knew about the axe incident?---Correct.

Was - was there discussion during the briefing about the axe incident?---Not necessarily. I think more discussion was is this the guy that was involved in the axe incident. That was probably what was said.

Did you tell the IRT members what equipment they should take?---I gave them the option for the equipment they took.

When you say - did it - did you say matters for you guys to decide yourselves what equipment you want to take?---Because normally we have a - if we're going - in normal general duties - - -

Yes?---We'd just arrive in the normal general duties. Like most police officers would. However we had access to long arm firearms - - -

Yes?---Because we're IRT members. And I think it Tony Hawkings that said at one stage, are you going – whether they should take the long arms, the rifles. And I – it could have been Tony, and I said I would. So we have access to this equipment. I would have taken it.

And you – but you left it for those IRT members - - - ?---Because they were going out in a general duties capacity.

And so in their general duties capacity, you referred to the – is this the case, the usual accoutrement for a general duties officer?---Correct, yep.

That includes a Glock firearm?---Yep.

And things like a baton?---Taser - - -

Taser - - - ?---Spray.

- - - spray?---But because they were going so far, I left it to them, and if it was me going out, I would have taken my long arm rifle, and I would have taken my body armour as well.

Did you take that discussion any further with the four IRT members about what - - - ?---No.

- - - additional equipment they might take?---No. They're all well experienced to know what they should bring.

Could I ask the witness be shown exhibit 1?

Acting Sergeant, could you turn up tab 12. You see that's an email trail?---Yep.

The second email which appears on the page, still – looking at page one, sorry, just still looking at the first page, do you see from the middle of the – at the middle of the page there's a line, and beneath that, there's an email from you, on 9 November at 4.22 pm to Julie Frost?---Correct.

And then there are a number of individuals who were copied on that email?---Yep.

Including Superintendent Nobbs?---Correct.

Lee Bauwens, who've you said was the – ordinarily the officer-in-charge of the IRT?---Yep.

But was on leave that day?---Yeah I believe he was on leave, yeah.

Shaun Furniss - - - ?---Yep.

- - - who was the Watch Commander you'd spoken to?---Yep.



And the last name on the – your email is Hawkings, Anthony Hawkings?---Yep.

And he's one of the four members of the IRT who was to be deployed?---Correct.

Your email, did you send this to Julie Frost on anyone's request?---Can't remember. I knew I was going to just – at the end of the day, it's just information of what is – it's like a paper trail - - -

Yes?---Of what is going to Yuendumu. And I obviously cc'd people in there who are not actually privy to what was happening at Yuendumu at the time. So it was pretty much a – like it's a record of what you're getting, who's going, and when they're going.

Would it be fair to describe this as a briefing note?---Yes, I suppose so, yeah it would.

Is it your observation that when the IRT was deployed, there would be reduced to writing in this sort of style, a description of the nature of the deployment?---Correct.

And information as such as appears here, by way of the situation, the task, the members who are being deployed, the hours that were involved, at least a starting point?---Yep.

And equipment that they might be taking?---Yes.

You described the task, still looking at page one, towards the bottom?---Yep.

“Provide a local presence of armed police to uphold law and order in the community. Provide support to local members.” Next line, “Arrest Walker and transport back to Alice Springs.” When you briefed the IRT in that couple of minute briefing at Alice Springs, did you tell them part of their task was to provide a local presence of armed police to uphold law and order?---I wouldn't have used those words.

What words did you use?---I imagine it would have been, “You're going out to support Yuendumu.” Normally when we go on IRT deployments, we are supporting the community we go to.

Is that more than, or different to, the task of affecting the arrest of Arnold Walker?---What do you mean?

Well you said normally when you're in the IRT - - - ?---Yep.

- - - so that's going out to support the - - - ?---It is, yep.

- - - police in that local community - - - ?---Mm mm.

- - - here what you've written is the – what you've first written, under the heading, "Task", is "Provide a local presence of armed police"?---Yep.

To your mind, was that more than, or different to the specific task, of effecting the arrest of Arnold Walker?---I'm sorry, I don't – I kind of don't understand the question. Was it more than or specific to?

I'll try – I'll approach - - - ?---Yeah.

- - - in a different way, your Honour.

HIS HONOUR: Did you anticipate that the support of the local police would – would require more of the IRT than simply arresting Mr Walker?---No, not necessarily. At the end of the day, they're going out to support the local members to deal with a violent offender. So whether that was more of or – at the end of the day, the arrest of Walker would just be part and parcel and going out and supporting their local community.

MS CALLAN: Was it your understanding that the task for the deployment of these IRT members, was the arrest of Kumanjayi Walker?---One of them, yes.

What were the other tasks?---To support the local members. So that doesn't necessarily mean the IRT members were the only ones going to go out and look for Walker. At the end, they're going – in police general duty uniform, you bolster their numbers. There's a reason why you send IRT members and I get into that, but the fact is, they are going out to support. It's not as if Yuendumu members are leaving and the IRT members are coming in.

What task, aside from arresting Kumanjayi Walker, did you understand or expect the IRT members would be undertaking?---Anything to do with policing.

That is, as per- - -?---Whatever they come across.

- - -officer-in-charge's requirement?---Yeah. Whatever they come across. I've went on IRT deployments and we were doing checkpoints for alcohol drivers. I went to domestics. It's just whatever you do as policing.

Thank you?---Thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: How long have you been a police officer?---17 years now.

Is that confined to the Northern Territory Police?---I was a police officer overseas. Married a kiwi girl, went to New Zealand, joined New Zealand Police.

So you were previously a police in New Zealand?---I was, yeah.

For how long?---Would have been just over eight years there.

Yes?---And here I'm coming up to – what did I say, 17? So maybe nine.

Right, thank you. Now, you've told us that you were a member of the IRT team?---Correct.

Are you still?---No.

For how long were you a member?---Two years, I think. Maybe 18 months.

When did you do your training to join that group?---I couldn't tell you the dates.

Well – all right. I want to ask you a little bit about the training itself. What does it involve?---The – so at stages, we'd have had a couple of weeks training, which would be dealing with a stronghold, where is an armed or dangerous offender inside. We then have to do forced entries, we do use stun grenades to – when we got in the house. We clear a house. We do use non-lethal force. Just – we could do observation on a target, on a house. We could do high-risk traffic stops. There's a number of things we did.

Having completed that training and then becoming a member of the IRT- - -?---Yeah.

- - -do you keep up with further training?---Yeah. So we normally do training when – probably once a month, which is – and at that stage, there would've been a firearms component in as well.

Do you know a police officer by the name of Meacham King?---Yes, I do.

Who is he?---I believe he's a TRG member.

And have you had any dealings directly with him?---In what context?

Well, has he been involved in your training in any way?---Yeah, I think he was. I'm not too sure.

In what capacity?---I think he would have been instructor there, if he came down to Alice Springs.

And in more recent times, have you had any firearms training?---Yeah, I was – I was trained by him a couple of months ago and I done my firearms re-qual.

What's a firearms re-qual?---Oh, sorry. Every year, we have to re-qual our firearms.

Yes?---Part of our general duties. So that's what we did out at the range.

Now, you said in answer to – in answer to a question put by my learned friend a moment ago, you said, “There is a reason why you send in the IRT,” or something to that effect?---Yeah.

You said, “I can explain, if you like”?---Mm mm.

Well, can I ask you now to explain? There is a reason why you send in the IRT. What is that reason?---So to get on IRT, there’s a number of skills and attributes you have to have. It’s always expected of you. One is that you’re fit, work well as a team, compassionate, easy-going, follow instructions and you’re motivated as well.

All right. And you have specialist skills?---Correct.

And the IRT are clearly designed to be deployed in much more difficult circumstances than general police duties?---I’d be confident to say you sent IRT, that they’re going to achieve what you want them to do.

As part and parcel of being a police officer and specifically, being an IRT member, are police officers trained as to the circumstances in which lethal force can and may be deployed?---Yeah, you learn that at day 1 at college.

And what do you learn?---You learn, obviously, you learn about the threshold of when you use force. You – sorry, I’m probably saying that wrong. Can you repeat the question again?

Sure. What sort of training do you receive about the appropriateness of deploying lethal force?---Yeah. So the training we receive is – you’d obviously conversation legislation, of where our powers come from.

Yes?---And also during when you do, for example, we’ll talk about the firearms training. Your scenario will be – you’ll have a paper cardboard cut-out. And for example, someone will shout, “Knife,” you’ll then deploy a firearm as per the training.

I want to ask you about an expression which has loomed large in the course of this trial. Knife equals gun or edged weapon equals gun. Have you heard that expression?---I’ve heard it in two police forces.

Thank you. And in what context have you heard it in two police forces?---So in all my training has been knife equals gun.

And what does that mean?---It means that if you present a knife to me, I’m not going to take out a knife as well. We’re not going to have a knife fight. That’s not how it’s going to work. I’ve been given a tool to protect me and other people.

Yes?---The Government sees fit for me to have that tool. You take out a knife, you’ve increased the level of force I may use.

And what is your – consistent with your training, what do you understand is – how can you respond in those circumstances, if a knife is presented against you by an offender?---My firearm would be out.

And if you're prepared to pull out the firearm, are you also prepared to pull the trigger?---100 percent.

Insofar as training is concerned – that is, the firing of a weapon and the circumstances that you've just described – is there a particular location that you should take aim for, consistent with your instructions?---So normally, we – what we aim for is a centre mass. It's larger. You have to – you have also imagine that we have adrenaline running through our system. Who's to say each shot you take is perfect shot? So to limit the amount of missing the person, we aim for the largest area, which is centre mass.

And that's what you've been trained to do?---Yes.

Insofar as you've been trained to deploy your weapon, which weapon – what weapon are we talking about?---A Glock.

Glock. Did your training encompass how many times you can pull the trigger in that sort of scenario?---No.

What training did you receive about whether you should or shouldn't fire more than once?---We on about training or real world?

Well, both?---So training would be – they say go, like, two rounds into the target. It's going to be two rounds into the target.

Yes?---There's other times when we're doing a scenario where it's – someone will shout, "Knife," and you completely empty your whole clip. You will do a tactical reload – so quick reload – and you might do two more rounds.

Yes?---So that's to get you into the habit of knowing that when you feel the slide rock back and it stays back, that your gun's empty. You quickly get it loaded again and keep shooting.

But as far as – sorry, I should've asked you this: in your training do you discuss, for example, what I will call the danger zone? That is, the distance between you and the offender who is armed with knife or an edged weapon?---Yes.

What training do you receive, or what are you told?---Within that six metres, I believe it is.

Within six metres?---Within six metres.

Yes?---That's the dangerous zone.

That's the danger zone?---Yeah.

Now, you told us that you're taught that knife equals gun?---Mm mm.

So if somebody's armed, they are a threat to you- - ?---Yeah.

Or potentially, a threat to someone else. Your training is that you can withdraw your firearm?---Yeah.

And discharge that firearm, if appropriate?---Correct. And it doesn't – it doesn't even have to be a knife.

Yes?---That's why everyone confuse me. If I ever see someone there with a baseball bat, I'm going to draw my gun. A hammer, I'm going to draw my gun.

An axe?---Going to draw my gun.

And depending upon the circumstance, pull the trigger?---Correct.

Is there any limitation on how many shots you should fire in those circumstances?---So, we can all turn round and say, "This is how many I should have shot." Let's say, for example, I used my firearm on someone. At the end of the day, it's how many I deem to stop that person doing what they are doing. We don't go to work to have to discharge a firearm. At the end of the day, we're here to help people, not hurt people.

Yes?---However, if those times are come, I'm the one that turned around and says, "This is how many rounds I believe to stop them doing – to doing." So it's nothing about trying to kill them, it's trying to stop them doing the whole reason I had to use force in the first place.

In other words, you continue to fire do you, until the threat is eliminated, finished?---Well I could fire. I could not. I could stop. I could fire again. I could stop. I could fire again. I could stop. Or those rounds could be continuous.

In other words, it's all about the incapacitation - - - ?---Correct.

- - - of the individual - - - ?---Yep.

- - - who is posing the threat by seeking to deploy an edged weapon, knife - - - ?---Correct.

- - - call it what you will, against the police officer?---And it's how I form in my mind at that time.

All right. I want to ask you some more questions if I can about training, and also in particular a gun. Have you bought today what's called your holster?---I think it's in that plastic bag behind you.

With your Honour's leave, could that be presented to the witness please.

HIS HONOUR: Yes?---And it's got a plastic fake gun in it, so - - -

MR EDWARDSON: It's not a loaded gun?---No, it's just plastic.

First of all, is this your holster?---That's my holster and it's got a training firearm in it.

And with his Honour's permission, I'd ask that you put it on?---I didn't bring my other belt, but I can show you how I'd wear it.

If you please?---I have it on here. I have it as a leg tie.

So it straps to your right leg does it?

HIS HONOUR: Can all the members of the jury see that?

Yes, thank you.

MR EDWARDSON: Now I'm going to ask you some questions in particular about what safety mechanisms are part and parcel of the – your piece of equipment there?---Sure.

Now you've got there what is – what I'll call a Glock replica?---It is, yep.

So it's plastic?---Yep.

But it's used for a reason, it's there for a reason isn't it?---Yeah, yeah, we use it during training.

Thank you. And what do you do with it?---So when we're doing a defensive tactics – sorry, defensive tactics training we'll be in like a padded room. It's where we do our handcuffs and our take-down, wrestles, head locks, et cetera.

Yes?---But also part of it we'll have a bunch on inert spray. So pepper spray, but it's just got washing up liquid in it. And then we'll have fake knives and fake guns. So the scenario could be, you're going to grab a knife, you're the offender, I'll have a blue gun, we're standing there talking. You pull out the knife, I'll pull out my gun. I'll shout "Gun". I'll mimic the fact I'm going to shoot you X amount of times, and then I'll put it away. And then we'll take turns during training.

Now when you say that you'll mimic the fact that you might for example say, "Gun"?---Yep.

Every scenario is different isn't it?---Correct.

And sometimes you might have the luxury and opportunity to try and de-escalate by negotiating?---Yeah.

For example, you might have your weapon drawn. You might say to the individual put your weapon down, or I'll pull the trigger, whatever it might be?---Mm mm.

Something like that. But there must be other scenarios, consistent with your training, where it all happens so quickly that you just don't have that luxury?---So it's easy to de-escalate when you have space.

Yes?---You're there with a knife, I'm here with my firearm. It's much easier to de-escalate.

I want to ask you a little bit about that holster?---Mm mm.

The gun holster. Does it have a mechanism which is designed to stop other offenders from removing the firearm from you and its holster?---It does. It has two, technically, yeah.

Two. Can you just explain that to the members of the jury please?---Yep. So if you - - -

Please stand up so – yes, please?---So the first one is we have the catcher, I don't know what the technical name for it. You push that down. So people think the firearm's unsafe, it's not. Still can't take it out. Kind of like a safe guard. And then I have another catch here, and that allows me to remove it. So effectively you have two safety devices on it.

In your training, and in the scenarios that you've mentioned to the jury, if you are – if there is a risk or a possibility that you might have to deploy your Glock, are you trained as to be in a state of readiness?---We are, but a state of readiness could be several ways. I could have my hand on the gun. I could have unclicked the top bit.

Yes?---I might not have unclicked the top – sorry, the top guard bit, well yeah, it's like – of course, we'd be in a state of readiness.

Right, thank you. All right can you just put that to one side for a moment please.

Could the witness - - -

MS CALLAN: Your Honour, sorry, could I ask that the item, that is the holster and the replica Glock be marked for identification.

HIS HONOUR: Will this witness be requiring the use of this - - - ?---I'll need it tonight for work.

MR EDWARDSON: I'd prefer that he had that for work tonight, your Honour.



MS CALLAN: We might make some enquiries as to whether this witness could be provided with a substitute holster for the purposes of his shifts. But in my submission, that is the item that this witness was shown in the witness box.

HIS HONOUR: I appreciate that.

MS CALLAN: Yes.

HIS HONOUR: But the question is whether it should be held here, or whether it should be simply returned to the witness on the basis that he gives an undertaking to return it to the court if called upon to do so.

MS CALLAN: Such an undertaking would be satisfactory, thank you.

HIS HONOUR: You're prepared to do that? If you're called to return the - - - ?---Of course.

- - - you'll do so?---This is – this is a standard issued holster.

All right, thank you.

MR EDWARDSON: Thank you.

HIS HONOUR: I will have it marked for identification in theory as - - -

MR EDWARDSON: Your Honour, the holster and the gun, or just – or separately?

HIS HONOUR: Do you want both, Madam Crown?

MR EDWARDSON: Yes please.

HIS HONOUR: So that will be marked for identification with the letter J. Both holster and gun. But they will be returned to the witness, on the basis that he has given an undertaking to return it to court if called upon to do so. Thank you.\

EXHIBIT MFI J: Replica Glock and holster.

MR EDWARDSON: Now just before we complete the edged weapon equals gun scenario. We referred to a knife. We refer to an edged weapon. But it doesn't matter, it can be any item?---Yep.

That has the capacity to cause damage?---Of course.

But the notion, edged weapon, is around sharp objects, that sort of thing?---Yeah.

All right, I want to ask you a little bit more now about the creation of the email that's now exhibit P1 tab number 12.

Could that be shown to the witness please your Honour?---I've still got it - - -

Got it in front of you. Now this is an email that you sent to Julie Frost, and others, the others being those persons that are cc'd into that email?---Yeah, yeah, sorry, yep.

And clearly you contemplated, and indeed, the conversation you had with these IRT members when they were deployed from Alice Springs, was that the ultimate mission was the arrest of Kumanjaya Walker?---Yeah, and if you see as well, they bought a caged vehicle.

Yes?---Which was the view that you take on it, because you are going to bring a person back.

Right. So given that you had some conversation with Sergeant Frost. You knew that that's what she wanted. And ultimately approval from high up - - - ?---Yep.

- - - was given, down through the chain of command, for these four men to be deployed?---Yep.

There was an expectation that they would assist, or have other local members of the police force, as part of this operation?---Yes, I've been a remote sergeant out in community, and when we've had people from out of town come in, they were more – the people who come out would more be just kind of back-up, like there to assist you. But at the end of the day, it's your community. You're going to know everyone. You're going to have the repour. And the whole view is to try and obviously do it as easy as you can, and as quickly as you can.

Yes. So was there an expectation that there'd be other police force members from – within Yuendumu, who would assist – be assisted by the IRT?---100 percent, yeah.

And is that why you've got in this particular email, "Provide support to local members"?---Yeah, they are going to support community.

Did Sergeant Frost ever tell you that she was not going to permit any police officer to actually go out to the community with the IRT members?---No.

MS CALLAN: Object.

HIS HONOUR: Yes.

MS CALLAN: I withdraw the objection.

HIS HONOUR: Thank you.

MR EDWARDSON: I want you to have a look at tab 13 please. And you'll see that this is what's been described, at least in this court, as the arrest plan, prepared by

Sergeant Julie Frost. Now if you look at the email, it appears that you were not – sorry, this is tab 13. If you go to tab 14?---14 yep.

It's the same document?---Yep.

But this time there's a whole list of people who are included in the so called arrest plan. Do you see that?---Yep.

And I don't think I've missed it, but you are not included - - - ?---No I'm not.

- - - in that email?---No.

So Sergeant Frost never forwarded to you this arrest plan?---No, I don't think so. I don't think I've seen it.

And you certainly have no knowledge, did you, of the notion that these men were not going to be deployed until say, for example, 11 pm on the Saturday night?---No. I think I did – I'm not too sure what I knew before or after the email. I think I did make a comment to someone if I knew – I think it was more around the arrest plan of them going to arrest him at 5 am. But I wasn't – I wasn't aware of it, even before they left Alice Springs.

Well you're certainly aware though, that at least at the time they were deployed, there was no actual intelligence of the precise location of Kumanjayi Walker?---Yeah I was – I was aware there was no – we didn't know where he was.

And you knew, didn't you, as can I suggest the other members of the IRT must have, from the discussions that you had, was that part of their job description, if I can call it that - - - ?---Mm mm.

- - - Was to actually try and gather intelligence to determine his location?---Yeah, I'd imagine they would, yeah.

And certainly the expectation was that if they were able to identify - - - ?---Mm mm.

- - - his location, their job, their task, with their skills - - - ?---Mm mm.

- - - was to arrest him?---Yeah.

Do you know – have you heard of the expression "Clearing a house"?---I have, yes.

What does that mean?---Well, "Clearing" - so for example, we're going to an address and the person may be in there but we're going to search the house. So it's just a term we use so you can turn around say to the group, "All right, we need to clear this house". What it means is that you search anywhere where you think a body - a person - could be hiding. Cupboards, laundry cupboards, outside - is there someone in the roof, crawl space, so you'd clear the house - what it means.

And when you are clearing a house with the prospect - or possibility of a dangerous offender being within the house that you are then clearing, you talked before about you would expect officers to be in a state of readiness?---Mm mm.

You've seen this body-worn video haven't you, of this axe incident?---I've seen it on the news, yes.

Right, but as at the time that you created this email, on 9 November, had you seen the video footage at that time?---Sorry the axe incident?

Yes?---Sorry, I thought you said "Zach's incident". Yes, I'd seen the axe incident.

Axe incident?---Yes.

When did you see it?---I think maybe the day before.

And it's quite a visual - - -?---Yes.

It certainly would have informed all police officers of the potential risk and danger the Kumanjayi Walker might present to police officers who were tasked with the responsibility of arresting him?---Yes. I am also mindful as well as that from policing for so long and the majority of my policing has been street policing is that when you have offenders or subjects that manage to get one over on the police, let's just be - what this was, it gives them more confidence. So you're dealing with someone now who's been able to use that level of force against police and still get away. So would - in my opinion, it would make them more confident.

Right. So in other words there is an escalation in his potential danger to police officers?---Definitely.

And his predisposition for violence?---Yes.

And part and parcel of policing is to know who it is that you are going to apprehend, as best you can?---Yes.

And due diligence would necessarily require in those circumstances, that you have access to the resource known as the PROMIS?---Yes, yeah.

Because it is through that case management system that the Northern Territory Police operate?---Mm mm.

That you can identify, for example, the criminal history of the individual?---Yes, criminal history, links, pictures.

Okay, so you get a profile of them, to put that way?---Yes.

And that informs the police as to how you consider the level of risk that that person might pose to the apprehending officer?---Of course.

Did you, as part of your due diligence, did you yourself feel it was necessary in the circumstances to check out Kumanjaya Walker's criminal history?---I wouldn't be a good supervisor if I didn't.

Thank you. And so you must have been aware of his extensive criminal record?---I was, yes.

His predisposition for violence?---Yes.

Not just violence to others, but violence to police officers?---I was, yes.

That we now know that at least on 6 November he deployed an axe?---Yes.

In what could have been a fatal incident?---Yes.

And so that necessarily - and as it happens, his deployment of that axe permitted him to ultimately escape?---It did.

And, as you've told this jury, that's the sort of scenario that gives a person greater confidence, more likely to deploy a weapon if confronted?---Well, it's worked before.

And so he was plainly a very high-risk offender?---He was, yes.

And that warranted, did it not, the expertise and training of this specialist group that we call IRT - or the Immediate Response Team?---Correct.

Thank you.

Nothing further, your Honour.

REXN BY MS CALLAN:

MS CALLAN: Acting Sergeant, just picking up on the answers you gave to those last few questions, the potential that this offender may have become more confident off the back of the axe incident?---Mm mm.

Indicated and perhaps would be more likely to deploy a weapon, does that mean it was even more important to plan for the arrest of Kumanjaya Walker?---Well, the plan was already to go and arrest him. It didn't make it more important - I'm sorry - I'm - - -

As an IRT member are you trained to undertake any planning in relation to the arrest of an armed offender?---We are, yes.

Does that planning include an assessment of the level of risk?---Yes, it does.

Does that planning include, for instance, cordoning the proposed location?---It does if you know the person is inside.

Well, there are a number of methods to determine if a person is inside, aren't there?  
---Yes.

One method may be to knock on the door and ask?---Yes, and another method is to actually go in and see if they're inside.

And in either of those methods, are you - - -?---Yes.

In general, as an officer with the Northern Territory Police Force, or more specifically as a member of the IRT, trained that a cordon should, where possible, be put in place?---So, for example, you need numbers for cordons.

Yes?---So when we do training work, say a siege stronghold?

Yes?---We'll have up to 10 members.

Yes?---And we'll - the training is the offence is in there - or the hostage is in there and that's how that scenario's set up and so that's perfect when you know 100 per cent that person is in there.

Can I - that is, as you say, a siege scenario?---Yes.

You have a number of officers involved, confidence that the individual is inside?  
---Correct.

And as you described, up to 10 members undertaking the cordoning?---Correct.

That is standing at appropriate points around the perimeter of the building in question?---Yes.

When the deployment involved has less - a lower number of police officers?  
---Mm mm.

For instance, four, cordoning can still occur, can't it?---I don't see how you could really cordon with four people.

If there are more - to the officers' observation - more than one door?---Yes.  
By way of entry and exit to the building in question?---Yes.

Is there any practice? Are you taught anything about locating officers at those doors?---So if we're going to an arrest target and there's two doors and one out the back - one at the front and you've got four members.

Yes?---I'd initially have to members go the back, two members go to the front.

Would you describe that as cordoning?---Not really. It's what we - you can put that word on it but it's what we would do even when I go and look for someone who's got a warrant of a lower level as well. It's to stop them running away - but that doesn't really cover off - you don't know how the windows are set up. A lot of the houses we go to have just got plywood over the windows, so much you won't have a window. So you're not taking that into account you're just - at the end of the day if we're doing something like that, it's in quickly.

I will just pause you there for a moment?---Yes.

You've described the purpose of having the officers at the back door?---Yes.

Being in the event that the offender tries to run away?---Yes, that's providing we know the offender is there.

Before you knock on the door or go into the house, if you think the offender might be inside, is it your training to place officers where other exits are located in that building?---Yes.

And the purpose is to prevent them from running away?---Correct.

That's not the - you wouldn't describe that as a cordon?---No.

But the purpose is to the same - has the same - it is to the same objective - to seek to place officers in locations to try and catch the offender if they are seeking to run away?---So a cordon - for me a cordon would be more when we are not going to go into the house immediately. For example, we have time, we have numbers, we're going to put the cordon in. I think for two members going in the front and two members at the back, I wouldn't really call that a cordon.

Is it your training and experience in the IRT to enter a house immediately?  
---In?

In seeking to effect an arrest?---Yeah, so - well, I'm confused, is like, how quickly I'd go into a house?

Well you - a moment ago, I understood your evidence to be "We may not have the luxury of time. We may have to go in immediately"?---Yep.

Is it your training, as a member of the IRT, to enter a house immediately, if you think a suspect is inside?---Well when I say immediately, we're going to enter the house. But whether it's immediately, it's like, do we know the person's in there, most of the time with the information we get, it's 50/50. So when you say immediately, we're going to enter the house. How quickly that's done really depends on how quickly we can get to the front door. How quickly we can get out the car. Where can we park the car. Is there dogs at the address? How many of the people are at the address? Are the doors locked? Which door do we move in? Which door is the front door?

Having dealt with all of those - - - ?---Yep.

- - - aspects - - - ?---Mm mm.

- - - is it your training and practise, as a member of the IRT, to then enter the house?---Correct, yes.

Is it your training or practise in the IRT to knock and ask if the person is inside?---I wouldn't say it's training in the IRT, but it's – it's policing.

Well I'm asking about the training and practise of the IRT?---Yep.

Is it the training and practise of the IRT - - - ?---Mm mm.

- - - to knock and call out – that is, enquire if the person is inside?---That really depends on the situation.

What do you mean by that?---Is anyone going to come to the door. Is the door already open. Most times if I go in there and they – for me personally, if the door's open, I'm just going to introduce myself while I come in.

In doing so, what is your training and experience as a member of the IRT, in terms of maintaining a reactionary gap between yourself and an individual you might find in the house?---So sometimes you find someone in a house in the bathroom. It's very hard to have a reactionary gap in a house. These rooms are narrow. A lot of the times there is whatever on the floor. There could be furniture. In a perfect scenario, they'd be at one end of the room, I'd be at the doorway. And that rarely happens. And also is that the person I'm looking for.

Are you – is it your – part of your training or experience, as a member of the IRT, to withdraw from a house upon determining that the suspect you're looking for is inside?---No.

Is it your - - - ?---No it's not our training to withdraw. We don't – to withdraw from people we're there to arrest. That's – that was a – that's our job. But as for, if I find an arrest target, I'm not going to withdraw. If anything, I'm trying to go and try and get, you mean, get hold of that person as quick as I can. Effect the arrest as quick as I can.

You were asked some questions about the two safety devices on your holster?---Yes.

You spoke about being where necessary, in a state of readiness, that is, in terms of the deployment of your Glock?---Yep.

You spoke of one state of readiness being your hand on your Glock?---Yep.

You spoke of unclipping the top bit?---Yes.



Is that part of your training, as a member of the Northern Territory Police Force?---No.

Is that part of your training as a member of the IRT?---Not necessarily.

It's your practise?---Sometimes it's my practise. Sometimes it catches on the seatbelt and it's already down by the time you get out the car. But as for if I go into a house, whether I'd push down the top guard there or not, I'm – I can't say at 100 percent, do it every time.

Is it contrary to your training as a Northern Territory Police Officer, to unclip the top part of the safety?---Well we were never trained to do it or not to do it. Get me? It's like it can be a personal choice if you actually push it down or not. I am – I can withdraw my firearm just as quick, whether the guard is up or not.

If you can withdraw your firearm just as quickly, whether the guard is up or not - - - ?---Yep.

- - - why do you on occasion, unclick the guard?---Some people might choose to do that. It doesn't – it – it's not really going to change how you're going to react in that situation. I've pointed guns at people and still not shot them. So it's not like just because the clips down it changes anything.

In so far as you've had to draw your Glock - - - ?---Yep.

- - - you say, "Point guns at people"?---Yep.

And you say "Still not shot them"?---Yep.

Is that because your assessment of the situation meant you considered it wasn't necessary to do so?---In all those situations, the person would have been say from the here to the door away.

You gave some evidence in cross – in answer to questions in cross-examination of some scenarios, which include use of dummy items. A plastic knife. A plastic gun?---Yep.

Were those scenarios that you undertake as part of your annual training as a member of the Northern Territory Police Force, in defensive tactics?---Correct.

You were asked questions about the reason for aiming at the centre mass?---Yep.

In – on the occasion when you do deploy your firearm?---Yep.

You explain you do so because – just want to make sure I understand your evidence - - - ?---Yeah, sure, yep.

- - - that minimises the risk of missing the target - - - ?---Correct.

- - - that the person you're seeking to shoot?---Yep.

You understand also that is a location of vital organs?---Correct.

And when you speak of shooting at the centre mass, that is to incapacitate the individual?---Correct.

And the aim is to incapacitate as quickly as possible?---Correct.

That is, because that means that they no longer pose the threat that you - - - ?---The whole reason you had to use the force in the first place, yeah.

In terms of the incapacitation of the individual, shooting at the centre mass, potentially hitting vital organs, but the aim is to ensure as quickly as possible, that level of incapacitation?---Yep.

You said that you would continue to fire until the threat is eliminated?---Correct.

Is that your training as a member of the Northern Territory Police Force?---So your training can be – yeah, so it can be continue to fire. It can be fire. It can be reassess. It – fire again. It could be continuing fire. It's not as in – it's like you must do two and then pause, or you must do five and pause. It's how I see at the time.

And you mention the word, "Reassess"?---Yep.

The – is there emphasis, in your training as a member of the Northern Territory Police Force, to continually reassess, in a scenario, so as to consider whether use of force is necessary?---Yeah, you continue reassessing, yes.

You were asked questions about, and you gave some – sorry. You gave some evidence about, and I think this was in the context of some training, about the expression "Knife equals gun"?---Correct.

My note of your evidence was that that meant you had to be prepared to pull the trigger?---Yep.

Does that mean you must or you will pull the trigger?---No.

Does that depend on your assessment of the risk?---Yes.

In the context of that evidence, you spoke of giving – of perhaps shooting two rounds, or completely emptying the clip?---Mm mm.

Changing it, and doing another two rounds?---Possibly.

So just to be clear, you're not trained to fire two rounds, are you, necessarily?---Well, I've trained to fire as many rounds – there's no - I could fire one round - - -

Yes?--- - - - fire five rounds. Not like it's – we do have this – when we go to the firearms range, we'll do like two round, but a lot of that is, at the end of the day, we're doing training, so you can't say to someone, saying, "Right, there's your bullets; just go shoot them." So to keep the training – you mean keep the training symmetrical, all's I could say, is that everyone's going to shoot two rounds. The next scenario, you're going to shoot five rounds. So that's – that's where a training from two rounds comes from.

Okay. The weapons-handling training that you undertake - - -?---Yep.

- - - that includes, literally, understanding the way the weapon works and - - -?---Yep.

And practising clearing that weapon so it's safe?---Yep.

And it includes going out and aiming at a target to maintain and improve accuracy?---Correct.

In that context, that is weapons-handling training - - -?---Yep.

- - - there're also exercises, as you say, where you might fire your weapon quickly twice or five times?---Yep, or once.

Or once?---Yep.

That is so that you as an officer, through that training, maintain an ability to, literally, be able to fire that weapon as required on however many times might, you assess, be required?---Yep.

That is, can I suggest – withdraw that.

You were also, is this the case, undertake training in what's called defensive tactics?---Yep.

And the focus on defensive tactics for officers is understanding and then repeating the exercise of assessing a risk, determining the appropriate response to that risk, and then it's, you say in the scenarios, physically practising it. Is that - - -?---Yeah. Yeah. Yeah. Yep.

When you spoke of, potentially ending two rounds, you mean two bullets?---Yes.

When you speak of completely emptying the clip, how many bullets do you mean?---It would be 15 in the clip, and at the start of shift, you already have one in the chamber, so 16.

So if you've got one in the chamber - - -?---Yep.

- - - 15 in the clip?---Yep.

When you spoke of completely emptying the clip - - -?---Yep.

- - - that means, one, 15?---Yep.

And then did you say another two rounds?---Yeah, you could do it. So it more the fact that you do your reloads quick.

And that is practise reloading quickly?---Correct.

So that if you deemed it necessary, you could continue to fire bullets?---Yep.

But I think you've said you're not trained to fire any particular number of bullets in response to any scenario. It's your assessment?---It's my assessment, yeah.

So if an individual produces an edged weapon, you're trained to assess the position to pull out your Glock?---Yeah.

It's your assessment whether you pull the trigger?---Correct.

And it's your assessment how many times you pull that trigger?---Correct.

The aim of pulling the trigger is to incapacitate?---Yep.

Another form of incapacitation is ground stabilisation; would you accept that?---Yeah, there's – there's hundreds of different types of incapacitation.

But ground stabilisation is where an offender is taken to the ground by another officer. Is that the correct description?---Well, I wouldn't call it incapacitation.

All right, you said there are hundreds of methods of incapacitation?---Yeah. Yeah.

That is stopping the – incapacitation means you are stopping the threat - - -?---Yep, yep, correct. True, but as for taking someone to ground to say – then say they're incapacitated; I've had some of my worst scraps of being on the ground, so.

It's a matter for the assessing officer, whether the individual is incapacitated?---Yep.

And therefore whether any – whether to pull the trigger further?---Yeah, I'm kind of confused, but we went with that, so.

You said there were hundreds of methods to incapacitate?---Yep.

Could you give the jury some examples?---Well, for example, are we talking about weapons?

Sorry, it's your evidence - - -?---Yeah, yeah, yeah, so the – sorry, when I say hundreds, figure of speech; there's lots of ways to incapacitate someone.

Could you give the jury some examples?---Well, you could be – from a distance, you could be using a rifle. You could use a vehicle. That's what I tried to - - -

Well, that's two. I you're in physical proximity with an individual, what are the methods of incapacitation?---So how close are we?

Perhaps you might work that into your answer, sir?---Yeah, so if I'm – and what level of force are they showing to me?

The case that the various methods of incapacitation range from lethal to non-lethal force?---Correct.

As a member of the Northern Territory police officer, you're aware of a general order which applies to only use force that is reasonable, necessary, proportionate and appropriate?---I do.

That members should use minimum amount of force required for safe and effective performance of duties?---Yes.

As a member of the Northern Territory Police Force, case that you're taught – you're given training both initially and then annually in relation to operational safety and use of force?---I am.

That includes what's known as the ten operational safety principles?---Yes.

So you're taught, for instance, that unless impractical to do so, a cordon and contain approach is to be adopted?---I believe that's one of them, yes.

And what is cordon and contain?---Cordon contain is keep the person there, contain them.

Yes?---And then put cordons around. And you just sit and wait, so you'd look for what else is available to you while you've got a cordon in place.

Are IRT members taught anything different to that in their training, their specific training?---When we a cordon and contain training, no.

Another of the ten operational safety principles is that a violent confrontation is to be avoided as much as is reasonably possible. You recall that?---Yep.

Are IRT members taught anything different?---No.

You are also, part of the operation safety principles, trained that the use of force is to be avoided as much as reasonably possible. Are the IRT taught anything different?---No.

Another safety principle taught to Northern Territory police officers, I suggest - - -

MR EDWARDSON: This is – I mean, I should have objected a long time ago, but this has gone way before – this is not re-examination at all.

MS CALLAN: In my submission, the topic, in very broad terms, was dealt with by my friend in cross-examination, and I'm entitled to deal with that, in the way that I have been in re-examination, to clarify what it is that IRT members are trained in relation to the use of force.

MR EDWARDSON: Well, then if that's – if is that, that is the position, and if the court accepts what's put, that is that it's a proper matter for re-examination, I'd ask that my learned friend not lead.

MS CALLAN: Yes, I accept that.

As a member of the Northern Territory Police Force, do you receive training about maintaining a safe distance?---Yes.

And what is a safe distance?---Safe distance is any distance that's going to keep you safe.

Do you received training about not closing in on a threat?---It depends on what the threat is. Most of the contacts we make with people and within a metre and a half/2 metres. That's policing.

Yes?---That's – that's what we deal with. The fact is it's very hard to arrest someone without touching them. So you do have to get in there to arrest them.

You receive training about achieving control as quickly as possible in relation to a subject?---Yes, but every – every context is completely fluid, so.

You may not be – sorry, I withdraw that?---Yep.

Are you, as a member of the Northern Territory Police Force, trained to use verbal communication - for instance in relation to the presence of an edged weapon or that you are drawing your Glock?---So can you give me a scenario? As in what?

When you see an edged weapon?---Yeah.

Are you taught, for instance to shout, "Knife - knife - knife"?---Yes, we are.

When you draw your Glock are you taught to communicate that fact to the people in the room?---Well, the fact I'm shouting, "Knife" would do that, yeah.

Well, that's about a knife?---Yeah.

If you in response are drawing your Glock?---Yeah.

Are you taught to - - -?---I don't know, there's no - there's no word we use when I take my firearm out.

Are you taught to warn an individual, for instance, "Drop the weapon or I'll shoot"?  
---We are taught that during training we are, when we have that range.

It's about timing?---Well, it's not so much about timing, it's about the factors that - for me to bring it up and make the decision when I'm going to shoot, really depends on how much at risk they are to me at that time. If I - if they are right beside me there's gonna probably be no words said.

Is the training that you received as a member of the IRT any different to what you have just described, which relates to all training given to members of the Northern Territory police force?---We probably do more training as IRT but at the end of the day we're still police officers.

The training that you received as a member of the IRT, was that coordinated by Lee Bauwens?---Some of it was, yes.

Was it delivered by Lee Bauwens?---Some of it was, yes.

Those are my questions.

HIS HONOUR: You may go?---Thank you.

WITNESS WITHDREW

HIS HONOUR: And we will now take the morning adjournment, so members of the jury, would you retire please?

JURY OUT

HIS HONOUR: I will adjourn.

ADJOURNED



## RESUMED

MS CALLAN: Your Honour, the item that was marked MFI J, steps have been taken and the preference is for that to be placed in the court's custody for the trial. That is, the gun holster.

HIS HONOUR: Yes, all right.

MS CALLAN: This is a regulation exhibit bag, your Honour, but here we are.

HIS HONOUR: All right, thank you.

Bring the jury in, please.

## JURY IN

HIS HONOUR: Yes.

MR STRICKLAND: I call Constable Mitchell Hansen.

MITCHELL HANSEN, affirmed:

XN BY MR STRICKLAND:

HIS HONOUR: Yes.

MR STRICKLAND: Can I ask you to speak slowly and clearly? Everything you say is being transcribed. If you'd like me to repeat a question or you don't understand, please say so?---Thanks.

What's your name and rank?---Mitchell Hansen. My rank is Constable First Class.

In November 2019, you were working as a Constable at Alice Springs Station?---Yes.

Under patrol group 5?---Yes.

Under Sergeant Evan Kelly?---Yes.

Other constables in your group included Zachary Rolfe?---Correct.

Breanna Bonney?---Correct.

James Kirstenfeldt?---Yeah.

And some others?---Yes.

You had been an officer since May 2016?---Yeah.

And you started in recruit college then?---Correct.

And you were in the same year – the same placement as Zachary Rolfe?---Correct.

You became close mates with him?---Yeah.

You still are?---Yes.

Did you know that Zachary Rolfe served in the Australian Defence Force?---Yes.

For how long?---Not sure.

Do you know if he served in Afghanistan?---Yes.

You were also a member of the Immediate Response Team?---Correct.

When did you join that?---I think that would've been at the end of 2018 or the beginning of 2019. I'm not totally sure.

Now, I want to take you to 6 November 2019. Were you aware, on that day, that Kumanjayi Walker was an arrest target?---I think I – I think I was aware, yeah.

Okay. On 7 November 2019, do you remember being on duty that day?---Yeah, I do remember that, I was on duty.

And Zach Rolfe was also on duty on that shift?---Yes.

You remember you watched a body-worn video of Kumanjayi Walker with an axe at House 577?---I do remember that.

I'll just call that the axe incident, okay?---Sure.

Did you watch the body-worn footage of the axe incident with Zach Rolfe?---Yes.

How many times?---A number of times. I'm not sure.

Where were you when you watched it?---We were sitting in the muster room of the Alice Springs Police Station.

Can I get you just to slow down a little bit?---Sure.

Did you talk about the body-worn video that you watched about the axe incident with Mr Rolfe?---I don't remember talking about it. But naturally, I'm sure we did talk about it at some point.

Do you remember any discussion you had with him about it?---I don't remember the specifics of any conversation we had.

Okay?---Just to clarify, that was the moment I became aware that Walker was an arrest target. I wasn't aware on the 6th.

Okay. Do you remember – just pause in case there's an objection to this question, okay? Do you remember you gave – well, not to this one – do you remember you gave an interview to the police a couple – on a couple of different occasions about this matter?---Yeah.

You gave an interview – you gave one interview on 17 January 2020. Do you accept that?---Yes, sure.

And that was at 9.52 in the morning. Then you had a bit of break and then you did a second one that day?---Yeah.

You remember that? Okay. Have you looked at those – in preparing your evidence today, have you had a chance to have look at the transcripts of those interviews?---Yeah, there's 40 pages of transcript, but I've look at those- - -

You've looked at those- - -?---As best I can, yeah.

Okay. So do you recall – again, this is where there may be an objection, so just pause. Do you recall in your interview on 17 January 2020 whether you told investigating police about your discussions concerning the axe incident?---Yes. I do recall.

Okay. Do you remember what you told investigating police about that?---I told the- - -

MR EDWARDSON: (Inaudible) question can be framed. First of all, you shouldn't really talk about recall, but I'll worry about that later. Bottom line is, your Honour, he should simply ask him what his recollection now is about the incident itself.

HIS HONOUR: Yes.

MR EDWARDSON: You can't call evidence from this witness as to what he might have told police, because- - -

HIS HONOUR: At a different time.

MR EDWARDSON: Exactly.

HIS HONOUR: Yes.

MR EDWARDSON: And you can't use a previous consistent statement to bolster the credibility of witnesses, as my learned friend knows.

MR STRICKLAND: I know that, your Honour. And I thought I had asked them that, and so this is really a refreshing the memory type of issue.

HIS HONOUR: Well- - -

MR STRICKLAND: Because it's – that's what I'm – my understanding of this evidence is he doesn't recall. But I'll try again.

HIS HONOUR: Just one moment. So you're looking at this as a preliminary to seeking leave for him to refresh his memory?

MR STRICKLAND: Exactly, your Honour.

HIS HONOUR: All right.

MR STRICKLAND: It's not prior consistent statement.

HIS HONOUR: Right. Then I'll allow it to continue.

MR STRICKLAND: Thank your Honour.

So just to be clear, what I'm asking you is what was the discussions you had with Mr Rolfe when you watched the body-worn video of the axe incident, either during watching it or shortly after?---That was approximately two years ago.

Yes?---I don't – I don't remember what we talked about exactly.

Would you be assisted if you read what you'd said to the police in January 2020?---What I said in January 2020 is – I was of the – I still couldn't remember then and I gave a hypothetical conversation about – a hypothetical recount of a conversation we may have had.

Okay.

Your Honour, I seek leave to refresh the memory from his transcript.

MR EDWARDSON: Your Honour, the pre-conditions to refreshing memory have clearly not been established through that question.

HIS HONOUR: No, they haven't.

MR EDWARDSON: Thank you.

HIS HONOUR: I'm not quite sure where my copy of the *Evidence Act* has gone.

MR EDWARDSON: Your Honour, this is what needs to be established is: (a) that there was a record, (b) that at the time the record was made, the facts were then fresh in this officer's memory and that it does accurately reflect his recollection at that time.

HIS HONOUR: Yes.

MR EDWARDSON: Now, he hasn't said that at all.

HIS HONOUR: No.

MR STRICKLAND: Your Honour, I- - -

MR EDWARDSON: None of the pre-conditions for the admissibility of this question have been asked by my learned friend. And in any event, what we've got so far, he said: "Whatever I might have said then, it was a hypothetical because I didn't remember then what I'd actually said to Zach on this occasion." So whichever way you look at it, it's not permissible to go to that statement to try and establish- - -

HIS HONOUR: Try and refresh his memory.

MR EDWARDSON: Yes.

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, I'll just very briefly respond. What I was seeking leave to do was for this witness to be shown the transcript and then I'll ask him further questions as the pre-condition to eliciting the content of that.

HIS HONOUR: So the purpose of showing it to the witness at this point is not to refresh his memory from it?

MR STRICKLAND: It's – I intend to show him the transcript and then satisfy the pre-conditions – or hope to satisfy the pre-conditions in the *Evidence Act* by- - -

HIS HONOUR: Well, are you talking about the pre-conditions for refreshing memory or s 38?

MR STRICKLAND: Refreshing memory.

MR EDWARDSON: It sounds to me, your Honour, like cross-examining his witness, which he can't do.

MR STRICKLAND: Well I can refresh his memory, your Honour.

HIS HONOUR: Yes, but only if the requirements of the Evidence Act are met - and they are not met.

MR STRICKLAND: Well, in my submissions to meet them I wish to show him the transcript and ask him some questions about that without going into any individual questions.

HIS HONOUR: Now, you are not allowed to.

MR STRICKLAND: If the court pleases. I will try it another way, your Honour.

When you spoke to the police on 17 January 2020 about the body-worn video, watching it and speaking about it, was that event fresh in your memory at the time you spoke to the police on 17 January?---The event being me watching the axe incident?

That's right?---The watching of the axe incident I remember my emotions and how I felt about what I was seeing but I don't recall my conversations with anyone that was around us at the time.

Did you remember them though, when you spoke to the police on 17 January 2020?  
---No.

Okay. Will your Honour excuse me? Okay. Now, on that day, on 7 November do you remember going - after watching the body-worn video do you remember going to look for Zach Rolfe? I'm sorry - for Kumanjayi Walker?---Yes, I do remember.

Do you remember you went to Abbott's Camp?---Yes.

Where is that?---Abbott's Camp is on South Terrace in Alice Springs.

Could you speak up please, it's hard to hear?---Alice Springs is on South Terrace in Alice - sorry - Abbott's Camp is on South Terrace in Alice Springs.

And who did you go with?---With Zach Rolfe.

Anyone else?---I don't believe so.

And did you find Kumanjayi Walker at Abbot's Camp?---No.

Did you then go somewhere else after going to Abbott's Camp?---Yes.

Where did you go?---We went to the Bunnings car park.

Speak up a bit?---We went to the Bunnings car park.

Yes, whereabouts?---On North Side - on the North Stuart Highway.

And who did you meet there?---There I met with Sergeant Evan Kelly, Brea Bonney, I don't - I can't guarantee who else was there, that's all that I remember seeing there.

Members of your patrol group 5?---Correct.

Did you have a briefing at Bunnings?---Yes.

Who delivered the briefing?---I believe it may have been Rolfe.

And what was said? At that briefing?---I don't exactly remember what was said but I - because it's the same thing, we do it every single arrest job, we discussed cordoning the house that we were going to approach in Warlpiri Camp, and then Zach, myself and Evan Kelly were going to knock o the door to see if we could ascertain whether or not Walker was there.

And you said that's what your practice is, is that correct?---Correct, that's what we do.

So you've done that many - you've done that many times as at November 2019?  
---Yes.

And why do you do that?---So that if the offender flees from the stronghold then we can have a higher likelihood of arresting that offender.

I am just going to show you a body-worn video, this is on the USB this is body-worn video of Mr Rolfe, on 7 November at approximately - central standard time, approximately 6:30 - 7 pm.

DVD PLAYED

MR STRICKLAND: Just pause for a moment. Just go back a little bit. There is no audio at the moment, your Honour, so I will just replay it again with the audio.

HIS HONOUR: Yes.

DVD PLAYED

MR STRICKLAND: So, do you recognise or can you see there that is a body-worn video of that cordon and contain on that day?---Yes.

Do you see yourself there?---Yes.

And you can see other officers cordoning the property?---Yes.

Yes, thank you.

DVD PLAYED

MR STRICKLAND: Can you recognise who is speaking there?---Constable Rolfe.

Thank you.

DVD PLAYED

MR STRICKLAND: Is it the case that you were the person who went to the car - police car?---Correct.

Thank you.

DVD PLAYED

MR STRICKLAND: I tender that body-worn video. It's part of the MFI on the USB.

MS CALLAN: Your Honour, I can indicate for the record the file name is "Rolfe BWV 1 of X Warlpiri Camp, Alice Springs, 7 November 2019 6:37 pm".

HIS HONOUR: That will be exhibit 15.

EXHIBIT 15 Body-worn video footage Warlpiri Camp 07/11/2019.



MR STRICKLAND: Did you wear body-worn video yourself that day?---Yes, I did.  
I will just show you another clip.

DVD PLAYED

MR STRICKLAND: So I tender that body-worn video.

MS CALLAN: Your Honour, for the record that's (inaudible) Hansen, BWV Warlpiri Camp, Alice Springs, 7 November 19 6.49 pm.

HIS HONOUR: Exhibit 16.

EXHIBIT P16: Body-worn video of Hansen, BWV Warlpiri Camp, Alice Springs, 7 November 19, 6.49 pm

MR STRICKLAND: Now did you – is that your body-worn?---Yes.

And did you see Mr Rolfe?---Yes.

What were you doing as shown in that clip?---We were trying to console the family of the people that were just located in the hills, because they believed he was in trouble for something.

Could you see – did you hear the lady saying “He” – “Arnold’s at Yuendumu”?---I didn’t pay attention to that part of the video, but if she said it on the video, she said it.

Could – I’d ask you to speak up please?---Sorry.

Could you repeat the answer because I didn’t hear it?---I don’t remember seeing that in the video just now.

Did you see the accused showing the woman something on his phone?---Yes.

What was that?---I’m not sure.

I’ll show you another body-worn video

DVD PLAYED

MR STRICKLAND: I do tender that body-worn video.

MS CALLAN: Your Honour, for the court record, the file name is Rolfe DWZ 2 of X, Warlpiri Camp, Alice Springs, 7 November – Nov 19, 6.49 pm.

EXHIBIT P17: Body-worn video Rolfe DWZ 2 of x, Warlpiri Camp, Alice Springs, 7 November 19, 6.49 pm.

MR STRICKLAND: Did you recognise Mr Rolfe's voice in that body-worn video?---Yes.

You were following two men, is that right?---Correct.

Why were you following the two men?---Because they matched the description of Arnold Walker.

Okay, thank you. Was it your experience that from time to time, men did run away from police?---Yes it was.

Particularly Indigenous men?---Any offender that didn't want to get caught would run, generally.

I'll play you a final body-worn video.

DVD PLAYED

MR STRICKLAND: Did you hear – do you recognise Mr Rolfe's voice?---Yes.

Did you hear him say "I'm still rolling"?---Yes.

Is that – do you know what that means?---That means his camera's still running.

Being his body-worn video?---Correct.

Thank you.

DVD PLAYED

MR STRICKLAND: I tender that body-worn video.

MS CALLAN: Your Honour, for the record it's file name Rolfe BWV 3 of 3, Warlpiri Camp, Alice Springs, 7 November 2019, 6.56 pm.

HIS HONOUR: Exhibit 18.

EXHIBIT P18: Body-worn footage, Rolfe BWV 3 of 3, Warlpiri Camp, Alice Springs, 7 November 2019, 6.56 pm

MR STRICKLAND: I just want to ask you finally about your training. You said you a member of the IRT?---Yes.

When you – as both your general duties and part of the IRT, you've received training into – in relation to the use of firearms?---Correct.

Defensive Tactics?---Yes.

What are defensive tactics?---Sorry?

What are defensive tactics?---They're tactics you might employ to defend yourself or someone else.

You're familiar – are you familiar with the General Order concerning Operational Safety and the Use of Force?---Yes.

And - - - ?---The General Order has changed.

Pardon?---Significantly since then.

Since – when you say since then, since when?---Yep, since – I'm not sure of the date it changed sorry, but since the incident that you showed me on the video, it's changed.

Well I'm going to asked you about the principles when you did your training?---Okay.

Which were applicable as at November 2019?---Sure.

All right. Just in a broad sense, do you agree that the purpose of those principles – I intend to ask this question, if there's an objection, then - - - ?---Sure.

Do you agree that the – in relation to those Operational Principles, the purpose of those principles is to resolve confrontation with minimum force and to maximise the level of safety?

MR EDWARDSON: I object to the question, your Honour, it's plainly leading. The question should be asked is what are those principles, and this officer, without being prompted by my learned friend, can then respond accordingly.

HIS HONOUR: Yes.

MR STRICKLAND: I'm asking about the general purpose, your Honour. I'll put it in a non-leading way.

HIS HONOUR: Yes.

MR STRICKLAND: What do you understand to be the – did, to be the general purpose of those 10 Operational Principles?---I believe that the statement relating to that is the success of an operation will primarily be judged by the extent to which the use of force is minimum is – is minimised, something similar.

Okay?---Yep.

Now as an IRT member, did you receive additional training?---Yes we did.

And what was the additional training you received?---We did training in relation to camouflage and concealment when conducting green roll(?) operations. We did training in relation to close quarters tactics within a strong-hold and a siege scenario. And we did – that’s – that’s mostly the bulk of what our training – our extra training was, yeah.

What was the degree – how much extra training did you actually get?---We would get a training day once per roster. So one day per five weeks.

And did that actually happen, or was that what’s meant to happen?---I believe that’s what’s meant to happen. For the most part we had a period of time there where we would get those days, but often times – operational requirements might mean we don’t get those days.

Now as part of your training, have you been told of the expression, or taught the expression “Gun equals knife”, or “Gun equals edged weapon”?---Edged weapon equals gun, yes.

Edge weapon equals gun?---That was from my general duties defensive tactics training.

And was that principle relevant if you were subjected to an edged weapon?---Given the right context, absolutely, yeah.

You were threatened with one?---Correct.

And when you say “Given the right context” - - - ?---Yep.

- - - depending upon the level of threat?---Correct.

Were you taught to always draw your weapon if confronted with an edged weapon?---We were only taught scenarios where someone presented us with an edged weapon in a threatening manner, so yes. That’s correct.

And when you say earlier “It depended on the circumstances” - - - ?---Yeah.

- - - what kind of circumstance did it depend on, as to whether you drew - - - ?---Yep, so if you were a safe distance, and that might be whatever I deemed safe at the time, from a person in a wheelchair with a knife, I know they can’t cover the ground to actually attack me. They have to have the means and present ability to carry out a threat.

Would it depend on whether there were other people present, in close proximity to the suspect?---Yeah, absolutely.

That would be a factor as to whether you drew the weapon or not?---Correct.

Were you taught about saying “Knife, knife, knife” if you saw an edged

weapon?---Yep, we were taught that if it's practical to do so, you should say that to alert other members that there's a weapon.

Okay, are you taught to give verbal commands if you saw an edged weapon like "Drop the weapon", or "Drop the weapon or I'll shoot"?---If it was practical to do so, we were – we were trained to give verbal commands.

And why – what was the reason for the verbal commands, as per your training?---Because it's a de-escalation of that offenders behaviour if they – it gives you some knowledge as to their intent, potentially, as well.

Sorry, it gives you some knowledge as to their intent you say?---Correct.

And when you say "de-escalation", what do you mean by that?---Yep, so when I present my firearm at an offender who's carrying a weapon that I feel is a threat to me, they are more – they are likely to drop the weapon, from my experience. And telling them to do it, generally helps them to de-escalate their behaviour.

So hand on the firearm is one escalation – part of escalation, is that right?---Yeah.

And then another level up is drawing it? That's a further escalation?---Yeah, sure.

Pointing it is a further escalation?---I don't – I don't necessarily agree that it's always an escalating factor of the offenders behaviour. In my experience, pointing my firearms at offenders has never escalated their behaviour.

I'm just – so when escalating the behaviour, it's an escalation from your point of view?---It's an escalation of force, yeah.

Yes, escalation of force?---Yep.

Do you agree with that?---The level of force is increased, correct.

And then firing it's a further escalation again?---The force that's applied is of a higher nature, yeah.

Were you trained to continually reassess the threat as circumstances change?---Yes.

I asked you about those 10 Operational Principles. One of them concerns cordon and contain, is that correct?---Correct.

You were taught that unless impractical to do so, a cordon and contain approach is to be adopted?---Correct.

Is that – are you taught anything different at the IRT about cordon and contain?---That cordon and containment, no, generally wouldn't be any different for an IRT member.

And what we saw on the video – the body-worn video, the first one - - - ?---Yep.

- - - that was an example in action of that principle, is that right? Cordon and containing?---Of a cordon, that's an example of a cordon, yeah.

Is one of the principles you're taught in those 10 Operational Principles is that the use of force is to be avoided as much as possible?---Correct.

And is the IRT – did – when you did IRT training, does that – anything different from that principle?---No.

Excuse me, your Honour. They're my questions.

XXN BY MR EDWARDSON:

MR EDWARDSON: Constable, I just want to deal a little bit with this edged weapon equals gun?---Sure.

You've qualified your explanation for what that expression means, consistent with your training by the notion of practicality?---Correct.

And you've given different examples for – let's say, for example, I think the one that you gave was somebody's armed with a knife, they're in a wheelchair but they're some distance away from you. So in those circumstances, in that scenario, you know that they can't cover the distance to, as it were, implement the threat of the knife against you?---Correct.

So in that scenario, it's a combination of things. It's the incapacity to cover a distance over a quick period of time because they're in a wheelchair?---Exactly.

That, of course, gives you the opportunity to assess the level of threat to you?---Yes.

And consider the minimum amount of force that can be applied to force that individual, in that scenario, to comply?---Yes.

For example, you might draw your weapon. You might say to the individual in that scenario, "Drop your knife, drop your knife," or something like that?---Correct.

Because in that scenario, the practical reality is that you have those options available to you?---Yes.

And you can do so with some degree of certainty and safety because of the distance between the two of you?---Yes.

But real life is such that that's not always possible?---Correct.

Indeed, you as a police officer are trained, are you not, that there are people out there who are very dangerous?---Yes, correct.

They might, for example, have a disposition for violence against police officers particularly?---Yes, that's correct.

They might have a reputation for accessing a weapon if that opportunity presents itself and, indeed, using that weapon against police if confronted by police?---Yes, that's correct.

Indeed, in the case of Kumanjayi Walker you were aware, were you not, of how high a risk he potentially was to police if apprehended?---Absolutely, yeah.

You said that you had viewed the body-worn video?---Yes.

Of the – what I'll call the axe incident?---Yes.

You told us that you couldn't recall what you actually said to Zachary Rolfe at the time that you viewed that video?---Correct.

But you did remember what your feelings were and what your assessment of that video was when you watched it?---Yes, that's correct.

What was your assessment?

MR STRICKLAND: Objection. Relevance.

MR EDWARDSON: The relevance, your Honour, is it's this – what his state of mind is and it goes directly to the level of the threat that, ultimately, he had to consider when the cordoning occurred in the manner that's described, ultimately, on the body-worn video. And it comes back to this issue of practicality, reasonableness and different scenarios that present themselves. So in my submission, it is relevant.

HIS HONOUR: Mr Crown?

MR STRICKLAND: Your Honour, on the first – I agree with the first part but not the second, so I withdraw the objection.

HIS HONOUR: Thank you.

MR EDWARDSON: So you viewed that video footage?---Correct.

And you said you do remember how you felt when you watched it?---Yes.

How did you feel?---I felt – I felt fairly ill. Watching that footage, I believed that – just to give it some context, when I got to work that day – I don't know long I'd been at work, I hadn't been – I think I was on an evening shift so, you know, I finished late the night before, started mid-afternoon. So when I got to work, the first thing I saw

was that axe incident. So I've got no other information on that – on Walker or the axe incident. The first thing- - -

Did you know Walker before then?---No, I didn't.

You knew nothing about his criminal history?---No, not at that stage.

All you saw at this stage, when you got to work, was this body-worn video?---Correct.

Now, can you answer the question- - -?---Sure.

- - -having put that into context?---Yeah. So when I saw Walker raise an axe to my fellow police officers, I hadn't heard whether or not someone had been injured or killed that – in the previous shift or whenever that incident occurred. And so I wholeheartedly believed that Walker was about to kill or severely injure one or both of those members. So when I saw that, I felt quite ill.

All right. Is it self-evident from the evidence that you've just given and the way in which you felt at the time that you saw that video footage, that that video footage – by itself, leaving aside any other information you might subsequently have got – meant that he was potentially a very dangerous and high-risk offender?---Exactly.

Did you then go on to PROMIS, for example, or did somebody tell you about his criminal history?---I don't remember exactly what I did on the computer, but my standard practice – this is what I believe I would have done at the time – my standard practice would be to go access that individual's criminal history and alerts on our system. And then from there, I would make an assessment further to the other evidence I've got from the axe incident as to whether or not they were a likely threat, or- - -

I think you told the members of the jury that there was a briefing at the Bunnings – at Bunnings?---Correct.

And I think you said it was Zachary Rolfe who conducted that briefing?---Yes.

Was the collective group apprised and fully aware of the potential dangers that Kumanjayi Walker might present when the arrest was affected?---Yes.

MR STRICKLAND: Objection. It's too late, your Honour. He's answered.

HIS HONOUR: All right.

MR EDWARDSON: What was said in that regard?---I believe that the members of my patrol group were aware because – I believe, at that time, they had also seen that axe incident.



Yes?---When we went to conduct this briefing – it's so common – commonplace to cordon a house and try and locate the arrest – locate and arrest the offender that way, that generally, we wouldn't have a briefing before a job.

Right?---We would say, for example, "Zach and I are going to go and make entry," or, you know, establish whether or not the offender is there. And the rest of the team that comes with us would automatically fill into place. But given the fact that we knew how dangerous this offender was, we did what we believe was the right thing. We pulled everyone on at the Bunnings car park and we had a conversation about exactly what we were going to do so that there was no mistakes.

All right. Now, coming back to the scenario – training, edged weapon equals gun and so on – we've been through the – what I'll call the wheelchair example- - -?---Sure.

- - -distance between the two of you- - -?---Yeah.

- - -him being confined or her being confined inside a wheelchair, which puts limitations on covering distance and the like. In your training are you taught, what I'll call, the danger zone? That is, how close an armed offender with an edged blade or a knife – some sort of distance where it becomes really dangerous?---Yeah. It's six or seven metres. I can't remember which one it is.

Six or seven metres?---I think there's different – yeah.

But whether it be six or whether it be seven, what's your – what was your teaching in that regard?---Yeah. So if you're within – basically, what – what my training was, if I was within that minimum safety distance then I should have my firearm drawn.

Right. And if you have your firearm drawn and you've got an offender who has armed themselves with an edged weapon, that edged weapon is, potentially, lethal to you?---Yes.

And that's what you're taught?---Yes.

And you're also taught, are you not, that in those circumstances you draw your firearm and you must understand that you have to be prepared to pull the trigger if required?---Yes, that's correct.

Are you taught anything about the number of times or number of shots that you might fire in a given scenario?---Yes.

What's your teaching?---We've been trained to shoot at the offender until their position – their posture or their behaviour – changes.

All right. Is it the case that the teaching is you shoot to incapacitate?---Correct.

And the number of shots will depend upon the individual and the

circumstances?---That's correct.

It might be one bullet, it might be two, it might be more?---Correct.

It depends on the individual?---Correct.

And are you told or were you taught – or have you been taught – as to where you should shoot? What part of the body?---Yes. We are taught to shoot at centre mass which is, like, the upper torso area of the offender, because it's really difficult to take a well-aimed shot with a pistol but also because it's the – gives you the greatest likelihood of incapacitating that subject.

The greatest likelihood of incapacitating that subject?---Correct.

So you're not taught to intend to kill- - ?---No, not at all.

- - -you're taught to incapacitate by shooting to the centre body mass of the individual?---Correct.

And the number of shots will depend upon the circumstances that present themselves to that police officer?---That police officer or another.

Or another. So in other words, you want to incapacitate the offender so that person no longer poses a threat to either you or anybody else in his proximity?---Correct.

Or her proximity if it's a female?---Sure.

Yes, thank you.

Nothing further, your Honour.

HIS HONOUR: Yes?

REXN BY MR STRICKLAND:

MR STRICKLAND: You were asked about the training in relation to the - I think you said six or seven metres?---Correct.

And that is a person running at you, is that correct?---No we were trained that six or seven metres is from the point of the edged weapon.

I see?---So it wasn't - from my understanding of the training it wasn't discriminatory, it was if there is an edged weapon you should have your firearm drawn if you're within that.

Did you see any - are you aware what that - was that trained at 21 - or six or seven metres, was that based on an American - - ?---I'm not sure.

Were you shown any videos about that?---We were all lined up in the college, my squad was split in half, we had one half on one side of the basketball court, the other half at the six or seven metre distance.

Yes?---And they said to us, "When this person runs at you, as soon as you see them moving draw your firearm and take well aimed sight picture" essentially. And that was how they reinforce to us that a person can cover that ground so quickly and that's why we should have our firearms drawn.

Well, the scenario is based upon the suspect running at you with a knife?---That specific scenario is, yes.

Thank you, your Honour, they are my questions.

HIS HONOUR: All right, thank you, you may go?---Thank you.

WITNESS WITHDREW

HIS HONOUR: Yes?

MR STRICKLAND: Your Honour, I call Breanna Bonney. Your Honour, when we get close to - I just can't see a clock here, when we get close to quarter past if your Honour wouldn't mind signalling.

HIS HONOUR: Certainly.

MR STRICKLAND: Thank you.

BREANNA LOUISE BONNEY, sworn:

HIS HONOUR: Thank you. If you remove your mask while you are giving evidence please, so we can hear you?---Yes, your Honour.

Thank you.

Yes?

MR STRICKLAND: Can I ask you to speak loudly and clearly. Everything you say is being recorded. If you would like me to repeat a question that you don't understand please say so?---Yes.

What is your full name?---Breanna Louise Bonney.

And what is your rank and station?---Constable First Class and stationed with Territory Response Group.

When did you join the Northern Territory Police Force?---I started at the college in September 2014.

And you knew Zach Rolfe?---One he started in his career and was posted to Alice Springs, yes, I got to know him.

When did you first met Zach Rolfe?---I don't know precisely but I would say when I returned to Alice Springs for my second posting which was late 2017.

Did you become close personal friends with him?---Yes.

I will take you to November - sorry - and are you still?---Yes. I haven't spoken to him for quite some time, but yes.

As at November 2019 were you working as part of a patrol group in Alice Springs?  
---Correct.

Under Sergeant Evan Kelly?---Correct.

And do you remember the other members of that patrol group?---Yes.

Who are they?---So the person I was partnered with in the same vehicle was Constable James Kirstenfeldt. Also in that patrol group was Constable Mitch Hansen, Constable Afam Nwaka Asagi(?) I'm not sure if the pronunciation is correct - Constable Luke Crotty, Constable Shane King, that's to the best of my recollection.

And did Mr Rolfe tell you he had formerly been part of the Australian Defence Force?  
---I was aware of that fact.

And do you know how long he had been in the defence force?---No.

Did you now he had served in Afghanistan?---I knew he had done an overseas deployment.

Was Zach Rolfe in your patrol group?---Yes.

I will ask you about 7 November 2019. Do you remember being rostered on that day?---Yes.

At about what time?---It was a 3 pm to 1 am shift.

What were your duties on that day?---General duties in Alice Springs area.

Who were you on shift with?---Constable James Kirstenfeldt.

Did you become aware that day that Kumanjayi Walker was an arrest target?  
---Yes.

On that day did you watch any body-worn video of an axe incident the day before involving Kumanjayi Walker?---Yes.

Who did you watch that with?---The - I'd say majority of the patrol group members.

Did that include Mr Rolfe?---Yes.

Do you remember if Mr Rolfe made any comments during the playing of that body-worn video?---I don't recall.

Why were you shown the body-worn video of that axe incident?---It was - he was our topic of conversation, being an arrest target and he was to be arrested for breach of parole and the consequential assault police which we watched that body-worn video to see the offending of the assault police as well as to understand the risks associated with any attempts to arrest him if we should get the time to make such attempt.

Having watched that body-worn video did you believe he was a high-risk as an arrest target?---Yes.

After you watched the body-worn video, did you do something - or go somewhere?---I just attended to my usual duties for the shift.

Did you discuss an arrest plan for the attempted arrest of Mr Walker?---Not at the time of watching the video.

Did you do that later?---Yes.

And where was that that you did that?---In a car park near Warlpiri Camp, I can't recall if it was Bunnings or the Shell Service station.

And approximately what time was that?---On dusk - around dusk.

So some hours after you started your shift?---Correct.

So you met up, is that correct, with some people?---With the rest of the patrol group.

At the Warlpiri camp?---And the rendezvous just before Warlpiri Camp.

And was that at Bunnings?---Bunnings or the Shell Service Station, I don't recall.

And do you recall a discussion at that meeting?---Yes.

And what was said and who said it?---I don't recall who said which, I believe Sergeant Evan Kelly had received intel on a possible address for Mr Walker - Kumanjayi Walker and someone brought up a satellite - a Google satellite map of Warlpiri camp, identified the location and the house address that the intel suggested Kumanjayi Walker might be at and I don't - I don't recall who said what but we discussed who would stand where to set a cordon and based on what we observed

from our cordon positions we would proceed from there with making or attempting to make an arrest.

Was that planned part of what is called a "Cordon and Contain plan"?---I suppose you could call it that - it's - yeah, it's just general method of how you arrest people.

Yes, was that part of your - have you been trained in that procedure before?  
---Not - no.

Not specifically?---Not specifically.

Are you a member of the IRT?---No.

And so did you go to Warlpiri Camp?---Yes.

And what did you do when you arrived at Warlpiri Camp?---We established the cordon, as discussed. Myself and James could see the – we could see two doorways from where our point on the cordon was. They didn't appear to be the primary entry points of the dwelling. So we maintained our position on the cordon, and the members on the other side, communicated over radio, that they would attempt to – or that they would door knock on the door on their side.

I'll just play you a short body-worn – sorry, I'll withdraw that. Did you wear body-worn video that day?---Most likely.

Okay, I'll just play you a short clip from a body-worn video on that day?---Yep.

#### DVD PLAYED

MR STRICKLAND: Do you recognise that as your body-worn video footage?---Yes.

And is that Mr Kirstenfeldt there?---Correct.

Your Honour, I tender that body-worn. I don't intent to play it all now.

HIS HONOUR: That'll be exhibit 19 then.

MS CALLAN: Your Honour, for the record, the file name is Bonney, B-O-N-N-E-Y BWV Warlpiri Camp, Alice Springs, 7 November 2019, 6.37 pm.

EXHIBIT P19: Body-worn video Bonney, BWV Warlpiri Camp, Alice Springs, 7 November 2019, 6.37 pm.

MR STRICKLAND: And did you – I take it you didn't have any success at that particular search, is that right?---Correct.

I want to take you to 9 November 2019. Were you rostered to work on that day?---Yes.

Alice Springs – at Alice Springs?---Yes.

You again partnered with Mr Kirstenfeldt?---I assumed I was, but I was not.

Okay, who were you partnered with?---Eventually I was partnered with Senior Constable Kingston(?).

Now at some point in time, were you aware that members of the IRT were tasked to go to Yuendumu on that day?---Yes.

And were you present in the muster room when they – when those members gathered?---Yes.

Including Mr Rolfe?---Yes.

Kirstenfeldt?---Yes.

Mr Eberl, Mr Hawkings?---Yes.

I just want to show you a diagram please. Is that a rough sketch that you made of where you were, and where the IRT was at the time of the briefing?---Yes.

I'm sorry, at the time they arrived?---Yes.

And there was a – you were there when there was a briefing of those IRT members?---A conversation.

A conversation?---Yes.

Your Honour, I tender that diagram.

HIS HONOUR: You've seen that?

MR EDWARDSON: Yes, I have, thank you, your Honour. No objection.

HIS HONOUR: Exhibit 20.

EXHIBIT P20: Diagram.

MR STRICKLAND: I have (inaudible) for the jury, your Honour and your Honour.

HIS HONOUR: Thank you.

MR STRICKLAND: Now do you remember now, any discussions of the – that occurred between the IRT members when they were in that place, as per your diagram?---No I don't remember.

Do you remember if – you know Sergeant McCormack?---Yes.

Was he there?---I don't recall seeing him.

I just want to ask some questions about your training. You've been trained in the use of a weapon, is that right?---Yes.

And the weapon itself, and when to use it, is that correct?---Yes.

And do you get that training every year?---Yes.

And you're familiar with the 10 Operational Safety Principles, is that right?---Yeah, loosely familiar.

Well you've been taught about them, is that right?---Yes.

And you've been taught about the principle, edged weapon equals gun, is that right?---Yes.

That is, if a subject is actively threatening you with an edged weapon, you're taught to draw your firearm?---Correct.

And does that depend on the level of threat you're faced?---Of course.

Are you taught, if you see an edged weapon to shout "Knife, knife, knife"?---It depends on whether the edged weapon is a knife. If – if it's a knife, then yeah – not necessarily those words, but I suppose, identify the weapon with loud verbal commands.

Okay. Is that to warn a partner or anyone else in the vicinity?---Yes.

If you draw your weapon, are you taught to give verbal commands like drop your weapon?---Yes, if possible.

Are you trained to continually reassess a threat as circumstances change?---Yes, of course.

Excuse me, your Honour. They're my questions, your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Just a few – couple of questions I want to pick up on the theme that you've just been asked about. Is – is it the expression edged blade equals gun, or is it knife equals gun, or both?---Either or.

Either or?---Interchangeable.



Obviously a weapon can be a knife, it could be a shard of glass. It could be a whole host of other items, all of which have the capacity to implement lethal force against a police officer, if deployed?---Yes.

Now you were asked about continually reassessing the situation, and also giving verbal commands, and also identifying verbally, for the benefit of anybody else in proximity, the nature of the threat?---Yes.

Of course that all depends, does it not, on whether opportunity presents itself in that way?---Of course, yes.

I mean sometimes, as consistent with your training, it may be that that sort of opportunity doesn't arise?---Correct.

Because of the speed with which the individual, who has chosen to arm himself or herself, deploys the weapon?---Correct.

The distance between you and that individual who has the weapon?---Correct.

All of those factors will vary, but one thing is clear. You're certainly taught, aren't you, about the inherent danger of an individual being armed with an edged blade, and the distance between you and him, or her?---Yes. Yes we are.

What's that distance?---Six metres.

And what are you told about six metres?---Within six metres

And what are you told about six metres?---Within six metres – one of the regular things that we train in our annual re-qual is – the role player will stand at six metres and lunge towards us with a mock edged weapon. And in that time, we have to draw our gun and, more often than not, the role player has gotten to us with the edged weapon just as we draw our firearm.

And you're taught, aren't you, that if somebody lunges at you in close proximity in those circumstances, the appropriate response is to draw your weapon?---Yes.

And you have to be prepared to pull the trigger?---Yes.

Are you taught – if you do choose in that scenario to discharge your firearm – are you taught how many bullets are warranted?---We're – there is no set amount. It's – we're constantly reassessing. But the end goal is subject incapacitation.

Subject incapacitation. In your training, are you taught where you should aim the shot?---Centre of seen mass.

And so the number of shots will depend upon whether one, two or three – for example – are required to incapacitate that subject in that scenario?---Correct, yes.

And you're told, aren't you – and you're taught this, aren't you – that one bullet may not suffice?---Yes, definitely.

Two may not suffice?---Yes.

Indeed, your training really is, you continue to fire until the incapacitation actually occurs?---Precisely, yes.

Nothing further, thank your Honour.

HIS HONOUR: Any re-examination?

REXN BY MR STRICKLAND:

MR STRICKLAND: Thank you, your Honour. Just one matter.

You were asked about this – the safe distance?---Yes.

And did that involve a scenario during training where a person is running towards you with an edged weapon?---Yes.

Thank you, your Honour. Nothing further.

HIS HONOUR: Thank you, you may go now.

WITNESS WITHDREW

HIS HONOUR: Right, members of the jury. We'll now break for the day. So you may now retire and reassemble tomorrow for a 9.30 start.

JURY OUT

HIS HONOUR: Any matters counsel want to raise?

MR STRICKLAND: No, your Honour.

MR EDWARDSON: No, your Honour.

HIS HONOUR: I'll adjourn.

ADJOURNED 1.13 PM TO TUESDAY 15 FEBRUARY 2022

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PART-TRANSCRIPT IN CONFIDENCE

THE SUPREME COURT OF

THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON TUESDAY 15 FEBRUARY 2022 AT 9:47 AM

(Continued from 14/02/2022)

Transcribed by: EPIQ

HIS HONOUR: I apologise for the delay, but a matter has come to my attention that I think needs to be dealt with in relation to the jury. And it is a matter which I believe I must deal with in a closed court. So I'm going to direct that all persons who are currently present in the court, other than the accused, and counsel, are to leave the court. Of course, Sheriff's Officers and security may remain.

MR STRICKLAND SC: And our instructors, your Honour?

HIS HONOUR: Yes, of course.

**CLOSED COURT**

HIS HONOUR: We'd better proceed. We'll bring the jury in.

JURY IN

HIS HONOUR: Now, members of the jury and also those who are present in the public area of the court. I apologise for the delay in resuming the trial this morning. A matter was brought to my attention relating to an individual juror that needed to be dealt with. It has now been dealt with. I have discharged that juror from the jury and the trial will proceed with the remaining jurors. You'll no doubt recall, members of the jury, that when the trial began I empanelled 12 jurors and two reserve jurors. The juror who has been discharged was a member of the jury and not a reserve juror.

So that I am now required, under the laws of this Territory, to conduct a ballot to determine which of the two reserve jurors will now become a member of the jury. I should also say, just before we commence that ballot, that both the accused and the Crown have accepted the assurances given by the remaining members of the jury that they are able to address the issues in this trial in an unbiased fashion. So on that basis the trial will proceed, as I've said, with reduced number of jurors.

But we will now ballot which of the reserve jurors will become a member of the jury.

#### A JUROR EMPANELLED

HIS HONOUR: Now, is there anything else, gentlemen, that we need to deal with? Then let's proceed.

MR STRICKLAND: I call Derek Williams.

DEREK WILLIAMS, sworn:

XN BY MR STRICKLAND:

HIS HONOUR: Could you please remove your mask while you're giving evidence, thank you.

Yes.

MR STRICKLAND: Mr Williams, could I ask you to speak loudly so everyone can hear you, please?---Yeah.

If I or Mr Edwardson asks you a question, you don't understand, please say so. If you want me to repeat a question, please say so?---Yeah.

What is your full name?---Derek Williams.

Can you speak up please, sir?---Derek Williams.

Thank you very much. Are you a Senior Aboriginal Community Police Officer?---Yes.

When did you start being a – can I call it ACPO?---Yeah.

When did you start being an ACPO?---Since 2006.

And what does an ACPO do?---It's sort of a liaison between the police and the community.

How do you do that job? How do you liaise between the police and the community?---Just – I just go around. If there's any incident, I just help out with language and other stuff.

And where have you performed that role as Senior ACPO?---What's that?

Where have you been – you been to Yuendumu?---Yeah, I – when I started I went to Papunya first and Alice Springs and then Yuendumu.

What was the first one you mentioned?---Papunya.

Papunya?---Yeah.

And how long were you in Yuendumu for?---As an ACPO or - - -

As an ACPO?---Yeah, probably about 10, 11 years.

So were you ACPO at Yuendumu in 2019, a couple of years ago?---Yep.

Now do you know Kumanjayi Walker?---Yes.

Is he family – part of your family?---Yeah, my nephew.

Can you explain the – how he's related to you?---Oh he's my – my grandfather, who's a Walker, he had two wives, and one of them being my grandmother, and one of them being this – my nephew's great-grandmother.

Did you know Kumanjayi when he was a little boy?---Yeah.

And you've known him since he's passed?---Yeah.

What was he like?---Quite shy young fellow. Never talks much.

Do you know Kumanjayi's mother?---Yeah.

And when she was pregnant, did she sniff petrol?---Yeah. Before she was pregnant, yeah she sniffed petrol.

Was – in your opinion, was Kumanjayi a bit slow?---Yeah.

And now his mother is not Leanne Oldfield, is that right?---No.



That – his mother – but Leanne Oldfield looked after him - - - ?---Yeah.

- - - like a mother?---Yeah she's adopted mother.

Have you arrested Kumanjayi Walker?---Yep.

Before?---Yep.

And did he try and run away?---No.

What was he like when you arrested him?---Happy, but I when – when I said I was going to arrest him, he said, "I'll jump on with you because you're my family", and yeah, off we went to the station.

And where did you put him?---In the front seat.

Of your police car?---Yep.

And when – when did you arrest him?---Oh - - -

How many years ago?---2018, yeah.

How many times did you arrest him?---2018 and 19 probably four times.

Now did you see a body-worn video of an incident where he was waving – when Kumanjayi was waving an axe at police?---Yeah.

That was Chris Hand and Lanyon Smith?---Yeah.

Were you surprised when you saw that?---Yeah, it was – yeah.

Why were you surprised?---It wasn't like him, like when I dealt with him he was quiet young fellow and never veered away from being arrested and he – well he also call me uncle, so there was no issues with him. And me and him.

Now after that axe incident, was there a funeral at Yuendumu?---Yeah.

Who's funeral was that?---My uncle, so that was Kumanjayi's grandfathers.

And did you go to the funeral?---Yeah.

Where was it?---At the basketball court.

And did you see Kumanjayi Walker there?---Yeah.

Is it important to go to funerals?---Yeah.

Why is that?---Everybody goes to funeral as the family members and just to pay their respect.

Now did you – after the axe incident, did you and Julie Frost go and see Eddie and Lottie Robertson?---Yeah.

All right, and why did you go there?---We just went there to ask what – or tell them – tell Kumanjayi to hand himself in after the funeral.

Can you – I'll get you to speak up a bit please?---Yeah, we just there and tell the family's to hand himself in after the funeral.

Did you see Kumanjayi Walker after the axe incident?---Yeah, after - - -

At the funeral?---At the funeral, yeah.

Did you speak to him there?---No.

Now when you saw Lottie and Eddie Robertson, where was that?---West – West (inaudible).

Is that at Lottie and Eddie's house?---Yeah 577, I think.

577?---Yep.

Did you have a discussion about when Kumanjayi should surrender himself?---Yeah, just maybe after the funeral.

And when was the funeral first going to take place?---Friday, but - - -

And did the – did the date of that funeral – or the day of that funeral change?---Yeah.

To what day?---Saturday.

So on your understanding, when was Kumanjayi meant to surrender himself?---After the funeral. Not straight after, probably like next day.

Next day?---Yeah.

Now were you on duty on 9 November?---No.

That's a Saturday?---Yeah.

That's because you were at the funeral?---Yeah.

And did you hear later that day, that there'd been a shooting, involving Kumanjayi ?---Yeah.

And what did you do after you heard that?---We was at the grave side, and a young fellow came rushing down and told us that Kumanjayi was shot, so.

Told you what, sorry?---That Kumanjayi was shot.

What did you do?---I jumped in with my father and we drove down to the – the crime scene, yeah.

Was it House 511?---Yep.

Did you go inside?---Yeah.

Did you touch anything?---No.

Did you then go back to the police station?---Yeah.

And you saw Kumanjayi there?---Yeah.

And you saw the police there?---Yep.

Did you then go outside to the front of the police station?---Yeah.

Why did you do that?---Just to calm everybody down because people was yelling and screaming and wanted to throw rocks at the station, and yeah, I just calmed everybody down.

You calmed people down?---Yeah.

Can I just go back to, when you were at House 511, just before the police station?---Yeah.

You went inside?---Yeah, had a – opened the door and just had a peek inside.

You then left House 511?---Yep.

Did you lock the door?---Yeah.

They're my questions, your Honour.

MR EDWARDSON: I have no questions of this witness, thank you, your Honour.

HIS HONOUR: Yes, thank you, you may go.

WITNESS WITHDREW

MS CALLAN: I call Sergeant Adam Donaldson.

ADAM DONALDSON, affirmed:

XN BY MS CALLAN

MS CALLAN: Sir, could you tell the jury your name, rank and station?  
---Adam Donaldson, Senior Constable First Class, Alice Springs Police Station.

As at 9 November 2019 were you working in the dog operation unit?---I was.

You were based at Alice Springs?---Yes.

It's the case isn't, it, Senior Constable, that you deployed with your dog to Yuendumu on 9 November 2019?---I did.

And that was to provide support to an IRT deployment that was going out there?  
---Yes.

Briefly in terms of your background, when did you join the Northern Territory Police Force?---2007.

Prior to that were you an infantry soldier in the Australian Army?---Yes

And having joined the Northern Territory Police Force in 2007 when did you start with the Dog Operations Unit?---2016.

Having joined the unit was there a period of time where you had to undertake courses and other activities to become operational as a dog handler?---Yes.

And when did you become operational as a dog handler?---I did two different disciplines. The first I was operational as a drug dog handler in February or March 2017 and then for a general-purpose dog handling it would've been the start of 2019.

The types of activities undertaken as a general purpose dog handler, could you give the jury sense of the actual tasks that you might be involved in?---Yes, so a general purpose dog handler will assist with the apprehension of violent - - -

Sorry, we might have to wait.

HIS HONOUR: We are having some difficulty with you. Can you turn that microphone towards you so we can make sure we pick you up?

MS CALLAN: Yes.

HIS HONOUR: Thank you.

MS CALLAN: Sorry to interrupt. I might just go back to that - that question. I was asking you about the types of activities or tasks that you might have as a general purpose dog handler?---Yes, so I would assist general duties or other units with the arrest of violent offenders. I would track - we'll do tracking for human scent from

unlawful entries and missing people and things like that, building clearances and public order.

In relation to assisting with the arrest of violent offenders, what is it about a general purpose police dog that adds a capability?---Initially presence can - can assist in the apprehension of an offender because they are quite an intimidating thing to see. Secondly, if you need to, you can deploy a dog without being close to the offender and the dog will take the person.

When you say, "take the person"?---Or bite the person.

In some way incapacitate them?---Yes, apprehending them, yes.

The tracking work that a general duties - a general purpose police dog has, is that - you referred to unlawful entries?---Yes.

Does that include property crime?---Yes.

Prior to 9 November 2019, had you, along with your general purpose police dog, provided support to the Alice Springs IRT?---I may have once, but it wasn't a regular thing.

Senior Constable, on 9 November 2019 you received a phone call from watch commander Shaun Furniss, didn't you?---Yes.

And the case that that call woke you up as you'd done a night shift overnight on Friday?---Yes, I believe so.

What did watch commander Furniss tell you on that phone call?---That he needed someone to go - he needed me to go to Yuendumu and assist with an arrest and that there had been some break-ins at Yuendumu at the nurses quarters and they needed me to go and assist with that.

In that phone call did watch commander Furniss tell you that you were likely to be required but he would confirm that?---No. I - he told me pretty much straight away they needed me out there and I said "Yes" so I packed up and started getting going.

Okay. When you say you packed up and started getting going, did you go to the Alice Springs Police Station?---Yes, briefly.

Before you travelled to Yuendumu were you aware who the arrest it was proposed would - was to be arrested as part of the IRT deployment?---Sorry, can you repeat that?

Before you travelled to Yuendumu were you told who the arrest target was?---Yes.

And what were you told about that?---That there had been - there's been an arrest attempt, I think it was the day before or maybe the day before that and he'd

produced an edged weapon and then he'd escaped and they still needed him arrested.

The case that you travelled by yourself in a police dog car out to Yuendumu?  
---Yes.

And you took you patrol dog with you, "Loki"?---Yes.

You'd been teamed with that dog, "Loki" is this right - since late 2018?---Yes it would've been, yes.

You said you went to the Alice Springs Police Station - is this right - briefly. Did you speak to anyone - any other member of the IRT when you were at Alice Springs?  
---No, they weren't there.

When you arrived at the Yuendumu station was the IR Team there?---No.

Did you speak to anyone at Yuendumu Police Station?---Julie Frost.

What did you speak with her about?---She gave me an email about an arrest plan they had for getting the person that they sent me out there to get.

Could the witness be shown exhibit 1, tab 14? Senior Constable, ignoring the handwriting that appears on the top corner of this document, do you recognise that as a copy of the email that Sergeant Frost handed to you?---Yes.

Did you read it?---Yes.

Do you see halfway down the first page under the heading, "Situation" a paragraph that commences, "At around 6:25 pm on 6/11/2019"?---Yes.

That paragraph describes an incident involving Kumanjaji Walker having an axe?  
---Yep.

When two members of the police attended at House 577. Do you see that?---Yes.

Did you watch any body-worn video footage of that event - what I might describe as "the axe incident"?---Yes.

When did you watch it?---At Yuendumu Police Station.

I'll come to it in a moment, but at a point in time, the other members of the IRT were at Yuendumu Police Station?---Yeah.

In terms of when you watched the footage, did you watch it before they arrived?---Before.

Did Sergeant Frost give you a rundown in terms of what had been happening in Yuendumu in terms of the nurses leaving town because of property crime?---Yes.

At that point in time, when you're at Yuendumu Station with Sergeant Frost, is it your evidence that you read the email then and there?---Yeah.

Based on the content of the email, what was your understanding of what you would be doing in – at Yuendumu over the forthcoming hours or days?---Well, I was to be assisting with the unlawful entries at the nurses' quarters to start with. And then the following day, I would be looking for the arrest target.

Page 2 of this email, towards the bottom of the page is, in bold, the words: "Sunday 10 November 2019"?---Yeah.

Then it reads, "5 am, SDOU Donaldson" – that's you?---Yeah.

"And Yuendumu Alefaio commence duty along with IRT members to affect arrest of Walker." At that point in time – that is, when you're at Yuendumu Station, is it your understanding that that was when steps would be taken to seek to affect the arrest of Kumanjayi Walker?---Yeah.

Could I ask the witness be shown exhibit 2 tab 4?

Senior Constable, I expect you're aware that there's CCTV in place at police stations in the Northern Territory?---Yeah.

I ask you to assume that this is CCTV from the police station in Yuendumu and per the date and time in – at the bottom of the first page, behind tab 4, that this is – can you assume these are still images taken from that CCTV footage on that date and at that time?---Yes.

On that first image, number 1, do you recognise Sergeant Frost in front of you?---Yes.

Turning to the second image, you recognise yourself there?---Yeah.

And the third image – you see it has jumped forward a bit in time to 6:03 pm. And what – do you recognise Sergeant Frost leaning against a partition there?---Yes.

Over at image 4, 6:09 pm. Do you recognise yourself in that image, with your arm against the partition?---Yes.

And you're holding something in your hand?---Yeah.

Do you know what you were holding at that stage?---I can't tell what that is there.

The evidence that you've given the jury about arriving at Yuendumu Station and speaking with Julie Frost, during which she gave you the email?---Yes.

We've already – you've already been taken to, and she gave you a rundown about the property crime?---Yes.

Does it accord with your recollection that that took place between about 5:49 pm and 6:09 pm?---Yes, I believe so.

If you turn to image 5. It may not be possible, given the quality of the image, but do you recognise Senior Constable Hand – now Acting Sergeant Alefaio coming in through the door?---Yes.

You'd worked with either of those men before?---Yes.

Did you have any discussion with them?---I don't remember.

If you keep turning, do you see image 6, 7 and 8 include a figure – you see their legs – holding a piece of paper with some image on it?---Yeah.

Do you recognise who that is?---Yeah, I believe that's me.

And with the benefit of those stills at 6, 7 and 8, do you recognise what you're holding in your hand?---Yes, that's the email.

That is the email that I showed you at exhibit 1, tab 14?---Yes.

Turn to image number 9. That is a different camera within Yuendumu Station, showing you walk out of the muster room at about 6:18 pm?---Yes.

Is it the case that you left Yuendumu Station at around about that time?---Yes.

What did you do?---I went for a drive around. I wanted to go see where the nurses' quarters were, because I wasn't familiar with where they were. I just wanted to get a lay of the land while it was still light and not dark.

While you were out and about, getting a lay of the land- - -?---Yes.

- - -did you receive a phone call?---Yes, I did.

Who was that from?---It was from James Kirstenfeldt.

What did he say?---That they were now at the Yuendumu Station and to come back.

Did you do so?---Yes.

When you got back to Yuendumu Station, was – who was there?---The IRT team was there then.



So that was Zachary Rolfe, James Kirstenfeldt, Anthony Hawkings and Adam Eberl?---Yes.

Did you know any of those officers previously?---Yes.

Had you worked with them before?---Yes.

Where were they, in terms of the various parts of the Yuendumu Police Station?---Everyone was in the muster room.

Was there anyone else in the muster room?---I thought Chris Hand and Felix were there as well, and Julie Frost.

Was there any discussion?---We – when I got there, they were all standing around a map. And I believe it was Zach that said we were going to go and have a look at House 577 to see if the target was there.

The target, that was Kumanjaya Walker?---Yes.

Do you recall if senior – Constable Rolfe used his – a name, or used the word “target”?---I don’t remember.

Common police terminology, is that correct?---Yeah, correct.

You have indicated an – or an intention to go to House 577, did you – were you told anything about why House 577 - - - ?---Yeah.

- - - had been selected?---Sorry, I was aware that was where the axe incident had taken place on the sixth.

In your presence, was there any discussion about Mr Walker being a high-risk target?---No.

Was there any discussion about whether Mr Walker might have any weapons?---No.

Was there any discussion about what might be done if Mr Walker became violent in the course of an attempted arrest?---Not that I remember.

Did you and the IRT leave Yuendumu Station shortly afterwards?---Yes.

From at the point you got back to the station, until the time you left, aside from Constable Rolfe saying what he did, what else do you recall happening?---I don’t recall.

Was there any discussion about what you would do, as the police dog handler?---Yeah, I was going to wait outside. The previous time he’d managed to escape from the house and run into the bush.

Yes?---So it was my intention to wait outside with the dog, and if he did leave, then I'd send the dog to apprehend him.

Were you present for any discussion about who amongst the – what – who amongst the IRT would do any - - - ?---No.

- - - particular task?---No.

Was there any discussion about attempting to effect an arrest of Mr Walker the following morning at 5 am?---Not at that time.

When you left Yuendumu Station, I suggest was around five or six minutes past seven, was it your understanding – what was your understanding as to what you and the IRT were going to do?---Well we were going – we were going to look for where he might be. Because there wasn't any firm intelligence on where he might be at that time. So I was just going to go knock on the door on 577 and see if he was there.

What was your understanding as to what you would do if you found him, if he was found?---He'd be arrested.

Was it your understanding the aim was to arrest Walker that evening?---If we found him, yes.

When you arrived at House 577, it's the case isn't it, senior constable, that you located yourself, as had been discussed, on the side of the house, nearest the bush area?---Yes.

Some minutes later, was it communicated to you that Kumanjaya Walker was not at that house?---Yes.

Was anything communicated to you about what the IRT had been told – had been told, concerning Kumanjaya Walker's location?---Yes, that he might be at House 511.

Do you remember who told you that?---I believe it was Zach.

Was there any discussion about what you and the IRT would do at that point?---I didn't discuss what they were going to do, but I was going to do the same thing again. Wait outside and be a cut-off team again.

Was it apparent to you that the next logical place to go was House 511?---Yes.

House 577, you might recall, is towards the outskirts of the Yuendumu Community?---Yes.

House 511 is more – has more houses around it?---Yes.

Does that have any relevance in terms of where and in what way you would deploy your police dog?---Yes. I didn't actually get the dog out on the first occasion when I got there. It was my intention that if he did run from the house that I would be in my car, and I would follow to the edge of the town, and then deploy the dog from the edge of town. Which wasn't – is not a great distance to get to the edge of town.

So when you got to House 511, is it the case that you stayed either in or in very close proximity to your car?---Yeah at – initially, I was still inside my vehicle.

Were you told what the IRT planned to do when they got to House 511?---No.

While you were in or close to your vehicle, did you hear three gunshots?---Yes.

And you, along with the IRT members, travelled back to the Yuendumu Police Station, not long thereafter?---Yes.

Those are my questions, thank you, your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Senior Constable, I just want to ask you some questions if I can, about your movements from the Alice Springs Police Station, to the Yuendumu Police Station, and your movements thereafter. As I understand it, you get this telephone call. You'd been on a long shift, and you were asleep when the phone call was received?---Yes.

You had an understanding that you were going to provide what I'll call dog support, for the IRT members?---Yes.

The IRT members you certainly understood, were a specialist team?---Yes.

They're a team that's used where potentially, a person who's to be apprehended, requires their training and expertise?---Yes.

They are the sort of people who have the training and capacity to arrest a potentially high-risk offender?---Yes.

You've told us that you saw the body-worn video, I think, at the Alice Springs Police Station – sorry, at the Yuendumu Police Station?---Yuendumu, yes.

That was the first time that you'd seen that video footage?---Yes.

Who played it?---Julie Frost.

And she played it to you?---Yes.

So that you would have an understanding of the gravity and potential danger of Kumanjaji Walker, to those who were intending to arrest him?---Yes.

Were you aware of what we call the axe incident, before viewing that body-worn video?---I'd only just heard about it when I'd attended the Alice Springs Police Station, but I didn't know the full details of it, no.

So that's the first time you saw it?---Yes.

Would you accept that it's quite a confronting piece of footage?---Yes.

And did you find it confronting yourself, watching it?---Yes.

Did it give you some indication, that the person that was to be apprehended, Kumanjayi Walker, and that you would provide dog support to the IRT, you'd have to be on high alert, bearing in mind what you'd seen?---Yes.

Apart from watching the body-worn video, did Sergeant Julie Frost appraise you, or did you look on what we call the PROMIS system, to have a better understanding of his criminal offending?---I don't believe I looked it up, no.

Do you know whether she provided you with any information about his past criminal offending?---I can't remember.

All right. You certainly understood, quite apart from what you'd been told in that telephone conversation earlier, you did understand however, that you would really be providing the dog support in the way that you've described, to the IRT members?---Yes.

Now you've told us that when you got to the Yuendumu Police Station, the IRT members had not arrived?---Yes, that's correct.

And Julie Frost provided you, with what's been called in this court, an email – but what some have described as an arrest plan?---Yes.

And that's the document that was produced to you a moment ago, which is dated 9 November 2019?---Yes.

When she handed it to you at the police station, the other IRT members had not arrived?---No.

You were not party to the email chain of that document?---No. I just received a hard copy.

So the first time you knew anything about its existence was when you attended at Yuendumu Police Station when she handed it to you?---Yes.

Now, I can do this if need be, but I think you've watched this footage before, haven't you?---Yes.

And the reality is – and you’ve accepted – that she handed it to you and we see it at some portions of the CCTV footage in your hand?---Yes.

And at some stage, you go outside, don’t you?---Yes.

When your return back inside, we can see that it’s no longer in your hand?---Yes.

Did you put that document in your car?---It would be, yes.

All right. Now, after you had watched body-worn video and you had seen this plan – and I’ll come back to the conversation involving it in a moment – did you actually physically leave the Yuendumu Police Station and go for a short drive?---Yes.

Where did you go?---Towards where the nurses’ quarters are.

And you went there where – for what reason?---Because there had been break-ins at the nurses’ quarters.

Yes?---And I wanted to know exactly where they were, so I’d know where to go at night if I needed to.

So were you, basically, familiarising yourself with that- -?---Yes.

- - -area and, in particular, the nurses’ quarters, having regard to what you’d been told by Julie Frost?---Yes.

All right. Whilst you were away, familiarising yourself in the way that you’ve described, did you receive a phone call from one of the members of the IRT team, asking you to return to the Yuendumu Police Station?---Yes.

Who was the person that rang you?---James Kirstenfeldt.

And James Kirstenfeldt was one of the four members of the IRT?---Yes.

The other members being Hawkings, Eberl and Rolfe?---Yes.

Did you know the members of the IRT team before the events that transpired on 9 November?---Yes.

You did?---Yes.

How did you know them?---We all work at the same police station.

Thank you. So they would perform, for example general duties, separate and distinct from a specific IRT tasking?---Yes.

But in this case, it was a specific IRT tasking?---Yes.

So it was the four members of the IRT plus yourself in your capacity as the dog handler?---Yes.

Now, we know that there were at least three police officers from the Yuendumu Police Station who were present when you were – four, sorry – when you arrived. There was Sergeant Frost?---Yes.

There was Felix – thank you, I'll get it right one day – Alefaio?---Yes.

He's a local member?---Yes.

There was Constables Hand and Smith?---Yes – I don't remember Smith being there.

Smith wasn't there? Just Hand?---Yeah, just hand.

All right. But there were certainly those three police officers, all of whom were attached to the Yuendumu Police Station?---Yes.

They were what we call local police officers at that station?---Yes.

Were there any other members?---No, I don't believe so.

Did any of those three police officers accompany you and the members of the IRT to go into the township of Yuendumu for the purposes of arresting Kumanjayi Walker?---No.

Was there any conversation in your presence that you can recall – and if you can't, please say so – but was there any conversation in your presence whereby a request might have been made or a suggestion that the IRT and you, as the dog handler, should have the assistance and support of local members?---Not while I was there. Or not that I remember.

One thing is clear, though. When you all left the police station at 7:05 or thereabouts, there were no local members at all who were there to assist you?---No.

And there were never any local members that were present at any time when, ultimately, Kumanjayi Walker was shot?---No.

So it was just the five of you?---Yes.

All right. I want to ask you a little bit more about this document. Can you have a look at the email which is – you looked at a moment ago, which is dated 9 November 2019. I think it was tab 14, exhibit 1. Can you just have a look at the email? I want you to have a look at the CC – “to,” I should say. I asked you a question before – I'd actually missed it and I'm grateful to my learned friend – if you have a look – is that you, Donaldson?---In the title – in the “to” line?

Yes?---Yes.

We can see that that's at 4:59 on 9 November?---Yes. Yes.

Are we understand your evidence that you never cited that email before you arrived at Yuendumu Police Station?---Yeah, no. I didn't.

Did you ever subsequently become aware – to your knowledge, or can you remember – ever having received that email?---Only from Julie Frost when I arrived at Yuendumu.

Yes, I'm not talking about physically- - -?---Sorry.

- - -her handing it to you as you've described?---Yes?

I'm talking about when you logged on and you went and had a look at your computer sometime later. Did you ever – do you remember ever seeing this email?---I would've after, but I don't remember when exactly I first saw it.

What is clear and important – for reasons that you don't need to trouble yourself with – but certainly at the time that you arrived at Yuendumu Police Station, you did not know of this email's existence?---No.

You had not seen it?---No.

And the first time you knew anything about it was when she physically handed it to you, and that was before any of the other IRT members had arrived at the police station?---Correct.

It's correct, is it not, that you did not see Julie Frost – in your presence, at least – hand to the other members of the IRT – when you were present at the police station – that same email?---No.

Sorry?---No.

No. Now, we know that you were all dispatched – or deployed, probably a better description – at 7:05. That's when you left Yuendumu Police Station. And you've told us that you went straight to House 577?---Yes.

When you're then in the presence of the IRT you, having previously conducted your little drive to familiarise yourself with the nurses' quarters?---Yes.

If you look at this document we can see, can't we, that there are – there is, identified on page 3, locations of interest. And you see, down the bottom of the page, it refers to, "House 577, Yuendumu primary residence"?---Yes.

I just want to go back a step if I can. You knew, didn't you, by virtue of watching the body-worn video and from the conversation you had with Sergeant Frost before the

IRT members arrived, that the axe incident had occurred at what's described here as House 577, Yuendumu?---Yes.

And you also knew, didn't you, that at that point in time that was the last known sighting of Kumanjayi Walker by police?---Yes.

So logically, it made sense to go there first?---Yes.

Now, the plan – if it is a plan – talks in terms of everyone starting or commencing duty – if you turn to page 3, at the top you'll see, "Plan Day 2." You were at the police station. You leave at – as it turns out, at 7:05. What time did you get there?---I believe it was about 5:30.

About 5:30. Well certainly, we can see on page 3 there's reference to the deployment occurring at 11 pm on Sunday 10 November 2019?---Yeah.

Nothing like that happened, of course, because we know that you were deployed at 7:05.

MS CALLAN: Can I just raise a matter with my friend?

MR EDWARDSON: Sorry, my apologies. Thank you to my learned friend.

Can you go back to page 2? I was looking – directing your attention to Sunday. It's the Saturday, of course. Saturday 9 November. Do you see that?---Yes, I see that.

Okay. At 11 pm. Now, you had arrived at 5:30 pm or thereabouts on 9 November?---Yes.

We know that once you've returned back to the Yuendumu Police Station, having familiarised yourself with the township and, specifically, the area where the nurses' quarters were located, Kirstenfeldt has called you back. There's some – I'll come to the conversation in a minute. But there's some discussion and then eventually, at 7:05, you're deployed?---Yes.

Nothing like 11 pm?---No.

No. Did your regard yourself as providing support, but it was really for the members of the IRT to decide where they would go and what they would do?---Yes.

Was there any conversation in your presence which suggested, for example – and I'm talking specifically by Sergeant Frost – that part of the responsibilities of the IRT was to conduct intelligence-gathering exercises? By that, going into the community to locate – see if they could find out where Kumanjayi Walker was?---I don't know.

You don't recall?---No.



Right, okay. Did you know or was – did anybody – sorry, I'll put it another way. It's the position, is it not, that nobody actually knew where Kumanjaya Walker was at the time that you were deployed at 7:05 pm?---No.

You agree with that?---Yeah, I agree with that.

MS CALLAN: I object. It can only be on the basis of what this witness knew. He can't speak for- - -

HIS HONOUR: Yes, that's correct.

MS CALLAN: - - -the state of knowledge of the others.

MR EDWARDSON: I agree with that.

There was nothing said, in your presence, nor did anybody convey to you, any information that would suggest that police knew where Kumanjaya Walker was when you were deployed at 7.05 pm on 9 November?---No.

So in that sense, the first port of call, was you following the IRT members to House 577?---Yes.

You must have been told by someone that they were going to go there first, because that's the last place he'd been seen?---Yes.

To see if he was there?---Yes.

And you knew, and you were told, at least somebody must have told you in your presence, and I'll come to the specifics if you're able to help, that the ultimate mission was to arrest Kumanjaya Walker?---Yes.

And if you came upon him, as you've told us a moment ago in answer to my learned friend's questions, if you came upon him, you were to arrest him?---Yes.

And that was clear?---Yes.

You didn't speak to anybody who occupied House 577?---No.

But after you'd arrived and were you – did you have knowledge, for example, that Officers Kirstenfeldt and Rolfe would conduct a search of that particular house?---Yeah I knew they were going to that house.

And they did go into that house?---Yeah.

And you remained in your position, just in case somebody decamped?---Yes.

Specifically, Kumanjaya Walker?---Yes.

And then from there, they go to House 511, ultimately?---Yes.

And that's where the shooting occurs?---Yes.

Did Julie Frost, in your presence, ever say that the IRT members or – including yourself, by way of a dog handling support, were prohibited from arresting Kumanjayi Walker before 5 am the following morning?---No.

Just bear with me, sorry, your Honour.

Nothing further, thank you sir.

REXN BY MS CALLAN:

MS CALLAN: Senior Constable, Sergeant Frost was the officer-in-charge at Yuendumu Station?---Yes.

And did you regard her as in command?---Yes.

Was there any discussion in your presence of the benefits of effecting or attempting to effect an arrest at 5 am?---Not while I was there.

Was there any discussion in your presence of the IRT aiming to effect an arrest at 5 am?---No.

Thank you, your Honour, thank you.

HIS HONOUR: Thank you, you may go?---Thank you, your Honour.

WITNESS WITHDREW

MR STRICKLAND: I call Felix Alefaio.

FELIX ALEFAIO, sworn:

XN BY MR STRICKLAND:

MR STRICKLAND: Can I ask you to speak loudly and clearly. If you'd like me to repeat a question, or you don't understand it, please say so. What's your full name?---Full name is Felix Alefaio.

Could you spell the surname please?---A-L-E-F-A-I-O.

You're an acting sergeant?---Currently, yes.

How long have you been a member of the Northern Territory Police Force?---About seven years, your Honour.

And in 2019, where were you stationed?---In 2019 I was stationed at Alice Springs Police Station.

Did you spend any time in 2019 at Yuendumu Police Station?---Yes, your Honour.

That's his Honour. How long were you at Yuendumu as at November 9, 2019?---I was only there for a few hours. From that morning of the ninth.

But had you been working in other remote stations or communities before the ninth?---Yes.

Which ones?---Haasts Bluff and Nyirripi.

And how long had you been – how many days were you in those two places?---We were there just for – for a few days. I think first was Haasts Bluff for about a couple of days, and then to Nyirripi for another three days.

And when you say “we” do you include another officer call - - - ?---That - - -

- - - Parbs, P-A-R-B-S?---That's correct.

And you were partners, he was your police partner at that time?---That's correct.

Did you know the layout of Yuendumu well in 2019?---Sorry can you just repeat that question.

Did you know – had you been to Yuendumu before?---Yes, prior to that, I was stationed in – I work in Yuendumu from 2017 until around mid-2018 I believe.

So did you know the people in the community at Yuendumu?---Yes.

Did you know Kumanjayi Walker?---Yes I do.

And had you arrested him before November 2019?---Yeah prior to that, when I was stationed in Yuendumu, I did arrested him. I can't remember how many times, but probably once or twice.

Had – did you have any trouble in arresting him?---No.

Did he try and run away?---Well there is a risk that he – he – he'll run, because there's a time prior to that when we tried to arrest him, that he ran off – he ran away from us.

Was he ever violent towards you when you tried to arrest him?---No.

So I just want to ask you some questions about 9 November 2019. Were you on duty that morning?---Yes.

Beginning what time?---I believe I started eight o'clock that morning.

Okay. On that morning, did you learn about what's described as an axe incident that occurred involving Kumanjayi Walker three days before?---That was after I arrived in Yuendumu.

Yes?---Yes.

You learned about that?---Yes.

Did you – how did you find out about it?---The – I find it like – I can't believe that he – he did that.

Did you watch the body-worn video of that axe incident?---Yes.

And you say you can't believe he did that - - - ?---Yes well I didn't expect him to – to run off with an axe to somebody like that.

You were surprised?---Yes.

When you were out in the communities, Nyirripi and Haasts Bluff, did you have any computer access there?---Yes, we do, your Honour, we do, but it's takes hours to log on to a computer.

When you watched the body-worn video of the axe incident, did you watch it with anyone else?---I believe I watched it with Chris Hand, who is the Senior Constable First Class at Yuendumu and Sergeant Frost - Julie Frost.

And about what time in the day did you watch it?---I believe probably between 12:00 and 1 pm.

Did Julie Frost say anything to you after you watched it?---I can't - I can't recall.

Did Julie Frost speak to you about members of the Immediate Response Team coming down from Alice Springs to help arrest him?---Yes, she did say that the IRT member from Alice Springs are coming in to help in the arresting of Mr Walker.

And did she ask you to help them in any way?---Yes, that's correct.

What did she say about that?---Yes, I told her that I will stay here and help them out.

Okay. When you said "stay here" - stay?---Like I will be like in Yuendumu.

Okay. Were you there when the IRT members came to the station?---Yes.

Your Honour, can the witness please be shown exhibit 2?

HIS HONOUR: Yes.

MR STRICKLAND: If you go to tab 4 please? If you go to photograph - do you see the photo numbers on the top right-hand page, can you go to photograph number 5? Do you see yourself in that photograph?---Yes.

You're coming into the muster room?---That's correct.

That's at 6:12 pm?---That's correct.

And were you there when other members of the IRT arrive, later on?---Yes, I was there.

Did you know any of those men?---Yep.

Who did you know?---The defendant in court today and his partner, I know him by his first name of "James" or "Jimmy" they call him?

When you were there at the station, did you see the body-worn video of the axe incident again?---Not that I know of.

Did you speak to the members of the immediate response team who came?  
---I don't think I spoke to them - I did say hello to them when they first walked in.

And did you hear any discussion that Julie Frost had with the IRT members when they arrived?---Yes.

And what did you hear her say?---Julie was briefing the members at the Yuendumu Police Station at the time but when I talk about the members it was the IRT members that - that were there to arrest Mr Walker.

Thank you?---And if I can recall, Julie wanted defendant and his partner at the time, to go out and do some patrol around community. I believe if I can recall is for them to wait until midnight that day and then the other two IRT members will come in and take over from 12 midnight till morning. Yes, that's - that's what was mentioned in there.

I just didn't hear one of the things you said, you said "Julie wanted 'someone' and his partner"? Beg your pardon? The defendant and his partner?---Defendant, yes.

Do you mean Mr Rolfe?---That's correct.

Thank you. And did you hear any discussion about an arrest in the morning?---Yes, the discussion was - was for IRT members who - who will be on duty at the time to - while they out in the community also to gather intel and try to find out of Mr Walker's whereabouts. And from that information to be provided to, I believe back to Julie Frost and the plan was to - to go in the morning at about 5:00 - 5:30 the next morning and arrest him.

And did Julie Frost ask you to attend duty at 5:00 in the morning?---Yes.

To attend duty where?---To - for us to start at 5 o'clock in the morning and to meet up at the Yuendumu Police Station.

And what did she ask you to do at 5 am - or from 5 am?---From 5 am she wanted me to accompany the IRT team, squad, to go and arrest Mr Walker and - and - but I believe we were told that IRT members will deal with the arrest. I believe I was there just to make sure that I identify Mr Walker correctly before they arrest him.

And did any of those IRT members present during that briefing disagree with that plan?---No, not that I know of.

Did any of them say anything about the plan?---Not that I know of.

Did you hear Julie Frost say anything about the dog handler? What his role should be?---I believe Julie wanted the dog handler to - not to go inside the property but to stay - stay behind because of other dogs around - there's a lot of dogs in the community so they - I believe she doesn't want his dog - or the police dog - to get attacked by these community dogs.

You said that Julie Frost said that the police should first go out and gather intel. Is that what you said?---That's what I believe I heard, yes.

And did she ask you to accompany the IRT members to gather the intel?---Not - not on that night.

Excuse me for just one moment, your Honour.

And later on, were you at the police station when Kumanjayi Walker passed away? ---Yes.

And do you know that the time of his passing was recorded at 8:36 pm?---I believe so. I didn't look at the time.

All right, thank you.

They're my questions, your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Constable – sorry, it's acting sergeant isn't it, sorry. Is that your rank now?---It's acting sergeant.

Thank you. Acting Sergeant Alefaio, before giving evidence in court, were you provided with a copy of the statements that you'd previously given to the police?---Yes.

So that you could read through and remind yourself about what you said to police when you were interviewed?---I had a brief look at it this morning, yeah.

And when you gave those interviews, you solemnly and sincerely declared that what you said in those statements would be true and correct?---That's correct.

And when you spoke to police, and you were interviewed, did you tell the truth?---That's correct.

Now you didn't make any notes, did you, at all, of who said what, in your presence, at the Yuendumu Police Station, before the IRT were deployed on 9 November?---I can't recall that.

You didn't make any notes did you?---I don't think so.

No. Well you certainly haven't had access to any notes, contemporaneous notes, of what might have been said in your presence on that occasion, apart from your statements?---That's correct.

Now the statement – the first statement you provided is 15 January 2020, consisting of 23 pages?---That's correct.

I want to ask you – sorry, the second statement is – the first statement is 11 November, my apologies, 2019, consisting of 37 pages. And the second being 15 January. Is that right? Sorry, I'll start again. 11 November 2019 is the only statement that you provided. My apologies. Is that right?---That's correct.

Consisting of 37 pages?---That's correct.

And that's the statement you read before giving evidence in court?---Partly of it. That's correct.

Sorry?---Partly.

All right, well I want to ask you some questions about that, and if we need to remind yourself about what you told police when you gave that solemn declaration, I'll give you a chance to look at it. But before we go to the statement, let's just go back over a couple of things that you've mentioned. You certainly knew, didn't you, that the mission for the IRT, was to arrest Kumanjayi Walker?---That's correct.

And you certainly knew, didn't you, and indeed, Sergeant Frost in your presence, specifically told the IRT members, that if they came across Kumanjayi Walker, they were to arrest him?---I – I believe so, but I can't recall.

You knew, didn't you, because you've touched on this already, without going to your statement, you knew didn't you, that one of the things that they were to do, was to gather intelligence from the community to try and identify where Kumanjayi Walker could be arrested?---That's correct.

I don't expect to remember the detail, because you weren't part of this team were you?---That's correct.

You were basically helping at the Yuendumu Police Station?---That's correct.

You never went out into the community with any of these members did you?---That's correct.

Nor did Constable Hand?---That's correct.

Constable Smith?---That's correct.

Sergeant Frost?---That's correct.

In fact no one from Yuendumu Police Station went out in the community to assist the four members of the IRT and the dog handler?---That's correct.

All right. You saw the body-worn video, so you had an idea, and you've obviously said you were shocked, very surprised when you saw what you saw. Would you agree that that's a very confronting piece of footage?---I agree with that.

It would be extraordinarily terrifying for anybody who might have been a recipient of Kumanjaya Walker with an axe, in those circumstances?---That's correct.

It was certainly a massive escalation from the way that you had dealt with him on earlier occasions?---That's correct.

And that's why it was regarded as being so dangerous, and so serious?---That's correct.

Indeed, that's why the IRT were deployed?---I believe so.

And they were deployed, we know, at 7.05 pm that evening on 9 November?---That's correct.

It's true also, and again, I don't expect you to remember much of the fine detail, but would you agree with this much. It was obvious, from all of the people who were involved in that discussion, briefing, call it what you will, that at that point in time, just before they were deployed, they did not know where Kumanjaya Walker was?---That's correct.

What they did know however, was that the last known place that he'd been seen by police was where the axe incident occurred, and that had occurred three days before on 6 November 2019?---That's correct.

At House Number 577?---I believe so.



All right. Now you were specifically told, were you not, by Sergeant Frost, that neither you, Smith or Hand were to assist. You were to stay at the police station?---That's correct.

In other words, you were never told that you were to go out into the community with the IRT to assist in the arrest?---That's correct.

You were told that you were to remain at the Yuendumu Police Station, and assist once he'd been arrested?---That's correct, but during part of the briefing that for if – if Mr Walker's to be arrested the next morning at 5:00 or 5.30 in the morning, she wanted me to accompany them.

Sure. But I'm talking firstly about when they went out, you were told specifically, that you were not to join them when they departed at 7.05 pm?---That's correct.

And the same applied to her, Hand and Smith?---That's correct.

Right. So all you were told was that if the arrest happened to occur the following morning, that on that occasion you might be – come on that shift at five o'clock and you might go out and help them then?---That's correct.

But in the meantime, you're understanding was that they were leaving and deployed at 7.05?---That's correct.

They knew that 577 was the last known place he'd been seen at?---That's correct.

Police did not know exactly where he was to be located?---That's right.

They were to conduct intelligence gathering exercises to try and locate him, if they could?---That's correct.

And if they came upon him, they were to arrest him?---I believe so but - - -

And if they came upon him, and arrest him, and you were still on duty, you would then help with the others, facilitate the arrest process?---If that happen to take place then I'll – I'll assist them.

Yes, thank you.

Nothing further, thank you, your Honour.

MR STRICKLAND: Nothing arising, thank you, your Honour.

HIS HONOUR: Yes, thank you, you may go.

WITNESS WITHDREW

MR STRICKLAND: Yes, I call Constable First Class James Kirstenfeldt.

JAMES LLOYD KIRSTENFELDT, affirmed:

XN BY MR STRICKLAND:

MR STRICKLAND: Sir, if I say a question you don't understand, or would like me to repeat it, please say so. And if you could speak up for the transcript?---Yep, no worries.

What's your full name?---James Lloyd Kirstenfeldt.

How do you spell the surname?---K-I-R-S-T-E-N-F-E-L-D-T.

And what's your rank?---Constable.

When did you join the Northern Territory Police Force?---November 2016.

What did you do before that?---Couple of odd jobs for about 12 months, working in construction sites, that sort of thing.

You served in the Australian Army?---Yep, prior – before doing that, I served in the Australian Army, yep.

Do you know whether the – Mr Rolfe served in the Australian Army?---I believe he did, yes.

Did you talk about that with him?---No.

Now in November 2009, where were you stationed? In – sorry, I'll start again. In November 2019, where were you stationed?---Alice Springs.

You member of patrol group 5?---Yep.

Who was in patrol group 5 at that time?---There was myself, Mark Watson, Mitch Hansen, Zach Rolfe. There was a couple of others in there as well, but – yeah. Stretching the memory a little bit.

Okay. Now, in November 2019, were you a member of the Immediate Response Team?---Yes.

How long have you been a member of that team for?---I think it was a little bit over 12 months at that stage.

Okay. I'm just going to ask you about 7 November 2019. That's two days before the shooting. Did you know that Kumanjaya Walker was an arrest target on that date?---Yes.

How did you become aware of that?---He was an arrest target, I think, for about a week prior to that for a breach of bail.

On that day, did you watch a body-worn of what's called here, the axe incident?---Yes.

And where did you watch it?---At the station?

Alice Springs Station?---Yeah.

Who did you watch it with?---I – I'd imagine it would've been the patrol group.

Do you remember who you watched it with?---No.

Okay. How many times did you watch it?---I think just once, from memory.

Okay. After you watched it, did you go somewhere to try and arrest Kumanjayi Walker?---I don't think so.

Okay. I'm just going to play for you a body-worn video on 7 November. Just a part of it, okay?---Yeah. So where do I – cheers.

We'll just take a moment to locate it. This is on 7 November, okay.

So I'm playing exhibit 9, your Honour.

DVD PLAYED

MR STRICKLAND: Did you see yourself in that footage?---Yes, sir.

Does seeing that body-worn jog your memory that you were – you went to Warlpiri camp on 7 November?---Yes, sir.

Had you forgotten that?---I remember – I don't remember what day we went there. We went there a couple of times.

Okay. That – what we just played was exhibit 15.

HIS HONOUR: Thank you.

MR STRICKLAND: So you recall doing a cordon and control – sorry, a cordon and contain around that particular House 6 at Warlpiri; is that right?---I remember attending that place.

Okay. You do remember that? To look for Kumanjayi Walker?---Yeah.

And there were two guys that ran off?---Correct.

And neither of them were Kumanjayi Walker?---No.

Okay. Now, I want to ask you about 9 November. Do you remember that you were tasked to go to Yuendumu on that day?---Yes.

And who called you to go out there?---Shane McCormack.

Right. And he spoke to you on the phone?---Yes.

What did he say to you?---He said, "We are calling out members to go Yuendumu, did you want to go?"

Yes. What did you say?---I said, "I'll check with the missus first and then give you a call back."

Okay. And you said yes eventually?---Yeah.

Did you go to Alice Springs Station?---Yes.

And did you meet up with other members of the IRT?---Yeah.

Who did you meet up with?---Adam Eberl, Tony Hawkings and Zach Rolfe.

Had you been on an IRT team with those men before?---I don't think so.

As at that time, November 2019, about how many times had you gone out on a task for the IRT?---I think I had only gone to one or two call-outs.

Okay. So this was either your second or your third call-out?---Yes.

Okay. So when you got to the station, did you see Sergeant Shane McCormack?---Yes.

And did he talk to you about going out to Yuendumu?---I don't really recall what he said.

But did he talk to you at all?---I'd imagine he would've.

Right. But you don't – you have no recollection of it?---No recollection of what the conversation would've been.

Do you remember looking at the body-worn video of the axe incident when you went to Alice Springs on the 9th?---Yes.

And who did you watch that with?---With the team that was going out. Zachary Rolfe, Tony Hawkings and Adam Eberl.

Do you recall any discussion about what you were seeing when you watched the body-worn video?---No.

Okay. Do you know, based upon your discussions with anyone at the Alice Springs Police Station, why you were going out to Yuendumu?---Julie Frost had sent an email requesting for IRT to go out there.

Okay. Who told you that?---Shane McCormack.

All right. And did he tell you why Julie Frost wanted you to go out to Yuendumu?---I believe it was to arrest Walker.

Right. Is that what he said?---Like I said, I don't remember what was said, but- - -

Okay. Did he read out this email?---I don't -- I don't recall.

Did he show you the email?---I don't recall.

Did you -- based upon this briefing at Alice Springs, did you regard this as a standard arrest?---Yeah.

Do you remember anything at all about what was discussed during that briefing or discussion while you were at Alice Springs station?---We didn't really have much information other than that we were going to Yuendumu and I believe it was to arrest Walker.

And that's what you could remember?---Yes.

Okay. And who did you travel to Yuendumu with?---I drove a HiLux that we borrowed. I drove with Zach Rolfe.

Do you know, did Adam Eberl drive with Mr Hawkings?---Yes, they had a single cab '79 series, so they were a bit behind us, they were a bit slower.

How long did it take to drive out there?---I think it was about three and-a-half - four hours - I think.

Did you speak to Mr Rolfe about what you were going to do when you got there during that car trip?---No.

I wonder if the witness could be shown exhibit 2?

THE WITNESS: Could I grab another water, if you don't mind? Cheers, mate. Thank you very much.

MR STRICKLAND: Now, if you just go to tab 4. Just go to - the photographs are numbered on the top right hand side?---Yep.

So if you can go first to photograph 10. Can you just accept from me that these are still images of closed circuit TV at the Yuendumu Police Station - just if you just accept that's what these are?---Yep. Yes, that looks like the entrance from where the cells are to the main muster room, that's what you said?---Yes, it looks like it?

Yes, okay. And can you see yourself there?---Sure can.

And Zach Rolfe?---Yep.

6:33 pm on 9 November. Does that accord roughly with your recollection about when you arrived?---Yes.

Okay. If you go to photograph 12. Can you see yourself there?---Yep.

And you are carrying something?---Yep.

What are you carrying?---A bean bag shotgun.

Okay, you can see that in photograph 10 as well, is that right?---Yes.

And what is a bean bag shotgun?---It's a Remington 870 shotgun that's been repurposed to shoot just bean bags out of the 12 gauge cartridge.

All right, now you were dressed in your blues, correct?---Correct.

When you went out on your previous one or two missions for the IRT did you wear your blues or did you wear camouflage?---Blues.

And what did that mean - the fact that you were wearing blues?---That's our standard police uniform.

Okay. You understand you were going there as general support?---Yeah, going out to affect an arrest.

As general support?---Yeah.

Okay. I am just going to play a little bit of an exhibit. I will tell your Honour the exhibit number in a moment. That is off the CCTV just of you coming in, around about the same time I showed you the - sorry, around about the same time as the stills I just showed you, so that in other words, about 6:33?---So, yes.

DVD PLAYED

MR STRICKLAND: I am just pausing it at 6:34:34, you can see yourself coming into the muster room?---Yes. Correct.

And then Zach Rolfe follows you?---Yes.

And you are speaking to Julie Frost for a while?---Yep.

And then it seem on the bottom left hand corner of the CCTV there is another person that you smile at, is that correct?---It looks like it, yep.

And then you shake that person's hand. You just have to answer verbally I'm afraid?---Yes, yes.

And do you know who that person was?---I - not without seeing who it is on the - - -

Sure. Do you remember who that person was?---No, no, like I say, I'd have to see the footage to remember who.

You understand, that's the footage we have?---Okay.

Your Honour, I just played exhibit 10 - part of exhibit - part of exhibit 10.

HIS HONOUR: Thank you.

MR STRICKLAND: Did you meet Chris Hand at the station?---I believe so. Like at the start?

Right, well that was the start, when you arrived?---Yeah.

6:33 pm? Correct?---Yeah.

And do you think that the person you met and smiled at and shook hands with was - okay. Okay, you say you met Chris Hand at the start. Did you speak to him?---What, sorry?

Did you speak to him - Chris Hand?---I don't recall.

You met him, you said, at the start?---Yes.

And by "the start" you mean when you arrived at the muster room?---Yes, he was in the muster room.

Right. Did Julie Frost say anything to you about whether Chris Hand would be part of any arrest team?---No.

She didn't say anything at all?---No.

Now, I will play it if you like, and please say if you would like me to, but for the next five minutes - four - five minutes - it shows you and Zach Rolfe speaking to someone. Do you accept that or would you like to see it?---I'll take your word for it.

Okay. When you first arrived you met Julie Frost, is that right?---Yes.

And did you know she was the officer-in-charge of that station?---Yes.

Did you understand she was in command of the operation to arrest Kumanjaya Walker?---Yes.

And do you remember her speaking to you when you arrived with Zach Rolfe?  
---Yes.

Now, I just want to show you - I just want to go to exhibit 2 please, again. Now if you go to photograph - excuse me - if you go to photograph 18, do you recognise those two officers?---It looks like Tony Hawkings and Adam Eberl.

Does that accord with your recollection that they arrived about half an hour or sorry, 23 minute after you did?---I don't recall how long it was, but .

Do you accept that they arrived at about 6:56 pm?---Sure.

So what I want to ask you about is the conversation that Julie Frost had with you in the presence of Zach Rolfe before Eberl and Hawkings arrived. Do you understand?  
---Yep.

Do you remember speaking to Julie Frost before Eberl and Hawkings arrived?  
---Yes.

And what did she tell you in those discussions?---Well, we were trying to get information out of her what we were doing and where he was, what houses he's likely to be at.

Yes? So when you say "We were trying to get information out of her" by "we" who do you mean?---Myself and Zach Rolfe.

And when you were trying to get information about her, were you asking her questions?---Yes.

And do you remember any questions that Zach Rolfe asked?---I don't recall.

Do you remember any questions you asked?---Yep.

What did you ask?---What houses he lives at.

Yes?---What family members are likely to hide him. Who doesn't like him and would be likely to give him up.

And when you asked her what houses did he live at, do you remember her answer?---She had a map, and she pointed to a dozen houses or so.

And that was in front of – all this was in front of Mr Rolfe?---Yes.



And do you remember asking anything else?---Not that I recall.

Okay. And did she answer each of the questions you asked her?---I believe so.

Did she mention anything about nurses?---Yeah I'm not sure if that was prior to going out there, or if that was when we got there, but I was aware by that stage, that there were no nurses in the community.

And who told you that?---I believe it was Julie Frost.

And are you saying you don't know if she said that just in front of you and Zach, or sometime later, is that what you're saying?---Yeah.

In other words, when all four of you were there?---Yeah.

What did she say about the nurses?---She said that they had been sick of getting broken into, and that Arnold Walker ran out a group of breakers, I think she referred to, of young fellows that look up to him and follow him, and they break into all their houses, and they'd all had enough and were scared and left the community.

Did you have a bit of a laugh about the fact that there were no nurses?---No.

You didn't?---No.

Did she tell you during this time, when it was just you and Zach, that she had a plan to arrest Kumanjayi Walker on the Sunday morning?---Sorry, can you say that one again?

Yes. Did she tell you, during this discussion with you and Zach Rolfe, that there was a plan to arrest Kumanjayi Walker on the Sunday morning?---I don't recall there being a plan.

Did she – what did she tell you about any plan to arrest Kumanjayi Walker?---I believe it was suggested that – that we go and arrest him at around about five o'clock in the morning.

Yes, okay. Had you ever been part of a plan to arrest people at dawn?---I'm a shift worker, so sometimes that just is the way it occurs.

And on those previous occasions, was there a discussion as to why you should do that?---No.

Well did you understand why there was a practise to arrest people at dawn, or early in the morning?---I'm unaware that that's a practise.

I beg your pardon?---I'm unaware that that's a practise.

Well you'd done it previously, was there a discussion as to why you were arresting someone early in the morning?---Because we were on shift early in the morning.

Was it anything to do with the fact that it might be dark?---No.

Or catch people by surprise?---No.

When a person was likely to be asleep?---No.

Did Julie – when you arrived, did Julie Frost tell you that Adam Donaldson had arrived?---She did tell us that, yes.

And you refer to him as the doggie, is that right?---Yeah.

The dog handler?---As in the dog handler.

And what did you – did she tell you why he was there?---No.

Did you know he was going to be there before she told you?---No I didn't.

Were you pleased when she told you?---Yes.

Why?---The dog's a great tool to have.

Why?---The dog can track people. The presence of the dog sometimes can cause people to just give up.

When she told you that Adam Donaldson was there, did she – did you contact him?---Yeah, I called him on my phone.

And what did you say?---I asked him to come back to the station.

Now I want to show you a document please.

Can the witness please be shown exhibit 1.

Now go to tab 14 please. That's an email from Julie Frost to a number of people, including yourself. Do you see that?---I can see that.

At 4.59 pm. Now did you see this email before – I'll start again. Do you accept that you left Yuendumu Station at about 7.05 pm to go out to look for Mr Walker?---Yes.

Before 7.05 pm, did you ever see this email?---No.

Did you see any copy of this email at the Yuendumu Police Station?---Not that I recall.

Do you remember Julie Frost ever talking to you about an email that she had sent you?---Yes.

All right. And what did you say about that email?---I think she said "I sent an email."

Yes. And did she say anything else?---Not that I recall.

Did she say anything about the content of the email, what was in it?---No.

Did you read any email?---Not that I recall.

Did you look at any email?---Not that I recall.

That Julie Frost had sent to you?---As in this one?

Well did you read any email that Julie Frost had sent to you?---No.

Did you look at any email that Julie Frost had sent to you?---No.

Now can I ask you to again go back to exhibit 2, tab 4. Can you go please to photograph five. And do you see in that photograph, that's the one at 6.12 pm and 22 seconds. Do you see that?---Yes.

And you can see two people entering the muster room?---Yes.

Can you – do you recall, do you know who those two people are?---The person at the rear is Felix, and the person in the front looks like Donaldson, the dog handler.

And Felix being, Constable Felix Alefaio?---Yes.

Have you met him before?---Yes.

Where had you met him before?---Alice Springs.

And did you speak to him when you got to the station?---Yes.

What did you say to him, or what did he say to you?---I don't recall.

Did at any stage, before you left to look for Mr Walker at 7.05 pm, at any stage did Julie Frost say anything about Felix Alefaio?---I believe she said Felix was out there to help support and he'd come in from another community.

Yes. Did she say anything else?---Not that I recall.

Did she say anything to you about whether he would be involved at 5 am, or the following morning?---Not that I recall.

Did you ask anything about Felix Alefaio to Julie Frost or to anyone else?---Not that I recall.

Had you ever met Kumanjaya Walker before?---No.

Do you know – in the discussions you had with other members of the IRT, do you know if any of the other members had met Kumanjaya Walker before?---I don't know.

Do you know if Felix Alefaio had met Kumanjaya Walker before?---I don't know.

Did he say he'd met – did Felix Alefaio say he'd met Kumanjaya Walker before?---Not that I recall.

Okay. You said a bit earlier that Julie Frost showed you a map?---Yes.

And did she give you a map?---I believe so.

Okay. And what was the size of the map she gave you?---I think it was an A4 page map.

Was it laminated or not?---I don't think so.

Do you know if she gave anyone else a map?---I don't know.

And by a map, I mean a map of Yuendumu?---I don't know.

Okay. When you said she gave you a map, was that a map of Yuendumu?---Yes.

Did she – did you have any discussion with Julie about when you were going to start – commence the operation in relation to Kumanjaya Walker?---We talked about going out for – for a drive and doing some recon of the place she'd pointed out. I had never been there before, so we didn't know our way around.

Now, what is – you said recon? What does that mean?---Go and have a look.

Recon being reconnaissance, yes?---Yes.

And did you discuss when you were going to do that?---We were going out once the whole team had arrived.

Okay. And did she mention anything about starting at 11 pm?---No.

Was there any discussion when you would start the recon?---It was once the team arrived.

When you were at the – Yuendumu, did you watch – I'm sorry if I've asked this before, did you watch the body-worn again?---No.

I just want to play you some further parts of the CCTV from around about 6:59 pm, 7 pm.

DVD PLAYED

MR STRICKLAND: Just pause there. Did you see Mr Rolfe in that part of the CCTV footage?---Yes, I did.

He was in the muster room and then he left at about 6:59 and 57?---Yeah.

Thank you. Continue on.

DVD PLAYED

MR STRICKLAND: Do you recognise those two people that came in with their kit?---It looked like Adam Eberl and Tony Hawkings.

Thank you.

DVD PLAYED

MR STRICKLAND: Now can you see that you have something in your hand? A piece of paper?---Yes.

Do you know what that was?---No.

You see another – and one of the other members had another piece of paper in their hands?---Correct.

Can you see what that was?---No.

If you just continue on just a short time.

DVD PLAYED

MR STRICKLAND: So at about 7.06.27 pm you can see you leaving the station?---Yes.

And do you agree that from there, you went out into the community?---Yes.

That was exhibit 10, your Honour.

HIS HONOUR: Thank you.

MR STRICKLAND: And you bought a weapon with you. Could you see that on the CCTV?---Several.

What – what did you bring with you?---I had a Glock pistol. I had spray. I had a baton. I had handcuffs. I had a Taser and I had a Bean-Bag shot gun.

And did you see another officer also seemed to have a – was carrying an assault rifle, could you see that?---Looked like a police patrol rifle.

Police patrol rifle. Who was carrying that?---I can't tell if that was Adam Eberl or Tony Hawkings.

Okay, thank you. Now we played approximately five or six minutes when you and the other IRT members were around that table?---Yep.

And you could see Julie Frost there as well?---Correct.

So I want to ask you about the discussions that took place at that time. Between that seven and – about 7 pm and 7.06 pm, do you understand?---Yep.

Do you recall anything that Julie Frost said during that time?---Yes.

What do you recall that she said?---We went to use the station radios for Yuendumu, and she said that they don't use them, because she doesn't know how to set it up on the Simplex(?) Channel, because there's no communications from Yuendumu back to the central police comms in Darwin. So they just didn't use them. We said we weren't going to roll out without radios. So we had to set them all up for her. And we were showing them how to set up her station radios before we took them out.

Okay, and what were the station radios for?---To communicate with each other.

Do you recall whether she said anything else in that period? That's seven – everything I say between 7 am and 7.06?---Yep, no I don't recall anything else she said.

Did she say anything during that time about the spate of break-ins?---No I think she said that prior.

Okay, when you said prior, that's when you first got there at 6.33?---No I mean prior to just that five minutes where we're doing the radios.

Okay. When – if I can just go back a bit, at 6.33, when you first arrived. Did she say to you that she wanted to wait until everyone came, until she gave a briefing?---I don't think so.

In that period, 7 am – 7 pm sorry, to 7.06 pm, did you she say anything to you about a funeral?---Yes, we were made aware that there was a funeral on in town.

And what did she about that?---That there was a big funeral going on at the moment in town, and that a lot of people had come in from other bush communities for the funeral.

Did she, during this period, 7 pm to 7.06, did she discuss Kumanjayi Walker?---Yes.

What did she say?---She said if you come across him, grab him.

Okay, did she say anything about his history?---I don't believe so.

Did she say anything in that period about you conducting high visibility patrols?---She mentioned about us doing RBT's later on in the night.

What's an RBT?---Random breath test.

Did she say anything about conducting high visibility patrols?---Yeah, that's like the RBT's and stuff - - -

And that's what you mean by – that's RBT's?---Yeah, doing that sort of thing.

Did she say anything about familiarising yourself with the community and the layout of the community?---I – that's what we were going to do.

But what I'm asking is what she said?---I don't recall.

Did she say anything in that period about arresting Kumanjayi Walker the following morning, about 5 o'clock or 5.30?---I don't recall.

Your Honour, I have an application to make, if that's a convenient time.

HIS HONOUR: Well probably now is as convenient a time as any, but I'd imagine that this will take us past 1.15.

MR STRICKLAND: It will, your Honour.

HIS HONOUR: All right, so you may stand down. We'll continue with you tomorrow, thank you.

WITNESS WITHDREW

HIS HONOUR: And members of the jury, I'd ask that you now retire for the day, and we'll restart tomorrow morning at 9.30.

JURY OUT

HIS HONOUR: Are you happy to deal with that application now?

MR STRICKLAND: Your Honour, I'd prefer to do it, if I could at – a little bit later. What I'd like to do is to check the particular parts of the records of interview in the committal I want to take your Honour to.

HIS HONOUR: All right.

MR STRICKLAND: Take a little while, but I propose to do was at least tender on this application, the records of interview in the committal transcript.

HIS HONOUR: Yes.

MR STRICKLAND: And I'll take your Honour to those relevant parts, at any time, your Honour.

HIS HONOUR: Well what time do you want to start back? 2.15?

MR STRICKLAND: Fine with me, your Honour.

HIS HONOUR: All right, I'll adjourn until then.

MR STRICKLAND: Your Honour, I'll hand up the material at 2.15? Is that convenient?

HIS HONOUR: Well if you've got it now, it would enable me to read it over the lunch adjournment.

MR EDWARDSON: And your Honour, I'd be grateful if my learned friend could indicate to the court, and to us, which particular page of the transcript – I mean I assume this is an application, as I understand, he foreshadowed an application to cross-examine - - -

HIS HONOUR: Yes, well that's my assumption, yes.

MR STRICKLAND: That's correct, your Honour, s 38 application – s 38 application.

HIS HONOUR: Yes.

MR STRICKLAND: What I'll do is over the lunch I'll email your Honour's Associate the relevant pages.

HIS HONOUR: All right.

MR STRICKLAND: And I'll forward that on to - - -

HIS HONOUR: All right, thank you.



MR STRICKLAND: So I tender on this application the following. A transcript of an interview with Constable Kirstenfeldt on 10 November 2019. It's 38 pages. A map is attached to it. A second transcript of an interview on 21 November 2019, that's 52 pages. And a committal – transcript of the committal hearing on 2 September 2020. Pages 111 to 130.

HIS HONOUR: All right. I'll have those marked respectively as exhibits 1, 2 and 3 on the application under s 38 *Evidence Act*.

EXHIBIT MFI 1: Transcript of interview with Constable Kirstenfeldt on 10 November 2019

EXHIBIT MFI 2: Transcript of interview 21 November 2019

EXHIBIT MFI 3: Transcript of committal hearing on 2 September 2020

HIS HONOUR: I'll adjourn.

LUNCHEON ADJOURNMENT

## RESUMED

HIS HONOUR: Now we do have a new Sheriff's officer. I'll have that person sworn in, even though we don't actually have the jury with us this afternoon.

## JURY GUARD SWORN

HIS HONOUR: Mr Crown, I also received a further page of the transcript I understand from the committal proceedings.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: In addition to the material that you tendered earlier.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Did you want to include that as part of that same exhibit?

MR STRICKLAND: Yes, I would, thank you, your Honour.

HIS HONOUR: All right, thank you.

Yes, well.

MR STRICKLAND: Your Honour, our application is under s 38A1C, principally, and then the alternative is s 38(1)A *Evidence Act*. It relates to a discrete part of Constable Kirstenfeldt's evidence. And that part relates to – your Honour will recall that the witness was shown exhibit 1, tab 14.

HIS HONOUR: Yes.

MR STRICKLAND: That's – if I can call it in the shorthand, the arrest plan, or the operational plan.

HIS HONOUR: Yes.

MR STRICKLAND: That's an email sent by Julie Frost to this witness, and many others, at 4.59 pm on 9 November. And a number of questions were asked about that email. I'll just read out our notes of that – of those questions. First, "Do you accept that he left Yuendumu Police Station at 7.05 – 7.06 pm, as per the CCTV, and he was asked this. "Before 7.05 pm did you ever see this email?--- " that's exhibit 1, tab 14.

HIS HONOUR: Yes.

MR STRICKLAND: "No."

"Did you see a copy of the email at Yuendumu Police Station?---Not that I recall."

"Do you remember Julie Frost ever talking to you about the email?" He says "Yes."

"What did she say?---I think she said I sent an email."

"Anything else?---Not that I recall."

"Did she say anything about the content of the email?---No."

"Did you read the email?---Not that I recall."

"Did you look at any email?---Not that I recall."

"Did you read or look at any email that Julie Frost had sent to you?---No."

And our application's based on the proposition that in his record of interview which is the 52 page interview with the police on 21 November 2019, and then at the committal on 2 September 2020, he gave inconsistent answers with the answers he gave in evidence.

So if I can start with the first interview. And can I just indicate this, your Honour. The reference to the email that Julie Frost sent, when one looks at the totality, these exhibits, what was known as exhibit P1 in the committal. Which is – is page eight, the same as the big document which is now exhibit 1 at tab 14. And I don't think there's any real – when you look at the totality of what I'm about to - - -

HIS HONOUR: All right.

MR STRICKLAND: - - - refer you to, I don't think there's any real doubt about that. So it begins at page 13, I beg your pardon, it begins at – so it begins at page 13.

HIS HONOUR: Is this of the statement?

MR STRICKLAND: I'm sorry, your Honour, of the 52 page statement, exhibit 2 on the – on this application.

HIS HONOUR: The 52 page, yes. And page?

MR STRICKLAND: 13.

HIS HONOUR: 13, thank you.

MR STRICKLAND: And I that it's just a reference to the email but I'll take you to the materials that indicates that it's clear that Kirstenfeldt understand that the email is exhibit – tab – exhibit 1, tab 14. He got the email from Julie Frost. Yes, I've just

been asked to – if your Honour would make a suppression order in relation to this application?

HIS HONOUR: Yes, I will do so. And I'll also remind anybody who is listening that this application is being made in the absence of the jury, and accordingly it should not be reported in any event.

MR STRICKLAND: If your Honour pleases.

MR EDWARDSON: If your Honour pleases.

MR STRICKLAND: So at page 13:

“What I mean by that, obviously you got the email from Julie Frost” (inaudible) there.

She's gone and referred to in the email as IRT coming out to assist. That's what the body of the email says. And he says:

“First time I saw that email was out at Yuendumu.”

So he's indicating he did see the email at Yuendumu. We were asking – Kirstenfeldt continues:

“We were asking Julie Frost details of what's going on. I think that was sent while on our way. It would have got sent to people above us. I don't know. But I didn't see the email – that email until I was already out there.”

So on two occasions, he says he saw the email when he was out there.

HIS HONOUR: Yes.

MR STRICKLAND: Page 23 of 24. The bottom of page 23, Wilson says:

“Chris Hand, they were both in the station. So you were receiving a briefing and now we are talking about the email that had been sent out, which seemed to have a plan on it.”

And again, we say that refers to exhibit 1 tab 14.

“You recall when you, sort of, went through it?---Still don't know that I have, yeah.’ And he just says, ‘Just skimmed through it.”

So he's indicating again that he has received it and skimmed through it. He then says:

“I'm pretty sure she set the plan that we were going to do, what we do anyway, is just intel-gathering and snatching an early morning.”

Again, consistent with the email, being exhibit 1 tab 14. What I – all I – if your Honour was – if your Honour was minded to grant leave, all I would be doing is reminding him of the answer from the bottom of page 23 up until the second last answer, which is:

“(inaudible) and arrest plan, I don’t know what it says on there or if that’s what was said. And that’s what we agreed upon.”

Then the next part is at page 20 – beg your pardon, then that passage – or those passage- - -

HIS HONOUR: The next page?

MR STRICKLAND: Beg your pardon?

HIS HONOUR: The next page?

MR STRICKLAND: The next page – that’s all from that interview, your Honour.

HIS HONOUR: I see.

MR STRICKLAND: The subject of those answers are referred to at the committal. So at the committal, Mr Kirstenfeldt is asked about those answers. So if you – at the bottom of page 113:

Could the witness please be shown exhibit P1?

HIS HONOUR: This is the committal proceedings?

MR STRICKLAND: This is – these are exhibit 3 on this application.

HIS HONOUR: Yes?

MR STRICKLAND: So exhibit P1, you’ll see from page 8 of the committal, that refers to the 4:59 pm email. And then really, the page – the next two or three pages, there’s questions about that. And that:

““Did you receive – there’s an email from Julie Frost to a number of people including you” – this is the top of page 114 – “Did you receive that when you were at Alice Springs?---No.”

“Were you shown that when you got to Yuendumu?---No.”

“Were you shown any email when you got to Yuendumu?”

And then he says:

"There was one. It spoke about us doing – coming out to funerals. I don't think it says anything here," et cetera.

So – and he says he read an email, but he doesn't say that was the same as exhibit P1.

HIS HONOUR: In fact, he seems to suggest the opposite.

MR STRICKLAND: He suggests the opposite, I accept that. But if you – if your Honour keeps going, she was asked – because your Honour will recall, what I seek to cross-examine about is she was given – what I – he said in evidence:

"I didn't see any email."

Not simply exhibit 1 tab 14. Whereas this evidence suggests that he did at page 114:

"What was in the email that she showed you?---It was just one she sent out, requesting us and what they wanted. So like I said, it mentioned us doing RBT through the whole night after the funeral and that and yeah."

"How were you shown the email?---I'm pretty sure it was a print-out."

"She gave you the print-out?---I think.' 'How many pages on it?---One."

Well again, we say that's inconsistent with his evidence today, where he said he wasn't given any email at all.

"Who was the email sent to?---Like I said before, I have no idea."

HIS HONOUR: Yes, but you're not interested in that particular email that he's talking about.

MR STRICKLAND: I beg your pardon?

HIS HONOUR: You're not interested in that particular email, unless it is the email that was sent by Sergeant Frost with, what has been referred to as the arrest plan, on it.

MR STRICKLAND: That's correct but, your Honour – if your Honour was to grant leave under s 38, I'm – depending upon his answers to the first interview, I may ask about this because it's the – we say it's relevant to this subject matter, which is that he did receive an email and that email relates to a plan – although it appears to be a different plan – because if your Honour just goes to page 114- - -

HIS HONOUR: Yes.

MR STRICKLAND: That the email seemed to have a plan on it not, I think, it said something about arresting at 5:30 in the morning or something like that. Well, that's the key matter.

HIS HONOUR: Now, where's that? On page 114 again?

MR STRICKLAND: Second last answer, your Honour.

HIS HONOUR: I see.

MR STRICKLAND: "The email seemed to have a plan in it." So I would want to ask him about that. Again, because what he said- -

HIS HONOUR: Yes, I see.

MR STRICKLAND: Your Honour sees, yes. And so then, at page 115, he's taken to exhibit P1 – exhibit 1 tab 14 – and he's asked a number of questions about the content of that. And then he's taken to – he's then taken to the part in the record of interview I've just taken your Honour to. The same part. The one at page 23. That's 23 of the 52-page interview. And so he's taken to that, and I just wonder if your Honour, at the same time, could go to page 23 of the interview.

HIS HONOUR: Yes.

MR STRICKLAND: At the bottom of page 23 it's got, "So you received a briefing" – and now we're talking about the email. And at page 115.5, he's taken to that particular passage. Does your Honour see that?

HIS HONOUR: Yes.

MR STRICKLAND: So his answer is – having taken to that passage: "I still don't know" – now at page 115 of the committal – point five:

"I still don't know that I have just skimmed through it.' Question. 'Just for the recording" –

Sorry, I beg your pardon. I've read him the whole passage.

HIS HONOUR: Yes, I can see that.

MR STRICKLAND:

"Does that relate to the email that you" – there's a missing word there – "were just asked about?---Yes." "The email did refer to a plan about intel-gathering and (inaudible) in the early morning, is that right?---Yes."

So when he says, "Does that relate to the email I just asked you about?" in my submission, the email just asked him about exhibit P1, because I had just finished

asking him about it. So he's accepting that the question he's asked – the question he's – sorry. He's accepting that when he gives the answers at page 23 and 24, he's referring to P1 in that interview.

“Does that relate to the email that I've just asked you about?” What I had just asked him about was exhibit P1.

HIS HONOUR: Just one moment. I think there's potential for you and the witness to have been at cross purposes on pages 114 and 115. It's not entirely clear that when the question is put to him:

“Does that relate to the email that you were just asked about,” whether that was referring to P1 – which he was shown at the top of page 115 – or whether he's referring to the email that he says that he remembers seeing, which is the subject of his question and answers on page 114.

MR STRICKLAND: I understand that, your Honour. So I – let's – assuming that, for the purposes of this application. If your Honour thought there was some unfairness about that, then what I will do is just confine myself to 114. Because there, what is clear in 114 is he says he saw an email which discussed – sorry. He saw an email at Yuendumu which had a plan on it about arresting- - -

HIS HONOUR: It had something about arresting at 5:30 in the morning- - -

MR STRICKLAND: Exactly, that's right.

HIS HONOUR: - - -or something like that.

MR STRICKLAND: That's right.

HIS HONOUR: Yes.

MR STRICKLAND: So I would – in the alternative, I'll confine it to that, so I won't get into the confusing- - -

HIS HONOUR: Yes.

MR STRICKLAND: - - -part of what we've read. So really, there's two – although it's the one subject matter, there's two areas. One is what he said in the record of interview, which we will say relates to exhibit P1.

HIS HONOUR: Yes.

MR STRICKLAND: And then secondly what he says at 114 where he appears to give a different answer. So we say that it does satisfy 138. If your Honour should grant leave - we notified the accused previously that we were apt to make an application to 138, so we have given the notice that we could, in my submission, the 192 factors that your Honour will need to consider are - it will not unduly lengthen the



hearing. I anticipate this cross-examination will be no more than five minutes or so, there's no unfairness to the accused. The relevance of this evidence has been canvassed is what Sergeant Frost communicated to the accused.

Your Honour will remember what was - the parties are at odds as to what was said in this briefing and whether an email was shown. I think it was put to Sergeant - I know it was put to Sergeant Frost that there was no email shown to these IRT officers, so the evidence is relevant, it has some importance. We say the factors in favour of leave would support the granting of leave and I can indicate to your Honour that I will confine it to just these pages that I have referred your Honour to.

We also say as an alternative, that the evidence elicited by this witness is unfavourable. The law unfavourable, as I am sure your Honour is well aware has widened considerably to this common law of hostile - being hostile. It simply is if there is other material which is relevant for the total explanation of this particular issue, which illuminates the issue, namely that he has given another version, then that's - his evidence that he never received the email is not favourable to the Crown and we say it falls on the latter (inaudible) but we say that (inaudible) that alternative.

HIS HONOUR: So there are two grounds, are there? That the evidence is unfavourable but also that the evidence that he has given at the committal proceeding and also in that statement is inconsistent with the evidence that he has given in this court?

MR STRICKLAND: Yes, exactly.

HIS HONOUR: All right. Yes?

MR EDWARDSON: If your Honour pleases, it is our respectful submission that leave should not be granted. Your Honour, we agree and it is trite to say, that the law in relation to unfavourable witnesses pursuant to s 38 of this Act are much wider than the tradition of common law in relation to hostile witnesses.

Having said that, your Honour, in the normal course, a party calling a witness cannot cross-examine their own witness and seek to discredit them. I mean, that is just fairly trite. In this case there is nothing, in my submission, either from any of the passages to which my learned friend has referred, either being in his first statement or indeed a committal or indeed in this trial, which could amount to a true prior inconsistent statement or an unfavourable statement. Let me explain why.

The starting point, your Honour is, of course, that there was no precision at all in determining precisely when he saw whatever email it was that he saw, whether it be in the first statement or indeed in the questions that were asked by my learned friend.

A simple reference to even in passing, "I didn't see that until I got to Yuendumu" only becomes relevant if it can be demonstrated that he knew and understood that what was being put to him was that that email in one form or another, its contents,

was brought to his attention before they departed or before they were deployed at 7:05 pm on 9 November, otherwise it is meaningless. That is the first point. And they are clearly those passages do not and cannot make out that proposition with any precision.

The second thing is if you have a look carefully, and because of the way in which, with respect, questions were asked at committal and you have a look specifically at page 114 and 115 which, as I understand it, insofar as the evidence at committal is concerned, my learned friend will now confine if leave is granted, any potential cross-examination to those passages.

HIS HONOUR: I understand. In fact, I would only be minded to grant leave in relation to 114 - not in relation to that evidence which was given on page 115 which to my mind was capable of being the subject of misunderstanding.

MR EDWARDSON: Well, I will come to that and why I say even 114 should not be admitted.

HIS HONOUR: Yes.

MR EDWARDSON: The starting point is at the top of the page. That's an email - sorry, I should say at the bottom of page 113 because that proves that what has been produced to him by Mr Strickland is, in fact, exhibit 1 which is what I will call "The Frost arrest plan email."

And then over the top of the page:

"That's an email from Julie Frost to a number of people including yourself, do you see that?---Mm mm"

"Did you receive that when you were at Alice Springs?---No."

Unambiguous - clear. Question, "Were you shown it when you got to Yuendumu?" Answer, "No".

Ow, that really should be the end of the matter because that is the evidence that he gave. But be that as it may, Mr Strickland pursued it without objection.

"Were you shown it when you got to" - "The email when you got to Yuendumu?---There was one. It spoke about us doing something after the funeral."

Can your Honour turn to exhibit P1 and turn to tab 12 - sorry, Exhibit 1. Yes please. And your Honour will see that this is the email exchange between Julie Frost and Shane McCormack on 9 November 2019 at 4:47 pm, very close to the time of the - what I'll call the "circular email" which is exhibit P1.

And your Honour will see that there specifically there is a reference, for example, of note, "The funeral is taking place in community this weekend."

Not what is not shown is that with that email in contrast to the other email, he having said unequivocally and unambiguously:

"I did not receive that email in Alice Springs. I was not shown it when I got to Yuendumu."

He then says:

"I did see and email, but not this one."

And then he says, "Do you want to have a look at it?" at that time, "Have you seen this before?"

"I saw this - I saw this - it - this morning for the first time."

"The first time?---Yes".

HIS HONOUR: Sorry, I am just making sure, the document behind tab 12 in exhibit 1, is that the same document as exhibit p1 in the committal proceedings?

MR EDWARDSON: No, your Honour.

HIS HONOUR: It's not?

MR EDWARDSON: No. T1 in the exhibit proceeding, in the committal proceedings is what I will call, "The arrest plan".

HIS HONOUR: The arrest plan which is - yes, all right.

MR EDWARDSON: That's it.

HIS HONOUR: Yes, all right.

MR EDWARDSON: This is the one that's created, she uses this document - that Sergeant Frost, as I understand her evidence in this trial - she uses that email in part for a cut and paste job - - -

HIS HONOUR: Yes.

MR EDWARDSON: - - - to create the plan.

HIS HONOUR: All right.

MR EDWARDSON: And it's that plan - there's a further reason why we say that leave should not - - -

HIS HONOUR: Yes, this was the email from Mr McCormack?

MR EDWARDSON: That's it. That's it.

HIS HONOUR: Yes.

MR EDWARDSON: But there's a further reason why we say, your Honour, with respect quite frankly, this plan is dead in the water, and it really comes down to this. Whatever case the prosecution might have opened on and whatever contentions they might have put forward to this jury in opening and attempted to adduce in examination-in-chief through various witnesses, the clear unambiguous evidence now is that whatever plan she might have created in the format of P1, that's not what happened. That's the first point.

The second point is, even if she did contemplate a deployment at 11:pm, she approved and permitted the deployment at 7:05 pm. Her evidence is that whatever might have been optimistic and hopeful that is a preference for Kumanjayi Walker be arrested at 5:00 or 5:30 in the morning. The evidence that she now accepts is that when they were deployed at 7:50 pm, they had no idea where he was.

She accepted - almost without exception, by the time we got to the end of cross-examination, that almost all of our instructions that we put to her, she accepted were part and parcel of the exchange which took place before they left - which included two critical propositions. The first was that they were to intelligence gather and that is to go out into the community and try and identify where Kumanjayi Walker was because they didn't have a clue.

The best they had was that the last known sighting was at 577 where the axe incident occurred and other possible places that she identified at some point either in the plan or when she had conversations. But, most importantly, she accepts - and the prosecution are now committed to the proposition or the notion that if they came upon Kumanjayi Walker they were to arrest him. So this plan, really, is just a complete red herring and the notion that there had been noncompliance when we now add to that Superintendent Nobbs' evidence, that is that she, in effect approved something that he had not contemplated - not explicitly - but he said - "Implicitly" I think what he said - he said was implicit, namely that he had in mind that Kumanjayi Walker would be arrested at 5:30 in the morning, there wouldn't be any intelligence gathering and so on. That's not what Sergeant Frost permitted, that's not what happened.

So this cross-examination, in an attempt to somehow undermine their own witness, on an issue that quite frankly goes absolutely nowhere, in clearly ambiguous circumstances, by - because of the failure to commit him in any precise way, whether it be in the original statement or in the committal, means that this unfair, in my submission. And should not be permitted. And leave should not be granted. If your Honour pleases.

HIS HONOUR: Thank you.

Do you want to briefly - - -

MR STRICKLAND: Just very briefly, your Honour. Your Honour, there's no objection on the grounds of relevance. And indeed there couldn't be, because my learned friend has quite properly asked Sergeant Frost and many other witnesses, probably including this one, about this plan. There's (inaudible) objection on the question of relevance. My learned friend says in making submissions of the operational plan is dead in the water. That's not really a matter for your Honour to consider. But we – we just get back to this, your Honour. At this trial, this witness has said today, asking about seeing an email before 7.05 pm, he said:

“Did you read or look at any email that Julie Frost had sent to you, that's before 7.05 pm?---No.”

So there's just no doubt, in my submission, that there's an inconsistency when he said both in the record of interview, and in the committal, at page 114, that he either saw exhibit P1, or the alternative, he did see an email containing an arrest plan.

So we say that one just can't get away from that inconsistency. So s 38(1)C has been satisfied. The only real question is whether leave should be granted under section – under the 192 factors. And I've already addressed your Honour on that.

HIS HONOUR: Thank you.

MR STRICKLAND: If the court pleases.

HIS HONOUR: This is an application to cross-examine the witness, Constable Kirstenfeldt, in relation to a narrow aspect of his evidence. The effect of his evidence, to this point, is that he did not see an email from Sergeant Frost, which has been referred to as the “Frost arrest plan”, and I will without disrespect, refer to it in a similar way, before he left the Yuendumu Police Station at approximately 7 pm on 9 November 2019.

Now it's part of the Crown case, that the accused, and other members of the IRT were aware of the Frost arrest plan before they left the police station at that time. Some criticism of that case has been made by Mr Edwardson, but now is not the time for me to engage in any debate about that issue. The question is whether there has been demonstrated, either an inconsistent statement made by the witness, on a previous occasion, or alternatively, whether I consider that the evidence given by the witness, is unfavourable to the Crown.

If so, then subject to the s 192 factors, which of course is a reference to s 192 *Evidence Act*, the requirements of s 38 *Evidence Act* are made out. The effect of the evidence, as I've said, given by Constable Kirstenfeldt, is that he did not see any email similar to that which has been described as the Frost arrest plan. The material

which I was taken to constituted by questions and answers in an interview, in which Constable Kirstenfeldt participated on 21 November 2019, and questions and answers which occurred in the context of committal proceedings, with regard to the present charges, suggest that Constable Kirstenfeldt has acknowledged on a previous occasion that he saw an email of some sort from Sergeant Frost on the evening of 9 November 2019, before he and other members of the IRT left the police station.

There is material contained within the statements made by Constable Kirstenfeldt, and to which I've referred, from which a jury could infer that the email seen by the witness was the Frost arrest plan. I'm satisfied that the evidence which has been given by the witness is unfavourable to the Crown in the sense that if left as it is, it would suggest that, certainly Constable Kirstenfeldt, was not made aware of the Frost arrest plan by being provided with a copy of the email. And by inference, that others in the IRT may have been in the same situation.

I'm satisfied that the Crown should be entitled to cross-examine the witness on the narrow issue as to whether in those previous statements, which have been identified, Constable Kirstenfeldt either saw the Frost arrest plan, or alternatively, saw an email with whatever detail Constable Kirstenfeldt was able to give in those earlier statements. And perhaps may even now be able to give. Which may in turn entitle the jury to infer that the document to which Constable Kirstenfeldt is referring is the Frost arrest plan.

So for that reason, I propose to grant the Crown leave under s 38 to cross-examine the witness. I should say, I have, in coming to that conclusion, taken into account the factors referred to in s 192 *Evidence Act*. In particular, I note that it is a matter of some significance, or potential significance to the Crown case. And that it is unlikely that cross-examination of this witness is going to, on this very narrow issue, is going to in any way significantly lengthen the trial.

MR STRICKLAND: If your Honour pleases.

HIS HONOUR: All right, now were there any other issues then that needed to be dealt with?

MR STRICKLAND: No thank you, your Honour.

HIS HONOUR: Then I'll adjourn until tomorrow morning.

ADJOURNED 2.58 PM TO WEDNESDAY 16 FEBRUARY 2022

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PART-TRANSCRIPT IN CONFIDENCE

THE SUPREME COURT OF

THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON WEDNESDAY 16 FEBRUARY 2022 AT 9:40 AM

(Continued from 15/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes.

MR EDWARDSON QC: Your Honour, just before the jury come in, can I quickly do some transcript corrections, just - - -

HIS HONOUR: Yes, certainly.

MR EDWARDSON: Page 343, now your Honour, this is in the absence of the jury, and during closed court, so it's transcript in confidence, but I'm simply changing the names which are wrong on that page.

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour will see "Resumed. His Honour, 'yes'", and then it's got "Mr Strickland", followed by five line. That should be "Edwardson."

HIS HONOUR: Yes.

MR EDWARDSON: And then "His Honour, 'yes'", and then the next passage under the – is attributed to Mr Strickland, that should be, Edwardson again. And then "His Honour, 'all right I'm happy to do that'" and then Mr Strickland, that should be Edwardson. Edwardson again, I'm sorry, Strickland then.

HIS HONOUR: Yes. That should be Mr Strickland.

MR EDWARDSON: That should be Mr Strickland, that's right. And then Strickland is the next one instead of me.

HIS HONOUR: Yes.

MR EDWARDSON: And then finally, Edwardson, and then your Honour, and that's it.

HIS HONOUR: All right, thank you.

MR EDWARDSON: Thank you.

HIS HONOUR: I'll direct that those changes be made.

Yes, well then, we're ready to proceed. So can we bring the jury in please.

JURY IN



HIS HONOUR: Yes, now I presume that you are going to recall Constable Kirstenfeldt.

MR STRICKLAND SC: Correct.

HIS HONOUR: Yes.

JAMES KIRSTENFELDT:

HIS HONOUR: You may be seated there again. You're still subject to the oath that you took yesterday?---No worries, thank you, your Honour.

Yes.

XN BY MR STRICKLAND:

MR STRICKLAND: Your Honour, could the witness please be shown exhibit 1, tab 14.

Remember I asked you some questions about that email yesterday?---Yes.

And you said that Julie Frost told you, when you were out at Yuendumu, that she'd sent you an email?---Yes.

But you had not read that email?---Correct.

And you don't remember reading any email when you were at Yuendumu?---That's correct.

And you don't remember Julie Frost showing you any email?---That's correct.

Now do you remember you did an interview with – you did a couple of interviews with police back in 2019?---Yes.

In relation to this matter?---Yes.

One of them was an interview at Alice – or both at the Alice Springs Police Station? ---One was at Yuendumu.

One – Yuendumu. And the second one was Alice Springs?---Correct.

That was on 21 November 2019?---Yep.

Now have you had a chance to read that interview before you came and gave evidence in court yesterday?---Yes.

And had you spoken to anyone since you gave evidence in court yesterday, about this case?---No.

I'll just show you this document please. Do you recognise that as a transcript of that interview on 21 November 2019?---I sure do.

And could that be marked please?

HIS HONOUR: Yes. That will be marked for identification with the letter K.

EXHIBIT MFIK: Transcript of record of interview 21 November 2019 of James Kirstenfeldt with police.

MR STRICKLAND: Now when you were asked questions about this matter at Alice Springs on 21 November - - - ?---Mm mm.

- - - were you doing your best to tell the truth?---I was trying to.

I beg your pardon?---Yeah, I was trying to.

I'm just going to play you part of that interview. Just go to page 13, just the – the first couple of questions in that. I'll just play that for you.

DVD PLAYED

MR STRICKLAND: So –

For the record, that's from page 13 of MFIK.

So you remember you were asked about whether you'd got the email from Julie Frost?---Yes.

And you said “aha” and then she said – and then Mr Wilson said “And she's got it referred to you in the email as IRT coming to assist.” So that would mean – and you said “First time I saw that email was out at Yuendumu. We were asking Julie Frost details of what's going on. I think that was sent while we were on our way, or it got sent to people above us, or I don't know. But I didn't see that email until I was already out there.”?---Yep.

Does that refresh your memory that, in fact, you did see an email when you got to Yuendumu?---Yeah, not – there's – he's talking about this email. I'm talking about the email that said, “IRT come out and assist.” That was the reason that we got the phone call.

But you said yesterday and today you didn't see any email when you were out at Yuendumu?---I said I don't recall seeing an email.

You now say you did see an email- - -?---Well- - -

- - -when you were out at Yuendumu?---I don't recall seeing one.

You remember saying that to the officer?---Then?

Yes?---No.

You accept you did say it?---Yeah.

So back on 21 November 2019, you told the officers you had seen an email while you were out at Yuendumu?---Yep.

Do you doubt whether that was the truth when you spoke to the officers on 21 November?---Sorry, do I doubt which is – what's the truth?

What you told them?---No.

I'll play you a little bit more. If you go to page 24 – or the bottom of page 23. If you go to the bottom of page 23.

#### DVD PLAYED

MR STRICKLAND: So, for the record, that's page 23 and 24 of MFI K.

So you were asked in that interview: "So you received a briefing, and now we're talking about the email that had been sent out, which seemed to have a plan on it and the situation. Do you recall when you, sort of, read through that?" You said, "I still don't know that I have, just skimmed through it." Do you remember saying that?---Yep.

So you told the police you skimmed through an email that had a – that seemed to have a plan on it; is that right?---Yep.

Is that what happened?---Like I said, I don't recall seeing an email out there, so. If that's what I said, then – yeah.

If that's what you said, "yeah?" You mean, if that's what you said, that's what happened?---Yeah.

You agree that's different from what you said yesterday?---No.

You don't?---He's – he's talking about this email.

Okay?---I'm – I didn't know this email existed until that day we were in court down in Alice Springs.

You said yesterday you hadn't read any email?---Yep. I said I don't recall reading any email.

You said: "I'm pretty sure she sent the plan that we're going to do, or what we do anyway, which is just intel-gather and snatch him in the early morning." Do you remember saying that to the police?---Yeah.

What was the plan that you're pretty sure she sent which contained that information?---I never saw a plan from Julie.

You said, "I'm pretty sure she sent the plan that we were going to do, what we do anyway, which is just intel-gather and snatch him in the early morning." What was the plan you were referring to when you gave that answer?---There was no plan at that stage. We hadn't been briefed on a plan.

Well, why did you say, "I'm pretty sure she sent the plan"?---Because I was – I was pretty sure she would've sent one.

Not she would have, she did. "I'm pretty sure she sent the plan"?---Yeah.

So you saw an email at Yuendumu, didn't you?---Like I said, I don't recall seeing an email at Yuendumu.

And you read an email when you were at Yuendumu, didn't you?---That's the same answer. I don't recall seeing an email at Yuendumu.

You then said – you were asked, "Did you read the arrest plan?" And you said, "We saw – I think we'd formulated our own, like, arrest plan. Like, I don't know what it says on there, or if that's what was said and that's what we agreed upon." Do you remember saying that to the police?---Sorry, which – which part is that on?

Go to page 24?---Yep.

HIS HONOUR: Mr Crown, can I ask that that be replayed? Because my recollection is that when one question was asked, the witness shook his head as if saying no, and then went on to say something.

MR STRICKLAND: Certainly, your Honour. Let's – we'll replay it. I might just replay the couple of questions before, to give it the context.

HIS HONOUR: Certainly.

DVD PLAYED

MR STRICKLAND: Yes, thank you, your Honour.

HIS HONOUR: Yes.

MR STRICKLAND: Just taking you back to an earlier answer when you – which you gave the police. I'll just read it in full. "I'm pretty sure she sent the plan that we were

going to do, or what we do anyway, which is just intel-gather and snatch him in the early morning"?---Correct.

When you said, "Snatch him in the early morning," you were talking about arresting him at 5 am the following morning?---Going and arresting him early in the morning.

Yes? In the early morning, being after midnight?---Yes.

And is that referring to around 5 am?---Any time after midnight.

Okay. And you say, "That's what we do, anyway." What did you mean by that?---Do some intel-gather and find out where they are and then formulate a plan and go arrest them.

Yes. But is what you were saying to the police about, "What we do anyway," that was a standard procedure that you adopted of- -?---Find out where they are and- - -

I haven't finished?---Sorry.

Okay. The standard procedure of what you did, which was to arrest people in the early morning?---It's not really a standard procedure. It's- - -

What do you mean by, "What we do anyway"?---As in, find out where they are, formulate a plan and go and arrest them.

In the early morning?---Could be early morning.

Well, that's what you said?---Yeah.

Did you – was a standard procedure to arrest people in the early morning because they're more likely to be asleep?---No, they're not.

Because it's dark?---No, that- - -

Because they might be sleepier?---No.

Okay. The last answer you gave in that excerpt was:

"Did you read the arrest plan?---Pretty much weren't aware of it."

As His Honour noted, you seemed to shake your head there?---Correct.

And then you said, "I think we'd formulated our own arrest plan" or "our own like arrest plan". Was that correct?---Yeah, that's the conversation we all had before we went out where we were going to do some reconnaissance of the area. Like I said, I'd never been to Yuendumu before, I didn't know where anything was and find out where he was and we'll formulate our own plan.

When you say, "I think we'd formulated our own arrest plan" were you talking about the "we" being the IRT?---As in like everyone collectively, including like Julie Frost and everyone that was there.

Okay. Now, do you remember you gave some evidence in this matter at the local court in Alice Springs?---Yes.

That was on 2 September 2020?---I - yes, I don't know the date, but yes.

I am just going to show you a document. Now, I am going to ask you some questions.

Could that be marked - that's at page 113 and 114 of the transcript of 2 September 2020, could that be marked please, your Honour?

HIS HONOUR: Yes, that will be marked for - - -

MR STRICKLAND: I am sorry - and 115 as well, I'm sorry.

HIS HONOUR: All right. Marked for identification with the letter L.

MFIL Pages 113, 114 and 115 of transcript of 2/09/2020.

MR STRICKLAND: Now, if you go to page 113 you can see the last questions, "Could the witness please be shown exhibit P1"?---Yes.

Now I just - I want you to accept from me, it will be corrected if I am wrong, but exhibit P1 is the same document as exhibit 1 tab 14, okay, that's the email?  
---So that's the email?

That's right?---Yep.

Just when it is referred to as "P1" there, it's tab - exhibit 1, tab 14?---No worries.

I will just read you the questions and your answers. "That's an email from Julie Frost to a number of people including yourself, do you see that?" You said "Mm mm".

"Did you receive that when you were at Alice Springs?---No."

"Were you shown it when you got to Yuendumu?---No."

"Where you shown any email when you got to Yuendumu?"

And you said, "There was one. It spoke about us going" - I'm sorry - "It spoke about us doing - coming out for the funeral. I don't think it says anything on here about doing RVTs and stuff". Do you remember giving those answers?---Yes.

Okay. "Do you want to have time to look at that? Have you seen this before?" And then you were shown exhibit P1?---Yep.

"I saw it this morning for the first time."

"The first time?---Yeah".

"When you say you saw it, did you read it?---Yeah."

"So did you receive - "

And you said, "Sergeant Frost" - sorry - sorry - you were asked,

"Sergeant Frost did show you an email, is that right?---Yeah, not this one though."

"Who was the email addressed to?---Don't remember."

Just pause you there, do you accept you've given those answers?---Yes.

And do you accept that you said that you - that Sergeant Frost did show you an email but it wasn't exhibit P1/exhibit 1 tab 14?---Yep.

And do you now accept that Sergeant Frost did show you an email?---Yeah.

You couldn't remember that yesterday but you now accept you did it?---I accept it. I - like I said, I don't recall it.

I will just continue with your answers.

"Who was the email addressed to?---Don't remember."

"What was in the email that she showed you?---It was just the one she sent out requesting us and what they wanted, so like I said, it mentioned us doing RBTs during the night while after - after the funeral and that - and yeah".

Do you remember giving that answer?---Yep.

"How were you shown that email?---I'm pretty sure it was a printout."

Question,

"So she gave you the printout?---I think."

"How many pages was it?---One."

"Are you sure of that?---Not really, I think - I'm not."

"Who was the email sent to?---Like I said before, I have no idea."

"What was the time on the email?---I have no idea."

Do you recall giving those answers?---Yes.

Do you accept now that Julie Frost gave you a printout, being an email?---Yeah, I answered that before. I accept that.

Well, you said you said it before - you didn't say it yesterday?---No, as in like just before - the question before that one.

Question, "Did you read the email?" Answer, "I glanced over the - it was just a quick little couple of sentence - paragraph about us - about us doing - like I said, RBTs and going out there to help out Yuendumu police and that the funeral was on." Question, "Did the email seem to have a plan on it?" Answer, "Not. I think it said something about arresting at 5:30 in the morning - I think - or something like that." Do you remember giving those answers?---Yes.

And is that the case, that the email that Julie Frost gave you which you read included something about arresting Kumanjayi Walker at 5:30 in the morning?---It seems to say that, yeah.

I know it seems to say that. Is that what happened?---Like I said, I don't recall reading an email out there, so I don't know what it said.

Okay. Is your answers that you don't recall, do you think that is going to help Mr Rolfe in this case?

MR EDWARDSON: I object to that question. I object to that question. I mean, it is one thing to establish inconsistencies, it is one thing to establish what he said and this witness has identified and accepted what he said, but to put that proposition to his own witness in these circumstances, in my submission is not appropriate.

HIS HONOUR: No, I will allow it. Thank you.

MR STRICKLAND: Would you like me to repeat the question?---If you wouldn't mind please, yeah.

Is your evidence that you don't recall being given an email by Julie Frost and you don't recall what it's contents were - are those answers given to try and help Mr Rolfe?---No, it's because I don't recall what was the exact content of that email. I know it wasn't this email 'cause this one has got photos of him on it, that would've been handy to have.

Can the witness please be shown exhibit 1?---This one? Thank you.



Tab 12. I am asking you about the first email in that chain from Shane McCormack dated 9 November. Is that the email you say you read?---This looks more like it.

Well, can you see anything at all in that email about - excuse me - can you see anything at all in that email about arresting Kumanjayi Walker at 5:30 in the morning?---No, I can't.

No. Mr Kirstenfeldt, I want to suggest there as only one email that you were shown at Yuendumu Police Station on 9 November and that's the one before you, exhibit 1, tab 14 - that's the only email that was shown to you when you went to Yuendumu Police Station, isn't it?---No, like I said this one would've been handy to have though, it's got new pictures of him on there.

And when you go to exhibit 1, tab 14 you can see - you have a look at that?---Yep.

You can see, at page 2 at the bottom, "Plan - Sunday - Day 1 - Sunday, 10 November 2019 - 5 am STOU Donaldson" - that relates to the doggie Donaldson?---Correct.

"And Yuendumu Alefaio commenced duty along with IRT members to effect the arrest of Walker". Correct?---Correct.

That's the plan you said at the hearing in January - that is what you said you read in an email when you gave evidence in January?---No - - -

I'm sorry, I will start again?---Please.

What you said in – on September last year was that the email seemed to have a plan on it. "I think it said something about arresting at 5.30 in the morning, or something like that." In September 2020. That's what you said in September 2020?---Yep.

And that, exhibit 1, tab 14, is the email that you're referring to, isn't it?---The – sorry, say that again?

You said in September 2020?---Yep.

That the email you read, you said "I think it said something about arresting at 5.30 in the morning, or something like that." Do you remember saying that?---Yep.

And I want to suggest the only email that you read at Yuendumu Police Station was this email, 9 November 16.59 email, which contained a plan to arrest Kumanjayi Walker at 5 am in the morning. That's the only document you read at Yuendumu?---No.

Now you said in answer to questions about this email, exhibit 1, tab 14, that this document has photographs on it?---Correct.

And you can see those photographs at page 2?---Yep.

And you said that "It would have been handy to have had"?---Correct.

Do you know that Mr Rolfe had photographs of Mr Walker on his mobile phone?  
---I'm not sure what he had. I know I had a photo of him on my phone. It was a screenshot from our police computer, but it was an old photo. These are more recent ones.

Now you gave evidence yesterday that when you left Yuendumu Police Station at 7.06 pm, you were planning to do what you described as a recon or reconnaissance?---Correct.

So you got in the car with Mr Rolfe, is that right?---Yep.

And you drove to House 577?---Yes.

And did you talk with Mr Rolfe during that trip?---I'd imagine so.

Did you discuss what you were going to do when you got to House 577?---I don't recall what conversation we had in the car, two and a half years ago.

By the time you got to House 577, was it your intention to try and locate him at that house and arrest him then?---Well I said we were doing recognisance to see where he was. I said none of us had ever been to Yuendumu before. So we didn't know our way around. So we needed to find out what houses were what, and who was where.

But when you got there, to House 577 - - - ?---Yep.

- - - was it your intention to try and locate him, at that house?---We spoke to some people and asked if they knew where he was.

I'm asking about your intention?---Our intention?

Your intention?---Was to do some recon to try and find out where he was and where he'd be.

So you intended to try and locate him?---Yeah.

And try and arrest him then and there?---If – like Julie said, if we came across him, grab him.

When you "If you came across him" - - - ?---Yep.

- - - did that – did you understand that to mean actually going into a house and trying to arrest him?---If we came across him?

Well, what did "Coming across him" mean in your mind?---While we were doing reconnaissance, finding out locations that he is, houses and all that sort of stuff, where his family are and friends are, and all that sort of stuff, if we came across him while we were doing that, then yeah, don't – don't just tell him to wait there until 5 o'clock in the morning. We'll grab him NOW.

So your intention was to try and grab him at the house, if he was there?---If he was there.

I'm just going to show you a body-worn. Your – I'm going to show you a body-worn of House 577 and the search there, okay?---Yep.

DVD PLAYED

MR STRICKLAND: Yes your Honour, I tender that body-worn video.

MS CALLAN SC: Your Honour, for the transcript and your associate's assistance, the file name on MFIC is BWV Kirstenfeldt, James 1 of 2.

HIS HONOUR: That'll be exhibit 21.

EXHIBIT P21 Body-worn video Kirstenfeldt, James 1 of 2.

MS CALLAN: And your Honour, perhaps while I'm on my feet, a USB of the video of the interview with Mr Kirstenfeldt on 21 November 2019, I should provide on the USB, and have marked for identification.

HIS HONOUR: All right. I'll have that marked for identification with the letter M.

MF1 M Video of interview with James Kirstenfeldt 21/11/2019.

MS CALLAN: Please the court.

MR STRICKLAND: Now when – before you entered House 577, you spoke to a young boy?---Correct.

And you asked him, "Do you know where they're staying tonight"?---Correct.

And that boy told you, "Here"?---Correct.

Being in this house, 577?---Yes.

And you remember you told Mr Rolfe twice that – you relayed that information to Mr Rolfe, didn't you?---Yes.

You said to him, "Little fellow just give me the go. He's going to be staying here tonight with his girlfriend, he reckons"?---Yes.

You heard that there?---Yes.

And you were saying that to Mr Rolfe?---Correct.

And you also said to him – you remember then you were in the house with Mr Rolfe and you actually identified the kid that told you the information?---Yes.

And you said to Mr Rolfe, “He seems pretty genuine, that kid”?---Yes.

And when you said that, in that body-worn, you meant it, didn’t you? That you believed that kid was telling you the truth?---Maybe.

Maybe? Did you say, “He seemed pretty genuine”?---Yeah. Yes, I did.

Meaning truthful?---Genuine as in, like, a good bloke.

I see. You – before you went to House 577, you knew that was where the axe incident occurred?---Yes. We’d been given that information by Julie.

And you knew that he was connected – that is Kumanjayi Walker was connected to that house?---Yes.

Were you told that was his – or were you informed in any way before you went there, that was his primary resident?---No. I believe he lives in Alice Springs. I think that’s his girlfriend’s family’s house.

I should say, his primary residence whilst he was in Yuendumu? Were you told that?---I don’t know what his primary residence in Yuendumu was.

And you were told that he’d been in that house just three minutes beforehand?---Yes.

He was going to come back that night?---Yes.

Receiving – with all that information, hadn’t you done the recon job you were asked to do?---Single source information from a child’s probably not the most reliable to plan an operation on.

Right. But you knew that that was a house he was connected to?---It was a house he was connected to. That’s why we went there.

Which you’d just been to?---Yes.

All right. May I ask – before, you saw yourself entering into House 577?---Correct.

And you saw Mr Rolfe entering 577?---Yes.

Did you discuss with Mr Rolfe before you entered House 577 what you would do if Kumanjayi Walker was there?---No, I didn't see that on there.

I know you didn't see it, but my question is, did you do it? Did you have any discussion with Mr Rolfe before you entered House 577 about what would happen if Mr Kumanjayi Walker was there?---No, I don't think so.

Did you discuss with Mr Rolfe what would happen if you found Kumanjayi Walker there and he presented with a weapon?---No.

After going – after entering House 577, you walked outside. Is that right? After you came out of House 577?---Yep, correct.

And you saw Mr Rolfe speaking to another man?---Correct.

That man was Ethan?---I – I don't recall his name.

Did you remember hearing that on the body-worn video?---No, I – I didn't – sorry, didn't catch that bit.

Okay?---I'll accept that that his name though, if that's who he is.

It says, "Stay out here, Ethan." You don't remember hearing that?---Nah.

Okay. Was Mr Hawkings also there? Outside House 577?---Yeah, everyone came with.

Okay. So were you there when Mr Rolfe was asking the man, Ethan, some questions?---At the end there?

Yes?---Yep.

And he gave you some – Ethan gave you some information about where he believed Kumanjayi Walker would be?---Correct.

And he gave you the number of the houses?---Correct.

As 511- - ?---Or 518.

- - or 518; is that right?---(No audible response).

And when you got that information, what did you and Mr Rolfe or Mr Hawkings decide to do?---We drove to those houses.

Okay. Did you – you drove in a separate car; is that correct?---From- - -

From Mr Rolfe, I'm sorry?---No, I think we drove – we drove together. We were in the same car we came in.

You and Mr Rolfe travelled together- -?---Yes.

- - -to House 511. And during that time, did you have any discussion with Mr Rolfe about what would happen if he found Mr Walker in House 511?---I don't recall. I don't think so.

Did you have any discussion with Mr Rolfe what would happen if he found Kumanjayi Walker in House 511 and he presented with a weapon?---No.

Okay. Now, I'm just going to play you another body-worn video when you get to House 511.

Before I do so, you are – would your Honour just give a warning to the public that the last segment of this contains some disturbing sound and footage.

HIS HONOUR: All right. Members of the public in the public gallery, you've heard what the Crown prosecutor has to say. And you may expect that there will be some disturbing footage which is now going to be played. So that if any member of the public is concerned about viewing or hearing that material, they should now leave the court. Thank you.

DVD PLAYED

MR STRICKLAND: Could you see – could you see yourself and part of Mr Rolfe in that car?---I didn't really notice Rolfe, but he was there. He was in the car with me.

Could you see someone holding a map?---You want to – you want to just go back a little bit?

I'll just play that again, if I could.

DVD PLAYED

THE WITNESS: Yep, saw that.

MR STRICKLAND: Yes, okay thank you.

If we could keep going, thank you.

Or sorry, before I go – do you know what that map was?---I imagine it would have been a map of Yuendumu.

And did you just hear – and was that given to you at the station?---Yes.

Now did you just hear someone say "rolling"?---Yeah, I did.

And why did you say that?---To turn my body-worn camera on.

And it's to remind yourself that the body-worn video is on?---And others to turn theirs on.

And others, thank you.

DVD PLAYED

MR STRICKLAND: Just pause there.

So you can see a blue house and a red house?---Yes.

Now is the red house 511?---That one – I think so.

And the blue house is 518?---Yes, the blue one's 518.

Thank you.

DVD PLAYED

MR STRICKLAND: I tender that footage, your Honour.

HIS HONOUR: Exhibit 22.

EXHIBIT P22 Body-worn video Kirstenfeldt, James, 2 of 2.

MS CALLAN: Your Honour, for the record, the file name is BWV Kirstenfeldt, James, 2 of 2.

MR STRICKLAND: Constable, you were very active in administering first aid to Kumanjayi Walker, weren't you?---We all had a go at first aid with him.

I'm not doubting you all did, but I'm just asking about you. You were active in that role?---Yes.

Doing your best to save his life?---Yes.

You in fact had done first aid training when you were in the Australian Defence Force?---Yes, and the police and - - -

And in the – I'll get to that. And in the police force. When you were in the Australian Defence Force, you were taught terminal ballistics, is that right?---Yes.

And you instructed in that, is that right?---Yes.

MR EDWARDSON: Don't lead on this please.

MR STRICKLAND: Okay.

What is terminal ballistics?---Terminal ballistics is what bullets do once they leave the barrel of a gun.

And you also – did you do combat first aid in the Army?---As – combat first aid?

That's right, I'm asking you?---I've done first aid in the Army.

Did you get a first aid certificate?---No, I never did the combat first aid course.

When Kumanjayi Walker was at the police station, you were present with him for some of the time?---Yes.

And you noticed that blood was filling up - - -

MR EDWARDSON: Your Honour, please, I do ask that my learned friend not lead this witness on this topic at all.

MR STRICKLAND: Okay.

HIS HONOUR: Yes.

MR STRICKLAND: Well what did you notice when – what did you notice about his – his condition, when he was at the police station?---I saw that he had three holes. I – I was of the assumption that one was an exit wound, where a bullet had travelled all the way through and exited. Because I'd only heard two gunshots. So I thought there was only two shots fired. So that was just assumption that I'd made of that. There was three holes in him on I think his lower – lower side, sort at the bottom of the lungs sort of area.

Would your Honour just excuse me for a moment please?

HIS HONOUR: Yes, certainly.

MR EDWARDSON: Your Honour, I think we are going have to have a little legal argument about this - I am sorry.

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, I will do this in a non-leading way. I will do it in – I have been asked not to lead. I won't.

MR EDWARDSON: No, but the topic it seems in my view is irrelevant and I want to argue about whether it is relevant or not.

HIS HONOUR: So you are flagging an objection to the course of questioning that has just been put to you.



Members of the jury, I am going to have to ask you to retire please.

JURY OUT

HIS Honour: Could you wait outside please?---No worries, your Honour.

WITNESS WITHDREW

HIS HONOUR: Now, I don't know who wants to start, but - - -

MR EDWARDSON: Your Honour, I think the first thing might be for you to view the video - or that portion of the video. There are two ways. First of all, my original objection was not leading.

HIS HONOUR: Yes.

MR EDWARDSON: The second is why is this relevant? My learned friend was trying to avoid playing the video on this particular topic and so therefore the alternative was "Are you going to let me lead" if you like "by reference to the transcript?" I take exception to this line of questioning. He uses a particular description of his observations of what he thinks is the medical problem associated with the subsequent shooting. He is not medically qualified - and what does it matter what he thinks. Why is it relevant? And don't - with all respect - see any relevant connection between the Army, him being - having had some form of first aid - - -

HIS HONOUR: First aid training.

MR EDWARDSON: First aid training - and I might say, the same applies equally in the context of the accused. So I object to this line of questioning. I assume the purpose of it is the prejudicial aspect which is that because of - if the lungs are pierced by a bullet it might be inevitable - the inevitable consequence may well be that it is a fatal shot. Well, there is no dispute that this man died as a consequence of the second and third shots. His cause of death is not in dispute. What this case is about is obviously Zach Rolfe's state of mind, what he did during that relevant period and any opinion expressed by this officer or any other is just simply not relevant and impermissible in my submission.

HIS HONOUR: Mr Crown, can you tell me what it is that you propose leading from the witness?

MR STRICKLAND: Yes, your Honour. I was proposing to lead from the witness what he - his evidence based upon his record of interview was that he knew that if the bullet had penetrated his lungs he was not going to survive, that's a - - -

HIS HONOUR: Well, both lungs I think was what he said.

MR STRICKLAND: Both lungs, exactly.

HIS HONOUR: Yes.

MR STRICKLAND: That's really what I was going to lead and I can - but I - that - so there is a body - - -

HIS HONOUR: But how is that relevant?

MR STRICKLAND: Well, it's relevant in my submission - my learned friend has asked numerous - in fact I think he has asked every single police officer questions about training in relation to shooting.

HIS HONOUR: At the central body mass.

MR STRICKLAND: At the central body mass, exactly, which includes the vital organs.

HIS HONOUR: Yes.

MR STRICKLAND: So I say, in my submission it is relevant to that issue. I intend to ask this witness those questions. That is I intend to ask this witness what his training has been in relation to shooting at the central body mass.

HIS HONOUR: Well, you can ask him that but I don't see how taking him to his opinion based upon any training in the - well, perhaps I am misunderstanding you.

When you say you want to take him to his training in relation to shooting at central body mass.

MR STRICKLAND: That's right.

HIS HONOUR: Are you referring to training which was the subject of the question by Mr Edwardson about where police officers were trained to aim when they fired a gun.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: As opposed to any training that he may have had in the armed forces about the consequences of being shot in the central body mass.

MR STRICKLAND: Well, I am certainly going to take him to the - what your Honour said is the former - that is certainly in relation to the former.

HIS HONOUR: Well, you can certainly do so but I don't see any reason why you would need to go into observations that he made of the deceased, other than that he observed that he had been shot in an area which was part of the central body mass. Beyond that why do you need to go any further?

MR STRICKLAND: Well, I was intending to ask this witness questions - a few questions - as to his knowledge based on his training, that if he had shot - someone

had been shot in the central body mass at close range, whether he would know that that would cause serious harm - likely to cause serious harm.

HIS HONOUR: How does it matter whether he knows or is of the opinion that such a course of action is likely to cause serious harm? We are not concerned about his state of mind.

MR STRICKLAND: No, I understand that, your Honour, but it is to do with the - my learned friend has asked many questions about what the purpose is in shooting at the central body mass - it is really the visible central body mass - what is visible.

HIS HONOUR: Yes.

MR STRICKLAND: And the knowledge that that - what the purpose of that is, which is to incapacitate.

HIS HONOUR: Yes.

MR STRICKLAND: So I wish to explore what that term means, being "incapacitate".

HIS HONOUR: Well, I can only observe that you haven't sought to do so with regard to the other witnesses.

MR STRICKLAND: Well, in my submission that is not really relevant. I mean this - this witness has a particular - he has a particular level of training and I am seeking to do it through this witness.

HIS HONOUR: Right, he has training in - you can ask him of course as to his training in relation to where to shoot if he is required to shoot in the course of his duties. I would imagine his answer would be that he was trained to shoot at the central body mass but it seems to me that what you are trying to do is to get an opinion from this witness about the likely consequences of shooting somebody to the central body mass.

MR STRICKLAND: That is so. In the circumstances of this case, that's correct.

HIS HONOUR: Well, I don't see that this witness - you have established that this witness has qualifications to answer that. He may have had first aid training, but we don't know the extent of that first aid training.

MR STRICKLAND: Yes. I will seek to - I understand there may be multiple objections but I will seek to lay the foundation for that further.

MR EDWARDSON: Your Honour, we haven't had disclosed - at all - any such qualification. We are not on notice about it, it has not been explored at any level. I come back to the exchange which your Honour has just had with my learned friend.

He has chosen - that is the prosecution have chosen - to avoid the inevitable questions that we have been asking in cross-examination and they are the ones that started this issue of training. They are the ones that have opened on the basis that they intend to call an expert - Mr Barram, Senior Sergeant Barram, to explore the question of whether or not what Zach Rolfe did is consistent with his training.

HIS HONOUR: Yes.

MR EDWARDSON: So fundamentally, because of the way this prosecution case is being run, the relevant - in fact the issue - is what was his training and was that consistent with training, and where that goes is a different question altogether.

But my learned friends have not - we are the ones that have introduced this issue of "Knife equals gun" or "Edged blade equals gun" and so on. He has certainly picked that up with a couple of witnesses near the end, but that has been something that has been front and centre, even from the committal days, of this topic because it is critical if this man - or every police officer - is trained that in the event that they are confronted with an edged weapon their training is to pull their weapon and, if necessary, discharge that weapon and the training is into the central body mass.

What my learned friend is really trying to do is to circumvent the notion of actual training - which he knows what the training is - that is to incapacitate. They are not trained to kill. They are not told, "I want you to kill this bloke and the best way to kill him is by hitting the central body mass." The training is to incapacitate. To fire as many bullets as that might require. And the reason for the central body mass, is it's the largest target.

HIS HONOUR: Largest target.

MR EDWARDSON: What my learned friend's trying to do is to translate that into an intention to kill, because of where these bullets ended up. And that is entirely inappropriate, let alone through this witness.

HIS HONOUR: Mm mm.

MR EDWARDSON: And so in my respectful submission, this should be shut down now, and it should not happen. I'd ask also, once your Honour's ruled one way or the other, that the exchange which has taken place in this court be suppressed.

MR STRICKLAND: Your Honour, could I just be heard briefly?

HIS HONOUR: Yes.

MR STRICKLAND: I certainly have no problem with the suppression order, and that's irrespective of what occurs. So, your Honour, first, Mr – Constable Kirstenfeldt's qualifications, and his knowledge are disclosed in his record of interview and in the body-worn video that I don't intend to play, because it's prejudicial. He describes – it's clear from the body-worn video that has been

disclosed, his detailed knowledge of these matters. And that's why I've chosen not to – I don't – I'm proposing, if allowed, to lead it to avoid playing a considerable body and body-worn, which is – shows the deceased in very distressing circumstances, with Mr Kirstenfeldt describing in some detail, or disclosing, what he knows. So his knowledge and training about these matters are disclosed. That's the disclosure issue.

The – I think – as I understand it, the fundamental objection of it is as to relevance.

HIS HONOUR: Yes.

MR STRICKLAND: And I accept that if it's not relevant, and your Honour rules on that, we won't lead it. In my submission, this officer, his training as to shooting at the visible central body mass, and its consequences, are relevant. There's indeed – that is what has been led thus far. Because the consequences of shooting in the central body mass, which relate – which involve incapacitation, are clearly relevant, in my submission.

HIS HONOUR: But there doesn't appear to have been any dispute that the central body mass includes vital organs.

MR STRICKLAND: Correct, that's right.

HIS HONOUR: So you don't require evidence from this witness, who is in my view, if he's qualified, hardly qualified at all, to give evidence of that matter. There doesn't seem to be any dispute about the fact that police officers are trained when necessary, to fire at the central body mass, which includes vital body organs. That hardly needs to be said by this witness, or indeed, I would have thought any witness, that shooting to the central body mass, which involves shooting into an area of vital organs in the body, carries with it, a very great risk of either serious harm or death.

MR STRICKLAND: But your Honour, as I understand it – officer – sorry I'll start – start again. The Crown must prove intention.

HIS HONOUR: Yes.

MR STRICKLAND: There's no – understandably, there's no concession about that.

HIS HONOUR: Well, are you going to call a pathologist?

MR STRICKLAND: Yes.

HIS HONOUR: Why can't you ask the pathologist?

MR STRICKLAND: Well because, your Honour, I will ask the pathologist. But in my submission, that doesn't mean I can't ask this witness, given this witness was trained about what the consequences were in relation to shooting at the central body mass.

And what I propose to ask him is whether he understood that if you shoot at the central body mass at a range of 5 centimetres, or at close range, you're understand from your training that that is likely to cause serious harm.

HIS HONOUR: And how does that assist the jury in determining the state of mind of the accused?

MR STRICKLAND: Because the accused has received similar training. That's the - -

HIS HONOUR: Yes, we know that.

MR STRICKLAND: Well that's going to be established, your Honour. That will be established. And that - - -

HIS HONOUR: Similar training in the Army or in the police force?

MR STRICKLAND: Well certainly in the police force, and – and he's also received similar training in the Army. And your Honour, that's why all of these witnesses have been asked about shooting in the central body mass, and its consequences.

HIS HONOUR: Well I don't know that they've been asked about the consequences. This witness seems to be the only one that's been asked about the consequences.

MR STRICKLAND: No, your Honour, I'll – I'm happy to give your Honour the references to that. I'm happy to give your Honour – I've – all of them have been asked about their training in relation to eliminating, or incapacitating an individual, by shooting the central body mass. That's the consequences thereof.

HIS HONOUR: No that's the intention. You're talking about the intention is to eliminate the threat in the sense of stopping the person being able to present as a threat. That's the elimination of the threat.

MR STRICKLAND: That's right, your Honour.

HIS HONOUR: What you're asking about is not the intention of the person in firing the shot, as in eliminating the threat, but the understanding of this witness about the likely consequences upon the human body of shots being fired into the central body mass. There's a difference.

MR STRICKLAND: Well your Honour, what I might do is reflect upon what your Honour – I'll just look at the time - - -

MR EDWARDSON: Your Honour, we've had – we've had a very extensive exchange. I would with the greatest of respect, ask that your Honour rule on it.

HIS HONOUR: I'm going to.

MR STRICKLAND: But your Honour, I haven't formulated the question yet, which I propose to ask. So in my submission - - -

HIS HONOUR: Well I'm going to rule on it at some point, Mr Crown.

MR STRICKLAND: Okay. Well what – what I propose to do, your Honour, is – I understand – I've obviously heard what your Honour has said. I'd ask if your Honour could – if we could have an early morning tea break now - - -

HIS HONOUR: I'll take the morning adjournment.

MR STRICKLAND: - - - and I'll reflect on that. And then I will – obviously what I don't intend to do, is to ask a question which I anticipate your Honour will rule against. Because I don't think that would be fair to my learned friend, or to either side. So I'll – if your Honour will give me time to reflect - - -

HIS HONOUR: All right.

MR STRICKLAND: - - - I'll formulate a question, if I do, and then I'm happy – content for your Honour to - - -

HIS HONOUR: All right.

Thank you, I'll take the morning adjournment.

ADJOURNED



## RESUMED

HIS HONOUR: Mr Crown, I've reflected upon your submissions, prior to the break. It seems to me that there would be nothing to prohibit you from questioning the witness about his understanding – I withdraw that, about his training, with regard to the consequences on the – or possible consequences on the human body of a shot being fired into the central body mass, if the Crown says that the – there will be evidence that the accused underwent similar training.

MR STRICKLAND: Your Honour, I believe it's the same position as your Honour, and I've told my learned friend. I intend simply to ask this witness questions on that topic. And I understand – well it will depend on the precise formulation of the question that there won't be a problem. But I'm not - - -

HIS HONOUR: All right.

MR STRICKLAND: - - - intending to lead – ask any further questions in relation to this witness' medical knowledge, or anything about the circumstances of the deceased at the time. It will be confined to the training, in the manner your Honour's - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - I don't anticipate, but obviously my learned friend will depend – will object if the question – the precise formulation.

HIS HONOUR: All right, thank you.

MR EDWARDSON: It's all in the formulation, your Honour.

HIS HONOUR: It is.

MR EDWARDSON: Subject to that - - -

HIS HONOUR: All right.

Can we bring the jury in please, and then we'll bring the witness in as well?

## JURY IN

JAMES KIRSTENFELDT:

HIS HONOUR: Yes, whenever you're ready.

XN BY MR STRICKLAND:

MR STRICKLAND: The last topic I'm going to ask you about is in relation to the training?---Yes.

I just want to first ask you about – by training, about training in defensive tactics. Training in the use of firearms. Use of lethal options, and non-lethal options. Do you understand?---Yep.

First, can I ask you, did you receive – I'll ask about training in the Army first?  
---Mm mm.

How long were you in the Army for?---All up, around about 14 years.

And did you receive training in the use of firearms in the Army?---I signed a non-disclosure when I left the military. I can't tell you about training, or operations or anything I did there.

I don't want to ask you about anything to do with operations - - - ?---Or training.

- - - I can't ask you anything about training?---You can - - -

I'm sorry?---You're going to have to speak to a representative from the Defence Force to see what training we receive on that matter I'm sorry.

Well that does pose a problem.

Would your Honour just give me one moment please?

HIS HONOUR: Yes.

MR STRICKLAND: Okay, I'll just ask you for the moment about police training?  
---Yep.

So you received training in defensive tactics?---Correct.

What is defensive tactics?---Defensive tactics is – ranges from everything from how to stop people from punching you, how to block, that sort of thing. Uses of Taser, spray, baton, handcuffs, firearm, all of that.

So Taser, spray, baton, they're non-lethal options when – would you agree with that?---Spray's non-lethal.

Taser?---Less lethal.

Baton?---Baton I would say is less lethal up towards, maybe lethal. It's probably not a good thing to get hit with.

A Glock is lethal?---Yes.

You're also taught, aren't you – so when did you receive your training, in relation to defensive tactics and use of firearms?---All through college, for six months from when I joined, in November 2016.

And you're also trained in operational safety in the use of force?---Yes.

You're trained that you should only use force that was reasonable and necessary?  
---Yes.

Proportionate?---Yes.

Appropriate?---Yes.

And you should use the minimum amount of force required for the safe and effective performance of your duties?---Yes.

Now the training that you've talked about, you receive this annually, is that right?  
---Yes.

And is that – how many days annually do you receive this particular kind of training?  
---One.

You're also taught about cordoning and containing, is that right?---Yes.

And that's what you did on 7 November, in relation to a house at Warlpiri, is that right?---No.

That wasn't cordon and contain?---No.

You know the one I'm talking about?---Yeah I know the one you're talking about.

That's the one where you had a perimeter around the house?---Yeah there was a fence in the road.

Sure. You don't call that cordon and containment?---No.

What do you call that?---Knocking on someone's door to see if they're home and people being in the best position for if someone runs away.

Those people being in the best position you don't cordon?---No, a cordon's like an outside perimeter stopping anyone from getting in or out. We were just positioned in the spot someone had run. Towards the front door, back door, that sort of thing.

Now when you were trained in the IRT - - - - ?---Mm mm.

- - - did you – did you receive additional training?---Some additional training.

So how many – let's take 2019, if you can remember?---Mm mm.

How many days, if any, of additional training did you receive as a member of the IRT?---Well in our roster, it's a five week roster, there's one day allocated as a training day for general duties policing. And then we had an extra day as a training day for IRT specific. So it worked out that we – because we weren't all on the same PG's and all of that, so it had to be rostered so everyone could be there. So every five weeks.

Did that always work out? Did – in other words, was there always – are you meant to have it, or did it actually happen, one day every five weeks?---It – most of the time it actually happened, yes.

Sometimes it didn't?---There was operational aspects of – you know, people aren't there, people are away and all that stuff, that sometimes it didn't. But very rarely.

Are those principles about the use of force I was telling – asking you about, were you taught anything different when you were at the IRT?---As in the principles of the use of force?

Using only when necessary and caution- - -?---No, that's the standard use of force principle across the police.

Now, you were also trained – you had heard the expression knife or edged weapon equals gun?---Correct.

So if a person was actively threatening you with an edged weapon, you have option to draw a firearm?---Correct.

And whether you did so depended on the- - -

MR EDWARDSON: How about my learned friend ask the witness what he understands by those expressions, rather than putting the words into his mouth? It is his witness.

HIS HONOUR: Yes.

MR STRICKLAND: When you are presented with an edged weapon, are you taught to say anything?---Usually, "Drop the weapon. Police, don't move." Things like that. That's the standard one now, because it's very understood.

Right. And why were you taught to say those words?---Because someone has got a weapon.

And – and?---And you don't want a weapon used against you.

Were you taught anything about warning people with an edged weapon?---As in?

Saying, "Knife, knife"?---That was in part of the training. We yelled, "Knife, knife, knife," as we drew our firearm.

What was the purpose of that, to your understanding?---To inform the other people in our vicinity that a knife had been presented.

Okay. Were you trained in de-escalation techniques or methods or tactics?---Usually talking to people can de-escalate things, or drawing of a firearm should de-escalate things. Make them drop their weapon. And once the person's behaviour changes or they comply, then you can change to other options.

Now, if – with your training, if you did fire your weapon – your Glock- -?---Mm mm.

- - -were you hit – were you taught to hit the central body mass?---Centre of seen mass.

The centre of seen mass?---Yes.

And what does that mean?---The centre of the most of everything you can see.

And what was the purpose of – in your training, what were you told was the purpose of doing that?---The centre's the easiest part to hit. Firing firearms under stress isn't very accurate, very – it's a – it's a bad day, if you have to use a firearm under stress. So centre of seen mass is the safest place to fire the weapon.

And were you taught what was the consequence, if you fired at the central body – or the seen central body mass?---No. Not really sure what you mean there. Maybe rephrase it?

Yes, sure. Were you taught what was likely to happen if you fired at someone's central body mass?---No, I don't think so.

Were you taught whether the central body mass contained vital organs?---No.

Were you taught whether firing at the central body mass was likely to result in serious harm?---I don't know if we were taught that, but that's pretty common sense, I think.

Why is that?---Because – because that is where all your organs are.

Okay. Are you taught whether firing at the central body mass was likely to result in death?---I – I don't think we were taught that.

Is that common sense?---It seems pretty common sense to me.

Excuse me, your Honour. I'd ask you just for one moment.

Now, just – I know I said finally before, this is truly finally. I asked you about, before you went into House 577, in relation to discussions you had with Mr Rolfe. Did you discuss with any other members of the IRT what would happen if you saw Kumanjayi Walker in House 577?---They were in a different car to us.

So you didn't?---No, I couldn't talk to them from my car.

And did you discuss with any other members of the IRT what would happen before you went into House 511?---No, like, same. They were in a different car to us.

Thank you.

They're my questions. Thank your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Constable Kirstenfeldt, I want to start, if I can, with just talking about some basic issues such as the IRT itself. For how long had you been associated with or a member of the IRT as at 9 November 2019 which, of course, is the day that Kumanjayi Walker was shot?---I think it was a little over a year.

Little over a year. And you'd been a police officer for how long before that?---Almost exactly three years.

All right. So roughly, about four years' experience at the time of this alleged shooting?---Yes.

All right. Now, I want to deal now with a little bit about due diligence. My words, not yours. We know, don't we, that on 9 November you receive a telephone call?---The afternoon, it was.

The afternoon?---Yes.

And that's the first time you knew that you were going to be deployed to Yuendumu for the purposes of a particular mission?---Yes.

Now, leaving aside you've told us that there are conversations that you had at various times or you must have had at various times with, for example, other members of the IRT, Sergeant Frost and the like, which you now cannot recall?  
---Correct.

But this much we do know: we do know that when you received that telephone call, you knew that you were going to Yuendumu?---Yes.

At that time, you'd never heard of Kumanjayi Walker?---No, I had. I had- - -

You had heard of Kumanjayi Walker?---Yes. We were aware that he was an arrest target, previous- - -

You did say that. You were aware that he was an arrest target, but you yourself had never had any personal dealings with him?---Not that I'm aware of. I don't think I had ever met the bloke.

And we know that you subsequently watched what we call the body-worn video of the axe incident, involving Constables Hand and Smith?---Yes.

And how many times did you view that body-worn video?---The – once on the day we left and I think I'd seen it once before, when it first came out.

Right. Was that incident of some – a topical conversation amongst other members of your patrol and within the police station?---I believe it was, yeah.

All right?---A few people were talking about that.

Now, obviously, if you've got an arrest target – and in this case, Kumanjayi Walker was the arrest target – do you agree that it was important for all police officers who were going to be involved in the arrest of that subject, it was important that due diligence be conducted, and by that I mean try and understand as much as you can about the individual?---Yes.

In other words, an assessment has to be made of any potential risks that that person might pose to arresting officers?---Yes.

In this case, members of the IRT?---Yes.

Usually, the IRT are deployed because of their extra skills and speciality?---Yes.

In other words, you are trained to apprehend and deal with high-risk offenders? ---That's what we were used for a lot, yes.

Thank you. Now, I want to ask you a little bit now about your due diligence. You mentioned at one stage that you took a photograph or a screen shot, I think you said, of an image of Kumanjayi Walker from the computer screen?---It was – it was my – my phone that I took the – it's a police phone, it – it's linked to the police computer, but yes. The police computer.

I see. So you've used your phone- - -?---It's – it's my work phone, but yes. Police computer on it.

So bottom line is, you can access what's called PROMIS from your phone?  
---Correct.

Is that what you did?---Yes.

So you accessed Kumanjaya Walker's PROMIS entries to identify him?---Yes.

And find out about him?---Yes.

Did that include his extensive criminal record?---Yes, it's on there.

And is that something that you'd expect anybody to do - and you did on this occasion - to apprise yourself of who you were dealing with?---Yes.

So that you have some idea of what sort of risk this individual might pose to the arresting officers?---Yes.

So you knew about his extensive criminal history?---Yes.

You knew that he had been charged and convicted of violent offences in the past?  
---Yes.

You knew - and you had seen the body-worn video of what we call "the axe incident"?---Yes.

And so that must have informed you at least - and presumably the other members of the IRT, that this individual had a predisposition for violence?---Yes.

He was a person who, if confronted and cornered by police, if the opportunity presented itself, would or could arm himself?---Yes.

And was capable of using a weapon against police?---Yes.

Now, common sense tells us that an axe could kill somebody, couldn't it?---Yes.

And we know from the questions that have just been asked a moment ago, about your training from day 1 about "knife equals gun" or "edged blade equals gun" and the like?---Yes.

That training is - and you are trained that you can respond by pulling your loaded firearm - a Glock - in response to an individual who presents with an edged weapon or a knife?---Yes.

And you are also trained, are you not, that if you do pull your firearm out, you have to be prepared to pull the trigger?---Yes.

And if you do pull the trigger, you've told us your training is that you aim for the central - or you called it - the - - -?---Centre of seen mass.



Centre of see mass - seen mass, thank you - so in other words, the largest part of the body that you can see from your position relative to that individual?---Yes.

You were asked some questions by Mr Strickland a moment ago about training and whether you say things like "knife - knife - knife" for example, to warn other people who might be present that the offender is armed?---Yes.

And likewise you might say, "Drop the weapon"?---Correct.

That's an example of hopefully getting the individual to comply?---Yes.

Such that the situation de-escalates?---Yes.

Would you agree with this - and please tell me if this is consistent with your training - much depends on time, place and circumstance?---Yes, it all works very well in training.

And what I am getting at is this, you might have, because of the distance between you and the offender who is armed with an edged weapon, you might have a whole host of other options, short of pulling the trigger?---Yes.

For example, if you can see somebody who is some distance away from you with an edged weapon, you can warn them - you might even pull your weapon and say, "Look, drop the knife or I'll shoot" or something?---Yes, depending on the distance.

Now, are you taught anything about safe distances between somebody armed with an edged weapon and you as a police officer?---Yes, we are.

What are you taught?---That as a general rule - nine times out of ten - anyone within 21 feet can advance on you and stab you before you can get your firearm out of the holster.

Now ,you said you had received no specific training to the effect that if you fire into the body mass that's where the vital organs are and you said nor did you receive any training about specifically what the consequences of firing into that area would be? ---That's - that's correct. I don't think we do that in training.

No, but what you said is it's obviously common sense isn't it?---Yes.

Anybody - you don't need to be a qualified police officer to know that if a gun is discharged into the central body mass of an individual that the vital organs might be exposed to that bullet and the consequences of that could be serious harm or death? ---Correct.

But you are nonetheless trained that if the threat is as we have described, that it the appropriate - or may be the appropriate response?---Yes.

The closer the individual is, consistent with your training, the closer the individual is to you, as a police officer, the less time you have?---Correct.

And it might be that if you are right next to each other and suddenly this person pulls a knife or an edged blade on you, as a police officer, you simply don't have the time - or the luxury - of putting distance between the two of you?---Correct.

In other words, you don't have the opportunity of calling "Knife - knife - knife" or "Drop the weapon" or "Stand back" - or those sorts of commands that you can do if there is a long distance or significance distance between you?---Correct.

What you are taught in your training, can I suggest, is that if you pull the trigger into the central body mass - pull the trigger and fire into the central body mass, the aim and the intention is to incapacitate the individual?---Correct.

Stop the threat?---Yes.

And you are also taught, are you not, again, depending upon the situation, you keep firing until the shot is - until the individual is incapacitated or the threat is incapacitated?---Sort of. We're taught to fire until the subject's behaviour changes as such that it's no longer a threat to your life - or another person's life.

Right, and that might involve one shot - it might involve multiple shots?---Correct.

And we all know - and you would know as a police officer, that sometimes one shot is sufficient, other times - for a whole host of different reasons, it may not be?  
---Correct.

That the whole thing is stopping the threat?---Correct.

Making sure that that person is no longer posing a threat when they are holding an edged blade to you or anybody else in close proximity to that individual?---Correct.

Would you agree that a pair of surgical scissors would be described as an edged weapon or just the same as a knife?---Yes.

I mean we don't distinguish, do we, between that type of weapon. It is what it is, it's an edged blade?---Yes.

And has the capacity to cause lethal force to anybody?---Correct.

If they hit the right part of the body?---Correct.

All right. I want to come back now to your deployment with the IRT. You've told that you received this telephone call. You've told us that you go to Alice Springs, I think you kit up and then eventually you move down to Yuendumu?---Yes.

And it's there that you meet Sergeant Frost?---Yes.

And Sergeant Frost is the office-in-charge?---Yep.

Now, you've told us that you have no recollection at all of ever having sighted that email that has been described in this court as the so-called "arrest plan"?---Yeah, not the - not the one that was P1 I want to say.

Yes. You say your evidence is that as far as you're aware, you've never seen - did not see that plan and, as you said at committal, the first time you saw it was at committal?---Correct.

And whatever it was that was shown to you, it did not have those photographs attached to it - the updated photographs that you didn't have?---No, correct.

And your evidence was that tab 12 of P1, which is the email - sorry - exhibit 1, which is the email exchange on Saturday 9 November 2019 between various people but in particular Shane McCormack, that document - I don't need to take it to you again, you said it looked more like that one, as you recalled it?---Just the initial one-page one requesting us.

Which, of course, as we know, specifically refers to the funeral taking place in the community this weekend?---Yes.

Identifying who the IRT members area?---I can't recall if it says that, does it?

All right, it doesn't matter - it doesn't matter, it's not a memory test. So that's the evidence - at least your evidence - about your recollection about what was actually shown to you. I want to ask you a lot more now about what you understood your mission was when you left with the other members of the IRT and the dog handler, Mr Donaldson, at around about 7:05 pm on 9 November. Do you agree that when you walked out of that building, you told us that you were going to conduct some sort of reconnaissance?---Yes.

And the purpose of the reconnaissance was to identify where Kumanjayi Walker might be?---Yes.

Because when you left nobody had any idea where was, did they?---No.

And so the first part of that job - that mission - was to identify where he was - because you can't arrest him till you know where he is?---Correct.

Now, you called it "reconnaissance - that's the same thing as saying "intelligence gathering" isn't it?---Yes.

So you leave, you start the intelligence gathering and the first and most obvious place to go was House 277, the first place you went to? Because, I suggest, that was his last known sighting by police on 6 November - three days before?---Yes.

In what we have called "the axe incident"?---Yes.

In other words, as far as promises and all the intelligence you had, including whatever Sergeant Frost may have conveyed to you and others at that short briefing, no-one knew where he was, that was the last time he was seen and that's where he was apparently residing, or at least staying, I should say, at the time of the axe incident?---Yes.

So you went there first to see if you could get any intel?---Yes.

As it happens, you struck gold, didn't you?---Yes, sort of.

My language sorry, I'll put it another way. You struck gold, can I suggest in this sense, you actually spoke to a young man, a young boy?---Yes.

And it's that young boy that we see you talking through the window from the outside to the inside?---Yes.

And you ask him specifically, didn't you, about whether he knew Arnold Walker, and whether he was in the house or where he was?---Yes.

And that young boy told you, didn't he, that he had been there, and you've just missed him, basically?---Yes.

And I think, I can't remember whether it was at the window, or when you got inside, but certainly you asked the question, and you were told that he'd gone about three minutes before you got there?---Yes, I think so.

So you knew, didn't you, that's you and indeed as a consequence, the collective IRT, that he was very close to where you were, and you'd only just missed him?---Yes.

But whatever that young boy told, it was a single source of intelligence?---Correct.

You, none the less, consistent with your duty and responsibility, had to clear that house, didn't you?---Yes.

Do you know what I mean by clearing a house?---To go inside and see if he is actually in there.

And that's what you did do?---Yes.

With – I think with Constable Rolfe?---Yes.

And you made sure that there was no possibility of him hiding inside that house?---Yes.

Once it was cleared, the next step was move to the two houses which were subsequently identified, 511 and 518?---Yes.

Now obviously, as soon as you had identified yourselves as police officers, as we've seen, and I mean – and I know you told that young boy I think "Don't tell anybody that we've been here, if you see him"?---Yes.

And the reason you said that was because you were hoping, can I suggest, ambitiously, you were hoping that no one who was at House 577 would tip Kumanjaya Walker off that you were looking for him, and you'd been to that house? ---Correct.

Moreover, that you'd received intelligence that he'd left that house only three minutes before?---Yes.

In other words, that you were hot on his trail?---Yes.

You didn't want that to happen?---Didn't want?

You didn't want him to be tipped off?---Oh yeah, no.

But let's be real, given the nature of the community, given the fact that you've got high visibility presence, that is police officers, given that you knew that – they – everybody knew or must have known, and certainly those who were at House 577, that he was in big trouble and you needed to find him, there was every chance and possibility that Kumanjaya Walker would be tipped off?

MR STRICKLAND: I object, your Honour.

HIS HONOUR: The objection?

MR STRICKLAND: Well for a start, it's a multi-barrelled question.

HIS HONOUR: Well it is, yes.

MR STRICKLAND: And secondly, it's really asking this witness to get into the minds of members of the community. I object on both bases.

HIS HONOUR: Well I don't think it's asking him to get into the mind of the members of the community. It's asking him what he thought at the time.

MR STRICKLAND: I have no problem with that - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - with that – if it's formulated in that way, your Honour.

HIS HONOUR: Do you want to reformulate your question.

MR EDWARDSON: I'll reformulate. It's all in the formulation, your Honour. I'll reformulate.

You told him not to tell – if he – he, the young lad, if he saw Kumanjayi Walker, not to tell him that the police were after him?---Correct.

Not to tip him off?---Correct.

And the reason for that of course is, that the trail was hot. You knew from at least on what you'd been told, he'd only left three minutes before?---Yes.

And that's why it was important for you and the other members of the IRT, to strike while the iron's hot. Get to him as quickly as you could, if that was possible?---Yes.

Because the longer the time, between your attendance at 577, the more likely it was that somebody might tip him off, and then you might lose him again?---Yes.

So the notion of you being told, for example, look, Kumanjayi Walker's going to sleep here with Rakeisha tonight, was really a bit farcical wasn't it, that you'd just wait until then?---Yeah.

So what you did, and the other members of the team did, was to go as quickly as you could, to the two houses that have been identified, 511 and 518, when at least on the intelligence you and the others had gathered, that's where he'd gone?---Correct.

Now back to the briefing. Whilst Sergeant Frost may have expressed a preference for a 5 am arrest, one thing is clear from your evidence, can I suggest, you were told, apart from intelligence gathering, or to you – or you call it recognisance, if you come upon Kumanjayi Walker, lock him up?---Yes.

You did come across Kumanjayi Walker, when I say you did, very quickly, other members of the IRT, as it happens, did come across, or come across Kumanjayi Walker at House 511?---Yes.

And we know, and the jury knows, and we've seen, all of us in this court room, that in the course of trying to effect an arrest, the shooting occurs?---Yes.

In the course of which, he has armed himself – sorry I withdraw that. Have you actually seen that footage, the shooting?---No.

Right, thank you?---Just like my bit from me outside, that they showed before.

Right, thank you. So you were still maintaining obs on – obs as in observations, on House 518, because at that stage, neither house had been cleared?---Correct.

Some of the other officers, particularly Constable Zach Rolfe, and Constable Eberl, had gone to 511?---Yes.

Do you know where Constable Hawkings was?---I have no idea.

Do you know where the dog handler, Mr Donaldson was?---I could see his vehicle still, he was in-between the houses and the north side of the community. Julie told us that was the men's business area, which is where he's most likely to run to. So we kept the dog handler there.

Thank you. And were you communicating with radios?---Yes.

And were they the radios that you – you or somebody from the IRT had requested Sergeant Frost to provide?---Yes.

And so they came from the Yuendumu Police Station?---Correct.

So you maintain observations on 518, in case contrary to whatever you might have been told by the two members of the community, the female members of the community that we see you speaking to just outside of 518, whatever they might have told you, you wanted to be sure, that if there was no one in 511, the next step would be the clearance of 518, assuming you'd get permission to enter?---Incorrect.

And that never eventuated, because as we know, the shooting occurred once Kumanjayi Walker presented himself at the time of the attempted arrest, inside 511? ---Yes.

Nothing further, thank you, your Honour.

HIS HONOUR: Is there any re-examination?

MR STRICKLAND: Yes.

REXN BY MR STRICKLAND:

MR STRICKLAND: You accepted the notion when you left House 577, you wanted to strike while the iron was hot?---Yeah, we'd sort of found out where he was.

And by that, you mean you were intending to arrest him at House 511?---Or by – that time – like in that time and distance between that, I would have thought we might have even come across him walking, but yeah. I didn't know which house he was going to be in.

You – strike whilst the – you're acceptance of striking whilst the iron was hot was to arrest him either on the way to House 511, or at House 511?---Or, like I said, I didn't which house he was in, so.

Or 518?---Yeah.

Okay. You gave some evidence about your training in relation to safe distance?

---Yep.

And you said 21 – the general rule was 21 feet and then your training was the person would be advancing within 21 feet was not a safe distance?---No.

Sorry, no was that the training you received?---No that's not a safe distance.

And that was the training you received?---Yes.

So the training was based on a scenario of someone standing up and advancing, is that right?---Someone that's already standing, I believe.

Right. And advancing?---The – when we practise it at the college and - - -

I'm sorry?---When we practise at the college and that, it's someone standing there, and they're within the 21 feet, and they rush at you, and you don't have time to draw your firearm out of the holster. Or very rarely get a chance to.

Okay. I just didn't quite – you said, "And they rush at you." Is that what you said?---Yep. They don't just stand 21 feet away.

Thank you.

Thank your Honour, they're my questions. Excuse me. And, your Honour, I'd ask that this witness not be excused.

HIS HONOUR: All right. Thank you. You can stand down. I won't excuse you at the moment, so you may be recalled at a later time?---Sorry, as in today, or?

I don't know.

Do you know, at this stage?

MR EDWARDSON: No, I don't, your Honour.

HIS HONOUR: All right. So you'll just have to be available, I'm afraid?---No worries.

Thank you.

WITNESS WITHDREW

MS CALLAN: Your Honour, the next witness is Eddie Robertson, who is to be giving via Teams from Yuendumu. Your Honour, Eddie Robertson was not on the witness list that was provided to the court some weeks ago.

HIS HONOUR: Right.



MS CALLAN: And my recollection, his name may not have been specifically indicated as a witness during the empanelment process.

HIS HONOUR: All right.

MS CALLAN: I wanted to draw that to your Honour's attention.

HIS HONOUR: Thank you.

MS CALLAN: Your Honour, I'm told there may be some short delay in getting Mr Eddie Robertson on the line. And in those circumstances, can I move to Ethan Robertson, his son, and he's here in person. He was the subject of a call-up order, your Honour.

HIS HONOUR: All right, thank you. Now, just one moment, whilst I enquire. I'm sorry, members of the jury. I'm going to have to ask you to retire for a moment. This should only be for a few moments.

JURY OUT

HIS HONOUR: It's simply a practical issue about having the witness brought into court.

MS CALLAN: Yes, your Honour.

HIS HONOUR: I'll do that now and then we'll have the jury return.

MS CALLAN: Yes, I'm grateful, your Honour.

HIS HONOUR: All right.

MS CALLAN: Your Honour, when Mr Ethan Robertson gives his evidence, we have an interpreter.

HIS HONOUR: Yes.

MS CALLAN: Is it your practice that the interpreter be sworn in in the jury's presence, or- - -

HIS HONOUR: Yes.

MS CALLAN: Yes.

HIS HONOUR: Just before you start, Madam Interpreter, can you come forward please.

Can we find a chair for Madam Interpreter as well?

Now we're going to bring the jury in first before we start swearing anybody. So the two of you can just take a seat there for the moment.

JURY IN

HIS HONOUR: Can we swear the interpreter first please.

MAGGIE BURNS, sworn to interpret:

HIS HONOUR: Thank you. And now can we swear the witness please.

ETHAN ROBERTSON, sworn:

HIS HONOUR: Thank you. Now I'm going to ask that both of you remove your masks so that we can hear what you're saying, thank you.

Yes.

XN BY MS CALLAN:

MS CALLAN: Thank you.

I'll just wait for some water.

Is your name Ethan Robertson?---Yes.

I'm going to ask you some questions. If you don't understand my question, and you want me to repeat, please say so?---Yes.

Can you try and talk with a loud voice so everyone can hear you in the court room?  
---Yes.

Ethan Robertson, are you a Warlpiri man?---Yes.

Is your home at House 577 Yuendumu?---Yeah, it's my dad's house.

Your dad is Eddie Robertson?---Yes.

Your mum, Lottie?---Yes.

Do you have a daughter, Rakeisha?---Yeah.

And do you have a son, Shamar?---Yep.

Did you know Kumanjayi Walker?---Yes.

Rakeisha and Kumanjayi, they were in a relationship, weren't they?---Yes.

Did Kumanjayi stay at House 577?---Yes.

What was Kumanjayi like with you?---He was like a good young fellow, not so much – not much talking, yeah.

Do you remember the day when police came to your House 577, and Kumanjayi had an axe?---Yes.

When the police arrived, you were in the kitchen?---Yeah.

Did you know those policemen?---They were local police.

And you were honest with those policemen when they asked you questions?---Yeah.

Did you see Kumanjayi with the axe?---Yeah.

Did you say anything to Kumanjayi at that time?---I just yelled – yelled – sing out to him, yelled out.

I'm sorry, I didn't catch that?

THE INTERPRETER: I just yelled out to him, sang out to him.

MS CALLAN: And what did you sing out to him?---It was really a policeman got guns, you know, stop, stop, stop, stop doing that.

THE INTERPRETER: The police have guns so stop – stop doing that.

MS CALLAN: Police have guns, so stop doing that. Is that what you yelled out to Kumanjayi?---Yeah.

Did you see Kumanjayi run away from House 577?---Yes.

Did you go looking for him?---My dad – my old man, and the rest of the people who were living at west side camp area, went looking for him.

Your dad and other people?---Other people.

Other men?---Yeah.

In the men's area?---Yeah that's only a men's area. Men allowed. A woman not allowed.

Do you remember a woman police officer coming to House 577 that afternoon, after the axe incident?---Yeah.

What did that woman police officer say?---I don't know he was talking to my daughter. We going to phone up to Alice Springs task force to come – come to Yuendumu with the dogs to hunt – hunt him down.

Just to make sure I've heard you correctly. You were there when police were talking to your daughter?---Mm mm.

That is Rakeisha?---Rakeisha.

And you heard the police woman say she was going to get a task force from Alice Springs?---Looked like she was yelling – yelling out to my daughter.

So she was yelling this when she said these things?---Yeah, just little bit of yelling.

MR EDWARDSON: Your Honour, if it's any assistance to my learned friend, I have no difficulty with her leading liberally with this witness. I think - - -

HIS HONOUR: All right, thank you.

MS CALLAN: I'm grateful.

Was the police woman yelling she was going to get a task force from Alice Springs?---Mm mm.

And they were going to come and hunt him down?---Yeah.

That was hunt Kumanjayi down?---It looked - it looked like it was threatening my daughter - I don't know.

Did you know the policewoman's name?---She was old lady but.

I'm sorry, I can't hear?---Nuh.

THE INTERPRETER: It was older lady.

MS CALLAN: Older lady - policewoman - was she a woman - a policewoman you had seen at Yuendumu before?---Yeah, probably she's a local police as well.

Do you know her name, Julie?---Julie? Yeah, it look like. Yes.

Yes? Okay. Did Kumanjayi come back to House 577 after the axe incident?---Yeah.

Did you talk to Kumanjayi about handing himself in to police?---Yeah, me - me and Bert - Eddie and mum, we told him to give himself up. But the young fella is little bit - was crazy and - (language spoken).

You remember, Ethan, there was a funeral at Yuendumu on Saturday - that Saturday?---Yes.

Did you go to that funeral?---No.

That same day - the Saturday - the day of the shooting, you remember police came to House 577?---Yeah.

And those policemen talked to you?---Yeah.

Did you know those police?---No. I only know them local police, that's all.

Was your son, Shamar, inside House 577 when the police came?---M'mm. Yeah, my boy was playing with video game inside.

Your boy, you said who was playing a video game inside?---Yes.

How old was he?---He's 15 now, so would have been 12.

THE INTERPRETER: He is 15 no so he probably was about 12 at that time.

MS CALLAN: How did you feel about the police going into the house?---I don't know how I was feeling and well - when police asking you few questions, so.

I just missed the beginning of your answer. How were you feeling when the police asked you questions?---No, I was all right but they was just asking where this young fella is.

You were - - -?---I was all right but they was asking where the young fellow was.

You mean Kumanjayi?---Mm mm.

And you were honest with police when you answered?---When police ask you you got to be honest with them.

I want to show you a short video, body-worn - body cam?---Mm mm.

Of police at House 577 - your house, that day?---Yeah.

Okay?

DVD PLAYED

MS CALLAN: I just need to make sure the sound is operational. It should be, but - while I am doing that, Mr Robertson, do you recognise that as House 577?---Yes.

DVD PLAYED

MS CALLAN: Just pause there. For the record, your Honour, I should indicate what I am playing to the witness and I propose to tender, is a file, EWB Hawkings, Anthony, 1 of 10. I've just paused it using the Z time at 9:42:05. Mr Robertson, do you see yourself talking to a policeman there?---Yes.

DVD PLAYED

MS CALLAN: Your Honour, I tender the footage I just played to the witness.

HIS HONOUR: Exhibit 23.

EXHIBIT P23: EWB Hawkings, Anthony, 1 of 10.

MS CALLAN: Ethan, in the video I just showed you - - - ?---Mm mm.

- - - do you see one of the policeman was holding a gun?---Yes.

Did you see how he was holding that gun?---Like this.

So is that pointing with the barrel down to the ground?---Yeah, pointing down.

Can I describe that as a rifle?---Yeah.

Is that how you would call it?---Machine gun, hey.

Like a machine gun, okay. Did you see other police carrying guns?---Yeah. But not all the – only the one weapon was automatic gun and the others were revolvers.

So one was the - - -

THE INTERPRETER: One was the actual, like a machine gun, and the others were revolvers.

MS CALLAN: And the revolvers, were they in their holster, or holding them?---On the side of the – in the holsters.

Those are my questions, thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: Ethan, just a couple of questions if I may. When the police came to speak to you that morning, to find out where Kumanjayi Walker was, after they left House 577, did you ring Rakeisha?---I tried to ring Rakeisha, but she wouldn't answer.

Right, sorry, I've misled you. I said in the morning, it was the evening. The evening of 9 November, the day of the shooting, police arrive at House 577 and speak to you, as you've told us. I'll start again.

THE INTERPRETER: Can you repeat that please?

MR EDWARDSON: I'll take it slowly, sorry. On 9 November, which is the day of the shooting, that evening, the police come to your house at 577?---Mm mm.

Yes?---Yes.

And they want to know where is Kumanjayi Walker?---Yeah.

They wanted to know who else was – who was inside the house?---Only my boy.

Yes, and you told them it was only your boy in the house?---Yeah.

And then they leave?---Yeah.

Kumanjayi Walker had been at your house only three minutes before the police arrived, hadn't he?---Yeah, wasn't three minutes ago.

THE INTERPRETER: He was there than more three minutes before.

MR EDWARDSON: Had he been there shortly before the police arrived?---Mm mm.

Had he spent the night there?---No.

Why did he leave your house?---I don't know where the rest of the rest of the kids were, they were just walking through disco area with our youth program.

THE INTERPRETER: They were walking towards the east. They had a youth program for kids. So there was a kids – a lot of other kids were going with them as well.

MR EDWARDSON: In any event, when he left your house, was he with Rakeisha? ---Yes.

And as soon as the police left, you tried to ring Rakeisha, didn't you?---Yeah, but there's no answer.

There was no answer. But you were trying to warn Kumanjayi Walker and Rakeisha that the police were looking for him?---I was going to tell my daughter to – they're looking for this fellow.

THE INTERPRETER: I was going to tell my daughter that they were looking for Kumanjayi.

MR EDWARDSON: Thank you.

Nothing further.

HIS HONOUR: Anything arising?

MS CALLAN: No, your Honour.

HIS HONOUR: All right.



Now members of the jury, I'm going to have to ask you again to retire, there are just some issues that we need to deal with. Won't be more than a minute.

JURY OUT

MR EDWARDSON: Would your Honour excuse me for a moment please.

MS CALLAN: Your Honour, the next witness - - -

HIS HONOUR: Just one moment.

Now before you talk to me about the next witness - - -

MS CALLAN: Of course, I'm sorry.

HIS HONOUR: Is Madam Interpreter required for any of the other witnesses?

MS CALLAN: All right, thank you.

Well you can stand down for the moment please, Madam Interpreter.

And Mr Robertson, you can return to custody, thank you.

INTERPRETER WITHDREW

WITNESS WITHDREW

MS CALLAN: Your Honour, Eddie Robertson, who's now to give evidence by TEAMS from Yuendumu, is unlikely to require an interpreter, but he has asked that one be present if he needs it.

HIS HONOUR: Yes.

MS CALLAN: In those circumstances, is it acceptable, from your Honour's perspective, for the interpreter to remain in the witness box here at Darwin?

HIS HONOUR: Certainly, yes.

MS CALLAN: Thank you.

HIS HONOUR: We'll have the interpreter re-sworn for this particular witness. All right, so yes.

Now we need to bring the jury in.

MS CALLAN: Yes.

JURY IN

HIS HONOUR: Yes, now.

MS CALLAN: Your Honour, I call Eddie Robertson, who is to give evidence by audio-visual link from Yuendumu.

HIS HONOUR: Now I understand that this witness has some facility with English, but has requested that an interpreter be made available, if he needs it.

MS CALLAN: Indeed.

HIS HONOUR: So we'll get the witness on the TEAMS.

MS CALLAN: Yes.

HIS HONOUR: And then the interpreter will be sworn, then we'll have the witness sworn.

MS CALLAN: Yes.

MR STRICKLAND: Your Honour, would you mind if Madam Interpreter was able to sit in the witness' seat. It's just that she'll have the microphone then - - -

HIS HONOUR: No of course not, I'm sorry.

Now Mr Eddie Roberston is now on the screen, but he will appear large once he begins to talk.

So can we swear the interpreter please.

MAGGIE BURNS, sworn to interpret:

MS CALLAN: Mr Robertson, can you hear the court?

THE SHERIFF'S OFFICER: Mr Robertson, this is the Sheriff's Officer. Can you hear me?

MR ROBERTSON: Yes.

Eddie ROBERTSON, sworn:

HIS HONOUR: Mr Robertson, we do also have an interpreter present in the court if you feel the need for one, you understand?---Yes.

Thank you.

XN BY MS CALLAN:

MS CALLAN: Thank you, your Honour.

Sir, could you tell the court your full name?---My name is Eddie Jamujinga (?) Robertson.

And are you a Warlpiri man?---I am a Warlpiri man.

Do you live at House 577 at Yuendumu?---Yes, I live in that house. 577.

Is Lottie your wife?---Yes.

Sir, did you help establish the community at Yuendumu?---Yes.

Have you represented the Yuendumu community in discussions with the Northern Territory Government?---Yes, I do.

Have you represented the Yuendumu community in discussions with the Commonwealth Government?---Yes.

Have you represented the Yuendumu community in discussions with the police?  
---Yes.

Sir, were you involved in the movement to end petrol sniffing in your community?  
---Yes.

And you received an award, didn't you, in 2015? The Northern Territory Senior of the Year?---Yes.

Is your son Ethan Robertson?---Yes.

Your granddaughter is Rakeisha?---Yes.

Did you know Kumanjayi Walker?---Yes.

How did you know him?---I knew when he was engaged to my granddaughter. It was five, six years.

He was engaged to your granddaughter to five or six years?---He was a partner to my granddaughter for that five years.

A partner?---Yeah.

Did Kumanjayi stay at 577 in Yuendumu? I'll try that again. Sir, did Kumanjayi stay at House 577?---Yes.

How often did he stay at House 577?---He stayed here for a long time, then he moved in.

How was Kumanjaya with you, Mr Robertson?---He was a really happy man. And the (inaudible) I didn't have any problem with him.

What was your relationship with Kumanjaya?---I was grandfather.

Did you try to direct him in the right way to be?---Yes.

Did he listen to you?---Yes.

Did Kumanjaya's birth mother sniff petrol?---I don't know.

Do you remember, on the day Kumanjaya was shot, there was a funeral at Yuendumu?---Yes.

You remember it was supposed to be on Friday and it was changed to Saturday? ---Yes.

Who was the funeral for?---My nephew.

Was Kumanjaya related to that person?---Yeah, it was his nephew.

Kumanjaya was the nephew of the person who died?---Yes.

Do you know why Kumanjaya was in Yuendumu on 9 November?---Can you repeat it, please?

I'll start again. Did you see Kumanjaya in Yuendumu in the days before the funeral? ---No.

Can I ask you about funerals in your community? Are they important?---Very – they're very important to our family members and the community.

Are there obligations for people to come together for a funeral?---Yes.

Do you remember on the Wednesday before the shooting, the police came to House 577 and Kumanjaya had an axe?---I wasn't there at that time. I was in another place with the men.

Were you told about that happening?---I was, maybe two hours after.

Two hours after?---Yeah.

Did you see Kumanjaya running away from police that day?---Yeah, I seen him running across where I was sitting.

And you were sitting in the men's area?---I was in the men's area, yes.

Did you go to find Kumanjayi?---I ran after the police and him, trying to talk with them.

So you saw the police chasing him?---Yes.

And you were following the police, who were following Kumanjayi?---I was running in the middle, between Kumanjayi and the police, in the middle (inaudible).

Do you remember at House 577 later that day, a policewoman, Julie Frost, coming to talk to you?---Yes.

And Lottie was there, too?---Yes.

And was the policewoman, Julie, angry?---Yes.

And what did she say?---She said that she will get somebody from the other forces to come down with the dog.

Did she say the actions of Kumanjayi were totally unacceptable?---Yes.

Did she say the policemen could've been killed?---No.

Did she say Arnold was lucky he didn't get killed?---No.

Did she talk to you about Kumanjayi presenting himself to police?---Yes.

What did you say in response?---I said that I would escort him to the police station and give himself in to the police.

Can I ask you to say your answer again? It was – and maybe a bit more slowly?  
---I ask Kumanjayi if can come with me to the police station and give himself in.

And what did Kumanjayi say?---He nod his head and said, "Yes."

Did you talk to police about them arresting Kumanjayi after the funeral?---I think that was arrangement made by the police.

Did you say that was the arrangement made by the police?---To arrest him after the funeral.

To arrest him after the funeral?---Yep.

The day after the funeral, on the Sunday, what were you going to do?---I was going to ask him to come with me to the police station.

The funeral that happened on the Saturday, that was at the basketball court?  
---Purvis (?), yes.

How many people went to the funeral?---There are really (inaudible) I think, probably 20 to two to 300 people.

And how long did the funeral take, at the basketball court?---Service.

The service?---Funeral service?

Yes?---With that one, might be three hour. Because there's a lot of people.

After the funeral service, did you and Lottie drive out to the cemetery?---Yes.

Were you at the cemetery when you got a telephone call about the shooting?---Yes.

Did you then drive back to Yuendumu?---Yes we drove back to the community.

You first went to House 511?---Yes.

You didn't touch anything there did you?---No.

Did you then go to the police station?---Yes.

Did lots of people gather at the police station?---Yes.

And was the Aboriginal Community Police Officer, Derek Williams, outside the station?---Yes.

Did you know that he had worked for the police for many years?---Yes.

And when Derek Williams was outside the station that night, were you relying on him for information?---Yes.

Mr Robertson, between the axe incident on Wednesday, and the shooting on Saturday, how many times did you see Kumanjaji?---I only seen him once it was at the funeral service. In the morning.

Is that when you asked if he could come with you to the police?---That was on Sunday.

But when you asked Kumanjaji if he could come with you to the police, and he nodded, when was that conversation?---That was after the funeral. That was on Wednesday.

So the conversation was on Wednesday?---Yeah like after he came back from the bush.

Did you talk to Kumanjaji about coming with you to the police - - - ?---Yes.

- - - once the funeral was finished?---Yes.

And that conversation was on the Wednesday?---(Inaudible) not on Saturday.

That conversation was on Saturday?---No. On - - -

Wednesday?---Yeah.

Your Honour, those are my questions in chief.

MR EDWARDSON: I have no questions for this witness.

HIS HONOUR: Thank you, Mr Robertson, that concludes your evidence, and we will now close down the audio-visual link.

WITNESS WITHDREW

INTERPRETER WITHDREW

MS POOLE: Your Honour, the next witness to be called is Nathan Coulthard, and we will need the interpreter.

HIS HONOUR: All right, thank you.

We'll swear the interpreter first, thank you.

MAGGIE BURNS, sworn to interpret:

NATHAN COULTHARD, affirmed:

XN BY MS POOLE:

MS POOLE: Is your name Nathan Coulthard?---Yes.

Mr Coulthard, I'm going to ask you some questions. If you don't understand anything at any time, please indicate, and I can repeat the question.

Are you a Warlpiri man?---Yeah.

Is Leanne Oldfield your wife?---Yes.

Where do you and Leanne live?---In Alice Springs, Warlpiri Camp. Town camps.

Which house at Warlpiri Camp?---House number 6.

Did you know Kumanjayi Walker?---Yeah.

Was he Leanne's son?---Yeah, step-son.



Step-son. Was he like your nephew?---Yeah.

Now, on the day of the shooting incident, do you remember that you were at Yuendumu?---Yeah.

And you were at Yuendumu to attend a funeral?---Yeah.

It was the funeral of your wife's uncle, is that right?---Yes.

Was Kumanjayi Walker related to your wife's uncle?---Yeah.

What was the relationship?---Like grandfather.

Like a grandfather. From what you knew, was Kumanjayi close to his grandfather?---Yeah.

Did his grandfather used to tell Kumanjayi a story?---Yeah.

Did they have a special relationship?---Yeah.

Did you see them sometimes together at Warlpiri telling stories?---Yes, sometimes.

Did you at tend the funeral service at the basketball court?---Yeah.

Did you see Kumanjayi there?---No, it was too many.

THE INTERPRETER: There was too many people there.

MS POOLE: Did you drive to the cemetery out of town?---We had no car.

No car. Where did you go after the funeral?---We went to the camp, my partner's mother's house.

Was that House 511?---Yeah.

Where were you sitting at the house?---Next to the door verandah.

Was your wife, Leanne and Kumanjayi with you?---Yes.

And did the police come to House 511?---Yeah.

Do you recall police spoke to you?---Yes.

Okay. I am just going to play you a very short bit of footage. Your Honour it is from body-worn footage, Adam Eberl 2 of 4.

DVD PLAYED

MS POOLE: Do you recognise yourself?---Yeah.

In that piece of footage?---Yeah.

That was you on the bed, is that right?---Yeah, that's me.

Your Honour, I tender that footage.

HIS HONOUR: Exhibit 24.

EXHIBIT 24 Footage, Adam Eberl 2 of 4 commencing at 9:49:55.

MS POOLE: The whole video - tendering the whole video, your Honour.

MS CALLAN: Your Honour, we've only played for this witness a short portion of the video which has otherwise been considered and served on the defence and I understand there is no objection.

HIS HONOUR: All right, well the whole video will be exhibit 24.

MS CALLAN: Yes, your Honour.

MS POOLE: Mr Coulthard, did you see the police walking towards you when you were outside House 511?---I seen the police coming from two directions, on the side and through the gate four coming.

How were they walking? Can you describe how they were walking?---They look like they was in a hurry.

Now, after the police spoke to you they went inside House 511?---Yes.

Did you then hear gunshots?---Yes.

I have nothing further for this witness, your Honour.

MR EDWARDSON: I have no questions for this witness, your Honour.

HIS HONOUR: Yes, thank you. Mr Coulthard, you may go.

WITNESS WITHDREW

HIS HONOUR: Can we also release Madam Interpreter now?

MS POOLE: No, your Honour, I understand she is still required.

HIS HONOUR: All right, thank you.

MS POOLE: Yes, your Honour, the next witness to be called is Margaret Brown.

HIS HONOUR: The interpreter is required for this witness?

MS POOLE: Yes, your Honour, and also some headphones just to assist with hearing.

HIS HONOUR: For the witness?

MS POOLE: Yes.

HIS HONOUR: Yes. Well, she has been given a hearing device.

XN BY MS POOLE:

MS POOLE: Yes, your Honour.

MARGARET BROWN, affirmed:

HIS HONOUR: Yes.

MS POOLE: Is your name Margaret Brown?---Yes.

Ms Brown, if at any time you can't hear me or you don't understand the question, please just indicate and I will repeat it?---Yes.

Okay. Ms Brown, did you live at House 511 in Yuendumu?---Yes.

Is Leanne Oldfield your daughter?---Yeah.

Are you the grandmother for Kumanjayi?---Yes.

Did you help to bring him up?---Yes.

When Kumanjayi was at Yuendumu would he sometimes stay with you?  
---Yes.

Would he also sometimes stay with Rakeisha Robertson at House 577?  
---Yes.

And when he stayed in Alice Springs, did he stay with Leanne Oldfield at Warlpiri camp?---Yeah.

Do you remember on 9 November 2019, there was a funeral for your brother?  
---Yeah.

A funeral service was at the basketball court?---Yeah.

Did you see Kumanjayi on your way to the funeral?---Yeah.

Did you speak with him?---No, I just go (inaudible) the funeral, my brother's.

Okay. Had you seen Kumanjayi in Yuendumu earlier that week?---Yeah.

And you spoke with him about the incident with him and the police officers and the axe?

THE INTERPRETER: He told Margaret that he protected himself from the police and he attacked the police officer.

MS POOLE: Mrs Brown –

I'll just ask for a small bundle of photographs to be handed to the witness.

Mrs Brown, before I ask you to look at the photos, I just wanted to ask you, did Kumanjayi ever tell you how he felt about the police?---No.

What I've - what the witness has been handed, your Honour, is a small selection of photographs that are from exhibit 1, tab 23. So the jury will find them there, according to their number. It's just a curated selection.

Mrs Brown, can you look at that first photograph in front of you. It's photograph number 14. Does that show the front of House 511?---Yeah. Yeah, that's at the front.

If you turn the page to the next page, it's photograph number 6. Does that show one side of House 511?---Yeah, that's behind – behind. On the side.

And the gate there that – you can see a gate partway through the wall? That's the photo that you're looking at?---Yeah.

And that was a gate into part of the house; is that right?---Nah, at the side. At the side. This is on the other side.

Okay, all right. If you turn the page to the following page. It's page – it's photo number 13 in the exhibit list. This photograph. Mrs Brown, does that show the other side of your house?---Yeah, other side.

And can you see on that another gate into the house?---There's a door on this side.

Can you turn over the page to the next photograph, it's photo number 34. And you see there's a washing machine there?---Yeah.

The washing machine is blocking the door, isn't it?---Yeah. This one – yes, other side.

Yes. But – and that's blocked. The door is blocked?---Yeah. Yeah, blocked.

The final photograph, if you turn over, please. That's photograph number 35. That shows the door on the other side is also blocked?---Yeah. This one is other side. Blocked, other side. Yes.

So Mrs Brown, the only way into your house and out of your house on 9 November 2019 was through the front door; is that right?---Yeah, only front door.

I have nothing further – sorry, your Honour. I have nothing further, your Honour.

MR EDWARDSON: I have no questions for this witness, thank your Honour.

HIS HONOUR: Yes.

Thank you, that concludes your evidence and you're now free to go.

WITNESS WITHDREW

MS POOLE: Your Honour, perhaps if we can just have this bundle marked for identification?

HIS HONOUR: That will be marked for identification with the letter N.

MFLN Bundle of five photographs.

MS POOLE: Bundle of five photographs, your Honour, if that assists. Thank you, your Honour.

HIS HONOUR: Yes. Now, I note the time. Are we- - -

MR STRICKLAND: That's all the witnesses for today, your Honour.

HIS HONOUR: All right, thank you.

So Madam Interpreter, thank you very much for your help. You're now free to go.

And members of the jury, you may now retire for the day and we'll start again tomorrow, at 9:30.

JURY OUT

HIS HONOUR: Now, are there any matters that counsel want to raise before I adjourn?

MR EDWARDSON: No, thank your Honour.

MR STRICKLAND: No, thank your Honour.

HIS HONOUR: Then I'll adjourn.

ADJOURNED 1.19 PM TO THURSDAY 17 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 17 FEBRUARY 2022 AT 9:34 AM

(Continued from 16/02/2022)

Transcribed by: EPIQ

MR EDWARDSON QC: If your Honour pleases, can I raise a matter with you now.

HIS HONOUR: Yes.

MR EDWARDSON: Now's the time to resolve the issue, but firstly, can I hand to you a notice of intention to seek leave, pursuant to s 38 that was served on us a long time ago. And also an outline of argument. Your Honour, before the last trial, and before the stay in the High Court, the prosecution served on the defence, a notice pursuant to s 38(1), dated 2 June 2021, identifying the four witnesses that your Honour can see.

HIS HONOUR: Yes.

MR EDWARDSON: Yesterday was James Kirstenfeldt. Breanna Bonney was presented, and no questions were asked that went to the issue that might have been the subject of a s 38(1) application. I remind your Honour that in the case of Mr Donaldson, Constable Donaldson was not asked any questions at all about the so-called plan, and all those issues that were ventilated with Mr Kirstenfeldt. Mr Kirstenfeldt, of course, fell into a different category because of those statements that he had previously made, which with your Honour's leave, permitted my learned friend to put those inconsistencies to him, and then raise that question of are you saying this, or – I can't remember the exact term of phrase, I'll find it. Well along the lines are you trying to help Zach Rolfe.

To avoid the repetition of that style of cross-examination of their own witness, I want to say right now that we object strenuously to that line of cross-examination in respect of the witness Hawkings, who's to be presented today.

First of all, Mr Hawkings was not the subject of a notice. Secondly, Mr Hawkings, as far as we're aware, does not fall into the same category as Mr Kirstenfeldt, and I want the opportunity to address your Honour on that topic, that issue, in advance of him being presented to give evidence. Because, as I expect he will say, as he did I think at committal, and I'll take your Honour to the various statements, he will say effectively, that that plan was never given to me. Something along those lines. And so I want to be given the opportunity, without being embarrassed in front of the jury, for obvious reasons, and ventilate that with your Honour.

So would your Honour consider, subject to what our learned friends say, consider after we finish with the two witnesses that are yet to be presented in a moment, both of whom are from the community, perhaps considering an adjournment, and then we can talk about this issue. The outline of argument I've handed to your Honour has simply been redated, and the heading changed slightly. Just simply because your Honour's now the trial judge. It's in exactly the same format that was presented to his Honour, Mildren AJ, when we anticipated there would be an argument on this topic. In other words, there's no change. So it won't come as any surprise to our friends, because they've had that now since June. As far as we're aware, I don't think we've ever received any response by way of outline



or otherwise. But obviously we are on notice, from last night at least, that in the case of Mr Hawkings, there is likely to be a s 38 application. And I want to do that before we start, if possible.

HIS HONOUR: Mr Crown.

MR STRICKLAND SC: I'm opposed to that course. I did notify my learned friend last night that there may be an application for s 38. But I did make it as clear as I could. That it really depends entirely on his evidence in chief. Now I understand my learned friend wants the opportunity, and should be given the opportunity, to fully argue whether there should be a s 38 application. But it would be futile to do so before his evidence in chief. Now there are – excuse me - - -

HIS HONOUR: Do you expect that he will give evidence different to the evidence that he gave in his committal – or in the committal proceedings?

MR STRICKLAND: I don't know the answer to that, your Honour. I don't know.

HIS HONOUR: If he gives evidence in the same terms as that which was given in the committal proceeding, do you anticipate making such an application?

MR STRICKLAND: The answer is possibly, your Honour. It depends on the precise terms of what he says. I mean there's – can I suggest this, your Honour, there are five witnesses being called before Mr Hawkings.

HIS HONOUR: Mm mm.

MR STRICKLAND: My suggestion is we hear his evidence in chief, and then we can adjourn before there's any cross-examination at all. That's when I will – because there may be more than one, there may be zero applications of s 38. This is one witness - - -

HIS HONOUR: So you're proposing that we hear his evidence-in-chief.

MR STRICKLAND: Yes.

HIS HONOUR: During the course of which you will not make any application.

MR STRICKLAND: Correct, that's correct.

HIS HONOUR: And it's only at the conclusion of the evidence in chief that I may ask the jury to retire, and then you'll indicate whether you are or are not making an application.

MR STRICKLAND: Exactly.

MR EDWARDSON: Your Honour, I'm content with that. And can I just say one thing now – again, for my learned friend's benefit – I want to be absolutely clear that

in the case of Mr Hawkings, Mr Eberl – the critical witnesses, if you like – there is no concession as far as leading is concerned.

HIS HONOUR: Yes.

MR EDWARDSON: It's entirely different with the community members. I've already indicated that and I indicate again that, insofar as the witnesses are to be presented this morning, in the community witness cases I don't have any objection to strong leading – however the examiner wishes to frame the question.

HIS HONOUR: Yes.

MR EDWARDSON: But when it comes to – there will be no cross-examination, there will be no leading questions.

HIS HONOUR: All right. Now, before I bring the jury in, there was just one matter that I wanted to raise. Amongst the requests by the media yesterday for access to the material which has been tendered, there was an application for access to exhibit 24. Now, as I understand it, exhibit 24 included not only the material that was shown to the witness yesterday but, in total – the totality of the body-worn video of Constable Eberl. Now, that is – again, as I understand it, not having watched the entirety of it – inclusive of the shooting of the deceased.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: So I've held off at this point making a decision about release of that, because I understood at the outset when I raised this issue, Mr Crown, that you said that you may take a different view with regard to that material.

MR STRICKLAND: Yes. If I can just ask for some very brief opportunity, I'll speak to my instructors.

HIS HONOUR: Yes, all right. I don't need an answer now.

MR STRICKLAND: You don't need an answer now, yes. By morning tea, would that be sufficient?

HIS HONOUR: Certainly.

MR STRICKLAND: Certainly. Would your Honour excuse me for one moment, please?

HIS HONOUR: Yes, certainly.

MS CALLAN: Your Honour, whilst that's happening can I indicate, when the jury are brought in, before calling the first witness this morning, it's proposed to tender a folder which contains transcript and certain still images from the body-worn footage of events on 9 November 2019. Your Honour might appreciate some of that has

been played to the jury and there is more to come. And this is a set of transcripts which will, in due course, correlate to all of the body-worn footage that is to be tendered.

HIS HONOUR: All right, thank you.

MR STRICKLAND: Your Honour, I've got those instructions. We have no difficulty with the media accessing that – the material on exhibit 24.

HIS HONOUR: All right, thank you. Do you want to be heard in regard to that? All right, then. I will, in due course, permit that material to be made available to the media. Now, we'll bring in the jury, thank you.

JURY IN

HIS HONOUR: Yes, Ms Callan.

MS CALLAN SC: Your Honour, at the outset this morning, I tender a folder which is titled, "Transcript and Stills of BWV" – or body-worn video – on 9 November 2019. Your Honour will find the outset of that folder is an index which, in brief terms, describes the contents which then appear behind the tabs in the folder which commence at tab number 5 and run through to tab number 11.

HIS HONOUR: That will be exhibit 25.

EXHIBIT 25 Folder titled Transcript and Stills of BWV 09/11/2019.

MS CALLAN: And we have copies for the jury.

HIS HONOUR: Thank you. Copies may be distributed.

MS CALLAN: Just as that's occurring, can I make it clear – as the jury may have appreciated, this is a transcript that contained in exhibit 2. This transcript is tendered on the basis that it is an aid only for the jury.

HIS HONOUR: Yes.

MS CALLAN: It's a matter for them what they hear and they will ultimately be the ones to decide what can be heard.

HIS HONOUR: Thank you. I reinforce what Madam Crown has just said. As I think I said to you earlier, these transcripts are provided to you to assist you. But the evidence is what is contained in the videos and if you hear something different when the video is played than you read in the transcript, then you proceed on the basis of what you hear when the video is played.

MS POOLE: Your Honour, the first witness to be called this morning is Danielle Martin. She'll be giving her evidence by audiovisual link.

HIS HONOUR: Thank you.

MS POOLE: Your Honour, while we're getting the link up, if I can just indicate there is an Anmatyerr interpreter located at Alice Springs, at the location. In relation to – there's two witnesses to be called by audiovisual this morning.

HIS HONOUR: Yes.

MS POOLE: If either of them need a Warlpiri interpreter, we also have an interpreter here for that purpose.

HIS HONOUR: All right.

MS POOLE: Now, I haven't- - -

HIS HONOUR: Can you hear me?

THE INTERPRETER: Yes.

HIS HONOUR: And can you also see the courtroom?

THE INTERPRETER: Yes we can, yes.

HIS HONOUR: Now, I understand that Danielle Martin is there in the remote witness room?

THE INTERPRETER: Yes, she is actually, your Honour. Yes.

HIS HONOUR: And I believe you are there to provide some assistance as an interpreter if required; is that correct?

THE INTERPRETER: Yes, I am, yeah. I am interpreter Anmatyerr(?).

NATHANIEL COULTHARD, affirmed to interpret:

DANIELLE MARTIN, affirmed:

HIS HONOUR: Thank you.

XN BY MS POOLE:

MS POOLE: Now, I'm going to ask you some questions. Is your name Danielle Martin?---Yeah.

Ms Martin, if at any time you don't understand a question- - -

THE INTERPRETER: Yes?

MS POOLE: Please let me know and I will repeat it for you?---Yeah.

Ms Martin, your partner is Leroy Brown, is that correct?---Yes.

And you are from Laramba?---Yes.

On the day of the shooting incident you were visiting Yuendumu, is that right?  
---Yes.

And the reason you were visiting Yuendumu was to attend the funeral service there?  
---Yes.

You didn't go to the burial that was held outside of town, is that right?---That's true, nothing.

Okay. After you attended the funeral service you were sitting outside House 518, is that right?---Yes.

You were sitting outside there with your partner, Leroy Brown, is that right?---Yes.

Ms Martin, I am just going to show you a short bit of footage and then I will ask you some questions about that.

Your Honour, for the record, what we are going to play now is a short excerpt from the body-worn video of Kirstenfeldt, which is exhibit 22 and we will be commencing the excerpt at 9:48:20 zero time.

HIS HONOUR: Thank you.

MS POOLE: And for the assistance of the jury, the transcript of this body-worn video is located at tab 10 of the folder that has just been provided. And that is exhibit 25, your Honour.

#### DVD PLAYED

MS POOLE: Ms Martin, do you recognise yourself in that piece of footage that you were just shown?---Yes.

And was that Leroy Brown that as standing there with you?---Yes.

Did the policeman that was speaking show you a photo of a person on his phone?---Yes.

How many policemen did you see at that time?---The one who spoke to me?

Yes?---Yeah. Just one.

Did you recognise the person that he showed you in the photo?---No, I didn't know that person.

Did the police officer have anything else in his hands, beside his phone?---Yes, he had a gun.

Where was the gun?---On sort of his hips.

Was he touching the gun?---Yeah, he just had his hand on the gun just standing up.

And the gun was in the holster or his belt, is that right?---Yeah.

How did it make you feel when you spoke to the police?---A little bit frightened.

And after you finished speaking with the police officer you went and sat back down outside House 518, is that right?---Yes.

That's the examination-in-chief for this witness your Honour.

MR EDWARDSON: I have no questions for this witness, your Honour.

HIS HONOUR: Yes. Thank you, Ms Martin, that concludes your evidence and you will now be free to go.

#### WITNESS WITHDREW

HIS HONOUR: Are we breaking the link with this - - -

MS POOLE: No, your Honour, because we have another witness.

HIS HONOUR: Who is going to use the same room?

MS POOLE: Yes.

HIS HONOUR: All right, thank you. So this witness may now leave that remote witness room and the next witness can be brought in. And the next witness' name?

MS POOLE: Danielle Martin - sorry - Leroy Brown.

HIS HONOUR: Leroy Brown, thank you.

Now if it's a fresh witness, we'll swear the interpreter again.

No, Mr Interpreter, this is directed to you. Because it's a new witness, I'm having you sworn again.

THE INTERPRETER: Your Honour, I thought, because I just done the first witness, she was a Mutijulu I thought they already organised a Warlpiri interpreter for this client.

HIS HONOUR: Have you got a different interpreter?

MS POOLE: We have, your Honour, we've got a Warlpiri interpreter for Mr Brown's assistance.

HIS HONOUR: Yes, I'm sorry that was my misunderstanding.

THE INTERPRETER: No worries, all good. I should just leave the interview room?

HIS HONOUR: I think that's probably the case.

MS POOLE: Yes.

HIS HONOUR: Yes, thank you.

THE INTERPRETER: No worries, your Honour.

HIS HONOUR: Thank you very much for your help.

THE INTERPRETER: Okay then, all good.

MS POOLE: Your Honour, I apologise, I think that was my misunderstanding.

HIS HONOUR: That's all right.

MAGGIE BURNS, affirmed to interpret:

LEROY BROWN, affirmed:

HIS HONOUR: Yes.

XN BY MS POOLE:

MS POOLE: Thank you.

Is your name Mr – sorry, is your name Leroy Brown?---Yes.

Mr Brown, I'm going to ask you some questions now?---Yes.

If there's anything you don't understand, please let me know and I will repeat it?---Yeah.

Mr Brown, your partner is Danielle Martin, is that right?---Yes.

And you live in Laramba?---Yes.

On the day of the shooting incident, you were visiting Yuendumu, is that right?---Yes.

The reason you were visiting was to attend the funeral service at the basketball court?---Yes.

And did you go to that funeral service?---Yes.

After the funeral service, did you come back to House 518 with Danielle?---Yes.

Did you sit outside House 518 with Danielle?---Yes.

Did a police officer come and speak to you when you were sitting outside House 518?---Yes.



Mr Brown, I'm just going to play you a short clip of footage, and then I'll ask you some questions about it.

For the record, your Honour, it's the same piece of footage that was played – it's already been played, and it is the – from the body-worn of Mr Kirstenfeldt, 2 of 4, commencing at 9.48.25.

HIS HONOUR: Thank you.

MS POOLE: Your Honour, there seems to be a problem with the sound for the footage. Just – so - - -

HIS HONOUR: Can you try it again.

MS POOLE: We may try it again, yes, thank you.

DVD PLAYED

MS POOLE: Mr Brown, do you recognise yourself in that video?---Yes.

And you're standing with Danielle Martin, is that right?---Yeah.

You didn't recognise the person in the photo that the police officer showed you, is that right?---Yep.

Did you just see one police officer at that time?---There was another police officer, but he was a bit – standing a bit long way – bit further. They were walking.

The police officer that spoke to you, was he carrying anything other than his phone?---He only had his phone that he showed me.

Was he touching anything at the time that he spoke to you?---He was touching his side of his hip.

What was he touching at the side of his hip?---I couldn't see clearly. Because I was focusing on his face when he was talking.

How did you feel when you were talking to this police officer?---He as asking for Kumanjayi.

After you spoke to the police officer did you return to sit outside House 518?  
---Yes.

That's the examination-in-chief for this witness.

MR EDWARDSON: I have no questions of this witness, your Honour.

HIS HONOUR: Thank you.

Mr Brown that concludes your evidence and you may go?---Yes.

WITNESS WITHDREW

MS POOLE: Your Honour, the next witness is Louanna Williams.

HIS HONOUR: Do we need the present interpreter for that witness?

MS POOLE: Just perhaps just in case we need to have her.

HIS HONOUR: All right, thank you.

MS POOLE: Thank you. Your Honour, I understand that the Warlpiri interpreter is required.

HIS HONOUR: Thank you.

MAGGIE BURNS, affirmed to interpret:

LOUANNA WILLIAMS, sworn:

XN BY MS POOLE:

MS POOLE: Can you tell the court your name please?---Louanna Williams.

Ms Williams, were you born in Yuendumu?---Yes.

Did you do your schooling at Kormilda College up until year 10?---Yes.

Are you now studying a Community Services Course at Charles Darwin University?  
---Yes.

And prior to that did you work for seven years at Centrelink?---Yes.

And you re the mother of four children, is that right?---Yes.

And two of those are being educated in Darwin and two are being educated at a boarding school in Queensland, is that right?---Yes.

You normally visit Yuendumu once a year or so for family reasons?---Yes.

In 2019 you went to Yuendumu for your uncle's funeral, is that right?---Yes.

And you stayed at your cousin's house, which was House 548?---Yes.

What is your relationship with Kumanjayi Walker?---Kumanjayi's grandmother and my mother are sisters from one father.

So is it correct that Kumanjayi is your nephew?---Yes.

A week before the shooting incident were you in the yard of house 548 cooking a kangaroo tail on the fire?---Yes.

Did Kumanjayi come and speak with you?---Yes.

Do you remember what time it was that he came and spoke to you?---5:30.

And do you remember the day?---Saturday.

Saturday. What did he talk to you about? What did Kumanjayi talk to you about?  
---First he spoke about - there was a break in in all organisations in Yuendumu and he told me that he never got involved in that and then he told me about the incident that happened at Lottie and Eddie's place, that he came out with an axe but he never meant to hurt anybody there, he just wanted to make a way through the house and then the third, he told me that he wanted to be arrested after the funeral.

Why did he want to be arrested after the funeral?---Because he knew that he was in trouble.

And did he tell you that he wanted to go to the funeral?---No.

Did he ask you to talk with your brother, Derek Williams?---Yes.

About being arrested after the funeral?---Yes.

Did you talk to Derek Williams?---No, not sure.

Okay. Did he tell you why he wanted you to talk to Derek Williams in particular?  
---He was comfortable for Derek to arrest him.

Did he tell you that he was comfortable for Derek to arrest him?---Yes.

And when he told you all of this, was there anybody else there at the time?---No, just me and him.

And he was with you for about five to ten minutes, is that right?---Yes.

You saw him very briefly again on the day of the funeral, is that right?---Yes.

And he asked you for a smoke?---Yes.

What was the smoke?---Just a cigarette.

Okay. That's the examination-in-chief - excuse me - now, you said earlier that the conversation that you had around the fire was a week before the shooting and it was a Saturday?---Mm mm.

And that Kumanjaya told you during that conversation about the incident with the axe?---Yes.

Now, the incident with the axe occurred on the Wednesday before the shooting incident?---Yes.

Three days before?---Yes.

So in that case do you accept that your conversation with Kumanjaya happened after the axe incident occurred?---Yes.

So it would have happened some time in the three days before the shooting incident?---Yes.

That is the examination-in-chief, your Honour.

MR EDWARDSON: Your Honour, I have no questions of this witness.

HIS HONOUR: Yes, thank you, you may go.

WITNESS WITHDREW

MR STRICKLAND: Yes, your Honour, I call Leanne Oldfield.

HIS HONOUR: Does this witness also require an interpreter?

MR STRICKLAND: Yes, she does, your Honour.

HIS HONOUR: Thank you.

MAGGIE BURNS, re-affirmed to interpret:

LEANNE OLDFIELD, affirmed:

XN BY MR STRICKLAND:

MR STRICKLAND: Good morning. Could I ask you to speak loudly, please? If you don't understand my question, please tell me. What's your full name?---Leanne Oldfield.

And did Kumanjaya Walker call you Mum?---Yes.

Did he grow up with you?---Yes.

And with your family?---Yes.

And a couple of years ago, where did you live?---511 at Yuendumu.

Whose house was that?---Margaret Brown.

Now, I want to ask you about the day that Kumanjayi got shot?---Yes.

Was there a funeral on that day?---Yes.

And whose funeral was that?---It was my uncle's funeral.

Was Kumanjayi close to your uncle?---Yes.

Did they do things together?---Yes.

And did you see Kumanjayi that day?---Yes.

I'm going to play you a part of a body-worn video. If you could look at that, and then I'll ask you some questions?---Yes.

MS CALLAN: Your Honour, can I indicate for the record what's about to played is a portion of the file named Rolfe, Zach, 2 of 4. And it's proposed to play from 9:50:21, Zulu time, through to 9:51:51. And we'll tender the video after it's been played.

HIS HONOUR: Thank you.

#### DVD PLAYED

MS CALLAN: I should correct, for the record, I just played through to 9:50 and 51.

MR STRICKLAND: I tender that, your Honour.

HIS HONOUR: Exhibit 26.

EXHIBIT 26 Part of body-worn video file titled Rolfe, Zach 2 of 4.

MR STRICKLAND: Did you see yourself in that video?---Yes.

And you saw a policeman?---Yes.

That was Mr Rolfe?---Yes.

And he asked you, 'Where's Arnold at'?---Yes.

And you told him that the House 511 was Margaret's; is that right?---Yes.

Was there a little girl next to you?---Yes.

Who was that?---My little niece.

Okay?---And- - -

How old is she?---She was maybe four.

And before the police came, did you see Kumanjayi Walker?---Yes.

Was he outside House 511?---Yes.

And whereabouts was he?---He was next to me and my partner.

Could you speak up, do you mind?---He was next to me and my partner.

Okay. And your partner was?---Nathan.

Okay. And where were you and Nathan and Kumanjayi?---We was next to the door.

Next to the door of 511?---Yes.

And what was Kumanjayi doing?---He was looking at the family photo.

Okay. And was he laughing?---He was laughing at the photo.

What was funny about the photo?---He had – two cousin was really small and Auntie was next to – in the swimming pool.

And what did he do after he was looking at the photos?---He was looking at the photo, then after – then he went inside.

How soon did the police come after that?---Soon as he went inside, I seen the police coming through the gate.

Okay. Were the policeman walking quickly or slowly?---They was walking really quickly.

And did you see the policeman carrying any weapons?---Yes, I did.

What did you see?---I seen the guns.

Excuse me for one moment, your Honour. They're my questions, thank your Honour.

MR EDWARDSON: I have no questions of this witness, thank you.

HIS HONOUR: Yes. Thank you, you may go.

WITNESS WITHDREW

MS CALLAN: Your Honour, I call Assistant Commissioner Travis Wurst.

TRAVIS JAMES WURST, sworn:

XN BY MS CALLAN:

MS CALLAN: Sir, could you tell the court your name and current rank?---Travis James Wurst, Assistant Commissioner of the Northern Territory Police.

As at 9 November 2019, were you the Acting Assistant Commissioner for Regional Operations and Road Policing?---I was.

And did that include responsibility for deployments of police resources in the Northern Territory, outside Darwin, Batchelor and Adelaide River?---That's correct.

Could I ask the witness be shown exhibit 1, tab 3.

Assistant Commissioner, this a former organisational chart that's been prepared for the purpose of these proceedings. So all it seeks to do is set out certain individuals, and the command structure, as it pertains to them. Do you see your name at the top, under the blue box, "Assistant Commissioner"?---I do.

And below you, "Commander Southern, Brad Currie"?---Yes.

And then below him, there's a number of superintendents?---Yes there are.

Including Superintendent Southern Desert Division, Jody Nobbs?---Yes.

And appreciating this is not a comprehensive chart of the position, as at November 2019, does it accurately, at least reflect the command structure between yourself, Commander Currie and Superintendent Nobbs?---Yes it does.

And then below Superintendent Nobbs, again, does it accurately reflect what is relevant for the purposes of this case in terms of the way that the stations in remote communities in the Southern Desert Division were structured, and the Alice Springs Police Command?---To my recollection, yes. Obviously there's more stations within the Southern Desert Division.

Yes?---But for this purpose, yes it's true. An accurate reflection.

Assistant Commissioner, on 9 November 2019, did you receive a phone call from Superintendent Jody Nobbs?---I did.

And what did he say to you?---For the first phone call I received on that day, was received at about 1.51 pm in the afternoon.

Yes?---During that phone call, he told me things. They related to the current situation at Yuendumu, and his request for additional resources to support the police at Yuendumu at that time.

MR EDWARDSON: Your Honour, if it's of assistance, I have no difficulty with this witness referring to his statement dated 20 August 2020, if he just wants to recite accurately what's set out in that statement.

MS CALLAN: With that being the indication, Assistant Commissioner, do you have with you in the witness box, a copy of the statement that you prepared on 20 – sorry I'll just get the date - - -

MR EDWARDSON: 20 August 2020.

MS CALLAN: - - - 20 August 2020?---I do.

And in circumstances where counsel for the accused has indicated no objection, could I ask you to refer to that statement at par 15?---Certainly.

And by reference to that paragraph, could you tell the jury, what it was that Superintendent Nobbs told you about the current situation at Yuendumu?---Certainly. And reading from the statement, "Nobbs told me certain things during this phone call. That Kumanjayi Walker was still at large, and believed to be in the Yuendumu Community, after threatening police and escaping police custody on Wednesday, 6 November. He was still an outstanding arrest target in relation to a breach of a suspended sentence. And the incident on 6 November. That health staff – several health staff houses were broken into over Friday night into Saturday morning period. And this had caused considerable alarm for the health staff at the Yuendumu Health Clinic." Paragraph C, "The Yuendumu Clinic had – was going to, or had already closed. And clinic staff were – had left, or were leaving Yuendumu. So there would be no health services in the community." D, "That there were only two staff available at Yuendumu, Hand and Sergeant Julie Frost, and they were suffering from fatigue, due to working long hours leading up to this point."

Can I stop you there? Can you then move to par F and continue?---F, "Support was required for the existing Yuendumu staff, to give them some respite, as well as allowing for the development of a plan to bring Kumanjayi Walker into police custody." G, "There was a – there was a funeral to be held in the community later that day. The family for Walker were going to hand him into police after the funeral." H, "That health staff will not likely return to the community without additional police numbers available to respond to the required work load, at that point in time." I, "that he, Nobbs, intended to deploy staff from Alice Springs to assist at Yuendumu, and give the members stationed there some respite overnight." J, "That the staff he intended to deploy were staff from the Alice Springs based IRT, who would be wearing normal police uniform. The reason the request focused on this particular team, is they were known to be readily – known to readily respond to calls for extra duty assistance. And this would be the most timely and efficient" – "effective", sorry, "approach to deploying additional resources." K, "The IRT were to be deployed in a



general support capacity only.” L, “He also wished for a patrol dog handler and his dog to also be deployed if they were available.” And M, “He sought my approval to deploy these additional resources into Yuendumu to support the local police. The question was asked of me, directly, due to the unavailability of Currie.”

I'll ask you about that last point N in a moment. But could you, by reference to par 16, tell the jury what you and Nobbs did, him having told you that information?---So the information that I've just explained, Superintendent Nobbs and I had a detailed and in-depth conversation about those points. And to allow me to understand his rationale for wishing to deploy additional resources to ensure that any decision made was evidenced based at that point in time.

And did you verbally approve the deployment of four IRT members and one dog handler?---I did.

And were they all to be in the community, as general support, to the permanently attached police at Yuendumu Station?---That was my understanding, yes.

You were told by Superintendent Nobbs, and what you approved was a general support deployment of the IRT?---Yes, so it wasn't necessarily the IRT as it was understood. It was the members within, to provide additional support. So the IRT, as I understood it, was just a collection of frontline officers from within Alice Springs. And the explanation provided to myself was they – that that – that the people attached to that unit or were linked to that unit, whenever there was a requirement for extra duty, they were responsive. And that was why Superintendent Nobbs chose to reference that particular group, or those individuals, that were linked to that IRT.

Could I ask the witness be shown exhibit 14?

Assistant Commissioner, this is a document titled Standard Operating Procedures for the Alice Springs Immediate Response Team. Is that a document that you've encountered in your work? You'd see, on page 2, it was – it's dated 30 June 2017?---No, I've never seen this document before.

Can you turn to page 4? You see under the – about halfway down the page, there's a paragraph numbered 1.1 titled, “High-Risk Deployment”?---Yes.

And immediately below that, sentence: “Any high-risk deployment of the IRT requires Assistant Commissioner approval”?---Yes.

Does that accord with your expectation or understanding in terms of the command requirements for the deployment of the IRT for what had been assessed as a high-risk deployment?---No. No, this was not fitting into that category. It was not, in my view, deemed a high-risk deployment.

That is, the deployment to Yuendumu was not, in your view – you didn't understand it to be a high-risk deployment in the sense described here?---No. It was a

deployment to provide general support to the police officers who were currently serving at Yuendumu.

Could you turn over to page 5. About a third of the way down, there's a paragraph number 1.2, with the heading General Support Operations?---Yes.

Then 1.2.1, Support to Other Units. And it commences, "IRT are available to assist other units, including but not limited to," and then there are a number of tasks listed?---Yes.

Was this the nature of the deployment that you understood and approved for the IRT that day, to go to Yuendumu?---Not necessarily. So Superintendent Nobbs was intent on providing additional support into Yuendumu.

Yes?---And that could've been any frontline members. They didn't have to be linked to this particular team. But again, his rationale was, as I understood it, that if he were to be able to provide timely respite, then using staff that were linked to the IRT in a general policing capacity may be able to assure that respite was expedited. It wasn't necessarily seeking members of the IRT to be deployed.

You used the word, "Timely respite." Respite for who?---For the police at Yuendumu. So I received a call at 1:51. Our conversation took 10 to 15 minutes. Yuendumu is a number of hours from Alice Springs and that's already mid-afternoon.

Yes?---And that's the point that I make about time and if respite was to be provide to those police at that community, then the whole process around identifying additional staff and having them recalled to duty and then deployed takes time. And that was the essence of Mr – Superintendent Nobbs' intent, was to make that deployment timely.

Did he – that is Superintendent Nobbs – provide you with any information as to the way the respite was to be provided to those local members? How would it give them respite?---So as I understood, there were only two police officers available for duty at Yuendumu at that time. And additional resources would allow – and if we had – had some concerns the night prior around property offending, it would give the opportunity to be able to conduct patrols that didn't require the police from Yuendumu. Additional police could provide that service to the community without those that were currently attached to Yuendumu doing that, to allow them to rest and receive respite.

A few minutes ago in your evidence when you were reading through some of the content from par 15 of your statement, you gave evidence by reference to subpar (m), for Margaret. "The question was asked of me directly due to the unavailability of Currie." Do you remember giving that evidence?---Yes, I do.

And why – what was the command position in terms of approval of these additional – these officers being deployed to Yuendumu?---So because of Jody Nobbs' intent – Superintendent Nobbs' intent to utilise the staff from the IRT, he chose to contact the

chain of command to seek that approval. At that time, Commander Currie was unavailable. He was out of range and non – uncontactable. As a consequence of that, I had availed myself to everyone within Southern Command if they had any decision-making requirements or approval requirements to contact myself as a substitute for Commander Currie and his decision-making authority.

But the case, Assistant Commissioner, that your – the next phone call you received in relation to Yuendumu, was after the shooting had occurred?---Yes.

That's the evidence-in-chief, your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Assistant Commissioner, when you received the initial approach from Superintendent Nobbs – and in particular, the phone call that you've described and you went through, I think, from A to J or thereabouts, by reference to your statement – the topics that were discussed?---Yes.

I want to focus a little bit, if I can, on the deployment itself. What you – you are only as good as the information that Superintendent Nobbs provides to you?---Yes. I also have a responsibility to seek further information as required.

All right. Were you aware, as at 9 November 2019 when you received that telephone call from Superintendent Nobbs, were you were aware of an incident that involved two other police officers by the name of Hand and Smith, an incident that involved an axe – or the use of an axe – by Kumanjayi Walker on 6 November 2019?---Yes.

How did you come to be aware of that?---On the Thursday prior – so that would've been the 7th – I received an email from Commander Currie, of which I was recipient as – along with others, indicating that the – as a consequence of what occurred on the 6th, efforts were being made to provide support to police at Yuendumu and negotiations in relation the safe apprehension of that person were underway.

Had you, at that stage – or have you ever – seen the body-worn video worn by the two officers concerned? That's Officers Hand and Smith?---I have seen it, but I saw it after Saturday 9 November.

So after your approval to Superintendent Nobbs for the deployment of, as it turns out, the four members of IRT supported by a man by the name of Donaldson – Constable Donaldson, who was a dog handler?---Yes.

So at that time, you were aware of the incident but you hadn't seen the footage?---No.

Having seen the footage, would you accept that it's incredibly confronting?---Yes.

Would you accept that it's the sort of indicator to police of the potential of this individual – Kumanjayi Walker – to be of violent disposition?---It could be perceived that way, yes.

It's of concern is it not, that at the time that those two police officers, Smith and Hand, attempted to arrest Kumanjayi Walker, he deployed an axe which clearly could've have been a lethal weapon, had he used it?---He did.

And that tells you, does it not – and tells any police officer concerned – that he is potentially a high-risk offender with a violent disposition?---He is potentially, yes.

Did you, when you were considering the deployment of the members of the IRT, access PROMIS to inform yourself of the extent of his criminal history?---No, I did not.

So, had you done - and have you done that at any stage?---No, I have not.

So you weren't briefed, for example, by Superintendent Nobbs as to the extent of his criminal history in addition to what I will call "the axe incident" which occurred on 6 November 2019?---Our discussion highlighted the incident on the 6th and the fact that he had an outstanding warrant in relation to a breach of suspended sentence.

Did Superintendent Nobbs, in the conversation you had with him when he was seeking your approval for the deployment of the IRT members, express his intention that he wanted to send out - and I quote, "Highly skilled, highly trained, highly disciplined, highly competent capability from Alice Springs that worked together frequently?---No.

Did he express anything in those terms?---No.

Would you agree that that description is a proper description of IRT members?  
---I can't answer that, I don't know. I don't know what their current capacity is or what their capacity was at that stage.

So you didn't know when you gave approval, what their capacity was at that stage?  
---I know that the IRT is constructed of frontline members who are trained as police officers and that's what they were going out there to be.

Sure. Have you ever had any direct involvement with IRT?---I was involved in its inception in Alice Springs in 2015.

They are certainly a step up above what I will call "general duty police officers" - they are frontline officers?---They are - "frontline" can be a combination of general duties police officers or investigators.

And you would understand therefore, given that you were involved in their conception, that they are intended to be highly skilled, highly trained, highly disciplined, highly competent individuals who work together frequently?---At that

point in time none of that was the case because it was being developed from a conceptual idea to come into fruition. So at that point in time I wouldn't suggest that was the case at all, when my involvement was - - -

When you say "At that point in time" you're talking about now when it was - it's first - its inception?---Correct.

I am talking about the position that existed at the time that you approved their deployment?---I don't know how it had matured, what its status was at that point in time. As I say, I wasn't deploying the IRT as the IRT, I was deploying officers to support the police at Yuendumu for a respite.

So, in short, as at 9 November 2019 you didn't know the extent of their training or their capability?---No.

And, as I understand it, Superintendent Nobbs did not convey to you his intention was to send out highly skilled, highly trained, highly disciplined, highly competent capability from Alice Springs that worked together frequently?---So, IRT, no, but a patrol dog and handler - sorry, patrol dog handler and dog, fits into that category but not necessarily working with others. That individual is highly skilled and highly trained.

I will ask the question again, Assistant Commissioner. If you could just grapple with the question please. Superintendent Nobbs did not express to you in any conversation he had for approval for the deployment of IRT members, of his intention to send - that his intention was to send out highly skilled, highly trained, highly disciplined, highly competent capability from Alice Springs that worked together frequently?---Not to my knowledge.

Not just because of the axe incident but because of the criminal history of this man, Kumanjayi Walker?

MS CALLAN: I object. What is - the question commenced with "not just - in my submission it is - there is a non sequitur - - -

HIS HONOUR: Yes, it's - - -

MR EDWARDSON: I withdraw the question.

HIS HONOUR: Yes.

MR EDWARDSON: Were you informed by Superintendent Nobbs when he made the approach for your approval, that there was a warrant for the arrest of Kumanjayi Walker which was outstanding?---Yes.

And were you aware that it was that warrant that was the justification for Smith and Hand seeking to arrest him on 6 November?---I don't know whether that

conversation occurred at that time but I was aware that was the case from the previous correspondence on the Thursday.

And were you informed expressly by Superintendent Nobbs in the context of seeking your approval, of these IRT members, that there was as likely prospect that he may not surrender - that is Kumanjaya Walker - if approached by police?---So, my understanding was that the intent around the apprehension that related to the funeral that was going to occur later that day and then efforts would be undertaken utilising family and family relationships to facilitate surrender.

I mean, it doesn't have to be exact, but in broad terms can I suggest what was conveyed to you was, in an ideal world he would surrender himself without the need of force?---Correct.

But were you informed that there was every likelihood, because of what had happened for example, on 6 November 2019 when he deployed this axe against Smith and Hand, were you informed that there was every chance that whatever the police hoped might happen, Kumanjaya Walker would not surrender?---There's obviously always that potential.

And that because he had used that axe on that 6 November and because it was unlikely that he would surrender, it was important to have officers who had specific skills and training to assist in his arrest?---Not necessarily. In remote areas you conduct policing duties all the time where you don't have support of people as you have so described.

I understand that?---Frontline officers deal with that all the time.

I am asking you though, what information was conveyed to you?---As I've described.

Right. At any stage were you advised or informed that the IRT members would be directed by the officer-in-charge, to go out into the community and intelligence gather?---No.

Were you ever informed that they were told specifically to gather intelligence to try and identify where Kumanjaya Walker was within the community?---No, I was not.

Were you ever informed that the police simply did not know where Kumanjaya Walker was on 9 November when the IRT members were deployed?---I was informed that he was in the community and that was the only information I was provided.

Were you ever told that because the police had no idea where he actually was, it was important for the IRT members to find out where he was by way of intelligence gathering?---Was I informed of that?

Yes?---No, I was not.

Were you ever told that the IRT members were deployed by the officer-in-charge at 7:05 pm on the evening of 9 November - - -

MS CALLAN: I object to - in my submission there is no relevance in this witness' evidence as to what he was told. It seems after the events of the shooting - - -

HIS HONOUR: Are you asking the witness whether he was told beforehand that they would be deployed?

MR EDWARDSON: Yes.

HIS HONOUR: So - - -

MR EDWARDSON: I will rephrase the question.

HIS HONOUR: Yes.

MR EDWARDSON: At any time was any information - when you gave this approval were you being updated between the approval being given and ultimately you being told or informed about the shooting itself?---No, I was not.

So therefore you had no understanding of when the IRT would be deployed?  
---Not specifically.

Were you ever told of the existence of a so-called plan of arrest?---Other than being advised by Superintendent Nobbs of what the plan that would be developed would be.

Right, so you have already given evidence about your conversation with Superintendent Nobbs and that's a comprehensive and extensive statement of the communication that occurred between you and him - and that's the extent of the communication that occurred between the two of you?---Correct.

And then as it works, it then goes down the chain of command, doesn't it?---Yes it does.

You give the approval, that's given to Superintendent Nobbs, he then facilitates, with your authorisation as it turns out, the deployment of the IRT members?---Yes.

And then it finds its way down to the officer-in-charge and we know that the officer-in-charge in this case of the Yuendumu Police Station was Sergeant Frost on the night in question?---Yes, as I understand.

Thank you.

Your Honour I have nothing further.

REXN BY MS CALLAN:

MS CALLAN: Assistant Commissioner, as officer-in-charge at Yuendumu Station, Sergeant Frost has command responsibility for the four officers plus the dog handler who deployed from Alice Springs on 9 November?---Yes, she would have.

You were asked if you were told of the existence of the plan of arrest and in answer you said that Superintendent Nobbs told you what the plan was to be?

MR EDWARDSON: Your Honour, I object to that question. Assistant Commissioner made it absolutely clear that insofar as there was any discussion about a plan, the whole of the conversation that occurred is exactly as he set out in his statement, and in his oral testimony. Nothing further.

HIS HONOUR: It does seem to be the case.

MS CALLAN: But in my submission, the question arises, from the witness' evidence in cross-examination, and the position - - -

HIS HONOUR: I'll allow you to ask it.

MS CALLAN: Thank you.

What was it that Superintendent Nobbs told you as to what would be the plan?---The plan related to negotiating with family after the funeral to have Kumanjaji Walker surrender himself, or present himself at the police station.

Assistant Commissioner, have you had experience policing in the Northern Territory in remote Indigenous communities?---I have.

And over what periods – period of time?

MR EDWARDSON: I object to this question, your Honour, how - - -

HIS HONOUR: How does that arise out of cross-examination?

MS CALLAN: Your Honour, the witness gave evidence that frontline workers deal with that all the time. I'm seeking to clarify that answer, but to do so, in my submission, it is relevant for the witness to indicate his experience in – for frontline officers in remote Indigenous communities.

MR EDWARDSON: Your Honour, I maintain my objection, because at the end of the day, what's important, are the officers who are actually deployed, and it's their state of mind. What they did on this occasion. Not what this officer might have done, could have done, or would have done.

MS CALLAN: I'm not seeking to ask this officer - - -



HIS HONOUR: I don't see how it can be of any assistance to the jury to understand what frontline officers in the Northern Territory have to confront on a day by day basis.

MS CALLAN: Yes, your Honour.

HIS HONOUR: What we're concerned about is what happened here.

MS CALLAN: If it please the court.

Could the witness be shown exhibit 1, tab 9.

I think you've still got that exhibit before you there, Assistant Commissioner.

MR EDWARDSON: Your Honour, I object to this line of cross-examination too. That wasn't explored in examination in chief, nor in cross-examination. It's simply a communication - - -

HIS HONOUR: Well why are you taking the witness to this?

MS CALLAN: All I was seeking to do, your Honour, was have the witness identify whether the email at the bottom of that chain, was the email that he's referred to in cross-examination, as having been an emailed received by him from Commander Currie, on 7 November 2019.

MR EDWARDSON: I don't think I asked a question about Commander Currie.

MS CALLAN: The witness was asked if he was aware of an axe incident which had occurred on 6 November 2019 - - -

HIS HONOUR: Yes.

MS CALLAN: - - - and the answer, the witness referred to having been told about that via an email from Commander Currie on 7 November 2019.

MR EDWARDSON: I withdraw my objection.

HIS HONOUR: Yes.

MS CALLAN: Assistant Commissioner, you've heard that exchange. The bottom half of that page, which appears behind tab 9, is that the email that you were referring to that you received from Commander Currie?---Yes it was.

Just one moment, your Honour. Those are my questions, thank you.

HIS HONOUR: Thank you.

Thank you, you may go.

WITNESS WITHDREW

HIS HONOUR: I might at this point take the morning adjournment, rather than starting a witness and stopping again shortly.

So members of the jury, would you retire please.

JURY OUT

MR STRICKLAND: Can I just raise one thing, your Honour? Can I raise one thing?

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, in relation to this – the next – the next witness is Mr Hawkings.

HIS HONOUR: Yes.

MR STRICKLAND: And as I indicated, I don't intend to ask – make any application to s 38 before completion of the whole examination in chief. But just to make it clear, I don't say the same about s 32. If that does arise, it arises.

HIS HONOUR: Yes.

MR STRICKLAND: Thank you.

HIS HONOUR: All right, I understand that.

I'll adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Bring the jury in, please.

JURY IN

MR STRICKLAND: I call Anthony Hawkings.

ANTHONY HAWKINGS, affirmed:

XN BY MR STRICKLAND:

MR STRICKLAND: Senior Constable, can I ask you to speak up?---Yes.

If there's anything I ask you, you'd like me to repeat or you don't understand, please say so?---Certainly.

What's your full name?---Full name is Anthony Charles Hawkings.

And your rank?---I'm a Senior Constable.

How long have you been in the Northern Territory Police Force?---Approximately eight years.

And before that, what did you do?---I was a police officer in the New Zealand Police.

For how long?---From 1998 up until I came here.

Okay. Now, in November 2019, were you stationed at Alice Springs?---I was, yes.

How long had you been stationed at Alice Springs for?---Since 2014, I believe.

And were you also a member of the Immediate Response Team?---Yes, I was.

When did you join that?---Approximately a year prior to that date.

I want to ask you about the events of 9 November 2019. Did you receive a call from someone to be deployed to Yuendumu?---Yes, correct.

Who did you receive the call from?---From Senior Constable Shane McCormack.

And when was that, approximately?---I believe it was sometime in the afternoon of the Saturday.

The 9th?---The 9th.

Of November?---Yes, correct.

What did he say to you, as best as you can recall?---From what I recall, something along the lines of, "I know you're freshly married up however, we have a call-out, or some words to that effect, "Are you available".

And what did you say?---I think I first said, "Is there anybody else available?" And

I think he may have said, "No, there's nobody else available" so I obliged.

And was there anything else in that call you can recall?---I think in relation to it being an IRT callout.

Yes?---I think it was an explanation of us going to - I think Yuendumu, for an arrest target.

When you say "an explanation" - from Sergeant McCormack?---Yes, yes, just as - like I say, from what I recall it was an arrest target.

Did you have a discussion about whether you would - what kit you would take?  
---Yes, I believe I asked if we were going in our full IRT kit.

What did he say?---No, he - I think he replied, "No, you're to come in your police blues" - police uniform and yeah, I queried it, to which he replied, "That's what I've been told, I think Superintendent Nobbs said to go in your blues" which is your police uniform. "However, bring your kit with you."

And what did you understand that to me?---To be my IRT kit.

And what is in your IRT kit?---It consists of a different type of uniform, a camouflage type uniform, standard police accoutrements along with a ballistic type vest, an AR 15 rifle, standard issue for IRT.

You said "standard police accoutrements"?---Yes.. As in - - -

What are they?---Which would be your standard accoutrement belt, your handcuffs, baton, oleoresin capicum spray, your Glock pistol, ammunition, etcetera.

So after you received that call, did you go to Alice Springs Police Station?---Yes, not too long after, yes.

And who did you see when you got there?---I spoke with - I think Sergeant - sorry - Senior Constable Shane McCormack, Zachary Rolfe and James Kirstenfeldt I believe.

Did anyone else join you later on, at Alice Springs Police Station?---Yes, another member, Adam Eberl.

Did you receive any briefing when you - when you were at Alice Springs Police Station?---I was shown a video of an incident that occurred a few days prior, involving an axe and police officers and was told that this - well, informed I think from memory - that this is the person that we're potentially who was our target.

And who showed you the video?---I'm pretty sure Zach - Zachary Rolfe showed me that video.

Who was the most experienced IRT officer in the group you have mentioned?  
---It would be Zachary Rolfe out of the four of us, he'd been in longer than us.

So Zach Rolfe showed you a body-worn video of what is described here as "the axe incident" is that right?---Yes.

How many times did you watch it?---It may have been once. It may have been twice. I honestly can't recall.

Do you recall if there was any discussion about what you were watching - amongst the IRT members?---I think - I don't - I honestly don't recall any words that were spoken, no.

And did anyone give you a briefing?---There wasn't a formal briefing of any type, to my knowledge.

Did anyone lead the discussions about what was going to happen?---We - I think the four of us were discussing obviously travelling out there to get to the Yuendumu Police Station to - for the briefing or go from there. Yes, it was a brief chat.

What did you understand your purpose was in going to Yuendumu?---At that point it was to go and look for the arrest target in relation to that incident.

And the arrest target being?---It was Kumanjayi Walker.

And how long were you at Alice Springs Police Station for?---I honestly couldn't tell you, maybe 15 - 20 minutes. Thinking about it from now - it's two and-a-half years ago almost, so.

Was Senior Constable Shane McCormack part of that discussion about your purpose in going to Yuendumu?---I honestly couldn't tell you, to be honest. I don't recall.

Who do you recall actually speaking during the discussion?---Well, the four of us members from - that were there, myself, Adam, James and Zach, would've had a brief conversation.

So you left Alice Springs for Yuendumu?---Yes.

And who did you partner in the - which person did you travel with to Yuendumu?  
---I travelled in a vehicle with Constable Eberl.

Did you have any discussion with Adam Eberl about what you planned to do when you got to Yuendumu?---I honestly don't recall. It's a three and-a-half hour drive I think, and we would've had a lot of discussions about a lot of things but I honestly wouldn't know what we discussed to be honest.

Could the witness please be shown exhibit 2?

THE WITNESS: Thank you.

MR STRICKLAND: Could you go to tab 4. Just wait until the members of the jury get their bundle out. Do you see there are some numbered photographs?---Yes.

At the top right hand side. Can I ask you to go to photograph 8 - 18 I am sorry, 18, apologies? Now, I want you to assume this is a CCTV still at the Yuendumu Police Station?---I think so, yes.

Do you see you there?---I believe that could be me carrying the bags.

And if you just - well no, sorry, I am the person behind.

You are the person behind?---Yes.

Perhaps just go - have a look at the next - have a look at the photos between 18 to 24. You can see yourself in those photographs - or some of those photographs, is that right?---Correct.

So, does that accord with your memory that you arrived at Yuendumu at about 6:56 pm?---That's what it shows, yes, I would take to believe that, yes.

Now, when you arrived at Yuendumu station do you recall what you did?---I think - I'm pretty sure we arrived - like the photographs depict, we arrived with our equipment and took our equipment into the main muster room area.

And do you remember after you did that, if there was a - did you see the other members of the IRT there?---Yes, I recall seeing Zachary and James, who had arrived earlier, prior to our arrival.

And did you see any other officers when you arrived at Yuendumu?---I recall seeing Sergeant Julie Frost and I think Senior Constable Chris Hand, are the two that I recall from memory.

Had you met Julie Frost before?---Yes.

In what circumstances?---It may have been a year or so, may be not quite that long, but sometime before I was called out with another police officer to assist with crime rate that was occurring out there, to relieve members in relation to fatigue, I believe.

Was that at Yuendumu?---Yes.

And how long were you there for?---I think I was there overnight.

And was that the only time you'd been to Yuendumu, that - on that occasion, about a year before?---No I had been there before. Some years before, in a similar capacity, to assist members, many years before though.



And how long had you been at – to Yuendumu on that occasion?---I think an overnight or two, yeah.

Had you ever met Kumanjaji Walker before?---No I don't believe I have – had.

Never seen him before?---No.

So you said you've seen those people you mentioned. Do you remember there being any briefing after you arrived at Yuendumu Station?---From what I can recall, I arrived with Constable Eberl, and spoke to Zachary and James. I may have said hello to the other two members that I mentioned that were already there. And yeah, we just had a brief discussion.

With those people you've mentioned?---Mainly with Constable Rolfe and Kirstenfeldt, to my knowledge.

Do you remember Julie Frost giving you a briefing when you – after you arrived?

MR EDWARDSON: Your Honour, my friend mustn't lead.

MR STRICKLAND: Well I - - -

MR EDWARDSON: The witness said that Julie Frost gave a briefing at all, and posing the question that way, do you remember Julie Frost giving a briefing. It's plainly leading, and impermissible.

MR STRICKLAND: I press it, your Honour. It's not leading in my respectful submission.

HIS HONOUR: I don't think that it is leading as that is defined in the *Evidence Act*.

MR STRICKLAND: Did Julie Frost give you a briefing?---I don't recall any formal briefing discussing anything in relation to a formal type briefing, other than – it was very, very minimal. It was – from what I recall it was a hello, how are we. I think the briefing that we had was a quick chat with – with Constable Rolfe and Kirstenfeldt, from what I can recall.

So you recall Julie Frost saying hello how are you?---Yes I believe there was a welcome. I don't recall if she said hello how are you, but it was a – you know, a peer welcome.

Do you recall her saying anything?---I honestly – I know that there would have been a few discussions, hello, how are you et cetera, but I honestly don't recall that conversation.

Do you recall her talking to the group?---I don't recall it. She may have, but I don't recall it.

Did you have a notebook at the time, a police notebook?---Yes I did.

Did you jot anything in your notebook?---I think I had jotted arrival Yuendumu, and the time that I arrived. And that was all that I'd put in it.

Did you jot anything else down in your notebook?---Not to my recollection, no.

Did you – do you have your notebook?---No I don't.

Do you know what happened to the notebook?---No, I don't. I – it went missing sometime after. And I put through an email to my supervisor to say that my – my notebook is not where I usually have it, so. I haven't heard back as to where that is.

I'm just going to play you a part of a CCTV footage, and then I'll ask you some questions?---Sure.

Your Honour, I'm playing part of exhibit 10.

So I'll play from – I'll play from, just because we're here, from 6.59.12 pm.

DVD PLAYED

MR STRICKLAND: Now we're approximately 19 seconds past 7 pm. Did you see yourself coming into the muster room?---I think so, yes.

We'll continue and see if you can see yourself.

DVD PLAYED

MR STRICKLAND: So the person you can see on the screen, is that Adam Eberl?---Yes I believe it is.

And so the person that came in, in front of him, was that you?---I think it was.

Is there anyone else it could be?---Sorry?

Is there anyone at the police station it could be?---Not to my knowledge.

Have a look at exhibit – let's go to exhibit 2 please, again. And just have a look at the photographs. I'm just showing you the photographs just before 7 pm, say at 30 – at 30, 31, 33, do you see yourself in any of those photographs?---Pretty sure on photograph 32, that's me. Possibly 30, standing by the red swag. Pretty sure that could be me.

Just go to photographs 38 and 40. Do you see yourself in either 38 or 40?---Yeah I believe that's myself.

At photographs 38?---38 and Constable Eberl, maybe, on 40.

All right, so does that suggest that you entered the muster room first?---Potentially yes, looking at that, yeah. I don't recall at the time, if I was first, second, third or fourth.

Okay, what I'll do, I'll just rewind it just a little bit, just 10 – 20, and see if we can – you can see who it is that comes in before Adam Eberl.

DVD PLAYED

MR STRICKLAND: Pause there?---I think that's me, first.

Right that's about seven – okay, right.

Yes, continue on please.

DVD PLAYED

MR STRICKLAND: And just pausing there.

So seeing that, do you recall being in the muster room, from that time?---Yes.

And do you recognise Julie Frost?---Yes I do.

Thanks.

I'll just continue on.

DVD PLAYED

MR STRICKLAND: Pause.

And can you see you came into the muster room then?---Yes.

This is now at 7:03 pm and 10 seconds. Who was that?---That's – I think it's Senior Constable First Class Adam Donaldson- - -

And who- - -?---The dog operator.

Thank you. Yes, thanks.

Continue on, please.

DVD PLAYED

MR STRICKLAND: Pause there.

So having seen that long five minutes, do you believe you were in the muster room that whole period?---I think so, yes, by the looks of that video.

Okay. Do you recall what was discussed in that period?---Like I say, I think it was an introduction. People were arriving. I think we may – speaking to Constable Rolfe and Kirstenfeldt. We were informed that there wasn't a lot of information to go from in relation to what we were going to do.

And you said, "We were informed" – by whom?---I'm thinking about it now, I can only assume by Sergeant Frost.

I'm not asking you to assume- - ?---Yeah.

- - -do you recall?---Yeah, I don't recall who – by who. No.

And you said that you didn't, "Have a lot of information to go from in relation to what we were there to do." Was there a discussion about what you were there to do?---I don't recall.

Okay. Is there anything else you can recall – do you recall if Zach, Mr Rolfe, said anything?---Sorry, could you repeat that?

Do you remember if Zach Rolfe said anything during those five or six minutes?---From memory – from now, I don't recall what was said exactly.

Do you recall if you said anything?---I don't recall what words I would have said during that time, to be honest.

Or do you recall what any other members of the IRT said during that five or six minutes?---Not from now, no.

Okay. All right. Do you remember looking at any documents or maps?---I do recall a map – and I may have mentioned that in my previous statements – that I recalled seeing a map of the Yuendumu location.

Okay. And who gave you the map?---I believe that was passed to me by Zach Rolfe.

Was it laminated?---I don't recall.

What was the size of it?---It was either A4 or A3. I honestly don't recall, but it was a map. So- - -

Was there any discussion about what you were to look for on the map?---Yeah, I believe the – there was a house where we were going to go and make enquiries at.

And what house was that?---Having thought about it, I'm pretty sure it was House number 577, on the other side of the – the oval in Yuendumu.

Did you note that, in your notebook?---I don't recall.

And what was said to you, if anything, about House 577?---I don't recall other than, I believe, we were going to – that was going to be our first place to make an enquiry as to the – our target's whereabouts.

Did anyone say why that was the first house to make an enquiry?---Honestly, don't recall.

Do you recall being shown or seen any email at Yuendumu?---I do not recall that at all, no.

So I'm just going to show you a couple of documents.

Could the witness please be shown exhibit 1, tab 12?

THE WITNESS: Thank you.

MR STRICKLAND: I'll take you to the email at the bottom of that chain from Shane McCormack to a number of people, copy – a number of people including you. That 9 November, 4:22 pm. Do you remember receiving that email?---I don't recall seeing that, no – receiving that email.

Do you want to have a look at it? Do you want some time to look at it?---Yes, please.

Yes, please do. So do you remember receiving that?---No I don't.

Do you remember receiving it – or do you remember reading a print out of it when you were at Yuendumu?---I don't remember that at all.

Do you remember discussing this with any members of the IRT?---No I don't.

Or with Mr Kirstenfeldt?---No I don't remember that at all.

Thankyou. Can you go to tab 14 please? It's an email from Julie Frost to a number of people, including you, 9 November 16.40. – 16.59, just have a – take your time if you like. Just have a look at that email. It's four pages. Just tell me when you finish that?---Yes.

Do you remember receiving that email on 9 November?---No.

Do you remember getting a print out of that email, receiving it, or seeing it, at Yuendumu Police Station, on 9 November?---I do not recall.

MR EDWARDSON: Your Honour, I object to this continual question. Every question starts with, "Do you recall", my objection to is, it presupposes that an event happened. And that's not fair to the witness. My friend is not entitled to lead. He

can ask the question, did you receive the email. He can certainly phrase it in that way, but he cannot, as he has done, time and time again, start the question with, "Do you recall", as though it's something that happened. And it's contrary to the evidence of other witnesses in this case, as your Honour's well aware. And it's very unfair.

HIS HONOUR: I don't necessarily agree with the proposition that starting the question with the words, "Do you recall" implies that the event happened.

You continue, Mr Crown.

MR STRICKLAND: Thank you, your Honour.

MR EDWARDSON: Your Honour, just for the record, the case is *R v Willis* (1985) 39 SASR 35(?).

HIS HONOUR: All right thank you.

Yes, continue Mr Crown.

MR STRICKLAND: Did you receive any print out of this email when you got to Yuendumu Police Station?---I do not recall receiving a print out, no.

If you go to page two. Under the heading, at the bottom of page two, under the heading "Plan day one." Did you hear any discussion about the IRT commencing duty at 11 pm?---I don't recall that at all, no.

Did you hear any discussion about the IRT conducting high visibility patrols and responding to call-outs?---I do not recall that, no.

Did you hear any discussions about – on the Sunday, 10 November, at about 5 am, having a plan for IRT members to effect the arrest of Kumanjaya Walker?---I don't recall that, no.

Can you go to page three, under the heading "Implementation of plan", the heading "Locations of interest." Did you – you've referred – you've given evidence about House 577. Did you hear any discussion about House 577 being Mr Walker's primary residence?---I don't recall that at all, no.

Did you hear any discussion about any other houses, apart from House 577?---Not that I can recall.

Can we just play that a little further please.

I'm playing exhibit 10, from 7.05 pm.

DVD PLAYED

MR STRICKLAND: Just pause there for a moment please.

We're at 7.05.40. Do you see some officers picking up or having something in their hands?---Yes.

And do you know what those documents were?---I honestly could not tell you what they are, or were.

Thank you.

#### DVD PLAYED

MR STRICKLAND: Pause please.

So approximately 7.06.27 – 29 seconds, you can see the IRT members leaving?---Yes.

Did you see yourself leaving?---Yes.

Were you the – what was the order? You the last, or second last, or third last?---I was last.

You carrying anything?---Yes.

What are you carrying?---I was carrying a patrol rifle, an AR15.

So when you left the station, where did you understand you were going to go to?---I believe the far house on the other side of the oval. I believe it was 577.

And what did you understand you were going there to do?---To make enquiries in relation to our target.

Being Kumanjayi Walker?---Correct.

And what did you understand was going to happen if you located the target at 577?---Well if he was at the address, he would have been arrested. Taken into custody, and transported back to Alice Springs.

And if he wasn't, what was your understanding?---I believe we would have been making enquiries to determine where he may be.

Did you have any – did you understand if he wasn't going to be at House 577, whether there was any other particular place you were going to go to?---I'm sorry, could you rephrase that?

Sure. Did you have in your mind, when left Yuendumu Station, if he wasn't at House 577, was there any other house you were going to specifically go to?---I honestly could not – don't recall.

And were you going to keep making enquiries until you found him?---We would have naturally been investigating to his whereabouts.

Yes, but were you – was it your understanding, when you left Yuendumu Station, that you were to continue enquiries until you arrested him?---I can't remember what I was thinking at that particular time, but that – but I believe we were making enquiries to – to locate him, or to find out his whereabouts.

You recall going to House 577?---Yes I do.

And where did you go when you went to House 577?---I went – I believe it's the rear of the house. I walked around to the rear of the house.

And you still had your AR15?---Yes, correct.

Do you remember speaking to anyone outside the house?---I believe there was a male at the rear of the house, an adult male. I may have made initial contact. I don't recall what I said, just a calm contact with him and then I believe Constable Rolfe may have spoken to him.

Were you there when Constable Rolfe spoke to him?---I wasn't beside him, no, I was outside a fence I think, from memory - a small fence - chain link fence - from memory.

So did you learn any information? Did you find Kumanjari Walker at House 577?---No, he wasn't at that address.

Did you receive any information from anyone about where he was likely to be?---Yes, the information passed to me by Constable Rolfe was that he had been told that he may be at the house on the other side of the oval.

Did he mention a number, do you recall?---I think it was 511.

And did you discuss then what you were going to do when you received that information?---Yes, we were going to go over and make enquiries to see if he was at that address as well.

Did you have any discussion with Mr Rolfe about what you were going to do when you got to House 511?---Yes, it was a brief - I think it was a brief chat as to what we were going to do - like we did with 577, Adam and I were going to take the rear of the address, we were just going to approach from the rear and Constable Rolfe and Kirstenfeldt were going to go from towards that front area.

Did you have any discussion with Mr Rolfe what would happen if any of you found Kumanjari Walker inside 511?---No, I don't believe so.



Did you have any discussion with Mr Rolfe about what you would do - what anyone would do if Kumanjayi Walker was found carrying a weapon?---No, I don't believe we discussed it.

When you say "we" you mean members of the IRT?---Yes.

Okay. So on - when you got to House - who did you go to House 511 with? Which officer?---With Constable Eberl.

And when you got to House 511 where did you go?---I went to the rear of that house.

I am just going to show you some footage. Your Honour, the footage I am about to show, would your Honour just give the usual direction to the public gallery that it is of a confronting nature?

HIS HONOUR: I am told that the video footage which is about to be played will contain material of a confronting nature so that any member of the public who is present in the court who fears that they may be affected by that, you may now leave. Thank you.

#### DVD PLAYED

MR STRICKLAND: First, do you recognise that as your own body-worn video? ---Yes, I believe so.

And you're at House 511?---I think it is, yes, 511.

I just want to show you this diagram or still of some footage. Now, do you recognise that from a birds-eye view as House 511?---Yes.

Can you - at the time of this footage can you mark approximately - whereabouts - before you mark it - whereabouts at House 511 were you? Front - back - side?

I was at the rear, looking at the picture, the left hand longer side of the house.

Can I ask you to mark that, perhaps with a - just with a pen, yes, and just put your initials next to it please?

Could I have a look please? Thank you.

Yes, I tender that.

HIS HONOUR: Do you want to see that Mr Edwardson?

MR EDWARDSON: Yes. Thank you.

HIS HONOUR: That will be exhibit 27.

EXHIBIT 27 Diagram of bird's-eye view of House 511 with markings.

HIS HONOUR: Do you want me to have the jury look at that now

MR STRICKLAND: Yes, thank you, your Honour.

HIS HONOUR: Okay.

MR STRICKLAND: Now, what I have is I have copies of it but of course it doesn't have the marking on it.

HIS HONOUR: I think that the Sheriff's Officer is going to put it onto the document projector and so that the marked copy can then be shown to all of the jury.

MR STRICKLAND: Thank you. Thank you, your Honour.

Now where - I don't know if you can see there but can you see there's numbers 1 and 2?---Yes, I can, yes.

Was that the front of the house? If you don't know please say so?---Yeah, I honestly don't know which was the front - whether it was that side or the side to the right of it.

When you were walking along the side - sorry - were you walking along the side of that house?---Yes, I covered that side where I've marked that X.

And were you going - I probably should have got you to do this - I am sorry - I will just get you to have that exhibit back please. Would you mind just drawing an arrow. At the time I just played that, which direction were you walking? Look, just mark it on the map - if you can remember?---Well, I - I actually walked up and down that side.

Up and down - okay thanks, okay, thank you?---If that makes it clearer. Thanks.

Now, I am just going to - do you hear yourself saying anything in that part of the body-worn I've just played - or was it too difficult to hear?---I didn't quite - - -

I'll just replay it once more and see if we can improve the volume.

DVD PLAYED

MR STRICKLAND: Can you see there's a - what appears to be a door?---Yes.

Did you ever - did you know if that door was accessible?---It didn't appear accessible, from what I recall.

Did you try it?---No, I don't recall trying it but I had a good look at it, from what I remember.

And just to be clear, you think it didn't appear accessible?---No, it didn't appear to me like it was a door that would be able to be opened.

Thank you. Please continue on.

DVD PLAYED

MR STRICKLAND: Did you hear what you said there?---I think I said, 'Yeah – are you – yeah Adam, are you around the front of the rear house? The red house?'

Thank you. Keep going.

DVD PLAYED

MR STRICKLAND: Sorry, pause.

At that time, did you know – did you know where Adam Eberl was?---I – at that time, I thought he was just to that – yeah, covering off the other side there, that corner, as such.

Thank you.

Just continue on.

DVD PLAYED

MR STRICKLAND: Could you hear another voice there?---Yeah, I believe that was Adam Eberl's voice, but I don't recall what the words were. Couldn't- - -

Do you – did he reply to your initial statement that, 'Yeah Adam, you round the front of the red house.' Did he reply to that?---It could have been an acknowledgement. There was a reply on the radio, that we've heard.

All right.

Yes, continue on, please.

DVD PLAYED

MR STRICKLAND: I'm pausing at Zulu time, 9:52:05.

That, can I tell you – if you'd like to assume that, in central standard time is 7:22 pm and five seconds?---Generally, it's 19:55 would be 7 pm.

It's – can I just – I want you to assume the evidence will be at 7:22 pm and five seconds?---Okay, if that's what the time was.

That's an agreed fact in this case?---Okay.

Sorry, seven – just accept that for the moment, will you? Did you see – where were you at the time we have stopped the body-worn?---Right there?

Yes?---I'm on the side of the house to my right that I was covering. So around the left hand corner to the other, which I believe was, potentially, the front of the house. Front side of the house, so.

To your knowledge, was there – how many entrances were there to the house?---I only saw the one.

Okay?---So I don't know. The one and the rear cover – the one that I was covering, which I thought was an accessible- - -

So is this the one entrance that you're talking about?---I believe so, yes.

Is that in the front of the house?---If that is the front of the house, then that would be it.

Okay. What did you see – or what – sorry. Did you see anything at this time, when you looked in the front of the house?---Yeah, I saw a lot of stuff. Because as – in this particular time, I could see inside the doorway and there was a struggle going on between three people and there were people outside the house that I could hear and see, yelling.

Okay. So I'm going to ask you questions about what you saw inside the house?---Yes.

Do you know how long you looked inside the house at this point in time?---It's a matter of seconds.

Did you see Zach Rolfe?---Yes.

Did you see what he was doing?---Yes.

What was he doing?---He was struggling with a male, who was on the – on a mattress with Constable Eberl.

Do you see in that still there- - -?---Yes.

- - -which of those – can you see Zach Rolfe in that image?---I can't identify, but I believe that would be Zach.

When you say, "That," who's the that?---The person that is crouching.

Okay. Did you see if he was holding anything?---At that particular time, I – within that few seconds, I saw that – I remembering seeing him holding a firearm in his right hand and- - -

And was he pointing it at something?---Yes. At the subject that was on the ground, struggling.

Whom you now know to be Kumanjayi Walker?---Yes.

And how far was the firearm from Kumanjayi Walker?---It was very close.

How close?---Well, from my point of view, I couldn't gauge the distance. However, I knew that the proximity would have been extremely close, within – within a foot. Very, very close, or closer.

And pointed toward which part of the body?---The torso area of- - -

Of Kumanjayi Walker?---Yes.

And could you see where Kumanjayi Walker was lying?---Yeah, he was on a mattress, yeah.

Could you see his position?---Yeah, he was semi – I think semi-prone.

What do you mean by that?---Well, he was – I can't recall if he was on his stomach or he was more so on his side, struggling.

Okay. Could you see Mr Eberl?---Yes.

What was he doing?---He was also struggling with Kumanjayi Walker. He was, sort of, that torso area – I think maybe on the left hand side or thereabouts. Very close, with physical contact.

Just in relation to Mr Walker's position. I think you said – can you just repeat what you said you saw, Mr Walker's position?---I think I said he was, potentially, prone or on his side.

Right?---But struggling. So it was in a split second. There's – it's a fair bit of movement happening at that time.

Could you – was he facing flat down or facing flat up?---I wouldn't say flat – flat down or flat up. Flat down to me would be absolutely flat, facing flat down. It was not facing up but, potentially, on a – on a side degree.

What do you mean by, "Potentially"?---Well, not flat. On a more of a side angle than a – being flat.

Okay?---It was a struggle. Like, it – there was movement.

At that time, captured in that body-worn still, did you go into the room after that?---I don't think I entered the room at all, from what I recall.

Why not?---I was covering the two officers at that time. I was covering the doorway to ensure that nobody else was going to come through from, obviously, the outside of the house.

Is there any other reason you didn't go in at that time?---Not to my knowledge.

Okay. And did you – when you – did you see any shots fired?---Yes, I did. I saw the – the two – the two final shots out of the three fired.

And you've described seeing the accused Glock I think less than a foot, I think you said, away?---It was close, yes.

Was that, at the time you saw shots – those two shots fired?---I believe so, yeah, thereabouts.

Can we just play a little bit further please?

DVD PLAYED

MR STRICKLAND: Now I paused it at 9.52.23 Zulu Time, that's – just have to accept from me, 7.22 - - - ?---Yes.

- - - and 23 seconds. So it's approximately 18 seconds after the last still - - - ?---Freeze.

- - - freeze, thank you. We heard a voice during that 18 seconds. Did you hear your voice?---Yes.

Now did you – what did you do in that – from the time you first saw inside the house until this time?---From memory, I was keeping people back. So I was keeping – observing the incident that was occurring inside the house, between that and telling people to stay back from approaching the area I was covering. Keeping them away from the incident.

Okay. During that period, were you looking in the house at the same time, or were you looking in another direction?---I was doing a little bit of both. I was obviously focussing on the officers, and glancing to keeping people back.

At this point in time, were you looking into the house, that is did you have a – did you look into the house again, at this time, 7.22?---Yeah I believe so. I would have been looking into the house.

And you can see Kumanjaya – can you see Kumanjaya Walker on that?---I can there, yes.

And do you know if his position had changed from the first time you saw him, and that – when shots two and three were fired?---I honestly can't recall if his position

had changed. There was a lot of movement inside that – that room, at that particular location. So I honestly couldn't tell you if he had.

When you saw – did you see Kumanjaya Walker holding any scissors? Either the first time, or subsequently?---Looking back now, from – from what I can recall now, and I've given a statement to this, I can't recall seeing too much what was happening. Any sort of micro movements, and that's from what I recall now.

I tender this – I tender this footage, your Honour.

HIS HONOUR: Exhibit 28.

MS CALLAN: Your Honour, for the court record, the file name is BWV Hawkings, Anthony, 3 of 10, part 1.

EXHIBIT P28: BWV Hawkings, Anthony, 3 of 10, part 1

MR STRICKLAND: Now, do you recall at some time shortly after that, Kumanjaya Walker was taken back to the police station?---Yes.

I'm just going to show you some short snippets of body-worn from that time.

And your Honour, for the next two or three body-worns, the same warning, it is disturbing footage.

HIS HONOUR: Yes.

Well again, I remind – or I warn those who are present in the body of the court that the footage which is about to be played is disturbing, and if that is likely to cause anybody any problems, they should now leave the court.

DVD PLAYED

MR STRICKLAND: Do you – was that your footage?---It showed it to be my footage, yes.

And did you recognise Mr Eberl there?---Yes.

Mr Rolfe?---Yes.

Did you hear Mr Eberl say anything?---No I didn't – didn't quite catch that.

I'll just play it one more time - - - ?---Sure.

- - - and see if you can hear anything.

DVD PLAYED

MR STRICKLAND: Now what I'm asking is, at the time, do you recall him saying anything?---At the time I don't recall what he said, no.

Your Honour, I tender that footage.

HIS HONOUR: Exhibit 29.

MS CALLAN: Your Honour, for the record, it's file name BWV Hawkings, Anthony, 3 of 10 part 2.

EXHIBIT P29: BWV Hawkings, Anthony, 3 of 10, part 2

MR STRICKLAND: Okay, I'm just going to play you another snippet of footage.

DVD PLAYED

MR STRICKLAND: Yes I – do you recognise that as your footage?---Yes.

And you spoke to Mr Rolfe?---Yes.

And you were asking about whether he was injured?---I think so, yes.

And where was that?---That was in the watch house area I believe, of the – the cell area of the Yuendumu Police Station.

I tender that footage.

HIS HONOUR: Exhibit 30.

MS CALLAN: Your Honour, for the record, it's file name BWV Hawkings, Anthony, 3 of 10, part 3.

EXHIBIT P30: BWV Hawkings, Anthony, 3 of 10, part 3

MR STRICKLAND: And it's just – sorry, there's one other bit of footage I wanted to play.

DVD PLAYED

MR STRICKLAND: And do you recognise that as your footage?---Yes.

At that stage, you were trying to retrieve the Glock from the accused, is that correct?---That's correct.

And for what purpose?---Evidential purposes.

Yes, I tender that footage.



HIS HONOUR: Exhibit 31.

MS CALLAN: Your Honour, I can indicate it is on a discrete USB labelled "Hawkings 3 of 10" the time - the Zulu time is marked 10:00:50 to 10:01:21.

EXHIBIT 31 Footage on USB labelled, "Hawkings 3 of 10 Zulu time 10:00:50 to 10:01:21.

MR STRICKLAND: Now, I just want to go to a different topic entirely, about your training?---Yes.

What I mean your training - I mean your training in the Northern Territory as a police officer?---Yes.

When you started as a police officer in the Northern Territory you received general training?---Yes.

And training about the use of force?---Correct.

Defensive tactics, your use of a firearm?---Yes.

And both when to use it and how to use it?---Yes.

And do you get trained annually in those things?---Up until COVID times we were, yes.

So let's - I won't ask anything about post-COVID, it's not relevant, but up until - - -? ---Yes.

The end of 2019?---Annually.

Annually - annual training?---Yes.

And you also received training - sorry - did you receive training as an IRT member? ---Yes.

In addition to general duties?---Correct.

And how often did you actually receive the additional training?---As in the IRT training?

Yes, as an IRT officer?---Generally when they could fit it in it would be once - once a month or once every five weeks the training days we were able to get out most of the time to be able to do some refreshers.

I see, and do I take it from that answer that sometimes you couldn't do the once every five weeks?---Yes, some members may not have been available at that particular time.

I am asking about you?---Me? I think I went to the majority of the training sessions.

When you did the IRT training, how long was that? Was that a day or less or more?  
---It was approximately a day's worth of training.

So, when you did your training in the use of force - I am talking now about both as general duties and IRT, were you trained only to use force that was reasonable?  
---Yes, reasonable and necessary.

Proportionate?---Proportionate and appropriate to the circumstances.

So you were trained to use the minimum amount of force required for safely and effectively performing your duties?---Appropriate to the circumstances, yes.

And you were trained in cordon contain, is that correct?---Yes.

You were trained in the ten operational safety principles, is that correct?  
---Yes.

Using - you were taught to use force to avoid force as far as practicable?---Yes, we were taught numerous - - -

Taught about assessing risk and then reassessing it continually?---Yes.

Taught about de-escalation techniques?---Correct.

What is that?---Depending on your level of force. If you are able to de-escalate a situation whether it is via verbal communication, then your level of force will be reduced to suit that level of de-escalation.

Were you taught about verbal commands as a method of de-escalation?---Yes, when possible, yes.

What were you taught about that?---To utilise verbal communication to de-escalate a situation if possible, we are talking about a standard situation where you have time and distance to create cover, et cetera. If you have the appropriate time to be able to verbalise a situation to de-escalate it.

In your training you heard the expression, "Knife or edged weapon equals gun"?  
---Yes.

If a subject was actively threatening you with an edged weapon you were taught to draw your firearm?---Yes.

And were you taught to say anything if that occurred?---Yes, you can challenge if you have the ability to do so, yes.

And by "challenge" what do you mean by that?---"Police - stop - drop the knife" et cetera. Clear, concise challenge.

For what purpose were you taught to do that?---In order to communicate that you are armed police and you wish for the subject to drop the edged weapon or whatever they have.

Were you taught that if you presented your firearm you may need to fire it?  
---Sorry, could you say that again?

Sure. You've given evidence of in the lessons or the training you've had about gun equals knives, you agree that if the subject actively threatened you with an edged weapon you may present your firearm?---Yes, correct, if knife equals gun, yes.

That's right. Were you taught that if you presented it you automatically fired it or what were the circumstances?---No, once again it all - it's all determining on the level of threat, your proximity to that level of threat, the demeanour in the person that you were challenging et cetera, yes, if you have that time and distance then you can verbalise your intentions as to what you would like to be done. If you don't have that time then you may not have that time to react and you may have to challenge and fire.

Now, were you trained that if you did fire your Glock, where you should fire it?  
---Generally the central mass of the torso area.

And were you told why you should fire at the central mass of the torso area?  
---Yeah, that's to achieve subject compliance via immediate incapacitation.

What do you understand by, "immediate incapacitation"?---To stop that threat immediately so it does not continue and you are no longer in a position where you could be seriously hurt or killed - or other people.

And did you know - were you taught whether the central body mass contained the vital organs?---Well, from historical teaching since I've been a police officer, that area generally would have most effect to achieve that incapacitation.

Okay.

Your Honour, there is a legal matter that I need to raise with your Honour.

HIS HONOUR: All right.

Members of the jury, would you retire please?

JURY OUT

HIS HONOUR: Senior Constable, would you wait outside for a moment please?  
---Certainly.

MR STRICKLAND: Your Honour, just before - your Honour, I just discussed with my learned friend, I think it is extremely unlikely that his evidence will continue. Would your Honour consider asking the officer to return tomorrow morning, because I don't think - given that we are going to stop at 1:15, I just don't think this will be resolved.

HIS HONOUR: All right. I will excuse you for today but you will have to return tomorrow morning at 9:30?---Thank you, your Honour.

HIS HONOUR: Thank you.

WITNESS WITHDREW

MR EDWARDSON: Thank you - sorry, I think the jury are going to have to come back so they can be told that they can retire for the day because all of their (inaudible).

MR STRICKLAND: I'm sorry, I must say I didn't think of that, yes.

HIS HONOUR: All right.

Can we bring the jury back in please?

MR STRICKLAND: Your Honour, just to - Ms Callan is going to tender some documents. If we could do that now.

HIS HONOUR: All right.

JURY IN

HIS HONOUR: Members of the jury, you'll no doubt have noticed that the witness is not with us at the present time. The discussion that we need to have is going to take a little bit of time. So accordingly, that witness has been released until 9.30 tomorrow morning. In a moment I'm also going to release you until 9.30 tomorrow morning. But before we do that, I understand the Crown has some material that it wants to tender.

MS CALLAN: Yes. Your Honour, the remaining files that are contained on MFI C, that have yet to be tendered. I propose to formally tender them now.

HIS HONOUR: So that was MFI?

MS CALLAN: MFI C, which is the USB.

HIS HONOUR: Yes. And you're seeking - - -

MS CALLAN: Your Honour has a copy of the index.

HIS HONOUR: Yes.

MS CALLAN: At the top of the second page, is a file named BWV Rolfe, Zach, 1 of 4, which as a general description concerns the attendance at House 577 on 9 November 2019. I tender that video.

HIS HONOUR: That will be exhibit 32.

EXHIBIT P32: BWV Rolfe, Zach, 1 of 4, attendance at House 577 on 9 November 2019.

MS CALLAN: And your Honour, if the jury have access to their exhibit 25.

HIS HONOUR: Yes, the folder of the stills.

MS CALLAN: And of transcript.

HIS HONOUR: Yes.

MS CALLAN: The – a transcript and some stills from that video, which has been marked exhibit 32, are located behind tab 5.

HIS HONOUR: All right.

MS CALLAN: And whilst the jury have that folder before them, your Honour, the transcript and stills, which appear behind tab 6, relate to the video which was tendered and marked exhibit 21. Behind tab 7 is a transcript, Mr Hawkings attendance at House 577. And your Honour that was previously tendered and marked exhibit 23, for the jury's appreciation. And your Honour, behind tab 8 is a transcript of Constable Rolfe's attendance at House 511, which your Honour has

marked – that is the video, your Honour has marked exhibit 26. At tab 9, members of the jury will find a transcript of the video of Mr Eberl's attendance at House 511. And I note your Honour has marked that video exhibit 24.

Your Honour, the last page behind tab 9 is a single page. It relates to an audio only file, which I tender. It's – and that file name is BWV Eberl, Adam, 3 of 4.

HIS HONOUR: That'll be exhibit 33.

EXHIBIT 33 BWV Eberl, Adam, 3 of 4.

MS CALLAN: And members of the jury, if they turn to tab 10, that's a transcript of a video, which has been tendered and marked exhibit 22. And then your Honour, behind tab 11, is transcript from body-worn video of Mr Hawkings, and the jury's, and your Honour's appreciation, the first three – or sorry, pages one, two and on to page three, until the line appears, is transcript of the video which has been marked exhibit 28. What appears below the line on page three, over to the top of page four, is the transcript for the video which has been marked exhibit 29. Then on page four, below the line, commencing with the words "Hawkings you all good" is transcript for the video which has been marked exhibit 30, three zero. And below the second line, which appears on page four, beginning with the words "Frost inaudible, it sounds like a through the front" that is the transcript of the video that was shown to Sergeant Frost and has been marked exhibit 11.

Just returning, your Honour, to what remains on MFIC. On the second page, your Honour, under the bold words "James Kirstenfeldt" I tender body-worn video file name Kirstenfeldt BWV, Warlpiri Camp, Alice Springs, 7 November 2019, 6.37 pm.

HIS HONOUR: Exhibit 34.

EXHIBIT P34: Kirstenfeldt BWV, Warlpiri Camp, Alice Springs, 7 November 2019, 6.37 pm

MS CALLAN: And over the page, your Honour's index to this USB, do you see, your Honour, the CCTV footage, what's been tendered is the footage with the file name "Yuendumu front counter MP4." And that, your Honour's already marked exhibit 10. There's a short clip of footage which I tender, and the file name is Corridor camera 3.

HIS HONOUR: Exhibit 35.

EXHIBIT P35: Corridor camera 3

MS CALLAN: And finally, your Honour, I tender the Birdseye video of events immediately outside, and then inside House 511 on 9 November 2019.

HIS HONOUR: That will be exhibit 36.

EXHIBIT P36: Birds eye video of events immediately outside and then inside House 511, 9 November 2019

MS CALLAN: Thank you, your Honour.

HIS HONOUR: Now, members of the jury, you may now retire, and we'll commence again tomorrow morning at 9.30.

JURY OUT

HIS HONOUR: Yes, Mr Crown.

MR STRICKLAND: Would your Honour consider doing the same thing as we did yesterday. I'll hand up the materials - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - I'll consider over lunch to try to reduce the ambit of the application. I've communicated with my learned friend and your Honour, if your Honour – I'll hand those up. Your Honour what I – during my examination, I decided against doing any s 32 applications. I thought it would be better to put it all in the same ambit.

HIS HONOUR: All right.

MR STRICKLAND: So the application is, I think, will be both 32 and 38. But I intend to minimise it as far as I can. So if I can hand – I'll tender the following material. So your Honour, I tender on this application transcript of record of interview on 10 November 2019. It's 11 pages. Transcript of second interview on 13 November 2019, that's 65 pages. And transcript of the third record of interview on 11 February 2020, that's 36 pages.

And a – the committal transcript, 2 September 2020. Now, your Honour, in relation to the second interview, there's a map – I'm sorry, a diagram that Mr Hawkings drew. That should form part of the second interview. They're the materials I tender on this application.

HIS HONOUR: Thank you.

MR EDWARDSON: Your Honour, can I just give you some page references to the documents that have just been tendered?

HIS HONOUR: Just one moment. I'm trying to make sense of – I'm just trying to see. Just one moment. So the first interview was 10 November 2019. That will be marked as exhibit 1 on the s 38 application.

EXHIBIT 1 (S 38 APPLICATION) Record of interview 10/11/2019.

HIS HONOUR: The second interview is 13 November 2019. It will be marked as exhibit 2 on the application.

EXHIBIT 2 (S 38 APPLICATION) Record of interview 13/11/2019.

HIS HONOUR: The third interview, which includes the diagram and is 11 February 2020, will be exhibit 3.

EXHIBIT 3 (S 38 APPLICATION) Record of interview and diagram 11/02/2020.



HIS HONOUR: The committal transcript will be exhibit 4.

EXHIBIT 4 (S 38 APPLICATION) Committal transcript 02/09/2020.

HIS HONOUR: Now, I'm sorry, Mr Edwardson. You were saying?

MR STRICKLAND: The diagram is part of MFI 2 not 3, your Honour.

HIS HONOUR: Well, it's attached to 3 at the moment.

MR STRICKLAND: Sorry, my mistake. I was thinking about 2.

HIS HONOUR: I've changed that. Yes.

MR EDWARDSON: Just going to give you some transcript references, your Honour, and page references to the documents that have been tendered.

HIS HONOUR: Yes.

MR EDWARDSON: And rather than waiting until 2 o'clock or 2:15 or whatever time the court intends to resume. Can I start, your Honour, with statement number 1?

HIS HONOUR: Yes.

MR EDWARDSON: Which is 10 November 2019.

HIS HONOUR: Yes.

MR EDWARDSON: This is specifically in relation to his recollection at that time, in respect of the – what I'll call the Yuendumu briefing and his attendance there. It's specifically page 2 and page 8.

HIS HONOUR: Pages 2 and 8.

MR EDWARDSON: And in relation to the statement, 13 November 2019 – which it the second statement – pages 22 to 30. In particular, page 30. And also pages 32 and 34.

HIS HONOUR: Yes?

MR EDWARDSON: In relation to the committal transcript, pages 87 to 88 and 103 to 104.

HIS HONOUR: Yes.

MR EDWARDSON: And, your Honour, for completeness could I just mention the evidence of Donaldson on this topic, bearing it mind – so it puts it into context, because part of the argument we'll advance is that only is there no – is the position

in relation to Mr Hawkings quite different from that of Mr Kirstenfeldt, but also one should have regard to the way in which the Crown conducted its affairs in respect of Mr Donaldson.

So his examination is page 353 to 357 – this is at trial. Cross-examination is 361 to 362. And in relation to Frost – Sergeant Frost – 226 to 227, 230 and 237 to 241.

HIS HONOUR: Thank you.

I will now adjourn. We will resume at 2:15.

MR EDWARDSON: Your Honour pleases.

LUNCHEON ADJOURNMENT

## RESUMED

HIS HONOUR: Yes.

MR STRICKLAND: Thank you, your Honour. Your Honour, I've had some discussions with Mr Edwardson over the lunch break. And there's only two areas - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - I'll be seeking to cross-examine Mr Hawkings about. The first area relates to an entry he made in his notebook, that he'd written in his notebook, "House number 577". And that appears at page 29 of exhibit 2 on this application. I understand that – that application is not opposed. And I'll simply lead that relevant part.

HIS HONOUR: All right.

MR STRICKLAND: And the second area relates to the – Mr Hawkings evidence as to why he did not enter House 511 when he first looked in at the time of the shooting. Which is approximately 7.22 pm and four seconds, or five seconds.

HIS HONOUR: This is after the shots were fired?

MR STRICKLAND: Either at the same time, or immediately after. He gave evidence of seeing the shots, and - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - observing what he saw.

HIS HONOUR: Yes.

MR STRICKLAND: And I asked him why he didn't enter. And he gave an answer in relation to that question, and I'll be taking him, by way of leading him, to his answers at the very bottom of page 43 of exhibit 2, and the very first question and answer at the top of page 44. Where he gives an answer as to why he didn't enter.

HIS HONOUR: Yes.

MR STRICKLAND: Namely, it's really captured at the top of page 44. He didn't want to get into a wrestle with a rifle, and looked like they'd contained the guy, or were containing the guy. And I'll simply lead that. I understand the matters not opposed either.

MR EDWARDSON: Not opposed, your Honour.

HIS HONOUR: That's not opposed.

MR STRICKLAND: And I'll have a couple of other questions in-chief, and I'll be two or three minutes with that witness.

ADJOURNED 2:21 PM TO FRIDAY 18 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 18 FEBRUARY 2022 AT 9:39 AM

(Continued from 17/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes.

MR STRICKLAND SC: Sorry for that delay.

HIS HONOUR: That's all right.

MR STRICKLAND: Your Honour, can I just mention one logistical matter?

HIS HONOUR: Yes, certainly.

MR STRICKLAND: One of the witnesses we anticipate will be called today is Ian Spilsbury, he's the crime scene examiner.

HIS HONOUR: Yes.

MR STRICKLAND: Going to be tendering various exhibits through him. Because of the way the exhibits are packaged, there's a lot of unwrapping and wrapping. It's going to be tedious to do that in front of the jury. So what we anticipated is at some point, before he gives evidence to have a break.

HIS HONOUR: Yes.

MR STRICKLAND: And then he, if – I don't know if it's possible for some table to be arranged, or some - - -

MS CALLAN SC: We'll arrange it.

MR STRICKLAND: - - - we'll arrange that.

HIS HONOUR: All right.

MR STRICKLAND: And then we'll have the exhibits unpacked, ready to go. Now most of them will be in vacuum sealed bags.

HIS HONOUR: Yes.

MR STRICKLAND: Now the one – there are at least one item, I'm thinking of the Glock, where there are special security - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - precautions. So if that's – my understanding is I'll be tendering that. But the jury can't – it will be inoperable. But even though it's inoperable, the jury don't – can't have access to it. It's kept in a special security box.

HIS HONOUR: Yes.

MR STRICKLAND: So would your Honour say to the jury, if at any stage, they wanted to see it, could they let your Honour know through a note, and then we'll make arrangements for it to be viewed?

HIS HONOUR: So do I understand then, that after the Glock is tendered, you would anticipate it being returned to the Crown each afternoon, or do you want the court to continue to hold it?

MR STRICKLAND: It's being held in a – it's being held basically in the custody of the Sheriff in a locked box.

HIS HONOUR: All right. So it will remain in the court's custody?

MR STRICKLAND: It will remain in the court, but they just can't have access to it.

HIS HONOUR: Yes, all right.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Yes, can we bring the jury in then please.

JURY IN

HIS HONOUR: Yes.

MS CALLAN: Your Honour, before we return to Constable Hawkings, you might recall the diagram that he marked in evidence yesterday, which is exhibit 27. We have copies now – a working copy for your Honour, and copies for the jury.

HIS HONOUR: Thank you.

MR STRICKLAND: Yes, I call Anthony Hawkings.

HIS HONOUR: All right, thank you.

MR STRICKLAND: Recall him.

ANTHONY HAWKINGS, on former oath:

XN BY MR STRICKLAND:

MR STRICKLAND: I asked you yesterday about the police notebook you had at Yuendumu Police Station?---Yes.

And you've said you lost it?---I didn't say I lost it, I said I – it went missing.

Went missing?---Yes. I don't recall where it ended up.

What do you normally do with a notebook once you've finished with it?---When we're finished with it, we store it.

And did you do that with that notebook?---I don't recall. It may have been – may have gone missing through the course of my duty throughout the day, or the afternoon. I honestly don't recall. I did select – submit an email to my supervisor.

When was the last time you saw that notebook?---I honestly couldn't tell you. It was some – some months after the incident. Quite some time.

After you had finished using it?---I don't think so. I think I was still using it – it was still in use. I hadn't completed the use of that notebook.

Now I asked you some questions about what you'd jotted down in the notebook?---Yes.

And I asked you whether you'd jotted down House 577, and you said you couldn't recall?---I – I couldn't recall.

Do you remember you gave a – or did you give an interview with investigating police on 13 November 2019?---I believe so, yes.



I'll just show you this document. Do you recognise that as a copy, or a transcript of that record of interview?---Yes.

And you said yesterday you'd read through that at some stage, is that right?---Yes.

And that was recorded two days after – I'm sorry, four days after the incident?---It appears so, yes.

Can I ask you to go to page –

Or I'll ask that document be marked, your Honour.

HIS HONOUR: That will be marked for identification with the letter O.

MFI O: Transcript of record of interview 13 November 2019 Anthony Hawkings.

MR STRICKLAND: If you go to page 29. Can you see you were asked some questions about your notebook?---Yes.

Did you have your notebook at the time of the interview?---I don't recall if I had it on me.

You said that you'd – you were asked this question, "And did you record any of the details of the briefing in your notebook", do you see that?---Yes.

And if you look – if you look up the previous answers, that that appears to be the briefing at Alice Springs, would you agree with that?---I think so, yes. Yes.

All right, because they're talking about - - - ?---My reply to that question, yes.

Yes, they're talking about arriving at Alice Springs - - - ?---Yes.

- - - just after 2:00 and 3 pm?---Yes.

And your answer to the question is, "Just arrival. I think I may have put arrive at the station then IRT call out. I may not have even written the time. It's just a brief call out. Chuck in my notebook. Come to the station, and then enter 1700 hours arrival Yuendumu." So that's something – is that something at the time you gave this interview you could remember writing?---It would have been, yes.

And that of course is within a few minutes when you did arrive at Yuendumu?---Yes, at the time I gave there that statement.

And then you've got, "Given an address, written House – House Number 577"?---Correct.

Does that jog your memory that you did record that in your notebook?---I honestly don't recall.

Now yesterday, I asked you some questions about when you looked into House 511, after – or at the time of shots two and three. I'm just going to put up that image on the screen, and ask you some questions about that. Now, yesterday I asked you these questions; "At that time" - this is at 512 - "At that time captured in that body-worn still" - and that's the still we are looking at - this is - and the time is Zulu time 9:52:05, which is 7:22:05 pm Central Standard Time. "At that time, captured in that body-worn still, did you go into the room after that?" And your answer was, "I don't think I entered the room at all, from what I recall." Then you were asked, "Why not?" Your answer was, "I was covering the two officers at that time - I was covering the doorway to ensure that nobody else was going to come through from obviously the outside of the house." Question; "Is there any other reason you didn't go in that time?" And you said - your answer was, "Not to my knowledge". Do you recall giving those answers yesterday?---Yes.

Now, can I take you please to that interview please, MFI O and can you just go to page 43. About halfway down the page you were describing hearing a gunshot and then you heard people - and you said, "The shit hit the fan"?---Yes.

Are you describing there the first gunshot, is that right, in that part of the interview?  
---(No audible response.)

I will read it to you just to give you the context of it.

MR EDWARDSON QC: Your Honour, I don't think that's (inaudible) I think - I don't think - if one goes back to the beginning from the interview to what this officer actually said was he didn't realise that what he'd heard was in fact a shot. It turned out it was a shot. I think he made some reference to a piece of wood or something.

HIS HONOUR: A piece of furniture or something like that, yes.

MR STRICKLAND: Well that's exactly what I was going to read with the full answer.

HIS HONOUR: Continue.

MR STRICKLAND: Yes. So I will ask - I will read this part of it. You said:

"It took me a brief second to realise what had happened and at that point there as yelling and screaming because I believe that previous noise obviously was a gunshot and that's what people had heard as well and started coming, uh, the shit hit the fan then."

Do you see that answer I read?---Yes.

What time - what time are we talking about when you gave that answer?---To be honest, from - if you are asking me from my point of recollection from now, I can only recall that everything happened in such a short time, it was within that time frame, so you know, what my statement was was what my honest belief was at the time, how

I observed it.

What I really wanted to ask you was the next question. I am just giving you the context?---Sure.

"When you observed this, where were you actually standing positioned?" And you said; "I was in the doorway. I didn't go in, from memory, because I was conscious of the fact they were already in there and containing the guy"?---Yes.

Are you talking about the time we can see in this still?---Yes, the entrance-way to the door, yes, that location, yes.

But I understand but in terms of the timing, are we talking about the time at or about the time you heard the second and third shots?---Yes. Yes, I was at that location.

And you went on to say, "So I didn't require me to go in, plus I was carrying a long rifle, so I didn't want to get into a wrestle with a rifle, and they looked like they had contained the guy - or were containing the guy"?---Correct.

Is that what you said?---Correct.

And is that the impression you had when you looked into the room, that Eberl and Rolfe were containing Kumanjayi Walker?---Well, they were in the process of attempting to contain the - Mr Walker. At that point - I think that's what I've described, but that's how my thought processes were at the time I gave that statement.

What you have written is, "They looked like they had contained the guy or were containing the guy"?---Yes.

That was what your impression was at the time?---I wouldn't say at that specific point in that photo, but whilst in that room. As I say, it was a very active situation, so - yeah.

You could see Mr Eberl on top of Kumanjayi Walker?---Yes.

And was he - you've heard the term, "Ground stabilising"?---I think attempting to. I think I may have described they were wrestling.

That's not my question?---Okay.

You've heard the term "ground stabilising"?---Yes, I have.

And what does that mean to you?---Trying to obviously stabilise a subject on the ground to prevent them from getting up, so you can move into some sort of - I don't know - resolution technique, whether it's handcuffing somebody.

Is that part of your training in terms of defence and tactics and use of force?---Yes, we've always been taught - yes.

And is that what you saw Mr Eberl do - trying to ground stabilise Mr Kumanjaya Walker?---I saw them wrestling on the ground.

Would you describe that as Mr Eberl trying to ground-stabilise him?---I think it was an attempt to.

Now finally, if I can just go back - I have finished with that image, thank you. If I can just go back to when you had left the police station, at about 7:06 pm?---Yes.

On 9 November and you've described going to House 577, correct?---Yes.

And House 511?---Yes.

You've also described Mr Rolfe as being the most experienced IRT officer within the four of you?---Within the four of us. He'd been in the IRT team for longer than the rest of us, yes.

Did you regard him as being the person in charge or taking the lead during the operation at House 577 and 511?---I would say he probably took the lead but he wasn't nominated as anybody in charge or anything to that effect. He obviously had more information than what I had.

Thank you, your Honour, they are my questions. Excuse me - sorry, your Honour. They are my questions. Thank you, your Honour.

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Senior Constable, I want to start, if I can, with a little bit about your background. You've told us, I think, that you were a police officer elsewhere before you came to the Northern Territory?---Yes, correct.

And where was that?---The New Zealand Police Force.

So for how long did you say that you had served in the New Zealand Police Force?---I joined in 1998 and I worked - give or take a year in between with leave et cetera.

And you came to the Territory - or to Australia - when?---I think, 2014.

2014. Was it around 2016 that you did the IRT course or was that a little bit later?---I think it was later.

2017? About a year after?---Maybe even a little bit more, off from the top of my head. I'd been in approximately up to about a year before this incident.

Now, I will come back to the specifics in a lot more detail shortly, but can I start by asking you this. You mentioned before your understanding of the notion of edge blade equals gun - or knife equals gun, as the case may be. That is an expression that you are familiar with?---Correct.

Was that an expressions that you were familiar with in your training in New Zealand as well?---Yes. Actually no - I tell a lie - excuse the pun. The training here I recall was knife equals edged - sorry, edged weapon equals firearm.

Yes, whereas in New Zealand?---In New Zealand we didn't carry firearms as a matter of course, like we do here.

Thank you. So there was a difference between New Zealand and Australia in that respect?---Yes.

All right. Now, I am going to remind you a little bit about what you said yesterday when you were asked a series of questions by Mr Strickland about your training. And you were asked specifically about annual training. And I think you said before COVID, you'd have your annual training but when he got to the IRT, you might have training on a regular basis, depending upon people's commitments. Something along those lines?---Correct.

And I want to run through –

I'm referring now, your Honour, to page 517 of the transcript.

And I'll just remind you of what you said and then I'm going to take you to some specifics:

"So when you did your training in the use of force – I am talking now about both as general duties and IRT – were you trained only to use force that was reasonable?" And you said, "Yes, reasonable and necessary?---Correct."

"Proportionate?" Was the question. Answer: "Proportionate and appropriate to the circumstances?---Yes, correct."

"So you were trained to use the minimum amount of force required for safety and effectively performing your duties?---Appropriate to the circumstances, yes."

"And you were trained in cordon and contain; is that correct?---Yes."

"You were trained in ten operational safety principles; is that correct?---Yes."

"You were taught to use force to avoid force as far as practicable?---Yes, we were told numerous."

"Taught about assessing risk and then reassessing it continually?---Yes."

"Taught about de-escalation techniques?---Correct."

"What is that?---Depending on your level of force, if you're able to de-escalate a situation, whether it is via verbal communication, then your level of force will be reduced to suit that level of de-escalation."

"Were you taught about verbal commands as a method of de-escalation?---Yes, when possible, yes."

"What were you taught about that?---To utilise verbal communication to de-escalate a situation, if possible. We were talking about a standard situation where you have time and distance to create cover, et cetera, if you have the appropriate time to be able to verbalise a situation to de-escalate it."

"In your training, you heard the expression, 'Knife or edged weapon equals gun'?---Yes."

"If a subject was actively threatening you with an edged weapon, you were taught to draw your firearm?---Yes."

"And you were taught to say anything if that occurred?---Yes."

"You can challenge if you have the ability to do so?---Yes."

"And by challenge, what do you mean by that?---Police, stop, drop the knife, et cetera. Clear, concise, challenge."

"For what purpose were you taught to do that?---"In order to communicate that you are armed police and you wish for the subject to drop the edged weapon or whatever they have."

"Were you taught that if you presented your firearm, you may need to fire it?---Sorry, could you say that again?"

"Sure. You've given evidence of in the lessons or the training you've had about gun equals knife. You agree that if the subject actively threatened you with an edged weapon, you may present your firearm?---Yes, correct. If knife equals gun, yes."

"That's right," was the question, "Were you taught that if you presented it you automatically fired it, or what were the circumstances?---No, once again, it all – it's all determining on the level of threat, your proximity to that level of threat, the demeanour in the person that you are challenging, et cetera, et cetera. Yes, if you have that time and distance, then you can verbalise your intentions as to what you would like to be done. If you don't have that time, then you

may not have that time to react and you may have not – have to not challenge and fire.”

“Now, were you trained that if you did fire your Glock, where should you fire it?---Generally, at the central mass of the torso area.”

Nearly finished. “And were you told why you would fire at the central mass of the torso area?---Yeah, that’s to achieve subject compliance via immediate incapacitation. Subject compliance via immediate incapacitation, and that requires a shot to be discharged towards the central body mass of the individual concerned.”

Would it be fair to say that whilst you described all of that training, in each case you are qualifying the training and the response depending upon the circumstances that confront the individual officer?---Yes, that’s correct.

When you did your course, part of the course is what’s known as “Edged and Blunt Weapon Awareness”, isn’t it?---Yes.

That’s the original course that you did when you first became a police officer with the Northern Territory?---Yes, I believe so. We would’ve covered that in the Defensive Tactics Training package.

It’s the Defensive Tactics Training?---Yes.

Incidentally, I’ll go back to what you were trained and the lead-up to the events of 2019, which you were party to. But what has happened to your police career since this particular incident? Have you gained further expertise and training?---I am currently undertaking a Defensive Tactics Instructors course with the police. I’m partway through that course.

And how long is the course?---It’s a six week course.

And how much longer have you got to go?---I still have another week and a half or so.

Another week and half to go. And then once you complete that course, you’ll be qualified to be an instructor?---If I pass the test – the course, yes.

Assuming you do pass, of course?---Assuming I do.

Yes, all right. But I want to go back to some basics and back to the specifics that you were taught when you became a Northern Territory Police Force and those specifics being reinforced throughout your career. By way of introduction, do you agree with this as being the philosophy that you, as a police officer, were taught: “Police officers need to be able to operate safely in a working environment that is often threatening and is, at times, dangerous. Police need the knowledge and skills to make good judgments and to employ a range of tactical options in circumstances

where decisions must be made quickly.” That is, effectively, the introduction, is it not, to the very course that you did?---More or less, yes.

‘The primary concern of this training’ – the training I’m now referring to – ‘is to prepare police officers to operate in such a way that maximises effectiveness which, at the same time, ensures their own safety and the safety and wellbeing of the people they are dealing with’?---Correct.

Again, that is the way in which the course was introduced and it’s pretty obvious that that was an important part of the training that you received?---Yes.

“Police officers often do not have the luxury of time to make anything more than instinctive choices of action. This course provides participants with the skills and knowledge to safely and effectively determine appropriate responses to risk situations, respond to risk and manage incidents”?---Yes, that sounded very familiar.

And it’s correct, isn’t it – and you’d know that, wouldn’t you, as a police officer – that you have been told – and you’d know from your own practical experience, would you not, that police officers often do not have the luxury of time to make anything more than instinctive choices of action?---It’s very common that, within the course of your duties, that may arise.

So against that introduction and background, part of the course that you participated in and had to complete as part of your training was a module that dealt with edged and blunt weapon awareness?---Yes, we are covering that off, yes.

By way of instruction – and again, I want you to think – if you can think back to the days when you were being instructed – in the context of edged and blunt weapon awareness, were you informed about – as by way of an example – the actions of the September 11 2001 hijackers, as a means of demonstrating the genuine threat of an edged weapon attack?---I honestly don’t recall that specific detail about the hijackers.

All right?---Yeah.

But certainly, part of the introduction must have been – even if you can’t recall the specifics – that you need to have some understanding of the threat of an edged weapon attack to a police officer in his or her day-to-day duties?---Absolutely, yes.

And you must have been instructed that you should never assume that you will be given warning of an impending edged weapon attack, allowing for time and room to prepare?

MR STRICKLAND: I object. Your Honour, I just object to the formula, “You must have been instructed.” What’s relevant is whether he was or not.

MR EDWARDSON: Were you instructed in those terms?---I’m pretty sure I would’ve been instructed, absolutely.



Because from what you've said in your response to the questions put by the prosecutor, it must be that each individual case is – depends on the circumstances, doesn't it?---Yes.

And clearly, you must have been instructed – and it's self-evident, is it not – that you can never assume that you will be given warning of an impending edged weapon attack?---That's correct.

And it's only if you're given warning that that would allow for time and room to prepare?---Yes.

And it was in that context, was it not, that you were qualifying the answers that you gave to the questions that were put by Mr Strickland when he was asking you, in very generalised terms, about your training?---Yes, correct.

Obviously to understand the notion of what is an edged weapon, your training included a description, or definition of what is an edged weapon?---Yes.

And can I put this to you, and suggest to you that this is the model that were taught. "Any weapon, purpose designed or improvised, that has potential to cause injury by cutting, slashing or penetrating. Any object capable of penetrating the skin, or of cutting, slashing, or drawing blood. It does not have to be sharp"?---Correct.

You were instructed, were you not, about the facts that relate to each weapon, something along these terms, can I suggest. "Other than a gun, the knife is the most common weapon used in crime"?---Yes.

"Yet attacks are not just with knives, but with a wide variety of edged weapons. Screwdriver, syringe, broken bottle, a chard of glass, a shank in a custody environment, and anything that can cut or stab"?---Yes, that's correct.

It was part of your training, wasn't it, to have some understanding of what precisely the instructors meant by an edged weapon. Because that's the only way in which you could put into context your training?---Yes.

Edged weapons don't jam, stop working, or run out of ammunition?---Correct.

Edged weapons don't need to user to be highly trained?---Correct, that's right.

Edged weapons are easily concealed, and are easily accessible?---Yes.

Edged weapons can be easily made from many materials or objects?---Yes.

Edged weapons don't need to big, sharp, or have a long blade, to cause serious injury?---That's correct.

Edged weapons can cause injury with minimal contact or application?---Yes.

You were instructed in those terms, were you not?---More or less, yes.

And you were also, can I suggest, given instructions about what is described as "Improved edged weapons"?---Yes.

"It is the very ordinary appearance of some of these weapons that makes them so lethal. Disguised, improvised, adapted, converted, commercially manufactured, or home made, they can pose a deadly threat. The design and concealment of a weapon is only limited to an individual's imagination", is that consistent with the training that you received?---I believe so.

Were you also taught, and indeed you now must – sorry, I withdraw that. Were you also taught about other edged weapons, such as ordinary credit cards. Ordinary shop bought pens. Normal hardware store screwdrivers. Broken bottles, or smashed glass. Broken pieces of plastic. Plastic disposable knives. Stationary scissors. Household keys?---Yes I was. I believe I was taught that, particularly through over the years, and experienced that, yes.

Were you also instructed about the devastation that an edged weapon can cause to an individual?---Absolutely.

In other words, what can an edged weapon do. And were you shown images of the type of injuries that a person might sustain by the deployment of an edged weapon?---I believe I was.

And were you also instructed by way of description, the different ways in which a strike might be deployed by somebody who's armed with an edged weapon, and what the consequences of that strike might be?---Yes.

Was part of your training, what is described as a reactionary gap?---I believe so, yes.

And specifically, in terms of tactics, the seriousness of the threat, having regard to the distance between you and the person who's armed with an edged weapon?---Yes.

Where the threat is nine metres away or less, and running at you, the undrawn firearm may not be the preferred means of defence?---Correct.

And were you instructed about test times? That is, how long it would take, or how long it might take an individual armed with an edged weapon, to strike from a particular distance?---Yes I think I was.

From 6.1 metres, or 20 feet, 1.57 seconds?---Yes.

From 9.2 metres, or 30 feet, 2.06 seconds?---Yes, I'm aware of that.

Part of the instruction that you received was distance equals time equals

options?---Yes.

Greater distance leads to more time to respond, which leads to more options available, which leads to better decision making and more effective action?---Yes.

I want to run through some very important points, which would – I suggest to you, that you were also instructed, as part of your training and package?---Yes.

“Officers may fire one or two rounds, however the subject’s momentum, combined with great aggression may result in the attack being continued”?---Yes.

“Five or six rounds may not stop an attacker on drugs”?---That’s correct.

“If time distance permit, draw firearm and go to position of cover”?---Yes.

“Use loud dynamic verbal commands, such as, ‘Police, drop the weapon’”?---Yes, correct.

“Instruct the subject to move away from the weapon”?---Yes.

“Control subject and weapon”?---Yes.

All of that is of course focussing on a situation in which a police officer is confronted, and there’s a sufficient distance between the two of you, to look at those alternatives that are available?---Yes, that’s correct.

“Do not engage armed subject in dialogue from an undefended position without your firearm at the ready. If he rushes you, you will be forced to attempt frantic last minute drawing of firearm, as you take evasive action”?---That’s correct.

“A police officer must be prepared psychologically to receive some type of wound. If one can accept this, the ability to defend effectively against attack by knife is enhanced”?---Yes.

“Remember that you have decided that you have no other option but to counter-attack, and you will survive”?---Yes, that’s true.

“if counter-attacking, you must have an aggressive mind-set”?---Yes.

“A timid or half-hearted approach could be disastrous”?---Correct.

Were you also instructed about points that might save your life in the course that you did?---I believe so.

“Do not use empty hand techniques, unless it is not possible to use a firearm. For example, attack is spontaneous and retreat is not possible”?---Correct.

So at that point, to save your life, is simply this. Don't try and use hand techniques unless it's not possible. You should use your firearm?---Yes.

In circumstances where the attack is spontaneous and a retreat is not possible?---That's correct.

"Place objects between you and the attacker", that again, is if you have the advantage of distance and time?---Yes.

"With weapon drawn, widening the reaction gap, tactically disengage and cordon and contain"?---Yes, correct.

Again, widening the distance between the two of you gives you the capacity to give verbal instructions and things of that nature, but if it's a spontaneous and immediate attack, that's futile. It can't happen?---Yes, the situation must allow you to do so.

And that's what came back to the introduction that I took you to right at the beginning of the questions I asked. Police officers often do not have the luxury of time to make anything more than instinctive choices of action?---Yes, and that's through my experience as well.

"Firearm, members must continue to move off the line of the armed subjects attack"?---Yes.

"Avoidance, grounding and control, must continue at all times, until the subject has been controlled and disarmed"?---Yes.

"Evade slashing or stabbing movements"?---Yes.

"When disengagement is not possible, control the weapon"?---Yes.

"Stun, if possible, use rapid multiple hard blows to the head to stun and disorientate the offender"?---Yes.

"Disarm the offender"?---Yes.

Now can you – can I just ask you this, were you, or can you recall now, if you were instructed in terms of the consequences of different stab wounds to the different parts of the body, and how long it would take for death to follow?---Yes, if you are struck in a location where you have an artery, or a main blood vessel, with an edged weapon, and that vessel has been punctured or damaged, you could die in a very, very short period of time. Within minutes.

I want you to look at the document which I now produce to you. If you just glance through it, you'll see that that document encapsulates all the points that I put to you, in which you have embraced?---Yes, correct.

Your Honour, I would ask - excuse me your Honour - your Honour, I will tender it now and then that way the jury have a copy. It is going to come through the expert witness the Crown are calling later, so I would ask that that be marked.

HIS HONOUR: That will be marked for identification.

MR EDWARDSON: Sorry, not for identification, I ask that it be received and tendered.

HIS HONOUR: You tender it as an exhibit? Thank you.

MR STRICKLAND: No objection.

HIS HONOUR: Thank you. That will be exhibit 37.

MR EDWARDSON: And I have copies for the jury.

HIS HONOUR: Thank you.

EXHIBIT 37 Document embraced by Constable Hawkings.

MR EDWARDSON: Senior Constable, you will recall that you gave evidence at a committal hearing in Alice Springs on 2 September 2020?---Yes.

And I asked you some questions, did I not, at that committal hearing?---Yes, you did.

As did Mr Strickland?---Yes.

Now, before giving evidence in court today did you have recourse to or read through the statements that you had previously provided in the course of the investigation of this matter and also read the transcript of your evidence?---Yes, I have done that a few days ago.

Need be I can ask you to look at it but I just want to read a portion of the transcript and then I am going to play the video that was played to you at committal and again played in this court, do you understand?---Yes.

This is at page 106, your Honour, of the committal transcript.

HIS HONOUR: Yes.

MR EDWARDSON: "We know on the evidence and you would have been told, that there were at total of three shots that were discharged?---Correct."

MR STRICKLAND: I object to this, your Honour.

HIS HONOUR: Yes?

MR STRICKLAND: Your Honour, in my submission, obviously I don't mind if previous statements are tendered but it has to be in accordance with the provisions of the *Evidence Act*. Reading out previous answers - - -

MR EDWARDSON: It's all right, I will do it that way, it's no problem.

We know on the evidence that you would have been told that there were a total of three shots that were discharged?---Yes.

As I understand your evidence in this court, two shots you were present for?  
---Correct.

And that's what you described when you were asked questions by Mr Strickland before?---I believe so, yes.

Can I just ask you some questions while I think about it, just about body cam? About what we see in the video that is played and has been played in this court is, of course, what we call body-worn video?---Yes.

Where is the camera on your body?---On my body I believe it is placed at about chest level.

So it's not at the same level as your eyes, obviously?---No.

It doesn't necessarily capture what you are seeing?---No.

Because it would depend, would it not, firstly on whether you're looking in exactly the same direction as the body-worn video?---Yes. If my head is turned to the right, my camera is still facing straight ahead.

Thank you. So what we see, for example, on the body-worn video may not be the perception that you have - or had?---Correct. Correct.

Or indeed, the description of what we see in those images what you can recall seeing?---Yes, the human element side of it, yes.

And again, of course, we've got camera lens versus eyes and so on, things of that nature, all right. I will continue. We know from the evidence that you gave that you heard something at that stage, as I understand your evidence, you didn't realise that what you heard was, in fact, the first shot?---In that split second I didn't realise it, yes.

No, but certainly enough - plus there's a lot of noise from people around the area - community members close by - that cause you to immediately rush to that door?  
---Yes.

That side entrance?---Yes.

MR STRICKLAND: Your Honour, I object. I object to the reference to, "side entrance" I just don't think that's the evidence.

MR EDWARDSON: To the doorway?---Yes.

To the doorway?---Correct.

And at least as we see in the body-worn video you must have been close to that doorway and looking inside?---Yes.

And we can see - and we will come back to the video in a minute. We can see that the camera moves from within inside the residence?---Yes.

And then out and we can see a number of community members coming towards you?---Yes.

And I think we can see your torch shining and you giving instructions to people and you turn back and so forth?---Yes.

So there were two issues that must have been occupying your mind at that moment. Firstly you've got a person who is being - well, there is an attempted containment of an individual who you now know to be Kumanjaya Walker?---Yes.

By officers Eberl and Rolfe?---Yes.

You've got a rifle in your hand?---Correct.

And that was one of the impediments of you actually moving inside?---Yes.

The premises?---Yes, at that particular time, yes.

Because that could have aggravated - could have actually made things worse?---Potentially.

Potentially. And that was certainly a matter of concern to you?---Yes.

At the same time you had quite a number of members of the community who were clearly upset, descending on you and so you put yourself between the other two police officers who were seeking to contain Kumanjaya Walker and those who were coming down in a fairly aggressive fashion?---Yes.

When we look at the images and we listen carefully to the video-worn camera and what is captured by the camera, we can hear Constable Rolfe say certain things, if not Constable Eberl as well - and in fact you as well, I suggest?---Yes.

When you listened to the tape did you hear the words, "Drop the scissors" or "Let go of the scissors"?---Yes.

Who did that come from - or who used those words - as you recall it?---I'm pretty sure - no, I believe it was Constable Rolfe and I may have even mentioned that when I saw the footage as well.

And were you asked specifically at the committal on that very topic?---Yes, I believe so.

And were you asked specific - - -

MR STRICKLAND: Your Honour, I object.

HIS HONOUR: The objection?

MR STRICKLAND: The objection is, your Honour, in my submission it is not admissible to ask what his previous statement was unless it falls within one of the rules in the *Evidence Act*, if it's a prior inconsistent statement, that's fine.

HIS HONOUR: Mm mm.

MR EDWARDSON: I will rephrase it.

On that video, having listened to it, do we hear you say something to the effect of "Drop the scissors" or "Let go of the scissors"?---Yes.

Right, I would ask that that video be now played again. It is exhibit 28 and if we can go from 9:51 - - -

HIS HONOUR: I will simply warn the court, those members of the public who are present in the gallery that the video which is about to be shown contains confronting material and if any member of the public believes that that may cause them difficulty then they should now leave the courtroom.

THE SHERIFF'S OFFICER: What is the time?

MR EDWARDSON: 9:50 - I mean 50 Zulu. Thank you.

DVD PLAYED

MR EDWARDSON: I want to ask you some questions about that if I may. And I want to go back to training as well. Firstly, from your perspective, when you first looked inside, and you saw, as you've told us, the discharge of the two shots that were fired by Constable Rolfe?---Yes.

And from your perception, it looked as though, is it the case, it looked as though he was aiming for the central body mass of Kumanjaya Walker?---Yeah, I believe so.

At any time, and I realise it's a very short time span, but, at any time, from your perspective, did it appear to you that Kumanjaya Walker had been



contained?---I don't believe so. Not at the time, even after those two shots.

Was it – you talked, I think in – to use your words, “In terms of the two officers wrestling with him”?---Yes.

You were able to see, as we can see on the video, you were able to see that he was in – or he was armed with what we now know to be scissors?---Correct.

He had not released or relinquished those scissors?---Correct.

And indeed, for some time after, the two shots were fired, and we now know that there was another shot earlier, I think it was 2.0 seconds earlier, he was not incapacitated, was he?---No.

Now you used an expression, in answer to the questions asked by the prosecutor yesterday, and the question was, “And were you told why you should fire at the central mass of the torso area”?---Yes.

And your answer was, “That's to achieve subject compliance via immediate incapacitation”?---Yes.

You were then asked, “What do you understand by immediate incapacitation?---To stop that threat immediately so it does not continue, and you are no longer in a position where you could be seriously hurt or killed, or other people”?---Yes, correct.

Your training, when you started, and right through to now, is incapacitation means stopping the threat?---Exactly.

It might require one, if you have to deploy a gun, a Glock, it might require one bullet. It might require two. Or it might require a lot more?---Yes, correct.

Indeed, as you've said earlier, by reference to your training, an example was that somebody might be for example on ice or drugs, and they might get shot five or six times and it doesn't stop them?---Yes, that's true.

Incapacitation necessarily, would require that the weapon be removed from the subject?---I – I think so. Look, it's – like I say, it's to stop that threat so that weapon is not able to be used upon you or other people, or that threat is no longer there to be able to do that.

Were you able – no I withdraw that. I withdraw that. When, as you've said, you and the others used the words, “Drop the scissors”, or something to that effect, did it appear to you that Kumanjayi Walker, even having been shot now three times, dropped the scissors?---No.

Or released the scissors?---No.

And scissors fall fairly and squarely within the definition that you've been taught of an edged and blunt weapon?---Absolutely.

I want to ask you a little bit more about your job, on this particular occasion, 9 November. It appears from the evidence that you gave yesterday, that you had relatively limited information about Kumanjayi Walker?---Yes.

I mean, you had, yourself, not had any dealings with him before?---No.

Probably the most graphic and visual indicator of his pre-disposition for violence, was the body-worn video of what we have been calling in this court, the axe incident which occurred on 6 November 2019?---Yes.

And in a sense, as I understand your evidence, that was your briefing at the Alice Springs Police Station before you moved to Yuendumu?---Yes.

So you had – you were able to visualise what this person was potentially capable of?---Yes.

Now plainly an axe is a potentially lethal weapon?---Yes.

And would plainly fall within the description of how you might deal with an individual, if presented with an axe?---Yes it would.

Because it's an edged weapon like anything else, all those other different items that we discussed earlier?---Correct.

In any event, you're told to kit up, or take your kit, with all the accouchements that go with it. The only thing is that you were told that you were going to wear general duties uniform, not your camouflage IRT?---Yes, correct.

But the IRT have other equipment, or pieces of equipment, which general duty police officers don't have?---Yes.

For example, the rifle that you were carrying?---Yes.

And other pieces of equipment - - - ?---And other equipment, yep.

And you were all kitted up, were you not, as an IRT member?---As in en-route to - - -

Well, you took all your gear - - - ?---Yes we took – I took my - - -

- - - equipment - - - ?---Equipment, yes.

- - - to Yuendumu?---Yes.

Now we know, from what's been shown to you, that you get there with Constable Eberl at around about I think it's 6.56 or thereabouts?---Okay, yes.

Something like that. That's when you first arrive. And then I think you go outside, and you go and get your equipment, and you kit up gear, and then you come in. And we know that you're despatched by about 7.06 or thereabouts?---Yes.

And we know also, that you go directly from the Yuendumu Police Station, to House 577?---Yes.

And although you now have no recollection of it, you accept that you must have made a note of 577 in your notebook because that's what you said when asked that question at another – on another occasion?---Yes.

But your clear evidence was, that to the best of your knowledge, you were never provided with what we call, the arrest plan, in that email that was sent to you and others by Sergeant Frost?---That's correct. That was to my knowledge.

Let me put it this way. Did anybody suggest to you, when you got to Yuendumu, that you weren't going to be going on duty until 11 o'clock that night?---I don't recall that at all.

Well it didn't happen did it?---Not to my knowledge.

Well not to your knowledge. It did not happen - - - ?---No.

- - - you left at 7.06 - - - ?---No it didn't happen.

- - - and went straight to 577?---Exactly, yes.

Again, whilst you can't recall what was said, it's clear that part of your responsibilities, as you understood them to be, was to try and identify where Kumanjayi Walker would be located?---Yes, correct.

Because what is clear, I think, can I suggest, is that no one actually knew where he was?---That's correct.

The last known place that he'd been at, that police were aware of, was House 577, where the axe incident had occurred on 6 November, three days before?---Correct.

And that's the first place you and the other members of the IRT, and the dog handler, Mr Donaldson, went to?---Yes it is.

And again, I don't know whether you know – you can recall this, and if you don't recall it, please say so. Did you at least have an understanding that when and if you locate Kumanjayi Walker, he was to be arrested?---Yes.

There was a warrant for his arrest that was out?---I believe so.

Importantly, he was going to be charged with the aggravated assault of Constables Hand and Smith, from the axe incident?---Yes.

And you were a specialist team that were to facilitate that arrest, once he was located?---That's correct.

When you consider, as a police officer, what you're dealing with – the individual – in this case, Kumanjayi Walker, do you have regard to what information you might know about the individual? Criminal record, that sort of thing?---We like to have that information on somebody, yes, so we are prepared.

Do you know whether you yourself – or to your knowledge, the other members of the IRT team – accessed his criminal history before you left the Yuendumu Police Station at 7:06 or thereabouts?---No, I don't recall that at all.

Right. So you have no specific recollection or knowledge of his criminal history?---Not to my knowledge.

But you do have a very clear recollection of having viewed that video footage?---Yes.

As an experienced officer and a member of the IRT team, would you agree that that particular footage is extremely confronting?---Absolutely.

It certainly suggests that he is potentially – or was potentially – a very dangerous individual?---Very.

Who had the capacity to arm himself if the opportunity presented itself?---Yes.

And more importantly, if he did arm himself, deploy that weapon against the arresting officers?---Yes.

Would you agree that in those circumstances – even given the – just with the information you had from body-worn video – that he was potentially a high-risk target?---Yes. Looking at that, I would've determined that, yes.

Excuse me, your Honour. Nothing further, thank your Honour.

HIS HONOUR: Yes?

REXN BY MR STRICKLAND:

MR STRICKLAND: Could the witness be shown exhibit 37, please?

Have you got that in front of you?---Is that the state – the transcript?

It's the, "Part 4, Edged and Blunt Weapon Awareness"?---Yes, yes.

That was part of a Defensive Tactics Training- -?---Yes.

- - -you received, is that right?---It is.

I'll just show you this document, please. Do you agree that the – part 4 is part of the larger document – the Defensive Tactics document I've shown you?---I believe it could be, without going into it.

Just go to page 64 of the larger document?---It looks very similar to the – yeah, if not the same, yes.

Do you agree it's the same?---I agree.

Excuse me for a moment. I MFI that document, the Defensive Tactics document, your Honour.

HIS HONOUR: That will be marked for identification with the letter P.

MFI P Defensive Tactics document.

MR STRICKLAND: They're my questions. Thank your Honour.

HIS HONOUR: Thank you. That concludes your evidence. You may now go?---Thank you, your Honour.

#### WITNESS WITHDREW

MS CALLAN: Your Honour, the next witness is Dr Keith Towsey. He's giving evidence by audiovisual link from Queensland.

HIS HONOUR: Yes.

MS CALLAN: Your Honour, if I may (inaudible).

#### AVL LINK INTERFERENCE

MS CALLAN: Your Honour, my enquiry – there is one image that I was proposing to show Dr Towsey. It's a diagram. Is it feasible to use the document camera to do that whilst he's giving evidence by AVL?

HIS HONOUR: I don't know. I'm told that it is.

MS CALLAN: I'm very grateful, your Honour.

KEITH MATTHEW TOWSEY, sworn:

XN BY MS CALLAN:

MS CALLAN: Sir, could you tell the court your full name?---Yes, it's Keith Matthew Towsey.

And what is your current occupation?---I'm a visiting Burns and Trauma Surgeon at the Royal Brisbane and Women's Hospital and I'm a visiting surgeon to St Andrew's War Memorial Hospital.

It's the case, isn't it, that you're a registered medical practitioner in Queensland?---Yes, it is.

And Doctor, in terms of your background before taking up your current positions as a Burn and Trauma Surgeon and Royal Brisbane and Women's Hospital and a surgeon at St Andrew's War Memorial Hospital, it's the case isn't it, that you, having completed your medical studies, spent two years as a full-time serving officer in the Australian Regular Army in Second Health Support Battalion?---Yes, that's correct.

And did that include provision of combat resuscitation to the ADF and command and training and supervision of nurses and combat medics in the ADF?---Yes, it did.

In that capacity, did you deploy to the Solomon Islands as a medical and operations officer for the purpose of providing support and relief there?---Yeah, that is correct.

That was between January 2002 and December 2003. Can you – it's the case, isn't it, that you then – from January 2004 to December 2008, worked in a full-time position as a surgical registrar?---I did, yes. That's correct.

And whilst doing that in a full-time capacity, you also provided reserve duties as a regimental medical officer to the ADF – again, in that time period? January 2004 to December 2008?---Yes, that's also correct.

It's the case, isn't it Doctor, that in – during the year 2009, you worked full-time as a burns and trauma fellow?---Mm mm, that's right.

And in that period of time, you also deployed for two months to Afghanistan as a surgeon for the ADF, where you, in particular, developed skills in the management of major penetrating trauma and blast injuries?---Yes, that's also true.

And in more recent times – that is, since 2013, you've worked as a visiting surgeon at different hospitals in Queensland?---Yeah, that's right.

And you've told the court what you're currently doing in terms of the work that you're doing as a burns and general surgeon at those hospitals that I've mentioned?---That's right. Yes, that's correct.

Now, it's the case isn't Dr Towsey, that in about March 2020, you were asked by the police investigating the shooting of Kumanjayi Walker to consider certain material and provide your opinion in respect of certain matters based on your training and experience?---Yes, that's correct.

And just to confirm what you were provided with, that was the – that was certain – copies of certain body-worn footage of the shooting incident?---That's right.

And your Honour, I – if there's a difficulty with this, I can deal with it at an appropriate time. But can I indicate for the record what the doctor was provided was the Rolfe body-worn video which, in these proceedings is exhibit 26. The Eberl body-worn video in these proceedings, exhibit 24. And the bird's-eye footage in these proceedings exhibit 36.

MR EDWARDSON: No issue with that your Honour.

MS CALLAN: I'm grateful.

HIS HONOUR: Yes.

MS CALLAN: Dr Towsey, were you – it's the case isn't it, you were also provided with a copy of an autopsy report which is prepared by Dr Tiemensma dated 21 January 2020?---Yes, that's correct.

And that report included a diagram, which showed where certain wounds were observed by Dr Tiemensma?---That's correct.

And also a number of autopsy photos, taken by Dr Tiemensma, during the autopsy she conducted on 12 November 2019?---That's also correct, yes.

For the purposes of providing your opinion, is it the case that the particular information in the autopsy report you focussed upon were the locations – the number and location of bullet wounds?---That's right.

Your Honour, I'm just going to have a diagram shown to the witness and the court, if I may.

That's sideways, could we - - -

HIS HONOUR: You prefer the other orientation.

MS CALLAN: If that's – yes that's - - - ?---Yes please.

HIS HONOUR: Yes.

MS CALLAN: Is that satisfactory, Dr Towsey?---Yes it is, yep.

Do you recognise the diagram that I've just had displayed on the screen as a diagram that you observed as contained within Dr Tiemensma's autopsy report?---Yes, that's correct.

Your Honour, could that be marked for identification.

HIS HONOUR: That will be marked for identification with the letter Q.

EXHIBIT MFIQ: Diagram contained in Dr Tiemensma's autopsy report.

MS CALLAN: Dr Towsey, by reference to this diagram, and Dr Tiemensma's autopsy report, is it your understanding, and in effect the assumption that you made, when providing your expert opinion, which – about which I'll ask in a moment, that the deceased sustained three gunshot wounds?---Yes that was my understanding.

And the location of the – one gunshot wound was shown in the diagram as entering at the location labelled A1?---Yes, that's correct.

And you observed in Dr Tiemensma's autopsy report, that on the basis of her examination, the track of that gunshot wound perforated the posterior medial aspect of the right 11th intercostal space?---That's right.

"The jury's appreciation", what does that mean, in terms of the part at the bottom?---So – yeah, so it's the area between the lower most rib and the second most – lowest most rib, at the back, and generally close to the spine, as you can see off the diagram. It – essentially it's a boundary area between the chest and the abdomen.

Did you also observe from the diagram and the – information in Dr Tiemensma's autopsy report, that a second gunshot wound was sustained, the entry point on the diagram B1?---That's right, yep.

And a third wound at C1?---That's correct.

Now the wound at B1, did you proceed on the basis set out in Dr Tiemensma's autopsy report, that the track of that gunshot wound perforated the seventh intercostal space laterally, with associated perforation of the left eighth rib, the left hemi-diaphragm, the spleen, left kidney, anterior aspect of the L2 vertebral body, right lobe of the liver, right hemi-diaphragm, and the inferior aspect of the lower lobe of the right lung, and the right seventh intercostal space laterally?---That's correct, yes.

And can I again ask you, in layman's terms, if you can, what does that mean in terms of the track of that gunshot wound?---So essentially it's gone from one side of the body to the other. And in doing so, it's passed through several major organs.

Yes?---In particular the – obviously the liver, the kidney and the spleen. These three organs in particular have a very rich blood supply, and penetrating trauma to them often causes quite extensive bleeding, which can be difficult to control.

The – to the extent there was penetration of the lower lobe and the right lung. What does that cause?---Yep, yeah so it sort of depends a little bit on the amount of tissue disruption, but obviously the lung itself is quite vascular, so you can expect



haemorrhage. The other thing it can do is cause what we call pneumothorax which is where air escapes inside the lung into the chest space, between the lung and the rib cage. And this can cause the lung to collapse. Which can in turn, impair a patient's ability to breathe.

The track of the third gunshot wound, marked C1 on the diagrams, did you proceed on the basis as set – as Dr Tiemensma sets out in her autopsy report, that the track of that wound, perforated the right – the eight intercostal space, that is, just below the second – that is sorry, bullet – bullet wound B1?---Yeah that's right, yep.

And exited the posterior aspect of the left plural cavity, just below the left 12th rib?---Yeah, that's correct.

And again, what does that indicate as to the nature of that wound, as sustained in layman's terms please?---So it's traversed the left chest. But it's a relatively shallow trajectory through the chest. So depending on whether the bullet's fragmented, or its path has been deflected by the rib, you have to look at the pathology report to see whether there was any underlying tissue injury. At this point, there's not too much lung that descends that low. And so depending on the phase of breathing, whether you're breathing in or breathing out, the lung might be clear of the missile track at the time of injury. But it's also possible if the missile has deflected off a hard object like a rib, it can turn inwards and penetrate through the diaphragm into the abdominal cavity. And my understanding from the pathology report, neither of those two situations occurred, it just went through and through.

Okay. Doctor, according to that information that you were provided that I've outlined, in respect of the three bullet wounds sustained, I want to ask you as to your view, whether those injuries, the three bullet wounds, amounted to serious harm, and when I say, "serious harm", what I mean is any harm that endangers, or is likely to endanger a person's life, or is – is or is likely to be significant and long standing?---Yeah so according to the definition that was provided to me which you've just described, yes I would consider this to be serious harm.

And can ask you, do you distinguish in giving that answer, between the three bullet wounds?---I was going to say, yes – yes and no. I mean all three wounds constitute serious harm. In that they will potentially provide or cause, you know, long term implications. They certainly warrant treatment. But I'd classify the wound B1, which has traversed the major organs as being the one that's going to cause death. I don't believe the other two injuries would have caused death. But they certainly would have warranted serious hospital treatment.

And, in that respect, caused harm that is - or likely to be - significant and long standing?---That's potentially true, yes.

Just to be clear, is this the case, it's your evidence, Doctor, that in your opinion gunshot wound labelled B1 you say would've - would or was very likely to cause death?---That's my understanding what you described as - from what you said a

couple of minutes ago that B1 was the round that traversed the major internal organs.

And your evidence as to A1 and C2 is that at the very least they would be likely to cause harm which is significant and longstanding?---Potentially, yes.

Doctor, in your training and based on your experience, what part of the human body do you expect a trained professional - by which I mean a police officer or an ADF member - to shoot at?---So, we are all trained to shoot at, what we describe as, "centre of mass" which is essentially the torso of the human body.

And why in that area?---So, that area obviously contains most of the major organs. More centrally you've got the major blood vessels which connect the heart to those organs and so the idea is that to shoot in that centre of mass is most likely to cause, you know, soon or immediate incapacitation of the target, the idea being that you neutralise the threat as soon as possible.

And why or how is that likely to cause incapacitation of the target?---So, through major haemorrhage, so it would cause the target - or the victim - to enter into haemorrhagic shock.

And what does haemorrhagic shock do in terms of a person's ability to move or wield, for instance, a weapon?---Yes, so as - as the individual continues to bleed they will experience a rise in heart rate and a drop in blood pressure and as that does you see a - essentially a loss of circulating blood moving through the major organs as well as the muscles, so from the peripheral muscles, so the arms and legs, that reduces their ability to move quickly and at maximum power, loss of diffusions to the head results in impairment of a person's cognition, the ability to remain conscious and obviously without treatment to stabilise that process eventually they will - they can bleed to death, depending on which organ has been injured.

I'm going to ask you about the bullet wound which is A1?---Yep.

Based on your training and experience, what is likely to have been the physical effects upon the deceased of that wound - specifically on his ability to move his right arm?---I wouldn't consider the wound A1 to have caused significant impairment of his ability to move his right arm. It hasn't struck any major organs to cause (inaudible) haemorrhage. It hasn't affected the major muscle groups which provided power to the shoulder and it hasn't affected any of the nerve supply of the shoulder, so anatomically I can't see how the missile tract at A1 would affect his ability to use his right arm.

When you say, "anatomically" what do you mean?---So I am referring to the location of the missile tract in regards to the structures that surround or power the right arm and so you've got bone, you've got muscles and you've got a nerve supply and a blood supply to that arm and none of those structures, I believe based on what the pathologist's report have to say, was affected by a bullet entry at A1.

Thank you, Doctor. Doctor, what is the most likely result of shooting someone in the torso or centre mass?---So, depending on which particular organ it hit first. So, for instance if it's a gunshot round to the heart you could expect that to be fatal, within moments. However, gunshot wounds to solid organs or the lungs - or solid organs or hollow organs such as the lung, solid organs like the kidney liver or spleen, they will bleed. The extent of bleeding depends on a few factors. So one is how wide the missile track is through those organs, so obviously if it's a smaller track, less likely to experience bleeding as opposed to a much larger missile tract. Bullets entering the body produce a phenomenon called, "Cavitation" which is where the pressure wave that is coming off the bullet as it passes through solid tissue causes a rapid expansion then relaxation of that tissue. That can cause what we call, "contusions" or bruising throughout those solid organs and, if only minor vessels in those organs are disrupted, it's not uncommon for the bleeding to slow or even stop potentially as the body's blood clotting process begins and the bleeding can potentially slow down to the point where they don't bleed to death. But, if a major blood vessel within those organs is damaged or divided, you can have uncontrolled bleeding which, without surgical intervention, results in death. Gunshot rounds to other hollow organs like bladder or bowel, again, the process for dying from haemorrhagic shock is considerably slow in those organs because their blood supply is less, the blood vessels are smaller. However you are much more likely to see problems arising from sepsis because those - obviously those organs contain contaminated fluid and so - but that process of dying from sepsis is considerably slower, so we're talking days to weeks for that process to run its course without treatment. So the idea being that you shoot at the centre of target to try and hit a major vascular structure to try and cause as much bleeding as soon as possible to incapacitate your target.

In giving that answer, you distinguish between the consequence of hitting the heart and the consequence of hitting other of the organs - or major organs in the centre mass when you described the range of potential consequences, depending on whether it hits a major blood vessel or not, can I ask, those range of consequences or would they all meet the notion of serious harm?---Yes, that's correct.

Those are my questions in-chief.

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Doctor, I want to start if I can, briefly, with a little bit more in terms of your qualifications. I just want to make sure I have got your CV correct, so bear with me?---Yes, that 's fine.

From December 2009 to now, you have a position title as a burns and general surgeon Royal Brisbane and Women's Hospital, is that right?---That's correct, yes.

And from January 2010 also till now, Director of general surgery and visiting surgeon at St Andrew's War Memorial Hospital?---That's also correct.

And it would appear that you work certainly at the Royal Brisbane Women's Hospital (audio malfunction 11.09.41 to 11.09.56). Thank you. Can you still hear me? I can't hear him now?---Can you hear me now?

I can but can - - -

HIS HONOUR: The suggestion is that the noise is coming from that end.

MR EDWARDSON: Doctor, as I understand what His Honour is saying, it may be that there's some interference at your end?---Okay.

Can you move slightly – although, not that you move very far?---Yeah, I'm not sure I've got – headphones on.

That's better. That's better?---Okay.

That's better. We'll press on, if that's all right?---That's fine.

Back to the burns and general surgeon at the Royal Brisbane and Women's Hospital. You work as part of a multi-disciplinary team in the provision of clinical care in burns, trauma and general surgery, including acute surgery?---That's correct, yes.

Now, trauma can be anything, I assume?---Yes, both blunts and penetrating, that's correct.

Both what, sorry?---Blunt trauma- - -

Blunt trauma- - -?---As well as penetrating trauma.

And would penetrating trauma include an edged weapon being used to harm somebody?---That's – yes, that's correct.

I'll come back to that in a moment. But I want to talk a little bit more about your active army reserve and service career. You are an active army reserve officer, is that right?---That's correct, yes.

You provide combat surgical care to the Australian Defence Force?---That is one of my jobs. Yes, that's correct.

And the provision- - -?---But it's not my current job.

No, no. I cut you off. My apologies?---I was going to say yeah, that is my – my clinical role. But it's not my current posted position. So my posted position is the Senior Medical Officer for First Division Headquarters. And that's a Health Advisory and Health (inaudible) role.

So do you provide training and supervision to junior doctors, nurses and combat medics of the Australian Defence Force?---Yes, I do.

And do you develop, implement and oversee clinical practice guidelines, clinical governance and clinical credentialing of all health-related matters for the 11th Brigade as part of the Commanders Advisory Group?---Yes, I did. I've now been posted out of that role and I'm now as the Senior Medical Officer for First Division Headquarters.

And were you – I'm sorry?---Sorry. Yes, that provides a similar role to what I was doing at 11 Brigade.

And were you deployed to Afghanistan in 2009 as an Australian Defence Force surgeon?---That's correct, yes.

And did you there develop skills in the management of major penetrating trauma and blast injuries?---Yes, I did.

Now, I want to ask you a little bit more if I can now, about the request that was made by the Northern Territory Police for the provision of your report. Your report, at the request of the Northern Territory Police, was dated Monday 23 March 2020?---That's correct.

And you were asked specific questions, were you not, by the Northern Territory Police along the lines of what we've been discussing in court today?---Yes, that is also true.

And the three questions that you were asked were these. Firstly, if the injuries of the deceased meet the legal definition of serious harm?---That's correct.

Secondly, if shooting the person in the torso – such as this incident – would always result in serious harm or should be considered as a likely outcome by a trained police officer and a former soldier?---Yes, that's also true.

And thirdly, the physical effects upon the deceased after being shot – specifically, what was the impact to the mobility of the deceased's right arm after the first shot?---Yes, that was also correct.

I want to focus for the moment on questions two and three?---Mm mm.

I'll just repeat question two. If shooting the person in the torso, such as this incident, would always result in serious harm or should be considered as a likely outcome by a trained police officer and former soldier. You qualified your response to that answer, did you not, by your understanding of what the training of police officers or law enforcement officers and members of the services are?---That's correct, yes.

Because that's something that you have specific knowledge and expertise in?---Yes.

And you said this: “It must be understood that all law enforcement and members of the Australian Defence Force are trained to shoot, aiming for a target’s centre of mass, which is loosely defined by the torso of the human body”?---Yes, that’s also correct.

“The purpose of which is to incapacitate the target immediately”?---That’s right.

Did you also say that you would expect that any trained professional to automatically shoot at the said centre of mass in order to immediately incapacitate the target and that shooting at the centre of mass would result in serious harm and potential or death?---Yes, that’s also true.

All right. Now again, whilst there are the organs that you’ve described within the centre mass of an individual, much depends on the trajectory of a bullet through that part of the body as to whether it will, in fact, incapacitate the individual?---That’s correct, yes.

Let alone cause death or serious harm?---Yes, that’s true.

Now, in this case, you were provided with body camera footage – the footage that has just been read into the transcript a moment ago – and specifically, you reviewed the extent to which the first shot had the capacity to incapacitate the person you now know to be known as Kumanjayi Walker?---Yes, that’s true.

Your Honour, is that a – I know it’s – we’ve got a medical expert, but would it be a convenient time for a break? I’m going to try and fix up this audio problem.

HIS HONOUR: All right.

Would that cause you any inconvenience, Doctor, if we took a short break at this time?---No, that’s fine.

All right, thank you, then. Look, we’ll close it down – close down the audiovisual link at the moment. We’ll come back in about 20 minutes.

MR EDWARDSON: Thank you.

THE WITNESS: Okay, thank you.

HIS HONOUR: Members of the jury, would you retire, please?

WITNESS WITHDREW

JURY OUT

HIS HONOUR: I'll adjourn.

MS CALLAN: Your Honour, could I just raise one thing. Sorry, your Honour.

HIS HONOUR: Yes?

MS CALLAN: I'm sorry to delay you. I need to attend to another matter. May I be excused for the balance of today?

HIS HONOUR: Yes, certainly.

MS CALLAN: Mr Strickland will continue with this witness. And I do apologise, the timing didn't quite work out.

HIS HONOUR: No need to apologise. That's certainly fine.

ADJOURNED

RESUMED

HIS HONOUR: Yes, we ready to - - -

MR STRICKLAND: Thank you for that opportunity. I think the sound problem has been solved.

HIS HONOUR: Yes.

MR STRICKLAND: After this witness I'll be calling Dr Tiemensma, and after that witness it'll be Mr Spilsbury. And we just need a five-minute break between Dr Tiemensma, and Mr Spilsbury.

HIS HONOUR: All right, thank you.

Yes, bring the jury in please

JURY IN



KEITH TOWSEY:

HIS HONOUR: Yes, now I believe that we are still connected. Ready to proceed? Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Dr Towsey, I want to turn now to the third question that was posed by the Northern Territory Police, resulting in your report, dated Monday, 23 March 2020. The question was "The physical effects upon the deceased after being shot, specifically, what was the impact to the mobility of the deceased's right arm after the first shot." That was the question that was posed?---Yeah, that's correct.

And after reviewing the body camera footage, did you conclude that no vital organs were injured with this projectile, and you would not consider this shot to be incapacitating to the deceased?---Yes, that's correct.

And of course, you had qualified, in relation to question two, "That it must be understood the all law enforcement and members of the Australian Defence Force, are trained to shoot, aiming for a target centre of mass. The purpose of which is to incapacitate the target immediately"?---Yes, that's correct.

Now in relation to the second and third shots. Was there any evidence that you could detect that would demonstrate that one or both of those shots, would have contributed to any immobility of the deceased's right arm?---No I couldn't determine that.

Thank you.

Mr Associate, could you please put up exhibit 37, page 68.

There's a document, which is about to be put up for you to consider, just by way of background, it forms part of an instruction module to the police officers concerned, about their training, in respect of what's called "Edged and blunt weapons"?---Mm mm.

You're familiar with that concept anyway, aren't you, as a – given your expertise?---Yes, yes.

And specifically, the capacity of a blunt or an edged weapon to effectively be a fatal weapon?---Yes, that's correct.

All right, now what you'll see, there's a table, which is included in the module, which has a timetable of death. Do you see that? Can you read that from where you are?---Yes I can, yes.

And you'll see, that depending upon the artery that is severed as a consequence of the deployment of the edged weapon, it gives an indication of how far below the surface the particular artery is, or might be. How long it might be for a loss of consciousness, and then in turn death. Do you see that?---Yes I can.

Now just – I don't need to go through all of the specifics of each one, but is that consistent with your understanding of the potential consequences of the deployment of a blunt or edged weapon severing, or puncturing an artery in any of those locations?---Yeah from what I can see, it looks like a very reasonable guide to, you know, from time of injury to time of death. And location of those blood vessels.

Where is the carotid artery?---Carotid artery is in the neck.

And can you just indicate, by reference to your own neck, where that is?---So it sits between – in the clavicle or your collarbone, and it runs at the front of the neck, up until basically the corner of your jaw.

And –

The witness indicates by reference to both sides of his neck, from the clavicle up to the upper part of the jaw.

HIS HONOUR: The corner part of the jaw, yes.

MR EDWARDSON: Doctor, I want to ask you a little bit about that artery specifically?---Mm mm.

How far under the skin is it?---Depending on how big the person is, on average, probably about two centimetres I would have thought.

All right. And I want – the next thing I want to ask you a little bit about is edged weapons. In the module, and the evidence that's been in this court, there are many, many examples of what might be described as an edged weapon. And I'll just give you some examples. Credit cards, shop bought pens, screwdrivers, broken bottles, smashed glass, pieces of plastic, disposable knives, household keys, stationary scissors?---Yep.

I mean the list is really endless?---Correct.

But if deployed to the right region, with sufficient force, would you agree, that all of those items have the potential, or the capacity, to cause a fatal wound?---Yes that is true – correct.

I want you to have a look at something which is now produced.

And I will ask that it be put up by Mr Usher.

I want you to assume, Doctor, that that's – they are photographs of the scissors, which were in the hands and control by Kumanjayi Walker, the now deceased?---Yes.

As you saw on the body-worn video, that you were provided with for the purposes of your opinion?---Mm mm.

First thing I want to ask you is this. Did the Northern Territory Police, or the Northern Territory DPP ever ask you to express an opinion, as to the capacity of edged weapons to be deployed and resulting in a fatal consequence?---Not in writing that I recall. But I do recall having a discussion about whether a pair of scissors could cause a fatal wound if applied to the right blood vessel.

Who did you have that discussion with?---It's a very good question. It's almost two years ago, so I can't recall.

But you were not – you did not provide a formal report?---No, I wasn't asked to, no.

But you did express an opinion?---I did.

And it's true, is it not, that if deployed to the right region and the right location, a pair of scissors, such as the ones we see on the screen, have the potential to be lethal?---Yes, that is very correct.

And I've no doubt that you would have expressed that opinion, to whoever it was that contacted you?---Yes, I did.

Have you got a diary note, or anything of that nature of what you actually said, and who you said it to?---No, I didn't, because it was right when I was in the middle of surgery. So I was in-between cases at the time, so.

Was it a male, or was it a female?---It was a male.

Did he - or she - identify - sorry, he - identify himself as a police officer or a lawyer? ---I believe it was a police officer.

Police officer. And that police officer, what - and I realise you haven't got notes in front of you, can you try and remember what the question was in respect of scissors? ---They wanted to know if someone was to stab someone in the neck with a pair of scissors could it - could it be fatal and I said, "Yes, it can be".

And what - and that's the response you gave?---Yeah, that's correct, yeah.

But they didn't ask you for a formal opinion, in writing?---No.

Your Honour, I call for any note or any record from anybody of the communication between the doctor and whoever this unidentified Northern Territory police officer is.

MR STRICKLAND: Well, your Honour, it's the first I've heard of it. I have nothing to produce. I have nothing to produce.

HIS HONOUR: Yes.

MR EDWARDSON: It's the first I've head of it too, your Honour.

The carotid artery is one area of the neck that if deployed by scissors such as those, that could result in death - a fatal wound?---Yes, that's correct.

Anywhere else in the upper part of the body?---So yes, so if you strike downwards over the clavicle - sorry for the - the collarbone, you can strike the subclavian artery which is a branch coming off the carotid artery and headed out towards the arm.

Yes?---A blow with a shove up into the armpit or the axilla either to the front or through the side can also strike a major blood vessel there and obviously a few other areas of the body would include, you know, the groin or potentially the elbow - an area we call the cubital fossa which is in the front of the elbow.

Now, these scissors that we see in the photograph that we can see on the screen, they've never actually been physically presented to you or shown to you?---No. I saw a photo of - I recall that photo. I was sent a copy of that image.

Thank you - you were sent a copy of that image? By email?---Yes. And who sent that?---I believe it was a Mr Newell from the Northern Territory Police.

Is that the gentleman that is sitting in court now?---I've never met him so I can't - I can't identify him.

I call for the email from Mr Newell and the associated scissors apparently attached to that email.

HIS HONOUR: Well, the photograph of the scissors.

MR EDWARDSON: Photograph of the scissors.

MR STRICKLAND: I don't have it, at this stage, but I will arrange for that to be produced.

HIS HONOUR: All right.

MR STRICKLAND: I will make some enquiries immediately.

HIS HONOUR: Thank you.

MR EDWARDSON: The scissors themselves, though, they've been called, rightly or wrongly in these proceedings sometimes as, "surgical scissors". Is that a common

expression or descriptor of the type of scissors that they appear to be?---I wouldn't necessarily describe them as surgical scissors, they just look to me like a generic pair of scissors that you get at any stationery shop, but you know, some - some of the community first aid kits would have a similar pair of scissors but I wouldn't - I've never used anything like that in surgery.

I am pleased to hear it. The scissors themselves, if you look at them carefully, what you can see - I know they are not open, but if you open the scissors up they've got two different types of blade - what I will call a "blunt" and a "sharp" blade?---Yes. I can see that.

Could you turn the page over please? Now, we can see that, can't we, here?---Yes.

Now, were you sent those photographs as well?---Yes, that was - - -

And what is on the other side?---Yes.

In the same - - -?---I can remember seeing the - - -

Sorry?---I was going to say, yes, I recall seeing the highlighted markings on both the tip and the handle.

And that's the same email from Detective Newell that you've referred to?---I believe so, yeah.

Did that email also ask you to express an opinion about the potential lethal force - sorry, the potential for the capacity for a lethal wound using those scissors, or was that separate in a telephone conversation?---I believe it was separate from the - in the telephone conversation, though, I must admit, it's a long time ago, so.

Understood. Do you know whether you - I will just ask you this because it's the first I've heard of it but do you happen to have any record or diary entry or anything of that nature of the call that you received asking you to express an opinion specifically on this topic?---I don't have any record of it, no.

That's all right. In any event, I just want to finish off by these two - the two different blades - if I can call it that way?---Mm mm.

Obviously, I mean, I am not an expert, you are, does it matter what the end blade - how it presents itself? Is one blade more likely to cause a more serious injury than the other or are they going to both have the same effect?---Depending on the force applied. As long as if it's - the gentler the force, you know, you're probably less likely to sustain an injury with the lowermost blade, but (inaudible) can see that the lowermost blade on that picture has, I guess, two - two corners, a sharper one and a rounded corner, I think the sharp corner has been highlighted. The upper blade is a taper, so you know, that would potentially cause a more deeper penetrating injury compared to the lower blade with the same amount of force that would be applied, but you strike hard enough and either of those blades would penetrate.

Thank you.

I have nothing further thank you, your Honour.

HIS HONOUR: Is there any re-examination?

MR STRICKLAND: Yes, thank you.

REXN BY MR STRICKLAND:

MR STRICKLAND: Dr Towsey, you have said that a credit card could cause - did you say serious injury or fatal injury?---Well, depending on how you used it. If you, you know, cracked the card to produce a tapered point to it then yes, you could use that to seriously wound someone.

In your vast experience have you ever known of a credit card to cause serious or fatal injury?---No, I've never seen anybody use a credit card.

You were asked some questions about the capacity of scissors to cause serious injury?---Yes, that's correct.

Does that capacity depend upon the velocity or speed of the use of the weapon?  
---Yes, it does, yes.

And the degree of force that's used?---That's correct.

Does it also depend upon the capacity of the arm or the extent to which the arm holding the scissors is restricted or not?---Yes, that - I - yes, I'd agree with that.

Yes, they are my questions thank you, your Honour.

HIS HONOUR: Thank you, Doctor, that concludes your evidence. We will now break the audiovisual link?---Thank you, your Honour.

WITNESS WITHDREW

MR EDWARDSON: Your Honour, there is an application I have to make. I had better do it in the absence of the jury. I am sorry to interrupt them.

HIS HONOUR: All right.

Yes, members of the jury could you retire for a moment please?

JURY OUT

MR EDWARDSON: The first application, your Honour, is that Detective Newell no longer be permitted to be present in court while evidence is being given. I gave my approval for him to be present on the basis that he was not going to be a witness in the case. I don't know whether he is actually the officer that communicated directly with this surgeon about the issue of the potential for the scissors to be deployed in a fatal manner but we need to get to the bottom of that and we need to have disclosed to us exactly what that communication was and what was said.

It is obviously a very very important issue. Nothing could be more important than whether this particular item had the capacity - because it is obviously relevant to all the issues that I don't need to explain myself on. But the reason I am raising it now, your Honour, is firstly I knew nothing about it until today. And certainly, there has been no disclosure of any opinion having been expressed by this doctor on that important topic. And that's deeply concerning.

The second issue is that the next witness who is to be called is a witness who has provided a report which, on the prosecution case, is favourable to their argument of the incapacity of the scissors to inflict a fatal wound – or unlikelihood, if I can put it that way. I want to check now all the communications and make sure that we've got all the communications between anybody and that particular officer.

And I'd like to get to the bottom of Dr Towsey's opinion and the expression of it and to whom before this witness is called. So I would ask that this witness not be presented at this stage. We've got plenty to get on with and we'll just have to find time later in the – next week, rather than her being called now. I don't want to be cross-examined if it turns out that there's other information that's not been disclosed on this important topic.

Was it the case, for example, that when they got an unfavourable opinion from Dr Towsey about the potential lethal nature of this pair of scissors that they simply said, "Well, thank you very much. We don't need a report from you," and it wasn't pressed and they've moved on to find a doctor who might carry favour with what it is that they want to present. Now, if that turns out to be the position, the jury need to know about all of that. And I should hasten to add, your Honour, what I'm saying in court should be suppressed.

HIS HONOUR: Yes. I will make an order suppressing publication of the submissions that are being made in relation to the present application. Mr Crown.

MR STRICKLAND: Your Honour, dealing with the second issue first. For your Honour's notice, the situation is this: it was a committal. And at the committal, there was a request – I think under 105G of the *Local Court Act* – for various witnesses to be called and the topics. One of the witnesses was Dr Tiemensma and the topic was the subject of the third report, which is the capacity of the scissors to cause injury.

That was a topic flagged by my learned friend – by his side. And as a result of that, we produced notes in the report. That is the origin of that report. Nothing to do with Dr Towsey and I can say that from my knowledge – the origin of Dr Tiemensma's report. It wasn't looking for another expert.

In relation to the notes that are referred to, we will certainly make enquiries about that. I was – I had been advised that Dr Tiemensma needed to give evidence today. My learned friend was on notice of that. But I understand evidence has just developed. So I'll have to make some enquiries now- - -

HIS HONOUR: Yes.

MR STRICKLAND: - - -as to whether and when – I don't wish to force an expert witness that my learned friend – I don't want to force an expert witness on. But I just can't immediately action that. So if I would ask – let's assume that Dr Tiemensma is not going to be called.

HIS HONOUR: Yes.

MR STRICKLAND: Then I will need 15 minutes to set up for the next witness and then just to check the availability of Dr Tiemensma. In relation to the first point about the OIC, Mr Newell, I'm going to need to get some instructions on that. He is an OIC. I can't see why he should be closed. He should not be in court for all witnesses, but I can understand why, for certain witnesses, perhaps it would be prudent he not be present.

But again, I'll need to get some instructions on that. But at least for the moment – and for example, the next – the crime scene examiner, Mr Spilsbury, I just can't see why he couldn't be in court for Mr Spilsbury's evidence. But could I just take some instructions, and I'll- - -

HIS HONOUR: Right. Well, I'll take a short adjournment and you can let my Associate know when you are ready. The document which was shown to- - -

MR EDWARDSON: Sorry, your Honour. I'll formally tender it when it should be- - -

HIS HONOUR: When the jury comes back.

MR EDWARDSON: When it has to be tendered. So I'll do that when the jury comes back. Thank you for reminding me.

HIS HONOUR: All right. I'll adjourn.

ADJOURNED



RESUMED

MR STRICKLAND: Your Honour, thank you for that opportunity.

HIS HONOUR: Yes.

MR STRICKLAND: I won't be calling Dr Tiemensma now. She does have a fairly pressing availability issue, so I'll call her on Tuesday morning. I'll need to call her at 9.30 on Tuesday morning, which may involve interposing.

HIS HONOUR: All right.

MR EDWARDSON: I have no difficulty with that, thank you, your Honour.

HIS HONOUR: All right.

Bring the jury in please.

JURY IN

HIS HONOUR: Yes.

MS POOLE: Yes, your Honour, the next witness to be called will be Dr Kerry Veling. She's appearing via audiovisual link.

HIS HONOUR: Thank you.

KERRIE LEANNE SUTHERLAND, sworn:

HIS HONOUR: Yes.

XN BY MS POOLE:

MS POOLE: Can you state your full name please?---It's Dr Kerrie Leanne Sutherland.

Was your surname previously Veling or Veling?---Yes, it was.

Dr Sutherland, what's your current occupation?---I'm an emergency specialist.

Does that mean that you have a general and specialist registration in that field, as an emergency medical specialist?---Yes.

Are your qualifications, Bachelor of Medicine, Bachelor of Science, and do you also hold specialist qualifications with the Australasian College of Emergency Medicine?---Yes.

Dr Sutherland, when did you graduate as a doctor?---In 2004.

Dr Sutherland, on 9 November 2019, were you working as the senior doctor at Alice Springs Hospital Emergency Department?---Yes I was.

And did that role involve you being available to supervise the Registrar, and the other junior doctors that were on duty that day?---Yes.

Did that role also involve you triaging patients, as required?---Assisting with triage. The nurses do the triage, and then I – the senior doctors can help if needed, to figure out where the patient should go when they depart.

Perhaps Dr Sutherland, for the benefit of the jury, could you just explain what triaging means. What it involves?---So triaging is just a system that is used to allocate how a serious a patients injuries or illness is, and how soon they need to get seen by a doctor.

Now, is it your practice that, as part of that process or when a patient comes to you and you're conducting an initial assessment of that patient's injuries, that you record your notes of what the patient tells you has happened?---Sometimes I'll do that.

Is it your practice to record what injuries have occurred?---Yes, usually.

And what's the purpose of those notes?---The purpose of medical notes is, I guess, to just record what we have done. So if the patient is admitted or if they go home and come back, that the next team is looking after them and knows what has happened. That's the main reason.

And is it the case that it may not always be possible for you to make those notes immediately; is that correct?---Yes, correct. Correct.

MR EDWARDSON: (Inaudible) consulting her notes, if that's what she reads.

MS POOLE: I'm grateful to my learned friend.

HIS HONOUR: Thank you.

MS POOLE: So depending on how rushed you are with the number of patients coming through the emergency room, you may need to record your notes sometime later?---Correct.

Okay. Now, on 9 November 2019, did you see Mr Rolfe when he attended at the emergency department at Alice Springs Hospital?---Yes, I did.

And I'd ask now that you go to the document that is attachment 2 to a statement you provided. And it's the hospital admission records of Zachary Rolfe- -?---Mm mm, yes.

- - -on 10 November.

And your Honour, that document is behind tab 20 in exhibit 1.

Do you have those documents in front of you? That document?---Yes, I do.

Can I ask you, please, to turn to the fourth page of that document headed, "Clinical Progress Notes"?---Yes.

Now, were these notes created by you?---Yes, they were.

They were created on 13 November 2019?---Correct.

And is it correct that you've put on the second line of those notes that they have been created in retrospect?---Yes.

What do those notes relate to?---They relate to what happened when I saw Mr Rolfe when he presented on 10 November.

The third line down, can you just read that out and explain what that means?---It says, "Patient seen briefly as a SWOT on 10th of the 11th '19."

What is a SWOT, sorry?---SWOT – that’s okay. SWOT – it’s a term that we used in Alice Springs ED. It stood for – it’s – I’m not sure exactly what it stands for. But it’s for a senior doctor when we would briefly see a patient to describe if they have any critical injuries and if they did, where they needed to go in the department. And we would start any critical treatment of a patient, if necessary.

And can you read the next bullet point down from that, please?---“Notes not written at the time due to my being busy with concurrent multiple casualty multi-trauma in the department.”

Is that a reference to the casualties that were being brought in that day from a tourist bus crash that occurred on the same day?---Yeah. Yes, correct.

Can you go through, now, the notes below. You’ve written, “28 male,” is that a reference to 28 years old, male police officer?---Yes, correct.

The next bullet point, “He was requesting a tetanus shot.” Is that right?---Yes, that’s right.

The next bullet point, can you read that out, please?---“Involved in incident in community Yuendumu.”

And can you continue, please?---“States was punched a few times and stabbed with scissors to left shoulder. Denied any other stab wounds.”

And is that an accurate record of what Mr Rolfe told you had occurred?---I don’t recall now, but I would say yes, from my notes.

The next bullet point down, please? “Very brief assessment.” How long was your assessment, do you recall?---I don’t recall.

“GCS 15.” Is that – can you explain what that is a reference to?---That is a score, the Glasgow Coma score, that we use in medicine to just assess a patient’s alertness or their neurological status. GCS 15 is the maximum level, meaning he was awake and alert.

What does GCS stand for?---Glasgow Coma Score.

So 15 is the highest and the lowest is three; is that correct? That’s an unresponsive patient?---Yes. That’s correct.

And 15 signifies – well, can you explain what 15 signifies?---Signifies that our patient is awake, following commands and cooperative.

Fully alert?---Fully alert, yes.

No signs of any head injuries?---It doesn't assess signs of head injuries, but no signs of any neurological problems.

Could you read the next bullet point down from that, please?---"Dressing over wound on left shoulder tip. Small wound seen by not examined fully by myself. Less than three millimetres."

Was the wound stitched?---No. Not at that time, no.

Does that wound relate to the left shoulder, is that – is that what you're referring to there?---Yes. Yes, correct.

And the next arrow down from there, could you please read and explain what that means?---It says, "Full ROM of left shoulder" – which is range of motion (inaudible) could move his shoulder completely. There was no signs of any limitation to his movement of his shoulder.

Did you ask – or how did you form that view?---Just asked. I can't recall exactly for this patient but usually, my assessment would be just to ask the patient to move their shoulder – move their arm in all directions.

All right. The next bullet point down. Could you explain – read and explain that, please?---"No obvious stab wounds to front or back chest wall."

And that – sorry?---Looking at his chest, there was no further stab wounds.

So did you actually examine Mr Rolfe's chest and shoulders – upper body, at that time?---I did a brief visual – he had – got his shirt off, and had a brief visual inspection of his chest and back.

All right. And the next bullet point, could you explain that, please?---"Equal AE both lungs." AE stands for air entry. So when listening to his lungs, he had equal air entry on both sides.

All right. You've prescribed ADT there. What is that?---ADT is a tetanus vaccination.

And is that something that you prescribed or is that something that Mr Rolfe indicated he was concerned about?---That is something he had come asking for, but it's something we would prescribe to anyone who has a wound. In emergency, it's very common.

Just that final arrow. Could you read that out, please?---"I then requested ED registrar to review the patient more thoroughly."

And that's the conclusion of those notes; is that right?---Yes.

Now, when you wrote those notes, did you look at any other documents of, for example, the hospital file?---I don't recall.

Well, was it – did you write those notes entirely from memory? Do you recall that?---I don't recall.

All right. Can I ask you please now, just to turn to the first page of the documents?---Yeah.

Actually, can I – I'll just – there was one question I didn't ask you in relation to your notes. In your notes, you'd said that Mr Rolfe told you he was punched a few times. If he told you where he was punched, would you expect that to have been recorded in your notes?---Not necessarily in my notes for a brief assessment if I was then going on to do a full assessment then I would normally write down exactly where he was punched.

Do you recall him telling you where he was punched?---No, I don't.

Now, you've requested the Emergency Department Registrar to review the patient more thoroughly. If we turn to the first page of those notes, do you recognise this as being an Emergency Department medical record of Alice Springs Hospital?---Yes.

And is this a triage form that patients that come into Alice Springs Hospital get? ---Yes, that's what every patient would get.

And it states the name, "Zachary Rolfe" and the arrival time as being 12:39 am on 10 November 2019, do you see that?---Yes.

Now, as part of your role you would be accustomed to reviewing such medical records?---Yes.

So I am going to ask you to just take us through this document if you can please. So the first entry there, there's a nursing diagnosis - sorry - the alert – NKOA (sic) - what does that stand for?---NKDA. No known drug allergies.

No known drug allergies, okay. The diagnosis? If you could read that out please? ---"Stab wound. Stabbed this evening with scissors to left shoulder. On examination dressing to laceration, small strike through, nil distress, feel otherwise well."

And is Hannah Daley the author of that note?---Yes.

Who is Hannah Daley?---She is one of the registered nurses that was on the triage shift that night.

Now just moving down then into the clinical progress notes. With the entry 10 November 2019, 12:55 am, can you take us through what that entry means?

---Yes, this is an entry by one of the nursing staff, so it says "nursing" and then it's listed his - sorry - the nurse's assessment of Mr Rolfe, so, "Respiratory rate 14, his oxygen saturation was 98 percent on room air, nil SOB, or nil shortness of breath, or increased rate of breathing, equal chest rise and fall, heart rate of 81 beats per minute with a strong regular radial pulse. He was afebrile, his temperature was 36.8, denies pain, ADT given as per order."

Could you move now to the next entry which is at 1:30 am on the same day - sorry excuse me. So can I just ask you about the signature there, below the entry of 10 November 2019, can you identify who has written that entry?---It was the nurse Nurse's surname is Reddon(?). I am not sure of her first name.

Moving to the next entry, 1:30 am on 10 November 2019, it says, "E.Nugent" it appears to and then some letters after that. Do you know who E.Nugent is?---I don't know her but that's Dr Nugent is one of the emergency registrars who was a locum with us at that time.

So does the appearance of her name at the top, does that indicate to you that she is the person who has taken these notes?---Yes.

And "ED" is Emergency Department, is that right?---Correct.

Just moving then to the first entry there, 28, can you read that out for us please? ---"28 police officer attending following stab wound".

What does the 28 indicate with the circle around it?---It is a male symbol that she has put around 28 - it's just a way to say it was a 28 year-old male.

Thank you. Dr Sullivan, can you move to the next entry please?---"HPC" would mean, "History of presenting complete." "Alleged assaulted earlier in evening with punch to head and" - and I think it says, "And then attacked with scissors, sustained puncture wound to left shoulder, some wounds superficial to upper arms and left elbow. No trunk or lower limb injury."

If we can turn over to the next page then please?---Mm mm.

Are you able to read out and explain what this first, say four lines on the next page please?---"PMH" is "Past medical history", which she said, "nil" then she's written "Scalp NAD" means, "No abnormalities detected" so scalp - no abnormalities detected neck, no abnormalities detected" and then, "OE" is "On examination", "comfortable " and then there is a diagram that she has drawn.

So just if I just deal with the first part of what you said there, I think you said there was an examination of the scalp and neck, is that correct?---It seems like that from the notes.

Now, if there had been any injury to Mr Rolfe's scalp, or head or neck area - and by "injury" I include any bruising, would you expect that to have been noted there by Dr Nugent?---If it was visible at that time, yes.

If we just move down to that next page - sorry, the next section. The little diagram that's there, could you just explain what has been written - what that diagram means?---So it looked like a diagram of an upper torso to just indicate where she has found the wound then an arrow pointing to - it looks like the left shoulder saying "Small 3 x 3 millimetre approximate puncture wound to shoulder, superficial abrasion to the lateral bicep" that's on the left arm and then on the right side a superficial abrasion as well, with a mark on the right.

What does the word, "abrasion" mean?---it's just a superficial loss of skin, I guess.

Like a scrape or a scratch?---A scrape, yes.

Just excuse me for one moment. And just above that, what does the word "puncture wound" mean to you?---A puncture wound would mean something has stabbed into the skin, to me.

If we just continue down, the next line? Can you read that please?---"Full RM" so range of motion of shoulder.

And again, would you expect that that would have been determined by asking, for example, Mr Rolfe to demonstrate the movement in his shoulder. I that how you would assess that?---That's what I would expect, yes.

The next line down? Could you read that please, Dr Sutherland?---She's - so "query contusion to left elbow, query he is unsure how long this has been there - query acute." And then "Full range of motion elbow. Contusion to right index finger. I'm not sure of - 'left - right index finger knuckle, states old injury."

What is a contusion?---Contusion is similar to a bruise, so the skin has not been broken.

And it's written there "acute" what is that - is that a reference to the contusion?---Yes, that's how I would read those notes.

What is an acute contusion?---"Acute" - "acute" just would be referencing to the time frame of when it occurred, so "acute" would have occurred in the last few hours, whereas a non-acute injury would have potentially occurred earlier.

If we can just continue down, there's a drawing again and some notes. Would you be able to explain that please?---There is a drawing which is how we depict a picture of the lungs with an arrow going through meaning that the chest was clear, there was no abnormalities found when she had listened to the chest. She has written, "Chest clear, no trunk injury, no lower limb injury."



And finally, those last few lines, if you could read those please?---"Wound to shoulder cleaned, dressed. ADT given, discharged to reattend if concerned."

Is it correct that there is no reference here to any stitches for the wound?---That's correct there is not - there is no reference.

And so the wound was not stitched, you can accept that?---I would accept that, yes.

Now have you signed – you signed a drug order there. It appears – the tetanus, down the bottom, is that right?---That's correct.

Just finally, if you could turn over to that next page. Now do you recognise this as a discharge letter, this document?---Yes.

The medical summary dated 10 November 2019, issued it appears at 3.05 am?---Yeah, correct.

Is it standard practise for a letter such as this to be prepared on discharge, for the purpose of providing to the patient's treating GP?---Yes, correct.

And this is the discharge letter that Dr Nugent has written on the Alice Springs Hospital computer system?---Yes, correct.

That's the examination-in-chief, your Honour, for this witness.

HIS HONOUR: Thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: Dr Sutherland, you've told us that on the night, Constable Zachary Rolfe came into the Alice Springs Hospital, and he was triaged?---Yes.

That was at 12.39?---Yes, correct.

Can you describe his demeanour when you engaged with him?---I don't – I don't recall, but I – in my statement, if I could just refer to that, I have said that he – I'll just find where I've written it.

Perhaps I'll do it this way. You've provided a statement dated 16 January 2020?---Yes, correct.

A statement taken by Detective Senior – Detective Sergeant Ronaldo Coulson(?).---Yes.

And presumably, you were provided with a copy of that statement to assist you, of 14 pages, to refresh your memory - - - ?---Yes.

- - - before giving evidence in court today?---Yes, correct.

Did you read through that statement?---Sorry?

Did you read through that statement before giving - - - ?---Yes.

- - - evidence in court today?---Yes I did.

Can I direct you specifically to page five? Where you were asked by Detective Coulson to describe he, that is, Zachary Rolfe's demeanour, when you engaged with him?---Yes.

And did you respond at that time, when the facts were fresh in your memory?---Yes.

Can you tell us what you said?---"He" – I had said that he was acting as if he had lots of adrenaline. That he was happy to talk and be examined, but the main thing he wanted was a tetanus shot and then to get home.

At that time, you were aware, were you not, that there had in fact been a shooting at Yuendumu?---Yes.

And that was because of social media posts?---Correct.

When Zachary Rolfe presented himself, you did not know, did you, that he was the alleged shooter?---No, I did not.

He just said that he was involved in the incident at Yuendumu and that's all you knew of him?---Correct.

Couple more questions if I can – he didn't discuss with you anything about the shooting?---No, nothing.

And one last thing, can I direct your attention to page six of your statement. Again you told Detective Coulson, did you not, that his demeanour, that is Zachary Rolfe, was "He just seemed to have a lot of adrenaline", and then you were asked "How do you describe that." And what did you say?---I said, "He wasn't angry. He just wanted a tetanus shot and to get out of there. There were lots of people and yelling and screaming outside from the public, and he just was keen to get out, to get home or somewhere safe."

And were there in fact apparently lots of people yelling and screaming outside from the public?---Yes, I didn't see how many people, but we could hear them all from inside the department.

Thank you. And did he in fact exit the hospital through the rear door?---That is what I was told by the nursing staff, yes.

Thank you.

Nothing further.

HIS HONOUR: Is there any re-examination?

MS POOLE: No, your Honour.

HIS HONOUR: Yes, thank you, Doctor, that concludes your evidence. We'll now break the audiovisual link.

WITNESS WITHDREW

MS POOLE: Your Honour, the next witness is Ian Spilsbury. I call Mr Spilsbury.

IAN JOHN SPILSBURY, sworn:

XN BY MS POOLE:

MS POOLE: Could you tell the court please your full name?---Senior Constable Ian John Spilsbury.

Senior Constable, what is your current occupation?---I'm a Senior Principle Examiner, Crime Scene Unit, Alice Springs.

You've received training in the recording and examination of crime scenes, is that correct?---Yes I have.

And also training in the recording and examination of photography and fingerprint examination, is that right?---That's correct.

Senior Constable, you've also been trained in techniques for the laboratory examination of items that are collected from crime scenes?---Yes.

And you're authorised to conduct crime scene examinations and item examinations, is that correct?---Yes I am.

You've attended specialised courses conducted not only by the Northern Territory Police Force, but also interstate police forces and outside agencies?---Yes I have.

Senior Constable, how many crime scenes have you examined during the course of your career?---Including all types, including violent crime, it would be in excess of probably a thousand.

MR EDWARDSON: And your Honour, my learned friend's – there's no dispute about continuity, the exhibits that were seized, where they were located and like, so if my learned friend wants to lead (inaudible) to get through what will be a very long process otherwise.

HIS HONOUR: All right, thank you.

MS POOLE: I thank my learned friend for that indication.

I'm going to ask you some general questions before we move to the specifics of the scene in this particular case. When you arrive at a crime scene, what steps do you undertake to record and examine it?---My standard process is after getting a briefing, receiving some information, is to make an assessment of the scene through viewing it. This is just done purely with your eyes. Not moving anything. Not touching anything. Once I've made that assessment, my first port of call is to photograph the scene, as it's presented to me. So the scene is photographed. Once the scenes been photographed, I then place out markers, generally on items of relevance that I've located. Once those markers are out, I will then obtain further photographs. I then may also obtain video footage of the scene. Once those are all completed, the items that have been marked are collected for further potential examination. And once that's occurred, a further search is generally done of the scene to make sure nothings been missed, or if there's other further items that have been overlooked in the first occasion. And then that process, if there's further items found, they will be photographed and collected. And then once that's done, that's generally the main part of the scene. We also on occasions sketch the scene, and also measure the scene.

Now on 9 September 2019, you received a phone call at around 25 past 8:00 in the evening from Detective Acting Senior Sergeant Philips, in relation to a death in custody incident that occurred at Yuendumu?---Yes, I did.

And you were asked to attend at Yuendumu to record and examine the scene?---Yes.

You departed Alice Springs that evening and arrived at Yuendumu at around 2:26 the following morning, Sunday 10 November?---That's correct.

You first examined and recorded the area in Yuendumu Police Station where First Aid was administered to Mr Walker before he passed away; is that right?---Yes.

And you also examined the area of the car park at Yuendumu Police Station where Mr Walker was first brought in by the officers?---Yes.

As part of the examination in the car park, you took photos of Mr Walker's shirt that he had been wearing at the time- -?---Yes.

- - -of the incident. And you collected that shirt?---Yes, I did.

Now, I'll now ask for some assistance, please, for the shirt to be shown to Mr Spilsbury?---Yes.

Do you recognise this as the shirt that you seized?---Yes, it is. And it's labelled Forensic Item Number 27.

Right. And this was the T-shirt that Mr Walker was wearing at the time of the shooting incident; is that correct?---That's my understanding, yes.

Your Honour, I will tender Mr Walker's Chicago Bulls shirt, if I may. And I'll just ask for this to be shown to the jury. And if it can also be shown to the Bar table, please. Okay, that's what we'll do- - -

HIS HONOUR: That will be exhibit 38.

EXHIBIT 38 Kumanjayi Walker's Chicago Bulls shirt at time of shooting.

HIS HONOUR: You can leave it there.

MS POOLE: That can now be left on the table, thank you.

HIS HONOUR: Now, members of the jury, you'll appreciate that a number of the items that are being tendered at the present time, including clothing worn by the deceased, are contained in plastic bags. Now, I would suggest that for reasons of avoiding possible infection, that you do not open the plastic bags. If, for some reason, you feel that it is necessary, ultimately, to open a plastic bag to examine such an item, then I would ask that you use gloves – which are provided to you, or will be provided to you by the Sheriff's Officers – and that you are extremely cautious in handling that material. Yes.

MS POOLE: Thank you, your Honour.

So it's the case that you first attended at Yuendumu Police Station. You examined any scenes of interest there and at 7:24 am, you attended at House 511; is that correct?---That's correct, yes.

There were scene guards at the house to preserve the scene?---There was at the time, yes.

Did you do a walkthrough of the scene at that time?---Yes.

Did you take photographs of the scene?---Yes.

Just excuse me for one moment. Your Honour, we do have a short bit of footage to show.

You took some – did you take some video of the scene?---At some stage during the examination, I did. I don't think it was done straight at the start.

All right. I'll just play some video. My learned friend's – I understand there's no issue with that.

HIS HONOUR: All right.

MS POOLE: I apologise, your Honour.

DVD PLAYED

MS POOLE: Thank you.

Senior Constable, do you recognise that as footage that you took of the front room – the lounge room – of House 511 when you attended to examine the crime scene?---Yes, it was footage by me.

Your Honour, I tender that footage. I have a USB.

HIS HONOUR: That will be exhibit 39.

EXHIBIT 39 Footage taken by Senior Constable Spilsbury in House 511  
10/11/2019.

MS POOLE: Your Honour, I'm just conscious of the time. Is now a convenient time to finish?

HIS HONOUR: Yes, it is.

MS POOLE: Thank you, your Honour.

HIS HONOUR: Members of the jury, we will now break for the day and indeed, for the weekend. So I'd ask that you return again Monday morning for a 9:30 start. You may retire.

JURY OUT

HIS HONOUR: And thank you, you can stand down, now?---Thank you, sir.

WITNESS WITHDREW

HIS HONOUR: Now, are there any matters that counsel want to raise before I adjourn?

MR EDWARDSON: No, your Honour.

HIS HONOUR: Thank you. Then I'll adjourn.

MR EDWARDSON: Your Honour – I'm so sorry.

HIS HONOUR: Yes?

MR EDWARDSON: I should have tendered those photographs. Perhaps if your Associate can remind us- - -

HIS HONOUR: He can remind us both on Monday.

MR EDWARDSON: Yes.

HIS HONOUR: Thank you.

ADJOURNED 1.11 PM TO MONDAY 21 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 21 FEBRUARY 2022 AT 9:55 AM

(Continued from 18/02/2022)

Transcribed by: EPIQ



HIS HONOUR: Yes, can you bring the jury in please?

MS CALLAN SC: Your Honour, just before - - -

HIS HONOUR: Just a moment. Yes?

MS CALLAN: Just before we do that, I have some transcript corrections from week 2 if I may hand those up?

HIS HONOUR: Yes, thank you.

MS CALLAN: My learned friend has seen those.

HIS HONOUR: All right, they are agreed?

MR EDWARDSON QC: Yes, they are.

HIS HONOUR: All right, thank you. I direct that those changes be made then to the transcript, thank you. Yes?

MS CALLAN: And just one further matter, in relation to exhibit 39 which was the footage of the crime scene tendered on Friday afternoon, your Honour's associate pointed out that there was some additional footage on that and so, for the record, I liaised with your Honour's Associate this morning, we will uplift that exhibit and we will remove those files and then return it to your Honour's Associate. Thank you.

MR EDWARDSON: And, your Honour, just before the jury come in, can I hand up to you a subpoena, we would seek the court's leave to issue and we'd ask for an abridgment of time and a return date of Friday of this week.

Your Honour will see that the subpoena is to the Commissioner of Police but it is in effect seeking relevant documentation of Assistant Commissioner Nick Anticich, Commander Martin Dole and Detective Sergeant Wayne Newell as defined and set out in the last annexure A which is the last page of the subpoena document.

HIS HONOUR: All right.

MR EDWARDSON: Thank you.

HIS HONOUR: Abridged time as necessary in order to have those subpoenas issued and I will direct that they are to issue.

MR EDWARDSON: Thank you. And I will wait until the jury come in, but I do need to - before I could tender that picture of the scissors.

HIS HONOUR: All right, thank you. Yes, now can we bring the jury in please?

JURY IN

HIS HONOUR: Yes?

MR EDWARDSON: Your Honour will recall that on Friday when I was cross-examining Dr Towsey, I had put up on the screen some photographs of the scissors that were deployed by Kumanjaya Walker in this incident. I forgot to tender them so I do so now and I've got copies for the jury.

HIS HONOUR: All right, those photographs will be exhibit 40.

EXHIBIT 40 Photographs of scissors.

MR EDWARDSON: Copies for the jury and, Mr Associate, I have copies for the jury - or Madam Associate - and a copy for your Honour too.

HIS HONOUR: Thank you.

MS POOLE: Yes, your Honour, I'll call Mr Ian Spilsbury.

HIS HONOUR: Thank you.

Be seated there, you're still subject to the oath you took on Friday.

IAN JOHN SPILSBURY, on former oath:

XN BY MS POOLE:

MS POOLE: Mr Spilsbury, where we left off on Friday afternoon, you'll recall we showed some footage of the front room of House 511 that you took when you attended to examine the scene?---Yes.

Now you also took photographs of the scene, is that correct?---Yes, I did.

I'm going to take you through some of those photographs now.

Could the witness please be shown exhibit 1, tab 23. And just for ease of reference, I'll just ask if at the same time a document could be projected onto the screen. That document is the sketch plan of House 511, and that is at exhibit 1, tab 1, annexure E.

Mr Spilsbury, can you turn to photographs number 15, 16, in that bundle. Do those photographs show the outside – the front door of House 511?---Yes.

Just confirming that these are photographs that you took of the crime scene?---Yes.

And if you turn to photograph number 18, is that a photograph that, at the back of the front room, you're looking for – back out through that front door that we've just seen?---Yes.

House 511. Now on your examination, it's the case isn't it, that you found that there was only one operational entrance and exit to the residence?---Yes.

And the other access points had been blocked off?---Yes.

And those access points were effectively in a breezeway area of the house, is that correct?---That's correct.

So if we just turn to photograph eight, in the bundle. Did you take that from the back of the house?---Yes.

And the doorway, you can see about half-way down the side of the house there, there appears to be a doorway?---Yes.

And is that a doorway to effectively the breezeway or the courtyard that is in the middle of the house?---Yes it is.

And you note there there's a washing line to the left-hand side of that photo?---Yes.

Just now going to photographs six – photograph six, is that – that's the doorway that you saw – a closer up of the doorway that we saw in photograph eight that I just showed you?---Yes it is.

And photograph seven, again you see the doorway, just on a different angle - - - ?---Yes.

- - - same doorway. Turning to photograph 10. Noting the clothesline here, it's correct that this photograph is now taken of the other side of the house, is that right?---Yes.

And again, it shows a doorway into what is the breezeway area of the house?---Yes.

And so for those who wish to refer to this on the sketch plan, if you can look up to the sketch plan, Mr Spilsbury, you see a – at the bottom of the sketch plan, it's just gone off the screen. The very bottom of the sketch plan is the front door?---Yes.

And then you go up through the front lounge room area which was the scene where the shooting incident occurred. And into that large, what appears on the sketch plan to be a vacant area, that's the breezeway area?---Yes.

And there's two doors marked at the rear of those area – at that area on the sketch plan. And those are the doors we've just seen photos of?---Yes.

Now just turning to photograph number 16 in your bundle. So this is the front door of House 511?---Yes.

Turning over to photograph 17. As you enter the door, this – the front door, this shows the mattress and doorway – a mattress and a doorway through to that breezeway?---Yes.

And it's correct that the red wall to your right is a wall separating the lounge room from the kitchen area?---Yes.

And that kitchen area is shown, if we turn to photographs number 13 – sorry – I'm sorry, 31. I got that around the wrong way?---Yes it is.

Yes that shows the kitchen area.

And if we could just see the sketch plan again, up on the screen.

So it's correct then – actually the walls not marked in that, but the kitchen is to the right side of that – sorry, the wall is marked. Where – you can see the wall. There's a front room. The wall, and then the kitchen, in that front section of the house on the sketch plan, is that correct?---Yes.

Now photograph number 18, if you could turn to that please. Well I'll come back to this photograph in more detail, but this depicts the front room of the house, facing outwards, towards the front door. Is that correct?---Yes.

And that's a photo just depicting the mattress immediately next to the front door?---Yes.

Now in terms of the – the inside of the breezeway area, if we could just turn to photo number 34. Can you confirm that this is a photo taken from the rear doorway into the breezeway – sorry, it's from the doorway into the breezeway – the front door into the breezeway. And on the left you have one of the access points, one of those doors there - - - ?---Yes.

- - - that we went through earlier, and that's blocked by the washing machine and mattress?---Yes, or the bedding, yep.

And above that – above that doorway, did you notice or observe there was, basically, wire or mesh all around the top of that doorway?---Yes.

So that was completely inaccessible; is that correct?---It appeared that, yes.

Okay. Just turning to photo number 35. That shows the door on the other side of the house?---Yes.

The right side. And again, that access point is blocked by table and a washing line; is that correct?---Yes.

Again, you see the same sort of mesh above, which meant that it was inaccessible?---Yes.

I'm now going to ask you some questions about the scene in the lounge room of House 511 and I'll ask you – in the front room – I'll ask you to go to photo number 57. So you mentioned, in your evidence on Friday, that the way you approach a crime scene is that you mark items or areas, locations of interest. Is – can you explain what these markers are showing? Is that an example of your process in marking areas of interest?---Yes, it is. So the markers there would indicate items that I've located in the scene that I deemed of relevance.

Okay. And is it the case that you touch nothing?---Don't touch anything, just put the markers next to them.

And the photos are taken of everything in situ, as you find it?---Yes.

Now, just turning then to photograph number 54. So as you enter, that's the first point that you've seen and that – what does that show, that marker number 20?---So marker shows stain that was consistent with blood on the ground, just in the doorway.

We turn to photo number 60, please. Marker 23, what does that show?---A spent shell on the mattress at marker 23.

Sorry, just going back to number 59 – photo number 59. Marker number 22, what does that show?---Shows staining consistent with blood on the mattress cover – or the sheet on the mattress.

Okay. Photo number 61?---At marker 24, a pair of scissors.

Photo number 63?---Marker 26 showed another spent cartridge amongst the blanket on the mattress.

And photo number 66?---Showed number 32, and a third spent cartridge on the mattress.

And is it the case that, at some point during your examination of this scene, you seized or collected each of those items?---Yes, I did.

Now, could you turn, please, to photo number 55. So having now looked at each of those individual items close-up, is this how those items – number 23, the mattress; 24, the scissors – sorry, 23's the shell casing; 22 is the mattress; 24, the scissors; 26, the shell casing. Is that how those items were situated when you attended?---Yes.

And if we can go to page – photograph number 65. Is it the case that, in relation to the third shell casing, which was marker number 32, you moved the pillow and then discovered that shell casing?---Yes.

And does the marker indicated where the shell casing was located when you moved the pillow?---Yes.

Now, you, having taken those photographs and examined that scene, you took some measurements and then you departed the scene and returned to Yuendumu Police Station; is that correct?---Yes.

I'm now going to show you some of the items that were seized. So the scissors. Perhaps if exhibit 1 could be removed? It might create some more room. And Mr Spilsbury, I see that you're putting on gloves. Perhaps you can explain the process – why you're doing this?---The process with the gloves is to protect myself (1) from biohazards, if they're present. But also to prevent any transfers of my DNA on to an item. And obviously, any DNA that may be on that item as well, on to me. So this is labelled, "Forensic Item number 57, Scissors at M24 House 511". And it's currently sealed. It's a pair of scissors.

Now, do you recognise these at the scissors that you seized from House 511?---Yes, they are.

Are you able to, please, demonstrate – open and close those scissors? And I'll just Mr Keen, if I may, just to show those to the jury. You open and then close them and to the other side of the room?

MR EDWARDSON: Could I just have a look closely, if I may, please?

MS POOLE: I tender the scissors M24, seized at House 511, your Honour.

HIS HONOUR: That will be exhibit 41.

EXHIBIT 41 Scissors M24, seized at House 511.

HIS HONOUR: Now, of course, you will be – when, at the end of the trial you retire into the jury room, you'll have the scissors with you. But you'll remember what I said the other day about clothing. That applies also to the items which are now being tendered, particularly the scissors. So that if, for some reason, you feel that it is necessary for you to examine that item, please ask the Sheriff's Officer to provide you with gloves.

MS POOLE: Mr Spilsbury, I'm now going to move to some items of clothing that you seized. At 11:35 am, when you'd returned to Yuendumu Police Station, did you collect Constable Rolfe's police uniform shirt?---Yes, I did.

And this was the shirt that was worn at the time of the shooting?---Yes.

Can you just explain, before we show you that shirt, how you managed the seizure of clothing items, to minimise the fabric degrading?---As in?

Well so if you can perhaps explain, how do you manage when you seize clothing items, what's the process to preserve those items?---In this instance it had been seized prior to my collecting it. So it was in a brown paper bag and sealed up. The brown paper bag is obviously breathable, so allows for any moisture to dissipate, preventing any contaminations, as in mould and the like. And also it being sealed allows for no cross-contamination, as the bag's sealed closed.

Is it the case, that sometimes, never the less, there can be some degradation of the material, despite - - - ?---There is potential, yes.

- - - yes.

So if we can show Mr Spilsbury please, Constable Rolfe's uniform shirt?---This is forensic item number 071, shirt of Constable Rolfe.

Okay.

I tender the shirt of Constable – the police uniform shirt of Constable Rolfe. If that can please be shown to the members of the jury.

HIS HONOUR: Exhibit 41. I'm sorry, 42.

EXHIBIT P42: Constable Rolfe's police uniform shirt.

MS POOLE: Mr Spilsbury, is it the case that at a later time, the t-shirt that Mr Rolfe was wearing underneath his uniform shirt was also seized?---Yes it was.

If that can be shown please to Mr Spilsbury?---This is a shirt marked as forensic item number 11, blue t-shirt worn by Constable Rolfe.

Could that shirt please be shown to members of the jury.

Your Honour, I tender the blue t-shirt, worn by Constable Rolfe on 9 November 2019.

HIS HONOUR: Exhibit 43.

EXHIBIT P43: Blue t-shirt worn by Constable Rolfe on 9 November 2019

MS POOLE: Mr Spilsbury, according to your records, was the protective vest, worn by Constable Rolfe on 9 November 2019 also taken – seized and taken to your office?---Yes it was.

I'll have that vest shown please?---This is an item number 12, black tactical vest with plate, worn by Constable Rolfe.

Could that item be shown to the jury please.

Your Honour, I tender black tactical vest with plate, worn by Constable Rolfe on 9 November 2019.

HIS HONOUR: Exhibit 44.

EXHIBIT P44: Black tactical vest with plate, worn by Constable Rolfe on 9 November 2019.

MS POOLE: Mr Spilsbury, that item you've described as a black tactical vest with plate, what is a plate?---It's a hard -- I'm not sure what it's made out of, that slides into the vest, as part of the protection.

Now later in the afternoon, on the Sunday, the 11th, I believe it is -- 10 November 2019, you returned again to House 511, the house remained under guard. And you collected the foam mattress that was in the front room of House 511, is that correct?---Yes I did.

We have the mattress here, your Honour. And I'll ask that Mr Spilsbury be shown the mattress that was collected?---So this is a mattress with forensic label 077, mattress, House 511.

If we can unwrap the mattress.

Mr Spilsbury, do you recognise this as the mattress that you seized from the room of House 511?---Yes.

Could Mr Spilsbury please be shown exhibit 1 again.

And once again, if you could turn to tab 23 please, which were photos that you took. Tab 23, and photo number 19, if you could look at photo number 19 please. And then photograph number 24. Can you confirm those are photographs of this mattress?---Yes they are.

Your Honour, I'll just have the mattress marked for identification, at this stage.

HIS HONOUR: That will be marked for identification with the letter R.

MFI R Mattress.

MS POOLE: Sorry, excuse me for one moment. Your Honour, if you could excuse me for one moment. Excuse me, your Honour.

Mr Spilsbury, apologies for the delay, did you also seize the uniform shirt, or your office seized the police uniform shirt belonging to Constable Eberl?---We received it, yes.

Yes.



If that can be shown please?---This is item 86, police issue shirt for Constable Ebert – Eberl, sorry.

Can I ask you, on a number of occasions when you've been shown an item, you've also be shown another package?---Yes.

What is that?---So the package that's accompanying each item is the original packaging that the item has been stored in, or collected in. For ease of the court viewing, we've moved it into a different package, but maintained the – the original packaging.

Could the jury please be shown Constable Eberl's police uniform shirt.

Your Honour, I tender Constable Eberl's police uniform shirt.

HIS HONOUR: Exhibit 45.

EXHIBIT P45: Constable Eberl's police uniform shirt

MS POOLE: Mr Spilsbury, were you present while an autopsy was conducted by – on – at 9.15 am on 12 November 2019, by Dr Tiemensma?---Yes I was.

And did you collect a reference blood file for Mr Walker?---Yes I did.

And you conveyed that to the crime scene office where it was secured, is that correct?---Yes I did.

Your Honour, there are some further items which are securely stored, which we wish to show this witness. We may need a short break of five to 10 minutes to retrieve those items.

HIS HONOUR: All right.

Members of the jury, would you retire please.

JURY OUT

HIS HONOUR: I'll adjourn.

WITNESS WITHDREW

ADJOURNED

## RESUMED

MS POOLE: Your Honour, thank you for that opportunity. We're now ready to proceed with the remaining items.

HIS HONOUR: All right, thank you.

Could we bring the jury in, please.

## JURY IN

IAN JOHN SPILSBURY:

MS POOLE: Senior Constable, did you – at a time that you returned to House 511 in the afternoon of Sunday 10 November, also seize the duty belt worn by Constable Rolfe during the shooting incident?---That was at the police station, not the house. Yes, I did.

Yes. If that could please be shown. Now, if I can indicate for Senior Constable Spilsbury's benefit, that bag is open but any ammunition has been removed?---So this is item labelled 78, duty belt. Previously had the Taser gun, spray and utilities of Constable Rolfe.

Now, Senior Constable, are you able to identify, please, the items that are contained in that belt?---So on this of the belt we've got a police issue baton, a gun holster, a holster that contains OC spray. On the other side, there's another pouch. A further pouch here, another pouch here. And the last pouch here contains a set of handcuffs.

And is it correct that the pistol has been removed from the belt?---It has been, yes.

For the purposes of this particular item?---Yes. And sorry, the last item is a torch holder.

Torch holder.

-

Could that item please be shown to the jury. Your Honour, I tender the duty belt worn by Constable Rolfe during the shooting incident.

HIS HONOUR: Do I understand correctly that there are still some items on that belt, such as the spray, the handcuffs and the baton?

MS POOLE: Yes.

HIS HONOUR: Should they not be removed?

MS POOLE: Your Honour, my understanding is that the – that duty belt will remain in a safe locker. And if your Honour could – with the items. And if your Honour could instruct the jury that if they do wish to see that belt, if they pass a note and it can be arranged for them to see that.

MR EDWARDSON: Your Honour, can I just suggest a more practical solution?

HIS HONOUR: Yes.

MR EDWARDSON: The items that are, obviously, of concern have really no relevance to the matters that the jury has to consider. So if those – like the spray and so on – if they're put in the locked-up – whatever it is – then they can have the belt which is, obviously, is important.

HIS HONOUR: Yes.

MR EDWARDSON: And they should really, actually, physically have access to that – in my view, anyway.

HIS HONOUR: Yes.

MS POOLE: Yes, your Honour. I have no difficulty with that course.

HIS HONOUR: All right, well, we'll do that. In due course, after that's done, it will be exhibit 46.

EXHIBIT 46 Duty belt of Constable Rolfe.

MS POOLE: As your Honour pleases.

HIS HONOUR: Yes.

MS POOLE: Senior Constable, was the pistol – the Glock pistol used by Constable Rolfe during the shooting incident also seized?---Yes, it was.

Could that item please be shown to Senior Constable Spilsbury. And once again, the bag has been opened but the item – the firearm – has been checked. It is empty and safe?---Just confirm it's checked safe. This is firearm with serial number 1134NTP.

Senior Constable, is it the case that that firearm has had a cable tie placed on it so it is inoperable?---Yes, it has.

If that item could please be shown to the jury. Now, your Honour, I'll tender the pistol of Constable Rolfe – the Glock pistol. Your Honour, that item will be secured stored and should the jury need to see it, that can be arranged.

HIS HONOUR: Yes. That will be exhibit 47.

EXHIBIT 47 Glock pistol of Constable Rolfe.

HIS HONOUR: And you heard what Madam Crown had to say. That, ultimately, if you need to examine that item, you'll need to pass on a request for that purpose to the Sheriff's Officer.

MS POOLE: Senior Constable Spilsbury, the final item that I want to ask you about is the duty belt of Constable Eberl, was that also seized?---Yes, it was.

Can the Senior Constable be shown that duty belt. Once again the bag is open but the item has been checked?---This is forensic item 81, a duty belt and previously the gun of Constable Eberl.

Senior Constable, could you please identify the items that are contained in that duty belt?---So, on this belt here we have at the back here, a pouch containing OC spray, a further empty pouch, a pouch containing a police issue baton. We then have – I believe that's a thigh holster setup. We then have a handcuff key attached to a metal plate and then a karabiner attached to the belt. Also attached are what we call "keepers" that hold the belt onto your duty belt or your belt around your waist. Further pouch that's empty, and another pouch that's empty. A pouch containing a set of handcuffs, another pouch and then a further pouch that's empty at the back.

And the pistol - the Glock pistol belonging to Constable Eberl has been removed from that belt?---It has been, yes.

So this is the belt that Constable Eberl was wearing at the time of the shooting incident, is that correct?---That's my understanding, yes.

Could that please be shown to the jury?

MR EDWARDSON: Your Honour, once it is received, (inaudible) if the same applies, those items can be removed and then the jury can have access to it.

HIS HONOUR: Thank you.

MS POOLE: Your Honour, I tender the duty belt worn by Constable Eberl on 9 November 2019.

HIS HONOUR: Again, once those items have been removed from that belt it will be exhibit 48.

EXHIBIT 48 Duty belt worn by Constable Eberl on 9 November 2019.

MS POOLE: That is the evidence-in-chief of this witness, your Honour.

HIS HONOUR: Thank you.

MR EDWARDSON: Your Honour, I have no questions of this witness.

HIS HONOUR: Thank you, you can stand down?---Thank you.

WITNESS WITHDREW

MS POOLE: Your Honour, if I can just ask for the packaging from the first exhibit as well to be placed on the table.

HIS HONOUR: Yes.

MS CALLAN: That's the packaging for exhibit number 38. Your Honour, while we are waiting for the next witness, we were going to just have that mattress rolled up and covered, your Honour.

MS CALLAN: Your Honour, I call Kate Cheong-Win.

HIS HONOUR: Yes, certainly.

KATE CHEONG-WING, affirmed:

HIS HONOUR: Could you please remove your mask while you are giving evidence? Thank you.

MS CALLAN: Could you tell the court your full name?--Kate Cheong-Win.

And are you a senior forensic biologist working at the Forensic Science Branch of the Northern Territory Police here in Darwin?---Yes, I am.

And could you explain for the jury's appreciation, the training, study and experience that you've had as a forensic biologist since 2002?---I did a Bachelor of Science at the Charles Darwin University. I've also completed all the internal training and authorisation boards that are required for my type of position as well as numerous courses over my career.

That included, for instance, undertaking – currently undertaking a course, through the University of Lausanne in relation to the interpretation of biological results given activity level reporting?---Yes, that's correct.

And it's the case, isn't it, that you were asked to examine and consider certain biological evidence, as it pertains to certain items which are the subject of the investigation in this matter?---Yes, I was.

MR EDWARDSON: Your Honour, if this witness requires notes, I have no objection to her referring to her notes or papers.

MS CALLAN: I'm grateful for that.

Ms Cheong-Wing, you – I see you've brought into the witness box a folder of documents. Does that include a report you prepared for this matter, and notes that you made for the purposes of all the work that you've done in relation to this matter?---Yes, it does.

And if arises, and if you consider that you would – you need to look at your report, or those notes, please indicate, and we'll take it from there?---Yes.

The work that you do as a forensic – Senior Forensic Biologist, is this the case, that it includes examination and analysis of items relating to investigations, in so far as those items may involve biological evidence?---Yes it does.

And is this the position, that generally you, and your colleagues, as forensic biology scientists, will not have knowledge of how the items were handled prior to you considering them?---That's correct, yes.

And that you, and this is an instance of it, conducted an examination of each of the items that I'll ask you about in a moment, and the examination includes screening for what's described as biological material?---Yes, it does.

And does biological material essentially mean blood, semen, saliva and hair?---As well as skin cells, yes.

And is that for the purpose of DNA profiling, to enable comparisons to be made between that biological material, and reference samples?---Yes it does.

In very broad terms, could you explain to the jury what DNA is, and how it is that you can compare biological material with a reference sample?---DNA is effectively the building blocks of life. So within your body they code for all sorts of things. Such as blue eyes and brown hair, as well as a lot of processes that actually occur in the body. Like metabolism, things like that. Each person's DNA is unique, and we look to try and obtain a DNA profile for each individual. Whilst, because we don't look at the whole genome, we don't consider the evidence that we get to be unique, which is why look at statistical weighting of all our evidence. Within the laboratory, we take items that might be from crime scenes, and look at obtaining any kind of biological evidence, putting it through a process within our laboratory, that lets us obtain a DNA profile from that. And we use that to compare to any DNA profiles that we would obtain for known individuals, or all she called them, reference samples.

So reference sample is a more bland description for a sample from a known individual, as of their DNA?---Yes, that's correct. We take a mouth swab and we process that to get their DNA profile.

And on taking a mouth swab, what type of biological material are you obtaining?---So we'd be looking at the skin cells actually in the mouth, as opposed to the saliva.

What approach is taken within your laboratory in terms of the statistical calculation by which you consider DNA material?---We use a program in the laboratory called STRmix. And this is a program that developed both Australia and New Zealand jointly. And it's used internationally, as well as nationally. And it looks at two competing hypothesis, around the DNA profile, and weights which one is most likely.

Is it the case that on occasion, when you conduct an examination, and you compare the biological material, you find a number of contributor, or a mixed DNA profile?---Yes, we can get mixed DNA profiles from items.

And what does that mean?---So it means that the profile that we obtained has indications that more than one person may have contributed to that.



Can I ask you about how DNA may be – from a person, or a donor, may be transferred to another person, item or surface?---So there's couple of different mechanisms by which DNA can be transferred. One of those is direct transfer, such as me touching this bench right here. I would be depositing, potentially, skin cells onto that surface. The other mechanism is by what we call indirect transfer. That's where the next person may sit down and touch that same area, and actually get that DNA present on themselves. This is what we can sometimes call secondary or tertiary transfer. This can also occur with bodily fluids, such as blood. Again, direct transfer would be blood falling onto an item, or a bleeding object transferring the blood. Indirect transfer may be someone coming along and touching that wet surface afterwards.

That having person having touched the wet surface, if they in turn place their hand in another location, is that a method by which an indirect transfer will have occurred?---Yes that's correct.

Following direct contact, will DNA always be recovered?---Not necessarily. There are a number of factors that can influence this.

And what are those factors, in broad terms?---So these can include things like the length of the contact, such as the duration. The type of surface that is being touched. Whether it's smooth and porous and those kind of things. Whether any kind of cleaning products may have been on those surfaces. These are just some of the instances, as well as environmental factors can affect whether you might obtain any DNA from that.

Is it also affected by the amount deposited?---Yes, that's correct as well.

That is, if the amount was below the detection limit for the protocol that you use in the systems that you have in the lab?---Yes, that's correct.

In relation to indirect transfer, you've explained what that means. Will DNA always be recovered in instances of indirect transfer?---No, the same types of mechanisms can affect whether we would recover something after indirect transfer as well.

You gave an example of an indirect transfer involving another individual coming into contact with that first deposit event. Does it – can it go further than that in terms of multi-step transfers occurring?---Yes, there can be multiple instances of indirect transfer, and with each instance, DNA could transfer.

Is the likelihood of detecting DNA, from a sample, following a – an instance, or series of transfer events, dependent on a number of factors?---Again, all the same factors that we described previously will influence it. Generally the more times you have indirect transfer, the less DNA that there is likely to be recovered, because you will lose DNA in each of those steps.

In undertaking analysis that you do of biological material, are there a number of possible explanations as to why biological material may not be recovered from an item?---Yes, that's correct.

And is the absence of the evidence – and the absence of evidence is not evidence of absence?---Yes, that is correct.

Can you explain to the jury what you mean by that?---So when we say that – excuse me – that the – we might not detect DNA. So even though it could actually be present on a surface, our – potentially our techniques or swabbing may not get the right area. It just might not be enough for our internal processes or our instruments to actually detect that. And also, as we've said, DNA might not actually be transferred with any kind of contact. So therefore, just because we're not seeing a DNA profile doesn't mean that DNA might not have actually been there.

Can you explain to the jury whether when you obtain a sample – if it's possible to determine the type of biological evidence that's produced this DNA sample?---So sometimes when we look at a result, we can determine what type of cell or biological evidence that it may have come from. We can do this sometimes by doing chemical tests with our screening process that give us an indication that a particular type of substance, such as blood or saliva or semen, may have been present. When we then look at the DNA profile that we obtain, if it's a single-source profile, then we can be confident that it came from the type of substance that we tested for and got a reaction to. However, when we get a mixed DNA profile, we can't always tell what that mixture may have come from. We can't always assign it to the particular source. This is because we can have different types of substances mixing together, such as skin cells, blood, semen altogether. We wouldn't be able to separate out which person contributed to which part.

And when you say, "We can't always determine which person contributed to which part," does that mean it's not necessarily possible to determine whether the biological material from that person was skin or blood or hair?---Yes, that's correct.

For the purposes of this case, the case – is it the position, Ms Cheong-Wing, that you obtained or received samples for the purposes of considering DNA matching? First, a reference blood sample from Arnold Walker?---Yes, I did.

Kumanjayi Walker?---Yes.

Second, a reference sample from Zachary Rolfe?---Yes, I did.

And was that a skin sample based on a saliva test?---Yes, it was.

And a reference sample for Adam Eberl?---Yes, I did.

And that was a – again, a skin sample based on a mouth swab?---Yes, it was.

I ask you first about the examination that you undertook in relation to a T-shirt that you understood was worn by the deceased, Kumanjaya Walker?---Yes.

Can I ask that the witness be shown a photograph – it's actually two photographs in a bundle, your Honour.

Ms Cheong-Wing, do you recognise the two pages that I've just provided to you as being photographs that you took and then indications that you made on this images as to the examination that you undertook of that item?---Yes, they are.

Your Honour, I tender those two pages, which are stapled together.

HIS HONOUR: Exhibit 49.

EXHIBIT 49 Two pages of photographs and indications by Kate Cheong-Wing.

MS CALLAN: For the record, your Honour, this – the images in what has been marked exhibit 49 are of the Chicago Bulls T-shirt, with – the physical item of which is exhibit 38.

HIS HONOUR: Yes.

MS CALLAN: And we have copies for the jury and a working copy for your Honour.

HIS HONOUR: Thank you.

MS CALLAN: Ms Cheong-Wing, you've still got those photographs, which have marked exhibit 49, in front of you. There's a series of red dotted lines and blue dotted lines on the first image, using the footer – it's described on the pages, page 3 of 35. You see that?---Yes, that's correct.

Towards the middle of the shirt on the right-hand side, there's a dotted area with a small dotted circle marked inside it, and then to the right of that is an arrow. And the typed words, "Stain 00-TOL and then POS." You see that?---I do, yes.

Then there's the words, "RSID Saliva," and then the words, "NEG." Is that short for negative?---That's correct.

As compared to positive, POS?---That's correct.

Then there's the word, "Swab taken." And then in bold print is some letters and numbers ending in 01A?---Yes, that's correct.

Is that a system that you utilise within the lab to keep track of swabs and other examinations that are undertaken?---Yes, it is.

In relation to the swab that was taken of that area, did you find the DNA profile was obtained?---May I refer to my notes, please?

Yes. If you wanted to do it by reference to your report of 11 June 2020, page 8?---Yes, a DNA profile was obtained.

And did that match the DNA profile attributed to Kumanjaya Walker?---Yes, it did.

We turn over the page. Towards the top right of the image here, which is of the back of the shirt, the typed words appear "Stain O-TOL" and then "POS", or positive?---That's correct.

And then "Swab taken", and then there's the reference number, this time ending in 01B?---Yes it does.

Is that location where, using the stain O-TOL, that's a technique that you use?---Yes ,it's a chemical test that we use in the laboratory to test for blood.

And that coming back positive, you took a swab?---Yes I did.

And that swab returned, or was tested, and returned a mixed DNA profile?---Yes it did.

And did the major DNA components match the DNA attributed to Kumanjaya Walker?---Yes it did.

And in so far as it was a mixed sample, were the minor DNA components insufficient for identification purposes?---Yes they were.

For the jury's understanding of that instance of the mixed profile, minor components being insufficient for identification purposes, if a person had touched the shoulder of that t-shirt, say two or three days prior, is it possible that biological material, skin cells for instance, might have been left there?---Yes, that's possible.

The photographs which are exhibit 49, indicate other techniques that you used and swabs that you took from this item, at the front and the back?---Yes they do.

And just working through them, still on the back page. And if you need to refer to your report, you'll find it at page nine. You found, towards the left-hand side, there is a swab which has been given a number ending in 01C?---Yes, that's correct.

And you found that that swab indicated a DNA profile which matched that of Kumanjaya Walker?---Yes it did.

Up, still on the second page of this exhibit, the "tape lift, from outer front of chest", do you see that text in a – towards the top left hand corner of the image?---Yes I do.

And did you not conduct presumptive staining – sorry, presumptive testing, or it wasn't possible to do presumptive testing in that region of the shirt?---It was – it

could have been done on the tape lift. But it was decided not to be done on that one, for fear of losing DNA.

The – was it otherwise the case that a mixed DNA profile was obtained, using other techniques?---So our normal DNA processing did return a mixed DNA profile, yes that's correct.

And the major components matched Kumanjaya Walker's DNA?---Yes they did.

And the position that the minor DNA components were not suitable to determine possible contributors?---Yes, that's correct.

You found there were components present which could not have come from Kumanjaya Walker, Zachary Rolfe, or Adam Eberl?---Yes, that's correct.

And that was a finding that you were able to make, based on the DNA samples you had of those three individuals?---Yes that's correct.

And comparing them to what you found, based on the sampling you took of that region of the shirt?---Yes, that's correct.

And coming back to the front page on exhibit 49. There are areas that are indicated by text on this page of swab having been taken and given the label 01E?---Yes, that's correct.

And 01D?---Yes.

01D that returned a DNA profile which matched Kumanjaya Walker?---Yes, it did.

And 01E, did that return a mixed DNA profile that was unsuitable to be interpreted?---That's correct, yes.

Thank you.

Your Honour, I've finished with that item. Could I show the witness two photographs on a single piece of paper.

Ms Cheong-Wing, do you recognise the piece of paper I've shown you as two photographs that you took of a red satchel style bag, you understand was seized during the police investigation in this matter?---Yes, that's correct.

And you took DNA – or you took samples, which indicated a mixed DNA profile. Again, if you need to refer to your report, towards the bottom of page 10?---Yes, I see that.

And at least one of your samples, as I said, indicate a mixed DNA profile, and the major DNA components of that are attributed to Kumanjaya Walker?---Yes. One of the samples returned that result.

Your Honour, I tender the two photographs.

HIS HONOUR: It's exhibit 50.

EXHIBIT P50: Two photographs of red satchel style bag

MS CALLAN: Could I ask the witness be shown exhibit 40, four zero.

Ms Cheong-Wing, do you recognise the two page document which has been marked exhibit 40, as containing a total of four photographs that you took, during your examination of that pair of scissors?---Yes, that's correct.

And with that still in front of you, could I ask you to have a look at this document. Ms Cheong-Wing, the document I've shown you, do you recognise that as being page 11 of the report that you prepared, which sets out your examination and findings, in relation to that pair of scissors?---Yes, that's correct.

Your Honour, I tender that one-page extract from Ms Cheong-Wing's report.

HIS HONOUR: Exhibit 51.

EXHIBIT P51: One-page extract from Ms Cheong-Wing's report.

MS CALLAN: Ms Cheong-Wing, with that document which has now been marked exhibit 51, and the photos which have been marked exhibit 40, I wanted to ask you some questions about the examination you undertook of these scissors and your findings?---Yes.

So in the document which has been marked exhibit 1, there is a table form - form of table - and under the heading "Scissors" there's some text with commences, "The item consisted of a pair of scissors" and then you set out the overall length of that item as being 130 mil and the blade is approximately 45 mil?---Yes, that's correct.

You observed and as stated here, "Staining on one side of the pair of scissors" on the arm as well as the tip of the blunted blade and you say, "Not all staining was tested due to the requirements of fingerprint examination?---Yes, that's correct.

Can you explain what testing you did undertake?---So the stain that was observed on the tip of the blunted blade was tested for the presence of blood with one of our chemical tests in the laboratory as well as the stain on the arm of the handles, was also tested with the same type of chemical test and then a swab was taken from both of those areas as well as a swab from the entire handles.

Okay, so working through, if you turn over to page 2 of the photographs which have been marked exhibit 40, see the top photograph - a closer up photo of the blades of the scissors?---Yes, that's correct.

And have you indicated using a red dotted line, the location on the end of the blunted blade part of those scissors where you took a swab?---yes, that's correct.

And what caused you to take a swab there?---The presence of that stain. It had a red/brown appearance which is one of the first indicators that we will look for testing for blood and then the chemical reaction was positive, indicating a presence of blood.

Did you obtain a mixed DNA profile from the sample you took at that location?---Yes, that's correct.

And coming to your table for these scissors, which has been marked exhibit 51, there is a number13 and a capital A in bold?---Yes.

Does that align with the reference number which has been given to that part at the blunted end of the blade?---Yes, it does.

As we see in that top photograph on the second page of exhibit 40?---Yes, that's correct.

And then moving along that row of the table, it states "The stain tested positive to a presumptive test for blood?---Yes, it does.

And you have told the jury, is that part of the processes that can be undertaken to determine whether something which looks like it might be blood, are you able to determine in fact if it is?---That's correct, it's a presumptive test so therefore there are other things that can test positive, but yes, that's an indication that it is blood.

And as you've indicated, a sample was taken and a mixed DNA profile was obtained from that sample?---That's correct, yes.

Then still reading from that part of the table, the profile was interpreted as coming from three individuals?---Yes, that's correct.

And then you have written, "The DNA components match the DNA components attributed to - I'll say Kumanjayi walker, Zachary Rolfe and Adam Eberl?---Yes, that's correct.

Would this be appropriately described as a "mixed DNA profile"?---Yes, it would.

That is, the sample that you took from the end of those scissors contained a mixed DNA components including from those three individuals?---Yes, that's correct.

Was there any other source of DNA in that sample?---There were no components that didn't match the components attributed to those three individuals.

Was thee anything to indicate the nature of the biological material which produced that DNA Match?---So the chemical tests showed that there was - it was positive for

the presumptive test for blood, so that indicates that blood was most likely present but I couldn't comment if there was any other type of biological evidence such as skin cells there as well.

In the - towards - again, following that row across, you then set out the likelihood of the DNA profile matching - to put it in layman's' terms, the DNA of Kumanjayi Walker. Zachary Rolfe and Adam Eberl?---So each of the likelihood ratios is the likelihood of us seeing that DNA profile given that it came from one of those individuals as opposed to people at random.

You have also indicated a few minutes ago that you took a swab from staining on the arm of the handles. Is that depicted in the image below, which is on the second page of exhibit 40?---Yes, it is.

And was that - did you take a swab of that area of that arm of the handle?---Yes, I did.

And that's been given a marker ending in 13B?---Yes, it has.

Did the stain test positive to a presumptive test for blood?---Yes, it did.

And did the DNA profile that you obtained match that attributed to Kumanjayi Walker?---Yes, it did.

And we see that in your table for the row which commences with the number 13 and then capital B in bold?---Yes, it does.

I come back to the front page of exhibit 40 and to the image at the top. I think you have explained to the jury, you took a swab of the entire handles of the scissors?---Yes I did.

And that swab that you took, you gave a reference number ending in 13C?---Yes, it does.

And does that - the result of that swab - are they set out in your table at exhibit 51 in the bottom row that we see there which commences with the letter 13C in bold?---Yes, it does.

As stated there in your table, the swab tested weakly positive to a presumptive test for blood?---Yes, it did.

A partial mixed DNA profile was obtained?---That's correct.

And you describe it "reportable DNA components matched components attributed to Kumanjayi Walker?---Yes, they did

And the minor components were insufficient for identification purposes?---Yes, that's correct.



I want to move on then to the analysis that you undertook in relation to a blue police shirt? Could I show you a two page set of images?---Thank you.

Ms Cheong-Wing, did you examine this blue police shirt and understand it was the police shirt that was worn by Zachary Rolfe?---Yes, that's correct.

Your Honour, can I tender those - the two-page document containing three images of a blue police shirt?

HIS HONOUR: Exhibit 52.

EXHIBIT 52 Two-page document containing three images of blue police shirt.

MS POOLE: I have got copies for your Honour and for the jury. Your Honour's copy may be a moment or two?

HIS HONOUR: Yes, that's all right.

MS CALLAN: Can I now show you a document, Ms Cheong-Wing, which is a table which has been extracted from your report in relation to this item?---Thank you.

Ms Cheong-Wing, do you recognise that table as – as a table that you included in your report which sets out your examination and findings in relation to the – if I could describe it as Rolfe's – Zachary Rolfe's blue police shirt?---Yes, that's correct.

Your Honour, I tender that one-page table.

HIS HONOUR: Exhibit 53.

EXHIBIT 53 One-page table of findings of Constable Rolfe's blue police shirt from Kate Cheong-Wing's report.

MS CALLAN: And we have copies, your Honour.

Ms Cheong-Wing, as set out in the table which has been marked exhibit 53, you describe the shirt as you examined it, including that it was received with a torch still attached to epaulette on the left shoulder. And there was a mount which you recognised as used for body-worn camera, attached to the front left pocket?---Yes, that's correct.

And it contained, at that stage, a police notebook, a police ID and a badge and they were – the notebook and the ID and the badge were removed from the shirt and marked separately?---Yes, that's correct.

You noted damage to the left shoulder with associated staining, which tested positive for blood?---Yes, it did.

And in your table, is that damage – and a swab taken – indicated with the reference 23A?---Yes, it is.

And that – did that produce the swab, a partial DNA profile which matched the DNA profile attributed to Zachary Rolfe?---Yes, it did.

You also – is this the case – observed further damage to the back-left of the shirt?---Yes, I did.

And is that further damage depicted in the images which have been marked exhibit 52?---Yes, it is.

The nature of that damage and its location, is that depicted with some yellow dotted lines in a circle on the top image on the first page of exhibit 52?---Yes, it is.

And then the bottom image, is that a closer-up capture of that same location?---Yes, it is.

Turn over the page. Does this show swab that you took of a visible stain on part of the front of the shirt?---Yes, it does.

And does that – you've given that the – a numerical marker ending in 23B?---Yes, I did.

And is that dealt with in your table, which has been marked exhibit 53, in a row there?---Yes, it is.

That is a swab that you took from staining on the outer front middle of the shirt?---Yes, it is.

You found that that tested positive for a presumptive test for blood?---That's correct.

A mixed DNA profile was obtained?---Yes, it was.

It was – you interpreted that as coming from two individuals?---That's correct.

And the major component matched that of Kumanjayi Walker?---Yes, it did.

And the minor component was insufficient for identification purposes?---That's correct, yes.

Can I turn then – and this is the last item.

I wasn't sure if your Honour wanted to take morning tea or not. I know there was quite a lengthy break in the last witness' evidence.

HIS HONOUR: Do any members of the jury want to take a break at this point? It doesn't appear so. So we'll continue, thank you.

MS CALLAN: Yes, your Honour.

Can I ask you about the last item I intend to have you address in your evidence, with a two-page document containing images of another police shirt?---Thank you.

Ms Cheong-Wing, do you recognise this two-page document as containing photographs with indicators that you've applied of a blue uniform police shirt you understand as coming from, or worn by, Constable Adam Eberl?---Yes, that's correct.

Your Honour, I tender that document.

HIS HONOUR: Exhibit 54.

EXHIBIT 54 Two-page document containing photographs of Constable Eberl's blue police shirt.

MS CALLAN: Your Honour, we've got jury copies of that item and a copy for your Honour.

HIS HONOUR: Thank you.

MS CALLAN: And then separately, I'll have provided your Honour's working copy of exhibit 52. Could I now show the witness an extract from her report in the table form.

THE WITNESS: Thank you.

MS CALLAN: Ms Cheong-Wing, do you recognise the document I've just had placed before you as an extract from the report you prepared, which sets out your examination of the blue police uniform shirt listed as coming from Constable Adam Eberl?---Yes, I do.

MS CALLAN: I tender that document, your Honour.

HIS HONOUR: Exhibit 55.

EXHIBIT 55 Extract from Kate Cheong-Wing's report setting out examination of Constable Eberl's blue police shirt.

MS CALLAN: By reference to the images which have been marked exhibit 54 and the table – which has come from your report – which has been marked exhibit 55, on your examination of this police shirt, Ms Cheong-Wing, did you note damage on the outer back right side of the shirt?---Yes, that's correct.

And if we turn over to the second page of the images, marked exhibit 54, does that top image with the blue box indicate the location of that damage that you observed?---Yes, that's correct.

You see there's an arrow which come – a blue arrow which has been applied, coming down from that top image to the bottom image?---Yes I do.

Is the bottom image a close-up of that location on the back of the police shirt?---Yes it is.

The – within the blue box is a white square. Is that a sticker?---The – are you talking to the one on the right or the left please?

The top of the – top photo?---Yes.

Blue box, inside of that is a white square, or rectangle?---Yes that is the sticker that can be seen below.

And is that the sticker that can be seen below, towards the right-hand side?---Yes, that's correct.

And was that former sticker used within the Forensic Science Branch, for designating and indicating certain observations as to that – an item when you're examining it?---I believe so. That was actually received on the shirt, when I examined it.

Did you – looking at the bottom image on this page, place a form of ruler next to that damaged area?---Yes I did.

And did you, once you'd taken the photo, apply the yellow dotted lines to identify where the damaged area is?---Yes I applied them just to the image itself.

Can I ask you about the screening and sampling that you were able to undertake of this item. Coming back to the front image of exhibit 54, that is the front of the shirt. According to the table, you've recorded, "Staining on the outer front left chest area tested negative to a presumptive test for blood"?---Yes that's correct.

Where and with what mechanism did you use to undertake that test?---So the area is marked with that small dotted blue line on that photograph. I visually observed a stain on that shirt. So therefore I used a piece of filter paper to very gently scrape that area, and hopefully transfer some of whatever it was to the filter paper. And then I used the chemical test that we've used previously, to test whether there was a presence for blood. And the result was negative.

Did you also undertake general screens of the outer front of the shirt in relation to the possibility of blood being present?---Yes I did.

And what was the result of those general screens?---So on the whole of the front of the outer shirt, I had weakly positive reactions for blood, using a general screen.

And what did you do on – with that indication as to weakly positive indications for blood?---So when we get a reaction like this, we try and narrow down where the area

of that staining might actually be, using both obviously visual examination, as well as contracting the areas that we were testing. I didn't – couldn't actually observe any staining in any of these areas. And even though contracting down the areas, I couldn't actually pinpoint where any of this positive staining might be.

Did you undertake a general screen of the outer back of the shirt?---Yes, I did.

And what was the result?---So I had a negative reaction for blood on the outer back of the shirt.

Were any samples submitted for DNA analysis?---No, they were not.

Can I just come back to the front left chest area, which you've indicated with the blue dotted line. Your evidence, as I understand it was that that area tested negative to a presumptive test for blood?---The staining that I observed, yes that's correct.

Can you explain when you examined the – this front area of the shirt, you said a general screen of the outer front of the shirt tested weakly positive to a presumptive test for blood. You've described trying to zero in on areas of staining, and not being able to do so. Did you use any other method to try to screen for, or obtain samples from that front shirt?---No, I did not.

What is the technique that you use, which involves the use of filter paper?---So when we have an item like this where we can't actually visually observe any staining, other than what has already been tested, we have a piece of filter paper, roughly so big, that we fold into four, so that we have an edge, and then we gently wipe that across an area, to hopefully transfer any biological evidence to that filter paper. We then apply our chemicals directly to the filter paper, and look for a reaction. And so this was done, over the entire outer front, using various pieces of filter paper.

And what was the result of that test?---So all of those tested weakly positive to a presumptive test for blood.

However, is this the position, it was not possible to obtain a sample sufficient for the purposes of DNA testing?---Because I couldn't actually zero in on where that staining was coming from, I deemed it to be too small to obtain a DNA profile, yes.

And you – did you also use that filter paper technique on the back?---Yes I did.

And is that the – in your report when – the table, which has been marked exhibit 55, when you have recorded the words, "General screens", is that using this filter paper technique?---Yes, that's correct.

And as you've indicated, the filter paper technique used on the back of the shirt tested negative to any presumptive test for blood?---Yes that's correct.

So is this the position in relation to the police shirt of Constable Adam Eberl, overall, on the front of the shirt were small quantities of blood, which you were not able to

attribute to any particular individual?---So because it was a presumptive test, I can't confirm whether it was blood or not. Howsoever, there were small enough quantities that I could not determine where they were physically on the shirt.

And you say because it was presumptive, what else might it be?---So there are vegetative materials that can test positive for a presumptive test for blood, as well as animal blood. And some of the soils with really high iron content, can also test positive.

Thank you, your Honour, those are my questions in-chief.

HIS HONOUR: Thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: Can I start by just asking you the extent to which you were briefed, and if so, in what terms, as to the circumstances of the scissors, having been deployed in relation to this incident, if you follow what I mean?---So when we had a case conference, we were told in the case conference that a struggle had occurred, in which a pair of scissors were used. And whilst they were identified as the pair of scissors, I believe that they were collected later. Therefore determining whether they were the same pair of scissors was of interest.

Right. That briefing, who was present?---I'll just turn to those notes.

Please?---There was Senior Constable Ian Spilsbury, from Alice Springs Crime Scene. Apologies, I don't know the abbreviations, so I'm going to use the abbreviations. D Sergeant Dan Ralph(?), DSC Brett Wilson from Major Crime. DS Sergeant Mark Malagorski(?) from Serious Crime. SC First Class Gino Robb from the Firearms Examination Unit. Myself. Senior Constable Pauline Setter(?) from Fingerprints FSB. Narelle Moss who was from the chemistry section, and Senior Sergeant Richard Howie(?), who was the OIC of the Forensic Branch at the time.

And when – on what day was that briefing?---That was on 13 November 2019.

And what's the day that you actually conducted the testing that you've described in relation to say the scissors and the various pieces of clothing that we've heard about today?---The scissors were examined on 15 January 2020. The blue bull shirt from Arnold Walker was examined on numerous days. Those were 2 December 2019, 7 January 2020, the blue uniform police shirt coming from - actually we'll do that one first - from Zachary Rolfe, was examined on 13 January 2020 and the police shirt coming from Adam Eberl was examined on 15 January 2020.

Can I ask you this, having been given a description, if I could put it that way, of the circumstances in which the scissors might have been deployed, were you ever shown any body-worn video footage or any still photographs of the incident when it occurred?---No, I was not.

And you haven't since?---No, I have not.

Could the witness be shown exhibit, 25, tab 8, please?

And turn to frame 1151. It should be a still photograph, like that of frame 1151?---  
Frame number?

One - one - down the bottom - 1151. Mr Officer can find it.

What I might do is ask if - I wonder if your associate would mind putting it up on the screen. It may be that some members of the jury can't find that particular frame?

HIS HONOUR: Yes.

MR EDWARDSON: Thank you, your Honour.

I will come to the specifics of this photograph in a minute but I just want to reinforce the process that you went through for the purposes of your investigation. A presumptive test for blood is no more than that, it is a presumptive test?---Yes, that's correct.

So it is the first indicator that at a particular location there may be the presence of blood?---Yes, that's correct.

And as I understand your evidence, the first thing you do is you try and see if you can see with the naked eye, a stain or a mark that might be consistent with blood?---Yes, we do.

And it is having identified, for example, that stain or marking, you then focus or zero in on that location?---Yes, that's correct.

You conduct the presumptive test and it comes up positive or negative as the case may be?---Yes, that's correct.

Having identified a positive test for blood you've got two choices, as I understand it You could, if you chose to, conduct what is known as a "confirmatory test"?---Yes, we could.

What is a confirmatory test?---Confirmatory test is - it's a little bit like pregnancy test, you would put the sample in a buffer and then you would that to a little cartridge. If you get two lines it's positive, if you get one line it's negative and then we could still submit that buffer through for our DNA processing.

On any of these items that you've identified in court today, I am talking about the two shirts, Mr Eberl's shirt, Mr Rolfe's shirt and the scissors. On any of those items were any confirmatory tests done?---No, they were not.

What did happen in respect of some of the samples, and we will come to the specifics in a minute, is that having obtained a presumptive test for blood, then a test for DNA was then conducted?---Yes, that's correct.

And the purpose was to identify whether it was a single source or multiple source, depending upon the outcome of that result?---Yes, that's correct.

Given that there was no confirmatory testing done - and I will come to there reasons why in a minute, is it the case - sorry, I withdraw it, I will put it this way. Can we turn to the scissors if I can please, and I want you to have in front of you please exhibit 40 which are the photographs that you took of the scissors as they presented to you and also can you have in front of you please - excuse me - bear with me - exhibit 51? Exhibit 51 being the results from the swabs that were taken from staining on the end tip of the blunted blade described or marked as 13A. Now, the swab was taken, as we can see on the second page of exhibit 40, the first photograph at the top of the page, the location of the swab was that area that we can see with a circle of red dots?---Yes, that's correct.

And we can see in your report that the stain had tested positive to a presumptive test for blood?---Yes, it did.

You've told us that, like all the other exhibits, in this case there was no confirmatory testing to determine whether, in fact, it was blood?---Yes, that's correct.

But nonetheless, a DNA profile was obtained from that stain?---Yes, it did.

And we can see that it's a mixed profile - or a mixed DNA profile containing the DNA profile of three individuals, firstly Kumanjaya Walker, secondly Zachary Rolfe and thirdly Adam Eberl?---The profile we obtained matched the profile attributed to those individuals, yes.

Thank you. The stain itself was consistent with blood?---Yes, it was. It had a red/brown appearance.

And a confirmatory test could have been done?---Yes, it could have.

Is it the case that you chose not to conduct a confirmatory test because the sample and the location was so small?---Yes, that's correct. I was worried that I might lose some of that DNA in that process.

And so you basically made a forensic - and appropriate decision - that you did not want to lose the sample, was more important from your perspective to do the DNA testing?---Yes, that's correct.

Were any swabs taken or any testing done, on what I will call the "sharper of the two blades"?---No, there was not.



Can you exclude the possibility that the - that the tip of what I call the blunt tip, that we see in exhibit 40 in that first photograph, can you exclude the possibility that, in fact, that staining was blood and that it was the blood of Adam Eberl?---No, I cannot exclude that.

Is it possible, if it was blood - and is blood - and indeed was Mr Eberl's blood, that it transferred from the sharper of the two blades to what we'll call the blunt blade?  
---That is possible, yes.

Now, the photograph that I want you to have a look at is this. Firstly, as I understand it, you have never been shown any stills or video footage of the incident in question?  
---No, I have not.

I want you to assume this is a frame that is taken from the body-worn video and that as we - and that the hand that we can see there is - with the scissors, is Kumanjaya Walker and to the right, the hand of Zachary Rolfe, holding his wrist, do you see that?---Yes, I do.

And you can see that in the hand of what I want you to assume is Kumanjaya Walker, we can see scissors and I want you to assume that they are the scissors that you subsequently identified?---Okay.

And tested. Now, we can see red markings - what appears to be red staining - on the palm of Kumanjaya Walker, the hand which holds the scissors. We can see that, can't we?---Yes, I can see markings.

And we know, don't we, that swabs were taken of that hand?---No audible response).

Can I just direct your attention to - it's your report dated 11 June 2020, in particular, page 7 of 26. And can I direct your attention to the right palm, marked, "07A Swab"?---Yes, I can see that.

And it's described in your report as follows, "Heavy staining on the swab tested positive to a presumptive test for blood, not submitted for DNA analysis"?---Yes, that's correct.

And we can see that this is the right palm area and we can see red staining - what appears to be red staining?---Yes, that's correct.

Now, obviously that looks - and it's consistent with blood, is it not?---Yes, it is.

But the only way in which one could be confident about whether it is blood and secondly, whose blood it is, is by going through that process that we've discussed today. That is- - -?---Yes, that's correct.

- - -initially, the presumptive test. That was done in this case?---Yes, it was.

And it showed a positive test for blood?---Yes, it did.

But from there, none of the other steps were taken. That is, the submitting it for DNA analysis and/or a confirmatory test to determine whether, in fact, it is blood?---Yes, that's correct.

So we can't tell now whose blood that is, if it is blood?---That's correct, yes.

I tender that photograph, what's in – it's already in, your Honour. Thank you.

HIS HONOUR: All right.

MR EDWARDSON: Excuse me, your Honour.

Can I just ask you a little bit more, if I may, about the testing that occurred in respect of Mr Adam Eberl's shirt which, as you've told us, is now the photographs that are captured in exhibit 54?---Yes, that's correct.

And in exhibit 55 are the conclusions that you reached, having regard to the testing that you conducted in respect of that uniform. Could I just focus for the minute on the dotted red at the – the blue dotted section underneath the left armpit area of Mr Eberl's jumper – or shirt, I should say?---Apologies, this is the wrong one- - -

That's – that there was staining within that area?---Hang on two seconds, please.

It's his left?---Thank you. Yes.

I'm sorry, have you got yours in front of you? There was staining within that area?---Yes, there was.

Are you able to give us an indication of how visible it was?---It was visible to me with the naked eye, without needing to use any alternate light source, such as a torch.

Thank you. When you went through the process of examining the various pieces of clothing, did you use a light source?---I did in the instances of the clothing that was coming from Arnold Walker, as well as the two police shirts, yes.

And – we see it on TV, don't we? Blue lights, are they something that you use?---So the blue lights that are often shown in the TV show are more looking for semen, because that fluoresces or glows, whereas blood doesn't have those properties. So in this instance, I used a torch at different angles, trying to see if something was more visible to me with that.

And so insofar as you conducted any testing, was it confined to what you could identify with the eye and, perhaps, with the assistance of a torch, as being what you thought was a stained area?---Yes, that's correct.

And so in respect of the outer front left chest area that you describe in exhibit 55, that came back with a negative presumptive test for blood?---Yes, it did.

If we go closer to, for example, the armpit area just outside of that blue circular indication area that you've marked, was there any testing done around that location for blood?---So that location was included in the general screen that I described previously, where we wiped the filter paper over.

Right?---But I didn't test that area by itself specifically.

Right. So if you're doing a general test and you're moving across different sections of the shirt, using – what was it you used?---The filter paper.

Filter paper. You weren't able to identify the source or the location of what tested weakly as being a presumptive test for blood?---That's correct, yes.

So we don't know where it comes from, if it was blood?---That's correct, yes.

And because no confirmatory testing was done, we can't say one way or the other as to whether, in fact, the positive presumptive test for blood at that – on the shirt itself was, in fact, blood?---Yes, that's correct.

All right, thank you.

Nothing further, thank your Honour.

MS CALLAN: Nothing arising, your Honour, from my perspective. If the witness could be excused?

HIS HONOUR: Yes, thank you. You're excused?---Thank you very much.

WITNESS WITHDREW

MS CALLAN: Your Honour, the next witness is giving evidence by audiovisual link. His name is Dr Michael Reade, R-E-A-D-E.

HIS HONOUR: Thank you.

MICHAEL CHARLES READE, sworn:

XN BY MS CALLAN:

MS CALLAN: Sir, can you tell the court your full name?---It's Michael Charles Reade.

And are you a Professor of Military Medicine and Surgery at the University of Queensland?---Yes, that's correct.

And you're a serving officer in the Australian Defence Force?---Yes, that's correct.

And are you a specialist intensive care physician and anaesthetist currently practicing in Australia?---Yes, that's right.

Doctor, you were asked to consider aspects of the circumstance of a police shooting that occurred at Yuendumu in the Northern Territory on 9 November 2019, weren't you?---Yes, that's right.

And for the purposes of considering matters that you were asked to address, you were provided with a number of documents as well as some video footage?---Yes, that's right.

And I want to ask you just about a specific subset of the documents you were provided, that include a post-mortem report that was prepared by Marianne Tiemensma in January 2020?---Mm mm, yes.

Did you also speak with Marianne Tiemensma in August 2020 to understand, in detail, her opinions on the cause of Kumanjaya Walker's death?---Yes, I did.

Amongst the other material that you were provided, did that include body-worn video of the shooting event from several different officers' cameras?---Yes, I did see all of those, yes.

And did you also see and consider body-worn video from several police officers' cameras of the subsequent first aid attempts of – by those officers in relation to Kumanjaya Walker?---Yes, I did.

I'd like to ask you about the information you were provided as to the gunshot wounds that Kumanjaya Walker sustained, by reference to a diagram which is annexure A to Dr Tiemensma's post-mortem report. And we'll have the diagram showed on the screen, which I hope you'll be able to see?---Mm mm.

Your Honour, this is MFI Q.

HIS HONOUR: Thank you.

MS CALLAN: Could we have the doctor also on the screen.

Dr Reade, I hope at your end you can see a diagram?---Yes I can.

And I should indicate for the record in these proceedings, it's marked MFI Q.

Do you recognise that as the diagram which was included in Dr Tiemensma's post-mortem report?---Yes it is, yes.

And by reference to that diagram, and Dr Tiemensma's findings, did you proceed on – in terms of the views that you express, in relation to this matter, on the basis that Kumanjaya Walker sustained three gunshot wounds?---Yes, that's right.

And the first gunshot wound was shown in the diagram as entering at the location labelled A1?---I – I was quite specific in my report not to distinguish which was the first, second and third. I was very careful to just refer to them as A, B and C - - -

All right?---It wasn't possible for me to distinguish which was the first fired, the second and the third.

Quite right. I'll – I should adjust my question on that basis. Was one of the gunshot wounds labelled A – the entry point labelled A1, on this diagram?---Yes.

And did you understand from considering Dr Tiemensma's report, that the track of that gunshot wound perforated the posterial medial aspect of the right 11th intercostal space?---Yes, that's correct, yes.

And is this a reasonable description, that that is the area between the lower most rib and the second lowest most rib at the back, generally close to the spine?---Mm mm.

And is essentially - - - ?---Yes.

- - - a boundary area between the chest and the abdomen?---Yeah, that would be a reasonable description, yes.

In relation to gun – the wound – the gunshot wound marked – labelled B, the entry point is depicted in the diagram as B1?---Yes.

And did you proceed on the basis as set out in Dr Tiemensma's autopsy report, that the track of that gunshot wound perforated the seventh intercostal space laterally, with associated perforation of the left eighth rib, left hemidiaphragm, the spleen, left kidney, anterior aspect of the L2 vertebral body, right lobe of the liver, right hemidiaphragm, and the inferior aspect of the lower lobe of the right lung, and the right seventh intercostal space laterally?---Yes, that's correct.

So essentially, was that track of that gunshot that it went from one side of the body to the other, and in doing so, passed through several major organs, including the liver, the kidney, the spleen and the lower lobe of the right lung?---Yes, that's right, yes, yep.

In respect of gunshot wound C?---Mm mm.

That entry point is shown on the diagram as C1?---Yes.

And did you proceed on the basis as set out in Dr Tiemensma's autopsy report, that the track of that wound perforated the right – the eighth intercostal space and exited the posterior aspect of the left plural cavity, just below the left 12th rib?---Yes, that's right.

So that is it traversed the left chest, but it – would you agree with the description that it was a relatively shallow trajectory through the chest?---Yes, it was said that there

was entry to the left plural cavity, but based on the observation that there was no damage to the left lung and no left pneumothorax, which is interesting in itself, but also a very small amount of blood in the left pneumothorax, then yes, I'd assess that as a relatively superficial wound. Relatively to wound B, it is essentially, yes.

Okay. And in your consideration of this matter, did you understand, or were you provided with information upon which to determine, for instance, the times when the three bullets were fired?---I – I was. Not enough to distinguish one from the other.

Yes?---But – but yes. I can relate that if you like, but yes.

And you understand, and you proceeded on the understanding as to the nature of the bullets which were used, being 0.40 calibre?---Yes, that was related to me – I can't recall whether it was actually in the pathology report, or whether it was from our verbal discussion, but yes, that was from the pathologist as well.

And in your experience, is that calibre of ammunition commonly used by police forces worldwide?---Yes, that's correct.

Did you also observe in the post-mortem report, the findings that Dr Tiemensma made in relation to what I might describe as blood loss?---Yes, yes.

And that included the quantity of blood found in Kumanjaya Walker's chest and abdomen?---Yes.

Dr Tiemensma's view as to Kumanjaya Walker's cause of death was that it was a combination of respiratory failure, due the haemothorax and diaphragmatic and right lung injury, and hypovolemia, or blood loss. Did you agree that that is a reasonable summary of the consequences of the wounds sustained?---I do. It was to explore that conclusion that I called her, and to discuss the case, in particular.

I was particularly interested to know whether she thought that there had any – been any more blood loss than that which had been recorded in the written pathology report. Because that is a relatively small amount of blood, as you'll see in what I've written. But she reassured me that no, that was her opinion of the extent of the bleeding. And as a result, I certainly thought that that contributed to the death. But I also thought that the presence of blood in the right hemithorax, and the damage to the right lung, would have been also a very significant contributor to the death. And, you know, we discussed those – those points there. The physiology versus the anatomy of those two points, I guess. My expertise is in the physiology, her's in the anatomy, so we conferred on that point.

All right. And in terms of the quantity, as you discussed, you checked that with Dr Tiemensma, and you understand and proceeded on the basis that some 900 ml was found?---Yes, that's – in total, that's correct, yes.

And then in terms of the discussion that you then had with the examining pathologist, Dr Tiemensma, was your view as to the cause of Kumanjaya Walker's death?---It was, that 900 ml of blood is a relatively substantial amount. But roughly double that,

one would give blood transfusion and that criteria used by the College of Surgeons amongst others, class 2 haemorrhage, not enough to cause death independently and therefore that there would've had to have been some other factor and we agreed - the pathologist and I, that that other factor would have been respiratory compromise due to the fact that most of that blood was in the right hemithorax, causing collapse of the lung, plus the damage to the lung itself that she observed.

Could you explain for the jury's understanding what you mean by a, "respiratory collapse"?---Indeed. So the lung on the right had progressively become collapsed due to the effect of blood in the right side of the chest outside the lung, pressing upon it such that when Mr Walker tried to breathe in, air was not able to enter the lungs because - well, the lung on that side was being pressed upon by that expanding blood in the right-hand side of the chest.

You use the term, "right haemothorax", where is that?---A haemothorax is when blood is in the cavity between the lung and the chest wall.

What bullet wound - using the numbers - letters you've used, A, B or C?---Mm mm.

Produced that consequence for the right lung?---Bullet wound B.

Along with the anatomical and other medical observations and findings, does your conclusion as to the primary cause of death informed for instance by what you observed on the body-worn video during the first aid attempt?---it is, to a degree. I observed - well, I can go into that in some detail if you like?

Perhaps - if I could deal with it this way, did you observe during the resuscitation attempts Kumanjayi Walker saying on several occasions that he couldn't breathe?---Yes, I did.

Did you also observe that at a certain point in time that his respiratory rate was something like 48 breaths per minute, indicating obvious respiratory distress?---Yes, I did. There were other times when I observed that his rate was elevated but there was just that one occasion when I was able to time his rate accurately and indeed, it was 48 breaths a minute, which is very high.

Do you also have regard to the views expressed at the scene by attending police officers as to what they believed was the main diagnosis, or problem?---I did put some weight on that, having regard to the degree of medical training that they had I didn't base my opinions heavily upon their opinions but I did note that in fact they had made the right opinion based on the other evidence that I had observed both in the video and subsequently the evidence that it had become apparent to the pathologist during the autopsy and that they had indeed made the correct diagnosis of a Haemopneumothorax.

Just breaking down, a Hemothorax you've described as concerning some blood in the lung cavity and what about pneumothorax?---Yes, indeed. So, forgive me. The distinction is arbitrary and specious you might say and almost impossible distinction

to make at the scene without imaging such as a CT can. A Haemothorax is blood in between the lung and the chest wall and a pneumothorax is air in between the lung and the chest wall and haemopneumothorax is a combination of the two - almost certainly just understanding the physiology here, there would have been a combination of both but it wouldn't be - and it isn't - possible to say how much air versus how much blood there would have been. So if I haven't been specific in what I've written in making the distinction sometimes between haemothorax and pneumothorax it's essentially because that distinction isn't possible to make but it's clinically inconsequential, the effect would be the same - the effect would be collapse of the lung.

Doctor, based on the material that you were provided including the video of the first aid efforts, it's your view, isn't it that you consider the time of Kumanjayi Walker's death to be 8:36 pm?---I'm just looking at my notes - - -

If I could refer you, in your report, to page 11?---Yes indeed, the bottom of page 11, so yes, so I've done the times in Zulu time and that is 11.06.24 and - yes indeed, 20.20.36 local time, so yes, that is correct.

Now, your conclusion was that the efforts of attending police officers in terms of rendering first aid assistance to Kumanjayi Walker with the equipment available, is that their actions were appropriate?---Appropriate within the bounds of their training and the equipment that they had available, yes.

You express - and your view is that you cannot think of any other actions that those police officers could have taken after Kumanjayi Walker had been shot, that would have resulted in ultimate survival?---That they - given their training and protocols and the equipment that they had available could have taken, that's correct. I don't think that they could have reasonably expected - been expected to do anything else.

It was your observation that the treatment provided to Kumanjayi Walker by the police offices in Yuendumu was focussed, attentive, displayed an appropriate sense of urgency and an appreciation of the gravity of the situation?---Yes, that's correct.

In terms of your ultimate conclusions and for reference I am drawing this from par 44 of the report that you've prepared?---Mm mm.

It's your view, isn't it, Dr Reade, that from the moment the bullet that cause would B reached the end of its wound path, in the circumstances present at the time, Kumanjayi Walker was going to die regardless of any efforts made by the police officers present?---Yes, that's correct.

Could you, in brief terms, explain why?---I believe that they - first of all appreciated the gravity of the situation, that they applied themselves to implementing their protocols and their training. They sought equipment with a sense of urgency and they applied that to the rendering of first aid as best they could. They called for help at the earliest possible opportunity, both pre-hospital and then from the ambulance



despatch officer when they arrived at the police station, and really - I fail to see how anything more could have been done by them, other than those actions.

What was it, Dr Reade, about the bullet that caused would B which meant that Kumanjayi Walker was going to die regardless of efforts made by the police officers present?---It had done such a degree of - you might say internal damage - damage to those major organs and in particular to the lung, that he would have required - or he did require - initially advanced resuscitation techniques that they were not capable of applying and then secondly, access to what we would term "damage control surgery" which was available - the closest available place was Alice Springs. And that was too far away for him to access within the time available for him to access it.

Thank your Honour. Those are my questions in-chief.

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Just one question, Doctor, if I may?---Of course.

Had appropriate medical treatment been available, could Kumanjayi Walker have survived?---I do deal with this in detail in my report. I think the answer to that, I guess, is a qualified yes. Had – had he been shot within metres of me here at the Royal Brisbane Hospital, I think his chance of surviving would've been extremely high. And I even quantify that with reference to very large, 20,000 patient study that looks at chance of survival after wounds like this with physiological parameters such as I infer he had. I estimated his chance of death would've been only around one percent. But that is, of course, with almost immediate access to damage control surgery. I think as you progressively degrade the medical care that's available, both pre-hospital and then the time to that damage control surgery, the chance of survival progressively diminishes. And that, regrettably, is a reality for much of rural Australia.

Insofar as there was a clinic at Yuendumu where the shooting took place, you would've been informed and I think it's part and parcel- -?---Yes.

- -of your opinion, but of course, there were no medical practitioners or nurses or staff that could assist in the tragic circumstances of this event. But had they been staffed or had it been staffed, would that have made a difference?---Here is the one part of my report where I – I think I'm uncertain. I do have some knowledge of that type of clinic, having worked in that environment very briefly many years ago. And I'm aware of descriptions of that clinic that have been given – that have been tendered in evidence as well. And from that knowledge, I – I believe that a limited number of those pre-hospital interventions that, optimally, would've been applied could have been applied. But others would not. So for example, I do not believe that the remote area nursing staff who might otherwise have been at that clinic would have been trained or equipped to undertake intubation, mechanical ventilation. I do

not believe they would have been trained and equipped to provide a blood transfusion and so on. So the many things that, for example, a Queensland Ambulance Service Advanced Paramedic might be able to provide here in suburban Brisbane. But they would've been able to do some other things. They would've been able to provide some lower level of support for his breathing, a lower level of support for his circulation and those – I'm abbreviating to a degree – but those things, I think, would've delayed his death for a period. Would that delay have been long enough to allow a retrieval team – an air and medical retrieval team – to arrive from Alice Springs? That retrieval team almost certainly would have had the ability to apply those advanced interventions. And then would that have further delayed his death long enough to get him to surgery in Alice Springs? They're matters that are very much open to speculation. I think all I could really reliably say is that could have been the case, but I couldn't give you a degree of certainty over that.

Thank you, Doctor.

HIS HONOUR: Anything arising from that?

REXN BY MS CALLAN:

MS CALLAN: Yes, just briefly.

Dr Reade, is the position – what you've just described as to the potential for other interventions to have delayed Kumanjaya Walker's death for a period and you've described – -?---Yes.

- - -the potential involvement of a retrieval team and into surgery at Alice Springs. You used the word that that could have had the result of his survived – having survived, is that your position?---If those pre-hospital interventions – that I do not believe were within the scope of practice of the police at Alice Springs – at Yuendumu, but may have been within the scope of practice of the nursing staff who, of course, were not there. But had they been there, had they been applied, that could have delayed his death long enough for a retrieval team to arrive. But I can't provide any certainty over that.

But on that lack of certainty, because we're dealing with scenarios that, for various reasons, didn't occur?---Yes.

Is this position the highest you could express it in your view is that, as a potential, he could have survived, but you don't know whether he would have?---That's correct. I – if you were to ask me to put a probability on that, I would literally be guessing.

And I won't ask you to do that, Dr Reade. But on the scenario that you've given of if the – those injuries had been sustained within metres of you at Royal Brisbane Hospital, in terms of the chance of survival there, the position the same, ultimately? That you don't know whether he would've survived?---So it's a foolish doctor that will ever say anything is certain. But had – had this wound pattern been sustained in

close proximity to an advanced surgical hospital, I would expect him to have survived. I would be very surprised had he succumbed to those injuries.

Thank you.

Your Honour, if his witness could be excused?

HIS HONOUR: Yes, thank you, Doctor. That concludes your evidence and you're now excused. We'll break the audiovisual link?---Thank you.

WITNESS WITHDREW

MR STRICKLAND: The next witness is Lee Bauwens. I'm entirely in your Honour's hands as to whether we begin him now or not.

HIS HONOUR: It's 10 past. I don't think we'll commence at this point. So members of the jury, would you now retire, please. And we'll start again tomorrow at 9.30.

JURY OUT

HIS HONOUR: Yes?

MS POOLE: Yes, your Honour. Before your Honour rises, I have exhibit 39, the USB of the crime scene footage, which has been corrected.

HIS HONOUR: Thank you.

MS POOLE: Thank you, your Honour.

HIS HONOUR: Then I'll adjourn.

ADJOURNED 1.08 PM TO TUESDAY 22 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON TUESDAY 22 FEBRUARY 2022 AT 9:39 AM

(Continued from 21/02/2022)

Transcribed by: EPIQ

MS CALLAN SC: For your Honour's appreciation, we have some transcripts of a couple of the video files which otherwise had not been tendered. So at a convenient time, I propose to tender those and provide them to the jury. Just whenever is convenient for your Honour.

HIS HONOUR: All right, thank you.

And before we bring the jury in, I'll now publish to the parties my reasons for the interlocutory ruling that I made before the trial began, in relation to certain messages.

MR STRICKLAND QC: If your Honour pleases. Your Honour, with – the next witness is Dr Tiemensma, and just for your Honour's – the Sheriff's benefit, I'll be playing – putting various things on the screen for the jury to see.

HIS HONOUR: All right, thank you.

Can we bring the jury in then please.

JURY IN

HIS HONOUR: Yes.

MS CALLAN: Your Honour, there was a body-worn video file, which has been tendered and marked exhibit 12. I now have copies to tender, and for your Honour and the jury, of the transcript of that footage. Noting, as has been said several times already, that the transcript is being tendered as an aid to assist the jury, but - - -

HIS HONOUR: Yes.

MS CALLAN: - - - ultimately it's a question for them as to what they hear and see in that footage.

HIS HONOUR: Yes.

MS CALLAN: So I tender the transcript of what is – it's BWV Hawkings, Anthony, 6 of 10, which has been tendered and marked in these proceedings as exhibit 12.

HIS HONOUR: Would it be convenient to also mark that as part of exhibit 12?

MS CALLAN: Yes, your Honour, if that's convenient.

HIS HONOUR: Yes.

EXHIBIT P12: To include transcript of BWV Hawkings, Anthony, 6 of 10.

MS CALLAN: And your Honour, similarly, I tender a transcript of the video, which has been marked exhibit 31 in the matter. Which is body – the transcript of the body-worn video of Hawkings. It's a portion of 3 of 10, from Zulu time, 10.00.50 to 10.01.21.

HIS HONOUR: And again, that will be part of exhibit 31. And again, this is tendered on the basis, all of these transcripts are tendered on the basis that they are to assist the jury in following what is in the body-worn video itself, but if there is any difference between what the jurors see and hear when they view the body-worn video, and what they read in the transcript, then they proceed on the basis of what they see and hear.

EXHIBIT 31: Addition of transcript of body-worn video of Hawkings. Portion of 3 of 10 from Zulu time, 10.00.50 to 10.01.21.

MR STRICKLAND: Your Honour, I call Dr Marianne Tiemensma.

HIS HONOUR: Yes.

MARIANNE TIEMENSMA, sworn:

XN BY MR STRICKLAND:

MR STRICKLAND: Could I ask you to speak loudly and clearly. Everything you say is being transcribed?---Yes.

And if there's any question I ask you'd like me to repeat, please say so?---I will.

What's your full name?---Marianne Tiemensma.

How do you spell the surname?---T-I-E-M-E-N-S-M-A.

And you are a senior forensic pathologist?---Yes, I've the Chief Forensic Pathologist in the Northern Territory.

How long have you had that role for?---For three years.

And what is a senior forensic pathologist?---A forensic pathologist is a doctor who specialises in forensic pathology. So my day to day job is to determine cause of death, mechanism of death, assist the coroner and police with the investigation of death. Collect evidence. Document injuries. Interpret injuries. Give opinions in court. Write reports. I think that's more or less in a nutshell, what I do.

You prepared a post-mortem or autopsy report in relation to Kumanjayi Walker, is that right?---I did.

And you inspected Mr Walker's body on 10 November 2019?---I don't think it was on the 10th.

On 12 November 2019?---That's correct, yes.

MR EDWARDSON QC: Your Honour, I have no objection to this witness referring to her notes for the legal report.

MR STRICKLAND: If the court pleases.

Now I want to show you a curriculum vitae please. Have you prepared that curriculum vitae?---I did.

And is that accurate?---It is accurate, however, I submitted this in 2020, prior to the first time that I was going to give evidence, so – but it is accurate.

Okay.

I tender that curriculum vitae.

HIS HONOUR: Exhibit 56.

EXHIBIT P56: Curriculum vitae of Marianne Tiemensma.



MR STRICKLAND: I have copies for the jury, your Honour. That will happen after morning tea.

I just want to go through some of those qualifications. What are – in short, what are your qualifications as a forensic pathologist?---So in order to become a forensic pathologist, you have to have a degree in medicine and surgery. So I have a bachelor degree in medicine and surgery, which I obtained - - -

Slow down a bit please, yes go on?---I obtained that in 2004 from the University of Pretoria in South Africa. After that I obtained a number of qualifications in Forensic Pathology, that includes a diploma in forensic pathology from the College of Medicine of South Africa in 2008. I also am a Fellow of the College of Forensic Pathologists in South Africa since 2010. I have a Masters Degree in Medicine in Forensic Pathology that I obtained from the University of Stellenbosch in 2011.

Where, sorry?--- University of Stellenbosch in South Africa, so that's close to Capetown and then I am also a Fellow of the Royal College of Pathologists of Australasia since 2019.

Did you practice as a forensic pathologist in South Africa?---I did.

For how long?---I started in the field of forensic pathology in 2007 where I was first employed as a registrar, that means a forensic pathologist in training and then after it became a Fellow of the College of Forensic Pathologists in South Africa I 2010. I was appointed as a specialist, so I practiced in South Africa from 2010 until 2017 when I relocated to Darwin and since then I've been employed at Royal Darwin Hospital as a forensic pathologist, so that's another almost five years.

So in the course of your career, approximately how many autopsies have you performed - or conducted?---At the moment it's in the region of 2800 autopsies.

I will hand up to the jury copies of exhibit 56, thank you. If you go to page 4 please, of your CV at exhibit 56? You worked as a medical officer at the Institute of Maritime Medicine in the naval base in Simon's Town, is that right?---That's right, yes.

And also the military hospital in Wynberg, is that in South Africa?---That's in South Africa. It's Capetown, it's the second largest military hospital in South Africa.

You've also published various articles, is that correct?---That's correct.

You have listed those on pages 4 and 5, is that correct?--I did, yes.

It says, on page 5, "Presentations" what does "Presentations" mean?---So that means oral presentations at conferences to fellow pathologists and fellow scientists on various topics, as listed on page 5.

It refers to you being a peer reviewer for Forensic Science, Medicine and Pathology Journal. What does that mean?---That means the editor of the journal submit

articles to peer reviewers , who our specialists in the field for an opinion as to whether these are worthy of publication or not, so I do that quite regularly and I am also on the editorial board of the Forensic Science Medicine of the college e-journal.

Now, I want to ask you about the autopsy you performed on 12 November 2019.  
---Sure.

You prepared a report, is that correct?---That's correct.

And you can have access to that report - that is a report you prepared on 21 January 2020?---That's right. That's the day that I signed it out.

And ,your Honour, could that report be MFI please?

HIS HONOUR: That will be marked for identification with the letter S.

MFI S: Autopsy report dated 12.11.2019.

MR STRICKLAND: Thank you. And have you got a copy of that handy?  
---I do.

You have also prepared an additional statement in relation to various matters related to that report on 1 May 2020, is that right?---That's correct, yes.

Could that also be MFI'd, your Honour.

HIS HONOUR: That will be marked for identification with the letter T.

MFI T: Additional statement re autopsy report.

MR EDWARDSON: Your Honour, could I just have a quick look at the two reports that have been handed up at the moment?

HIS HONOUR: Certainly.

MR STRICKLAND: Sorry, Madam Usher, I think that one is yours too.

HIS HONOUR: There is another one.

MR STRICKLAND: Are there two or one?

HIS HONOUR: There were two. Did you - there were two reports. One was marked S and one was marked T.

MR EDWARDSON: I think (inaudible). Sorry about that.

MR STRICKLAND: Now, when you conduct an autopsy do you do both an inspection of the external part of the body and the internal part?---that's correct, yes.

So it depends on the authorisation given by the Coroner, but usually a full post mortem examination entails complete examination externally, the clothing, body surfaces and then followed in by internally, which means looking at the organs as well as the subcutaneous tissues if necessary.

What is a "subcutaneous tissue"?---"Subcutaneous" means under the skin.

And did you do that in this case?---I did.

Both internal and external examination?---That's correct.

Now, I want to take you just main findings please. Now, you found that there were three gunshot entrance wounds, is that correct?---That's correct , yes.

And you prepared a diagram of - showing those - the entrance points of those three gunshot wounds, is that right?---I did, yes.

I will just show you a diagram, together with a photograph. Did you prepare that diagram?---I did.

And you can see on the second page of the photograph - I'm sorry, there's a photograph of the left side of the torso, is that correct?---That's correct, yes.

Which shows two of the three gunshot wound entrances, is that correct?  
---That's correct.

I tender that diagram and photograph.

HIS HONOUR: That will be exhibit 57.

EXHIBIT 57: Diagram and photograph of torso of deceased at autopsy.

MS POOLE: Your Honour, we have a working copy for your Honour and copies for the jury. The witness has got the tender copy.

HIS HONOUR: Yes, thank you. If they could be distributed.

MR STRICKLAND: Now, I want to take you to some of these drawings. The first drawing of the body on the back has - you've noted A1, C2 and D, is that right?  
---That's right, yes.

And then on a side body – I'll just show the jury this diagram at this part here – you've got two other – B1 and C1?---That's right.

Do they represent the three gunshot wounds you refer to?---A1, B1 and C1, yes.

The entrance points?---That's correct.

So let me take you to A1. Can I ask you to describe, in layman's terms, the – what you found in relation to the tracking of that gunshot wound?---Yes. So A1, where the gunshot went to the right lower aspect of the back, quite close to the centre of the body. The track was in a slightly downwards direction from the back to the front and it didn't really travel very far. It just got stuck into a large muscle group which is called the psoas muscle, adjacent to the spinal cord. So I've written in my report – and I'll just make sure that's in layman's terms. So the post-remedial aspect of the right eleventh intercostal space, that means at the level between the eleventh and the twelfth rib on the back. So the right lower aspect of the back. It caused some damage to the right eleventh rib, the right diaphragm – which is the large muscle that separates the chest and abdominal cavity. And the projectile was lodged in the right psoas muscle, which is that large muscle group adjacent to the spine.

Now, if you go to – you see there's a diagram of a body facing front-on?---Yes.

And you've got A2?---Yes.

Is A2 to represent where you found the projectile for the first shot?---That's correct. That shows the level of the projectile in the body.

In your opinion, was A1 – did that – was that a fatal shot?---No.

And why do you say that?---Because it caused minimal injury to some structures, not very vascular structures, so it didn't result in excess of bleeding. If untreated over time it can cause trouble. But in the immediate first hours or days after it was inflicted, I don't think it would've caused any fatal injuries.

Now, take you to B1 and C1. Again, can I just ask you to explain in lay terms, not medical terms, what was the trajectory of the projectile in B1?---So B1 travelled from the left side of the torso to exactly the opposite right side. So it was in a horizontal direction from left to right. And it caused a number of injuries in its track. I've listed them. So again, the left seventh intercostal space – so that means the space between the seventh and the eighth rib – with perforation of the left eighth rib, so that's the bone. The left- - -

You say perforation, meaning?---Perforation means it's caused damage. It travelling through – partly through the bone. So the bone splinters as the projectile travels through the rib. The left hemidiaphragm – the diaphragm is what I referred to earlier, the big muscle that separates the chest and abdomen – so the left side of the diaphragm, the spleen, which is a vascular organ on the left side of the body- - -

Hold on. What's a vascular organ?---Organ that's rich in blood supply. So if it gets injured, it can bleed quite a lot.

Continue on?---The left kidney, the anterior aspect of L2 vertebral body. So L2 is the second lumbar spine, the vertebral body so the bone in your spine. So it travelled across the anterior aspect, which is the front aspect. So it caused a track through the bone. It didn't injure the spinal cord but it caused injury to the bone on the front.

The right lobe of the liver. So the liver has a left and a right lobe, so the right lobe just means it's the right side of the liver. The right hemidiaphragm – which is again, that big muscle. The inferior or the lower aspect of the lower lobe of the right lung and the right seventh intercostal space. So again, the space between the seventh and eighth rib, but on the right side. And I retrieved the projectile from the subcutaneous tissue, or tissue underneath the skin on the right side of the chest.

And can you see that on the diagram on the side, where it says B2?---Yes, that's right.

Okay. That's where you retrieved the projectile from?---That's correct, yes.

And what in your – and your opinion was – the projectile in B1, did that cause fatal injuries?---Yes.

Why do you say that?---Of the three gunshot wounds, this was the only one that caused a number of injuries to a number of vital structures and organs. So as I've explained, it perforated the spleen which is vascular, so it can bleed. It perforated the kidney, which can bleed, and the kidney has obvious vital function for survival. The liver, which can also bleed. The diaphragm, which is an important muscle that helps you with breathing. The lung. And as a result of the injury to the right lung, it caused a large accumulation of blood and air. So there's a big, gaping hole in the lung. Air starts to leak out, blood starts to leak out in the chest cavity. And that puts pressure on the lung and the lung starts to collapse and it can't expand to breathe normally. So that's why I say that was a fatal injury.

And that was based upon your examination of those internal organs; is that correct?---That's correct.

Do you know whether B1 was the second shot fired or the third shot fired?---No, I don't.

Now, I'll ask you to explain the track of C1, please. Again, in layman's terms?---Sure. C1 was situated also on the left side of the chest, just half a centimetre below the other one. So 0.5 – 0.5 centimetres below B1. This track was from left obliquely towards the back. So it entered the left eighth intercostal space. So that's the space between the left eighth and ninth rib. And it exited the posterior, or the back aspect of the left pleural cavity. So the pleural cavity means the chest cavity in which the left lung is situated, just below the left twelfth rib. So slightly downwards, oblique, from left to the back.

And in your opinion, was that a fatal shot? C1?---No, not on its own. It did penetrate the chest cavity, so it- -

I beg your pardon? If what?---No, it did penetrate the chest cavity and it caused injury to the chest wall, but it didn't cause any injury to the left lung and no major vascular structures or structures that are reaching blood supply in its path.

Thank you. You turn over and look at the photograph, please. What do you – what does that photograph show?---So this photograph, 10, shows the two gunshot entrances, labelled B1 and C1 on the body diagram. So you can see exactly where they are located. The body's on its back and you're looking from the side. So you'd see the two large gunshot entrance wounds, situated close together. And around them you see an area of grey discolouration.

What do you – what's your opinion about the cause of the discolouration?---In my opinion, it's a result of soot and smoke disposition. So those are substances that exit the barrel of the gun with the projectile. And if the barrel of the gun is close enough to the skin, the soot and the smoke gets deposited on the skin and that's helpful, as it gives you an idea as to the range of the gunshot wound.

Of the what, sorry?---Of the gunshot wound. At – the distance at which the barrel of the gun was held from the skin.

Does it tell you if it's close or not close?---It does. So soot and smoke are very light, so it won't travel far distances. So generally, when we see soot and smoke deposition on the skin – depending on which references you use or which textbook you use – but we will put that in a close range gunshot wound category, in the region of 15 centimetres or less, that the barrel of the gun was held to the skin.

So what, in your opinion, was the cause of Mr Kumanjaya Walker's death?---So the cause of death was the gunshot injury to the torso and the mechanism of death – which is how the cause of death was exerted – I believe was a combination of respiratory failure – which means he wasn't able to breathe. That was the main, critical issue, I think. There was also an element of blood loss. But I think that was to a lesser degree important in this case. I think the main issue was the respiratory failure, the inability to breathe. Because of that injury to the right lung with the collection of blood and air in the right chest cavity.

If I can still keep you on exhibit 57. Can you see the first diagram has some notes, EFG – I think it's H and I, on the face?---Yes.

What observations did you make about Kumanjaya Walker's face?---So there were minor blunt force injuries. Blunt force injuries are injuries where a blunt object makes impact with the skin. So there's not a full breach of the skin. So that could be a result of a punch, a fall, a blow, a kick, movement over rough surface. So those, in my opinion, were minor blunt force injuries. They weren't life threatening. I didn't really consider those to be significant in the cause of death.

So just putting aside cause of death. Were you able to say whether those injuries – how recent those injuries were?---Yes. I described all of them as fresh. So that means they were recent. They didn't show any signs of healing. So in my opinion they were sustained a few hours before death.

Were they consistent with a blow by a fist?---It could be a blow by a fist, but as I say, it's not the only thing. It could be movement across a rough surface. It could be a

fall. Anything where a blunt object makes impact with the skin can result in a blunt force injury.

Now in your report you noted that there were no significant underlying natural pathology?---That's correct.

What does that mean?---So when we do autopsies, we always have to examine and see if there are any underlying medical conditions that may have contributed to death. And in this case, I couldn't find any evidence of any significant natural disease that would have contributed to him dying quicker or slower or – that played a role in the cause of death.

Now you also became aware of a toxicology analysis, is that correct?---That's correct. So during the autopsy I collected samples for the purpose of post-mortem toxicological analysis, and those results became available a few months later.

And what were those results please?---So the blood alcohol concentration, I'll just quickly turn to my page.

Which – just – if you could just identify which report you're referring to?---So it's still my autopsy report, so if you - - -

"S", yes?---Yes, so that would be on page 12 of the autopsy report. So the results, 0.018 percent of alcohol was detected in the preserved blood. And 0.012 percent alcohol in the urine. Three micrograms, delta-9 tetrahydrocannabinol per litre. So that's the main active ingredient of cannabis, or marihuana. And the presence of 11 Nor-9 carboxy-delta-9-tetrahydrocannabinol and that's just a metabolite of cannabis. So when cannabis enters the body, it's broken down, and then you get one of the metabolites. No other drugs were detected in the blood or in the urine. So basically, it was a very low blood alcohol concentration level. And insignificant amount of cannabis.

Thank you. Now you understand that specimens were taken, is that correct, of Kumanjaya Walker's blood?---Yes. I collected a reference blood sample for the purpose of DNA comparison, if required by the forensic investigators.

And just what's a reference blood sample?---So it means taking a sample of blood from the deceased, from Kumanjaya Walker. To make sure if they have any other items with blood that could possibly be his, that they can compare it in the laboratory to see if it belongs to him.

And did you take – did you – what about the urine? Did you collect any urine?---I collected urine as well, for the toxicological screening, yes.

Now you mentioned earlier that you inspected his – some of his – some of Kumanjaya Walker's clothes, is that correct?---I did, yes.

Can the witness please be shown exhibit 38, the Chicago Bulls

T-shirt?---Thanks, okay.

Now thank you – thank you for that.

You inspected that particular shirt?---I did, yes.

You made some observations on page five of your autopsy report, is that correct?---That's correct, yes.

What were the observations you made?---So I've listed them. So I'll just read off my report. So in the – on page five, under "Subsequent examination of clothing. This specific exhibit refers to the short-sleeved T-shirt. Navy camouflage pattern with a black square fabric, with a picture of a golden bull and" - - -

Can you slow down a bit please?---Sure. "With a picture of a golden bull and the numbers 23 on the anterior", so that's the front aspect of the shirt. "Size M" for medium. "This was reportedly the outer layer of clothing worn by the decedent, Kumanjaya Walker at the time of the incident. So on further inspection of the T-shirt there were two perforating." Which means two holes. "The effects visible on the T-shirt. One defect, or hole, was seen on the right infra-medial", so that's again the right lower area of the back, "To the right of the met-line. Another larger defect, or hole, was seen on the left lateral", so on the side of the T-shirt. And then I further described that "There was dried blood staining visible around the defects in the shirt, and gravel and dust was present on the shirt."

Did those holes in the T-shirt, exhibit 38, correspond with the wounds you observed being A1, B1 and C1?---Yes they did. On the left side, there was only one big hole. So they weren't two separate holes. So it means the projectiles, or B1 and C1, travelled through that same defect. Or the defect was caused by those two projectiles fired in succession.

Defect equals hole, is that right?---Yes, that's right.

You also inspected a singlet, is that correct?---That's correct, yes.

And what was the result of that inspection?---So the singlet was grey and black patterned fabric on the front. With the word "Future", the numbers "88" and a red horizontal line printed on the front. Black fabric at the back, sized XL. I was told that the singlet was worn underneath the navy T-shirt at the time of the incident. So similar to the defects or the holes seen in the T-shirt. There were also two holes visible, in the same location. So directly underneath the holes on the T-shirt. And then I've described again the locations which were in exactly the same locations as described with one defect on the right lower side of the back. And one large hole on the left side of the – of the torso. And again, I noted that there was dried blood staining visible around the holes, and gravel and dust present.

Could the witness please be shown exhibit 1, tab 26.



Was that the T-shirt you inspected?---That's the singlet turned inside out.

Sorry, I beg your pardon, the singlet you inspected?---That's right, yes.

Now you – Kumanjayi Walker was weighed, is that correct?---That's correct, yes.

If you go to page six, his weight is recorded as 71.8 kilograms?---That's correct, yes.

And do you – what about his height?---He was 175 centimetres, or 1.75 metres tall.

Would your Honour excuse me.

Now you also prepared a third report, is that correct?---That's correct, yes.

August 2020?---Yes, that's right.

Do you have that present?---I do.

Could that be marked too, your Honour.

HIS HONOUR: That will be marked for identification with the letter U.

EXHIBIT MFI U: Dr Tiemensma's third report August 2020.

MR STRICKLAND: Now you were asked by the Northern Territory DPP, Director of Public Prosecutions, to consider the capacity of some scissors to cause a penetrating injury, is that correct?---That's correct, yes.

Could the witness please be shown the scissors, which is – which is exhibit – I'm afraid I've forgotten the exhibit number.

HIS HONOUR: 41.

MR STRICKLAND: Thank you, your Honour. Exhibit 41.

You've seen those scissors before today, is that right?---I have, yes.

Thank you. And what you were asked to do was to consider the capacity of those scissors, to cause a penetrating injury, is that correct?---That's correct, yes.

Thank you very much.

Yes, that can be returned.

So before I ask you what your opinion is, I want to ask you about what documents, or photographs, or videos you were shown?---Yes, so I was - - -

No well sorry, you go, yes?---No, you can. Sorry to interrupt.

Not at all. Well first, you were shown some body-worn video, is that correct?---That's correct, yes.

I might just go through it. You were shown what's called a Birdseye view, is that right? Created by the Northern Territory Police?---That's correct, yes.

That's now become exhibit 36. You were shown some photograph of some scissors, is that correct?---That's correct, yes.

Could the witness please be shown exhibit 40?---Yes, that's correct.

And you were shown those scissors, is that correct?---Yes, that's right.

And you were also shown some body-worn video, one from Mr Rolfe's body-worn, is that correct?---That's correct, yes.

That's now exhibit 26, Rolfe 2 of 4. And you were shown Mr Eberl's body-worn, is that correct, 2 of 4?---That's correct, yes.

That's now become exhibit 24. You were also shown some photographs, is that correct? Some still photographs?---From the body footage.

I'll go through it.

First, could the witness please be shown exhibit 1 again.

So can I just take you to – go to exhibit 1, tab 19?---Goodness, this isn't my file, so I don't know where this would be.

I can't hear you I'm sorry?---Can you just point me to the number? Is that - - -

Tab 19, have you got that?---Sure, I've got it, yes. I've seen that.

So you were shown that?---Yes.

And go to tab 20?---Yes.

You were shown that?---Yes, so that's the medical notes from Alice Springs Hospital.

That's right, 21?---21 yes, I was shown these.

If you just describe them very briefly, they were the photographs of?---These are the photographs of Constable Eberl.

Thank you. Tab 25?---25, those are the images of the scissors. Only two of them though, yes.

MR EDWARDSON: I'm sorry, I missed that.

MR STRICKLAND: He didn't – could you speak up that last – could you repeat the last answer?---Yes, so these are the images of the scissors, but there are only two images here. I don't know if there were more images of the scissors.

In total, you were shown four photographs, is that correct, of the scissors?---That's correct, yes.

And then go to – and you were shown tab – I think tab 26 we've already – you've already said you were shown that, that's the singlet?---Yes, that's correct.

And then were you shown photographs in tab 27?---Yes I was.

And then tab 28?---That's correct, yes. So that's the blue police uniform shirt.

And tab 29?---Yes, that's a picture of the protective black vest.

And tab 33?---Yes, that's the picture of the blue cargo pants, 30 – or was that 30 or did you say 32?

33?---33, sorry, apologies that was 30. Yes, 33 is a picture of the – Constable Eberl's blue police uniform shirt.

Now you were also shown some stills from the body-worn video footage, is that correct?---That's correct, yes.

Could the witness please be shown exhibit 25?---Which tab is this?

Tab 8 please?---Tab 8, I'll just find them in here. I wasn't shown all these images, but I was shown - - -

I'll take you to a couple. You were – if you go to frame 1151 and 1175?---Okay, they're not in order. Frame 75?

Yes, so 1151 and 1175?---Okay, yes, I've seen 1175, as well as 1151.

Now do you recall –

Those exhibits can be returned.

Now do you recall if there's anything else you were shown in relation to this third report?---No.

So first, can I ask you, what is a penetrating injury?---So a penetrating injury is when an object breaches the skin and then with or without entering the tissue deep into the skin. So it may be superficial, then it just enters the soft tissue just below the skin. Or if it's deep, it may structure other structures like bone or muscle or organs.

As a pathologist, as a forensic pathologist, do you have experience in assessing injuries caused by edged implements?---Yes, I do. I frequently examine injuries. Like I've mentioned before. And in the cases that I've personally done, about 250 would – would have been the result of sharp force injuries alone.

That includes knives and scissors, is that correct?---That's correct, yes.

You've also read a number of articles on the subject, is that correct?---That's correct, yes.

And you identified those in your report?---I have, yes.

They are articles relating to the study of stab penetration forces, is that correct?---Yes, stabbing force, interpretation of injuries.

In particular, injuries caused by cutting implements, is that correct?---That's correct, yes.

Thank you. So based on your knowledge, training and experience, what are the factors relevant to determining whether these scissors, that's the one's you've been shown, exhibit 41, is likely to cause a penetrating injury?---So when you try and determine whether a certain weapon or certain instrument can cause injury, there are a number of factors that you have to consider. So firstly, you will have to assess the intrinsic characteristics of the weapon. In the case of sharp-edged instruments, or edged instruments, you're specifically interested in how sharp the weapon is. How thin the blade is. How thin the tip of the blade is. And then thinness and the sharpness of the tip of the blade is almost the most important factor that's going to determine how easy, or not, it's going to penetrate the body. So the one thing that we assess is the characteristics of the object or the weapon. In the case of a scissor, you'll have to see both blades. Both the static blade at the bottom and the dynamic blade at the top - - -

I'm just going to pause you there. Let's just go to these photographs in exhibit 40, please?---Sure.

Yes, so you mention the two blades. Let's go to the second page of those – let's wait until the jury get theirs out, if they want to. So you mentioned two blades?---That's correct, yes.

And what is your opinion about those two blades?---So if you look at the images, so the bottom one which is what's called the "static blade" so that's usually the one that is not moving a lot while you're cutting something, so that's got - - -

I will just pause you - do you call it "static blade"?---Static blade.

Why do you call it the static blade?---Because when you cut with the scissors that's usually the blade that is kept in a static position while the top one moves, so that is

called the "dynamic blade" the one at the top. So the static blade, if you look at the image, is squared off, the tip of the blade, so it's not a pointy tip, it's got a blunted or a rounded tip. And then if you look at the dynamic blade, which is the top blade that will be moving, it's more pointy but it's still not a sharp point. That's when they are separated, so in the case of scissors you also have to consider the thickness of the tip when the blades are closed, so when the blades are closed and of this particular scissor when it is closed it means the top is even thicker and rounder and less sharp because the blades are held together. So with a blunt - relatively blunt object like this pair of scissors, you are going to require greater force to penetrate the skin. So the tip is important. The sharpness of the blades, whether it is open or closed and then how thick or thin the blade is. So that's the one aspect that you consider, the weapon in this case the scissor. A second aspect that you consider, if you want to determine whether it's going to cause penetrating injury or be able to cause penetrating injury, is the speed of the attack. So it means the speed at which the weapon is approaching the body. The higher the speed, the greater force is generated, and the less it's going to be easier to penetrate the skin, to overcome the resistance posed by the skin. In a blunt object you're going to require greater force in a very sharp, thin object you are going to need less force to be able to penetrate the skin and less speed. So the velocity or the speed of the weapon or object moving towards the target is the second factor that you need to consider. Would you like me to go into details now or just mention the other factors?

There is a third factor, is that correct?---There is a third factor.

What is that third factor?---So the third factor would be the resistance and movement by the relevant parties, so a stabbing attack is a dynamic process and you have to take all of these factors into consideration. So firstly resistance by any protective coverings, so the skin poses a lot of resistance against penetrating injury but then anything that is between the skin and the weapon can cause further resistance, so if there are layers of clothing, protective vest, bags, any object that comes between the tip of the weapon and the skin is going to pose some resistance. The more resistance, the greater force you are going to need to cause deep penetrating injury. And then the last thing would be movements of the different parties, so where there is any resistance or any restrained movement by the body part that is inflicting the attack. So if there is resistance, there is restraining, you are not able to move around freely, jump forward and launch an attack, that is going to decrease the ability, it is going to decrease the force, so it's going to make it less likely for the weapon to cause serious penetrating injury. So those are the three factors in general and forensic pathology that we consider when assessing the ability of something to cause severe penetrating injury.

Thank you. Now, in - you've also given an opinion about the potential injury in the circumstances you viewed to Mr Eberl, is that correct?---That's correct, yes.

And have you taken into account what protective clothing he was wearing, based upon the photographs you have seen?---That's correct, yes.

And you've taken into account the scratches on his body shown at exhibit 1, tab 21, is that right?---That's correct, yes.

You've also been given, have you - or have you been given the evidence of Dr Towsey that was given a couple of days ago?---Yes, I was.

And you read the transcript of his evidence?---I have, yes.

Just a few things I wish to ask you about his evidence. He gave some evidence about the - - -

MR EDWARDSON: Which page?

MR STRICKLAND: I am going to. He gave some evidence about the carotid artery, is that right?---That's correct, yes.

And - this is at page 565, can you describe yourself where the carotid artery is? ---So the carotid artery is a main blood vessel in the neck, so, situated - you have to carotid arteries, on both sides of the neck, so it comes on the right side of what we call the brachiocephalic artery and then the left side of the artery of the aorta, so just sort of just behind the collar bones, you get the carotid artery that stretches from the clavicle and then it enters the skull beneath the angle of the jaw. So it's covered by a number of neck muscles, so you've got a number of anterior neck muscles as well as soft tissue, depending on how big or small the person is, so you may have some fatty tissue, soft tissue and skin. So it's lying - you've got your windpipe or trachea in the middle and then you've got your carotid arteries adjacent to each arm just off centre in the middle of the neck.

Now, Dr Towsey was asked this question, he was shown the photographs of the scissors that you've seen, exhibit 40, and he was asked this question, page 566;

"And it's true, is it not, that if deployed at the right region and the right location a pair of scissors such as the ones we have - we see on the screen, have the potential to be lethal?"

And his answer was; "Yes, that is very correct."

You read that answer?---I have read it, yes.

What do you say about his evidence in that respect?---I get the impression that he just gave a very general answer. If you have a sharp instrument - -

MR EDWARDSON: Your Honour, I object.

HIS HONOUR: Yes.

MR EDWARDSON: This witness cannot comment on what was going through his state of mind and goes way beyond her expertise, as she well knows.

HIS HONOUR: Yes.

MR EDWARDSON: She should concentrate on the question and grapple with it please.

HIS HONOUR: Yes. I agree.

MR STRICKLAND: What do you say as to whether these pair of scissors that you have seen have the potential to be lethal?---Well, as I've explained the different factors you have to consider, so the attack happened in a short space of time - so there was a very short window of opportunity for any meaningful attack. Kumanjaya Walker was restrained within seconds, so there was a very short space of time that he was able to move his upper limb and to deploy the scissors to any body part of any of the police officers. So the first thing is the very short amount of time and then I've already described the scissors, they were blunt. One edge - the dynamic edge is slightly more pointy, but the blades were closed as far as we know, so that means it's a thick, blunt stick. He was immediately restrained, the coverings on both the bodies of Rolfe and Eberl, so that is going to cause additional resistance. Everyone was moving, first up against the wall. The minute he pulls the scissors from his pocket it's met by resistance. Within seconds he is partially restrained with Eberl moving in behind him, grabbing him around his right shoulder and the neck. He starts to move Kumanjaya Walker over to the mattress where he is placed on his right side and he is holding the scissors in his right hand, so there's decreased movement of his right upper limb. Because of the positioning on top of the positioning his own bodyweight, Kumanjaya's own bodyweight is lying on his arm and Eberl is applying his bodyweight on top of Kumanjaya, so that means that he has very limited ability for the right arm and right hand to move. It's a small pair of scissors so it only expands about 3 centimetres from the hand. So in order to get that relatively blunt, thick tip to any part of Eberl's body and cause significant penetrating injury, I don't think he would have been able to generate enough force to overcome all the resistance posed by the covering, into the skin and soft tissue and structures of importance to cause serious injury.

In that answer you are referring to the injuries of - potentially to Mr Eberl, is that correct?---That's correct, yes.

Is that when Kumanjaya was on the mattress?---That's correct, yes. And when he is standing against the wall Constable Eberl is standing on the left side of Kumanjaya Walker, so Rolfe is standing in front of him, Eberl is standing on his left side, the scissors in his right in Kumanjaya's right hand. So for him to get the scissors all the way past Rolfe to Eberl, I don't think it's likely that he would've caused any injury to Eberl at that stage.

And when you say at that stage, you mean when they're standing up against the wall?---That's correct, yes.

Now, at page 567 – I’m sorry, at page 567 of the transcript – you don’t have that in front of you?---I do.

Okay, thank you. You’ve got – you were asked these questions – I believe Dr Towsey was asked this question:

“The carotid artery is one area of the neck that, if deployed by scissors such as those, that could result in death? A fatal wound?” Answer: “Yes, that’s correct.”

“Anywhere else in the upper part of the body?” And he answered, “So yes. If you strike downwards over the clavicle – sorry, the collarbone – you can strike the subclavian artery, which is a branch coming off the carotid artery and headed out towards the arm.”

I’ll continue on a bit later. But first, what do you say – what is your opinion about his evidence that the carotid artery is one of the neck that, if deployed by scissors such as these, could result in death or a fatal wound?---Okay, I will answer this based on my – if you – if you pose a question to me, not what Dr Towsey said. So if you had to ask me, do I think this pair of scissors could cause fatal injury to the carotid artery, I would say you still need to take into consideration all those factors. That means Kumanjayi had to deploy enough force, get his hand in the right position, penetrate through the skin through all those layers of muscle to reach the carotid artery. The tip of the scissors is blunt and thick, so it’s going to cause tearing rather than cutting of the tissue. So it, basically, pushes the tissue away. And if you look at the injuries to Mr Rolfe’s right shoulder, you can see it’s not a clear cut or incised wound. It’s a laceration. So it means that the skin is teared (sic) rather than cut, and that gives you an idea as to how blunt this object is. So it’s not cutting. It’s pushing and tearing. So it means you need to push it through the skin, push it through the thick muscle to get to the carotid artery. And you’ll have to exert a lot of force in order to do that. In addition to that, the bodies are moving. So it’s not as if Mr Rolfe is standing against a fixed object that is resistant against his back and he pushed against the wall, because that would also be able to generate more force, because it’s more pressure from the front but he’s not able to move backwards. In this case, Mr Rolfe is able to step backwards. He can step away from the – from the stabbing attack. It’s a blunt object that’s moving towards him. But in these circumstances, I don’t think that pair of scissors would have caused fatal injury to the carotid artery.

Your evidence there relates to Mr Rolfe. Let me ask you about Mr Eberl, while he’s lying – while he’s on the mattress, on top of Mr Walker?---So while he’s on the mattress, Mr Eberl is positioned on the upper half of Mr Walker’s body. So Walker’s arm is pressed beneath the right side of his body and the mattress and Eberl is weighing down on top of him. So as I’ve explained before, the upper limb movement is restricted by the body weight by both Kumanjayi and Eberl. It’s going to be very difficult to get this arm with – and hand – with the scissors up against any part that can cause any significant, fatal injury. And on top of that, he’s not going to be able to create enough force to cause sustained movement with the blunt scissors through



the clothing, through the skin, through the muscles to reach any vital structure, such as a large blood vessel or any other organ.

Dr Towsey gave evidence about striking downwards over the clavicle – the collarbone. “You can strike the subclavian artery.” Can you demonstrate where the subclavian artery is?---Yeah, so the subclavian artery is below the collarbone. So the same blood vessel that I explained before – so from the heart you can the artery of the aorta and then you get a brachiocephalic artery. And then the subclavian arteries are branches of those. So you have one on each side. So it’s lying underneath the collarbone. So in addition to being protected by skin and soft tissue, it’s also protected by the very hard, firm bone.

So do you have an opinion as to whether it was likely when Mr – I’m talking about now, simply, Mr Eberl while he’s on the mattress. Do you understand that?---Yes.

Do you think it’s likely that there would have been a penetrating injury in relation to the – over the clavicle?---No, because Eberl is on top of Mr Walker. So for him to be able to reach the subclavian artery and stab in a downwards motion, it means his arm would have to come from the top. And I don’t think he would’ve had the range of movement to get to over the collarbone. In addition to that, there’s the protective clothing that I’ve mentioned before. And even if he was stabbing from downwards upwards, so stabbing from, say, between the first intercostal space – so the space between the first and the second rib and clavicle – I don’t think in a muscular man like Mr Eberl, wearing clothes in that position, Kumanjaya Walker was going to create enough force to penetrate or injure the subclavian artery.

Now, Dr Towsey also said at 567: “A blow with a shove up into the armpit to the axillar” – what’s the axilla?---Axilla is the (inaudible) sites, which is this space between the arm and your chest.

The front – I’m sorry, I’ll start again. “A blow with a shove up into the armpit or the axilla, either to the front or through the side, could also strike a major blood vessel there.” Do you have an opinion about that, in relation to – the likelihood of that injury being occurred while Mr Eberl’s on the mattress?---So again, you’re going to have to overcome all those resistances encountered. So it will be the skin, quite a large amount of soft tissue. And the axillary artery is quite a deep artery, so it’s not superficial that it’s just lying under the skin. So it means you’re really going to have to be able to penetrate that deeply enough to cause injury to the axillary artery. So in these circumstances, with this pair of scissors and those clothing worn and the body build of the parties involved, I don’t think he would’ve caused injury to the axillary artery.

Now, in your answers, you’ve referred to the scissors being closed?---That’s correct, yes.

And you’ve had regard to those two photographs in – the still photographs; is that correct?---That’s correct, yes.

And I'm talking about frame 1151 and frame 1175?---Yes, that's correct.

Would your answers to the questions I've asked you change if the scissors were, in fact, in an open position?---You still have to consider, exactly, the dynamics. So if they were open, I think the lower blade – or the static blade, that's still very blunt. I think it's not very likely that, in those circumstances, with all those factors, that he would have caused significant penetrating injury. The dynamic blade, the top blade, is slightly more pointy. So it's possible that it may have needed a little bit less force. But it's still not a sharp, thin scissors. It's still relatively pointy. It's not thin and sharp. And if the blades are open, it's also going to change the dynamics of the scissor movements. Depending on how the scissors are held, the blades can start to move around. So you may not have complete control over what the blades are doing. So they may deflect outwards, depending on how you're going to hold it and inflict the attack.

So if the blades were open not closed what, in your opinion, was the likelihood of Mr Eberl sustaining a serious penetrating injury while he's on the mattress?---I still think, because of the size of the scissor and the positioning of the two parties, that it's still unlikely that he would've been able to – Kumanjaya would've been able to penetrate the skin, soft tissue muscle, any other structures at a significant depth. And the injuries that I see on Mr Eberl, that's exactly what I would've expected if I was asked a question the other way around.

When you say that's what you would've expected to see, what do you mean by that?---I mean if I was given the pictures of the injuries first and asked - -

You say the pictures of the injuries? You're talking about Mr Eberl?---To Mr Eberl, yes.

Yes?---So if somebody had asked me, "This was the attack, these are the injuries sustained, do you think it would've been any worse than that?" I mean, I've written in my report – I'm sorry, I'm confusing the matter. I've written the report and I've said, in my opinion, I don't think in these circumstances with these scissors it could've caused significantly penetrating injuries. When I then looked at the images of Mr Eberl's very superficial, barely breaking the skin, scratch in his left axilla, I thought, "Well, that's exactly what I expected." I didn't expect to see worse than that.

They're my questions, your Honour.

MR EDWARDSON: Your Honour, would it be convenient to have the morning break now?

HIS HONOUR: Yes.

MR EDWARDSON: Thank you.

HIS HONOUR: Members of the jury, would you adjourn, please. And retire to the jury room.

JURY OUT

HIS HONOUR: And Doctor, you can stand down from the witness box for the moment.

WITNESS WITHDREW

HIS HONOUR: And I'll adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Yes, can we bring the jury in please

JURY IN

MARIANNE TIEMENSMA:

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Thank you.

Doctor, you have provided, or did provide a post-mortem examination report for the Coroner, which is dated 21 January 2020?---That's correct, yes.

And the purpose of that autopsy report was to establish the cause of death, and to consider the mode of dying, in order to assist the Coroner, in deliberations regarding the manner of death?---That's correct, yes.

And the autopsy itself was performed on 12 November 2019 at 10.30 am, or commencing at 10.30 am?---That's correct, yes.

And that's when you examined the body of a person we now know to be Kumanjayi Walker?---That's right.

And it was done so at the direction of Roger O'Brien, the Coroner's Clerk, with the delegated authority from the Northern Territory Coroner, Gregory Cavanagh?---That's correct, yes.

There were a number of attendees present at the autopsy, were there not?---That's correct, yes.

I just want to put them on the record if I may. Detective Senior Constable First Class Natasha Woods, Northern Territory Major Crime Division. Detective Senior Constable Michael Curtis, Southern Coronial Investigation Unit, Alice Springs. Detective Senior Constable Nicholas George, Southern Coronial Investigation Unit, Alice Springs. Senior Constable Ian Spilsbury, Crime Scene Examination, Northern Territory Police, Alice Springs?---That's correct, yes.

So those four police officers were present?---That's correct, in addition to the technicians that assisted me.

Of course. In the course – is it your practise, in the course of performing your autopsy to identify as you go, for the purposes of say note taking and also informing those who are present, any findings that you're able to make along the way?---I don't understand your question.

Well as you go to different parts of the body, for example, you might be focused on a particular wound, do you announce out loud, what it is that you see, from your medical expertise perspective?---Usually a combination. I make my observation. Make my own notes. Explain to the attendees present what I'm doing, what I'm looking for. If I need assistance. So it's a combination, yes.

Or you might, for example, describe whether a particular wound is consistent with a gunshot wound?---Yes.

Were you able to identify, or did you have the capacity to identify, for the purposes of that post-mortem examination, which of the three gun – or the sequence of the three gunshot wounds?---No.

So you couldn't say which was first, second or third, or vice versa?---No I couldn't. From the footage I could say which one was the first. But I can't distinguish between the second and the third.

What I want to ask you a little bit about is the process of ensuring that proper disclosure is made. You'd understand that of course you as an expert, will be called upon, and you are regularly called upon to give evidence in court?---Yes.

And I see that you're vigorously making notes as we speak?---That's my habit.

That's a practise that you have is it? You take notes, contemporaneous notes as you go?---I do.

And no doubt you keep meticulous records of all of the communications and conversations that you had with various police officers about this case?---That's correct, yes.

All right. I need to go through a little bit of history if I can?---Sure.

You've told us that the post-mortem report was ultimately signed off on 21 January 2020?---That's correct, yes.

I'm going to hand you a bundle of emails, and I want to take you through those. What I want to make sure, that they coincide with your records, because of course you would have kept all communications between police, yourself and anybody else that had an interest in this particular case?---Thank you.

I want to run through this bundle first if I may. On Monday the sixth – and these have been disclosed yesterday. Monday 16 March 2020, did you receive an email from Detective Wayne Newell in relation to the death of Kumanjaya Walker?---I did, yes.

And were you asked specifically in that email the following, "I have some questions about the injuries to Constable Rolfe and Constable Eberl. Are you the appropriate person to make comment about the injury to Rolfe's shoulder, and the scratch to Eberl's arm in relation to the type and cause of those injuries." Did you receive that email?---I did, yes.

Did you respond to it?---Yes, I did.

Did you receive – well that's dated 16 March 2020 at 15.25. At 16.01 did you respond, or thereabouts?---Yes, that's right, at 3.46 pm.

Sorry, 3.46, my apologies. And did you respond in this way? "Thank you for your email" – there was also a question about whether you could provide some additional photographs from the post-mortem, but for present purposes, that doesn't matter. But in the context of that question about reported injuries to both constables, did you say this, "Regarding the reported injuries to the involved constables, I think the best person to give an opinion would be a clinical forensic physician. I suggest you contact VIFM, to obtain the contain details of their physicians. I have done clinical forensic work in the past, but I don't think it would be appropriate for me to give the only formal opinion in this matter, as I performed the autopsy and made be accused of bias"?---That's correct, yes.

"If you are unable to find a willing physician, you may ask my colleague, Dr John Rutherford, however he's also been involved in this case by means of peer reviewing my report"?---Yes.

I'll come back to the contents of this and allow you to give an explanation, but I just need to get the sequence right, then we'll tender them, and then the jury can have their copy and we can work through this. On 15 July 2027 – 20, I'm sorry, at 3.07 pm, did you receive an email from a police officer, Detective Sergeant Paul Morrissey?---Yes I did.

And were you asked in that email, or did he say to you, "I have just received an email from the DPP with a number of questions to put to experts that have provided statements. They are not seeking a written report, but an indication over the phone, or email. This will apparently inform the position the Crown will take on defence applications for individual experts to be required in this initial hearing"?---Yes, that's right.

And specifically, were you asked, "Do you consider you have qualifications, expertise, training, experience to answer any or all of the following questions, and secondly, if so, is there further information, assumptions you consider you would require to enable you to answer any or all of the following questions"?---Yes, that's correct.

And were the three questions as follows. "Your view as to the extent to which the scissors in the possession of Arnold Walker, deceased, had the capacity to inflict a serious or potentially fatal wound to a police officer"?---Yes.

"B, if you assume that none of the three gunshot wounds sustained by Arnold Walker would have caused any immediate immobility to his right arm, your opinion as to the potential for him to inflict a serious or potential life-threatening injury, on a police officer"?---Yes.

"And finally your view as to the extent to which the proper medical intervention could or would have saved the life of Arnold Walker"?---Yes, that's right.



And then, I want to ask you – I'll come – just complete this sequence of emails. On 18 August 2020, did you receive an email from Collette Dixon, who's the solicitor from the DPP, attaching four photographs of the scissors that she expected the defence would ask questions about?---That's right.

And attached to that email were the four photographs that the jury have seen, I think it's exhibit 40 in the bundle?---That's right.

On 24 August 2020, did Detective Newell, CC'ing you and other experts into an email saying "As per the instructions of the DPP, they have requested that you be provided with the following video footage prior to your witness proofing with Mr Philip Strickland SC, the DPP have also requested that you have access to that footage at the time you provide your evidence in court." And there was a drop box which had three videos that you've identified in the course of giving evidence today. The enhanced incident of the – of body-worn video of Eberl. The enhanced incident of the body-worn video of Rolfe, and then what's called the compilation video, showing them all running at the same time?---That's right, yes.

Then 24 August 2020, did you respond to that email by saying, "Dear Ms Dixon and Mr Strickland, in preparation for next week and the proofing on Friday, please find a summary attached of my interpretation on the ability of the scissors to cause serious injury with relevant references. I'll have this with me on Friday next week, with the other relevant contemporaneous notes on the case file"?---That's right.

And attached to that email, is that the notes that we're talking about?---The draft of the notes.

The draft, yes?---Yes.

The draft, which is not signed off. It's not finalised?---No, it was just a work in progress.

Work in progress?---Yes, that's right.

30 August 2020, did you email both Mr Strickland and Ms Dixon, "Please find my final signed assessment attached following further review of the footage, and available information. Please note, the document sent to you previously was an unsigned draft note for me to use during court testimony, but I sent to you to understand my interpretation prior to the proofing, and in preparation for court. Not a formal submission"?---That's right, yes.

And then finally, attached to that is the complete report that you did in respect of this matter?---That's correct, yes.

And also I think attaching your CV?---They asked for that at the time, yes.

And that's the final report, which is dated 29 August 2020?---That's correct, yes.

All right.

I tender that bundle, your Honour. And copies are here for the jury.

MR STRICKLAND: If I could just have a look at them first please, your Honour.

MR EDWARDSON: I come can back to that your Honour, I'll keep moving so Mr Strickland can have a look at the assessment.

Now what I want to ask you about firstly is this. We know that as early as 16 March 2020, the – Wayne Newell, a senior detective sergeant, was interested in questions about the injuries to Constable Rolfe and Eberl, and whether you were the appropriate person to comment about their injuries. That is the injuries that were visible on both their bodies?---That's correct, yes.

And you said that you didn't think you were the best person to express that opinion. You offered them alternatives, and you said that there might be a suggestion of bias, given that you had done the post-mortem, quite proper. Why did you properly convey that notion to Detective Newell?---To ensure that nobody can accuse me of bias. So that there's an independent person who review the injury, describe the injuries, describe the likely mechanism of injury, the severity of the injuries. Just in order that there's a separate independent opinion on the injuries. I - - -

To your knowledge, has anybody done that?---As far as I know, it's only the medical officers at Alice Springs Hospital who has examined the wounds. And they would be the most appropriate to describe the wounds, and give an indication as to how severe they are.

Well what about Dr Rutherford, or a contact via VIFM? That's what you suggested in your email?---To my knowledge, I wouldn't know what Detective Newell did, but I don't know if he contacted anyone else.

In the normal course, when you're conducting a post-mortem, and as you've already told us, that the purpose of the report was to establish the cause of death and to consider the mode of dying, in order to assist the Coroner in deliberations regarding the manner of death. They're your words which are contained in your report?---That's correct, yes.

So what happens normally, as a pathologist, when you're conducting a post-mortem, is that you look at a whole – obviously enormous number of things that you have to consider, much will depend of course on how a person might have died. And how much knowledge you've got. But in this case, you must have been informed fairly early on, that the – the man Kumanjayi Walker, had been shot three times?---Yes, I was told that right from the beginning.

So understandably, can I suggest, the focus of your examination would have been very much on those three shots?---At the time of the examination, not only on the

three shots, because you want to describe everything around the body. You actually describe all the other injuries that's present or not, underlying disease or not. Do toxicological analysis, so you're not only focussed on whatever's been told by you, you want to have a look yourself. Examine from head to toe. Put everything together - - -

Of course?---With the information you have, so it's not only focussing on the gunshot injuries.

Of course. But you did not have any information from any police officer who briefed you, in respect of this matter, to suggest that the scissors, which had been armed by Kumanjayi Walker, and deployed against Zachary Rolfe, apart from the injury to the shoulder, you had no information to suggest that he had succeeded in stabbing or causing injury to any other part of Zach Rolfe's body?---No I haven't – I can have a look, I can make sure in the information that was provided to me by the police, at the time, to be absolutely accurate - - -

How is that documented, doctor?---Just to be able to answer your question truthfully.

No, no. Sorry, you misunderstand me. How is the information that was conveyed to you by police documented?---I was given an Information to the Pathologist. So usually prior to autopsy when Major Crime Division is involved, they give me a summary or synopsis of the case. In addition to that, the Coronial Investigation Unit also give me what is called an Initial Police Notification. So that will usually give you an overview of the circumstances, any information that's available at that stage.

So just to answer the question that I put – dealing with Zachary Rolfe first, if I may?---Yes. So I was told – so this is the Information to the Pathologist- - -

Yes?---So it refers to PROMIS reference 9129856.

Sorry, it refers to?---PROMIS reference number. So that's the police job number, 912- - -

Sorry to interrupt you on that. You've introduced the notion of PROMIS. That's something this jury has heard a little bit about. Do you, like the police, have access to PROMIS entries?---I don't, no.

No. So that's just simply information that they've conveyed to you so it documents, if you like, where the information has come from?---Yes, that's right. So I'm just pointing it out in case anybody like yourself would like to refer to the document. So that's a reference number that I have. And then on the second page, at the bottom of the page, "The circumstance of death as known. It was said to me the investigation is still in its early stages and information available continues to evolve. This report covers the initial information known. On the evening of Saturday 9 November, 2019, a team of Immediate Response Team, IRT Police, attended House 511"- - -

Can you just slow down? Sorry, Doctor. Can you just slow down. There's a lot of information that we all need to absorb and it is important that we have an understanding of what information was conveyed to you for purposes of your post-mortem. So can we just slow it down, please?---Okay. "On the evening of Saturday, 9 November 2019, a team of Immediate Response Team, IRT Police, attended House 511 Yuendumu community, in response to an arrest target, being Arnold Walker, 13/10/2000, 19 years of age. Walker is recorded with extensive criminal history and alerts for attempting to escape custody and being violent. Five police members attended the location with two members entering the residence and locating Walker within. Attempts to arrest Walker resulted in a physical altercation between Rolfe and Walker. During the struggle, Walker produced a pair of scissors and inflicted what appears to be a small puncture-type wound to Rolfe's left shoulder. The exact details of the interaction between Rolfe and Walker, at this point, is unclear. Rolfe discharged his Glock pistol three times into the mid-region, bracket chest area, of Walker. Due to the volatile nature developing within the immediate vicinity and to ensure the safety of all, members disengaged from the local and transported Walker back to Yuendumu Police Station with first aid treatment (sic) commenced." And then they asked Request to Pathologist, "What do you want from the autopsy? PCOD" – which stands for Provisional Cause of Death. So usually after the autopsy, we can give an indication as to whether we know what the cause of death is or not. Sometimes, you need additional investigations or result to help you with that. "Any external injuries, removal of the bullets or fragments. Indication as to, if Walker received immediate treatment by a trained medical staff, what were the chances of his survival." And- - -

All right. I'll cut to the chase, it might make it a little bit easier. Apart from the puncture that you've described to Zachary Rolfe, there were no other physical injuries that were identified by police that might have been caused by Walker deploying the scissors?---Nothing else was mentioned, no.

And there was nothing identified in respect of Eberl, specifically, in relation to the scissors?---No.

No. And at that stage, you hadn't seen the body-worn video?---I have.

No, no- -?---They showed it to me before the autopsy.

Did they? I'm sorry?---Detective Natasha Woods took me to – we have an office there, with a computer, and she showed me the raw footage. It was before it was enhanced.

Yes?---So she showed me the raw footage and I've seen it both before and after the autopsy.

Thank you, that's important. So the first time you saw it was before the post-mortem was conducted?---I've seen it then, yes.

All right. I need to ask you a few questions about body-worn video, if I can?---Sure.

First of all, have you got any expertise in body-worn video?---Not on expertise, but I've reviewed a lot of footage – CCTV, security footage, body-cam – when asked for opinions on certain attacks. So I'm not a sole body-footage-cam expert, but I'm a pathologist who's reviewed a lot of material in preparation for court and trials.

But the short answer is you're not an expert in relation to body-worn video, but you've watched lots of it?---To give an expert opinion- -

All right- -?---On mechanism of death and injuries sustained, yes.

Given that you acknowledge that you're not an expert but you have to look at body-worn video regularly in order to be able to express an opinion, are you familiar with the considerable limitations on body-worn video in terms of any opinion that you might express?---Yes, I am.

Can I run through a few of them with you?---Sure.

You'd agree and you would understand, wouldn't you, that the body-worn video is not positioned where the eyes are, usually? Of the individual, if it's a police officer?---Of course. It depends on where the camera is located.

Were you ever given any information as to where the cameras were located in respect of Eberl or, for that matter, Rolfe?---I wasn't given the exact locations but I didn't consider it relevant- -

I'll come to that. The question – can you please grapple with the question, Doctor. The question was, were you given any information as to the position of the body-worn video on either of those men?---No, I wasn't.

Thank you. Secondly, do you know what the shutter – the shutter speed was?---No.

Do you know whether or not the image that's captured by the lens is different to what would be captured by a normal eye? A naked eye?---I don't know what the exact difference is, but I know there will be a difference.

For the purposes of expressing your opinion did you – either on the first occasion before the post-mortem or, more relevantly, when you came to consider whether the scissors had the capacity to inflict a lethal wound – did you slow the video down, did you stop it frame-by-frame and look at it carefully?---Yes. I've reviewed the footage countless times. I've watched it in slow motion, fast motion, normal speed, stopped it frame-by-frame, to try and get an idea as to what's going on as I saw this as a supplement. Usually, we're not that fortunate to have body-footage-cam. Often, you only have witness statements, descriptions, photographs. So this is not the only thing I used, but I used that as a very useful supplement to support my findings.

Doctor, if you can just concentrate on the question, please. Would you accept this: would you accept that you have spent a great deal of time watching these videos in

order to be able to try and detect the exchange and movements of the two individuals from the perspective of the video footage?---That's correct, yes.

Would you also accept that, depending upon where the eyes of individual who's carrying the body-worn is looking – in other words, if I'm looking to my right but the body-worn video is looking to the left – you're going to have a completely different image?---It's going to be different, but the locations of the individuals won't be dramatically different.

How do you know that?---Because where they are located, you can still see the positioning. If you have a look at it, although it may not be the exactly right angle and the exactly right location, you can see they are situated closely together. I didn't give any technical references in my report. I gave it the way I saw it and the way I observe it as a pathologist, and this is the way I usually do it when I'm asked for an opinion on body-footage-cam.

I'm simply asking you to explain to the jury, if you can – as best you can – the extent to which you factor in limitations that, I suggest, you need to factor in in trying to resolve the question of whether, for example, there was some sort of constraint on Kumanjaya Walker deploying the weapon – things of that nature. You're only as good as your analysis, as I understand it, of the body-worn video. Because you weren't there?---I wasn't there, no.

And you've had to do that by, as you've said, many, many times. Slowing it down, looking at it frame-by-frame and all the rest of it?---That's right.

And you'd agree with this much though, wouldn't you, that whatever perception you might have had, having engaged in that reconstructing method of slowing down frame-by-frame, frame-by-frame, that's nothing like the image that the individuals who have actually got the body-worn video would have had?---I'm not giving an opinion on perceptions.

No?---I'm giving an opinion on observations. I'm a pathologist, so I have no idea what the individuals would've or could've or should've perceived.

But one thing you do understand, by virtue of your expertise, is that things can happen very, very quickly. And if you play in that normal time, we know it happened incredibly quickly?---That's right. And that's what I pointed out in my report, that there was a very, very short space of time during which this happened.

And you'd also agree, wouldn't you, leaving aside the limitations that might exist in respect of this particular piece of equipment, the body-worn video, you'd accept, wouldn't you, that it's actually very difficult to be able to identify precisely who is doing what during the course of that exchange?---You can get a very good idea as to who is doing what.

That will be a matter for the jury, of course, but you say you can get a very good idea?---In my opinion, after watching it numerous times I think, yes, you get a good idea as to what went on.

Do you have any qualifications in biomechanics?---Well, just biomechanics as part of the doctor and forensic pathologist, yes.

But specific expertise in biomechanics. You don't provide biomechanics reports, do you?---No, I don't.

No. Have the police disclosed to you at any stage any report that they might have sought or got, from a biomechanic expert by the name of Dr McIntosh?---No, I haven't seen anything like that.

Or from the defence, of Dr Ackland?---No, I haven't seen that.

So you haven't been provided with any expertise or expert opinion they might have expressed about the capacity of an individual - in this case Kumanjayi Walker - to have free movement, for example, of his right hand?---I haven't seen that and as you pointed out for the previous opinion on another expert, it wouldn't be my position to comment on their expertise.

No, it wouldn't. Have you had any experience or training in - or understanding - of the way in which police officers - or for that matter members of the Australian Defence Force - are trained?---No because that's also outside my field of expertise.

Did the police - or have anybody disclosed to you, for example, that all law enforcement and members of the Australian Defence Force are trained to shoot aiming for a target centre of mass which is loosely defined by the torso of the human body.

MR STRICKLAND: I object to that.

HIS HONOUR: On the ground?

MR STRICKLAND: Relevance.

HIS HONOUR: Relevance.

MR EDWARDSON: Your Honour, I want to take this witness to the - I will withdraw the question.

You've had no expertise in training - you've had no instruction on training?---I'm not a police or a defence force so it doesn't matter to me. I describe the injuries that I see.

Indeed, you describe the injuries that you see and in the normal course, a pathologist is then asked whether those injuries are consistent with a particular type of weapon that might have caused that injury?---That's correct, yes.

In nine times out of ten that's what you, as a pathologist do day in, day out?---Yes.

You interpret injuries, wounds, markings, whatever you want to call it, on the body and then one of the things that you might be asked to identify is what was the cause of death in that context?---Yes.

Let's say, for example, you've got a stabbing and you've got a stabbing that's gone to the carotid artery and let's say that that happened with a pair of scissors. I mean, you would agree that a pair of scissors can - subject to all the qualifications you've mentioned - scissors can be the cause of a fatal wound to that part of the body? ---Taking into consideration all the factors that I've said. Not any pair of scissors. I won't go through everything again but it depends on the weapon - the circumstances et cetera.

All right. I mean you must have seen stab wounds that have been caused by scissors?---I have, but very rarely. Most stab wounds that I've seen - and I've seen hundreds that I've done personally and in addition to that I've observed hundreds more that were done by colleagues. Fatal stab injuries by scissors are not common.

Be that as it may, the issue - the issue for a pathologist might well be whether an edged or blunt weapon is, in fact, the weapon responsible for the wound that you are then examining?---Yes.

Because you look - as a pathologist - to see if there is a causal nexus between the two?---Yes.

I will give an example because it arose recently in a case not far from here. Let's assume that you've got multiple stab wounds and you've got a murder weapon, which is a knife, and it's covered in blood. One of the things that you would want to identify - and the blood came from the deceased - it would nonetheless be important to identify whether that knife had the capacity to inflict the stab wounds on the deceased?---Yes, and - yes.

You'd agree? And so therefore what you would look at is you would look at the width of the knife against the width of the wound?---Yes.

You'd look at the depth of the stab marks against that knife?---Yes.

And we know, don't we, in forensic terms that sometimes, with sufficient force, even though a blade might only be two centimetres, the wound might nonetheless be four centimetres because of the force applied by the individual who is wielding that knife? ---The force and the resistance offered by the tissues, yes, so depending on the path that it follows through the body and the coverings and all the rest, so but - - -



And if you were looking to see whether a knife - even though the stab wound exceeded the length of the blade, you would be looking, for example, for what is called "hilt marks" on the surface or skin of the individual, wouldn't you?---If the hilt went all the way up to the skin, yes.

Yes?---And you'd also consider the possibility that there may be other weapons because just because there's a weapon with blood of the deceased doesn't mean that it could've been the only weapon that was used, so if you find a wound track that's disproportionately deeper - - -

I can understand - - -?--- - - -you are not only going to look for a hilt abrasion, you are also going to consider other - other possibilities.

Of course, Doctor. What I am simply trying to do is to establish this much, if you can bear with me. Obviously, the question that you have to be asked is keep an open mind, obviously, and in that context, police, pathologists - sorry - coroners, courts and everybody else, needs to know whether that weapon had the capacity to cause that injury or that wound?---Yes.

Sometimes you can say "Yes" and sometimes you can say, "It could have" and other times you could say, "I don't know". It would depend on a whole variety of factors? ---It depends on a number of factors, yes.

But nonetheless, it's important, isn't it, and you would understand, that edged weapons in one form or another, sadly, are regularly deployed in violent altercations and you have to interpret those injuries?---Yes.

We know, don't we, that again depending upon where the injury is sustained, that it may be fatal in a very quick space of time?---Depending on which organs or structures are injured in the path, yes.

Thank you. What I want to ask you a little bit about now, is the four matters that you say determined your ultimate opinion that you think it's unlikely that the pair of scissors that were secreted by Kumanjayi Walker and deployed against these two men, were unlikely to ever have the capacity for a fatal wound, that's the nub of the opinion that you've expressed, isn't it?---In those circumstances and taking into account everything, yes. So it's not only about the scissors, it's taking everything into account.

Of course. The starting point though, is what you say is the scissors themselves and you proceeded, as you told this jury, on the basis that there is no evidence that the scissors were opened?---That's right, yes.

But you can't tell because you can't see, can you, on the video, whether they were ever in an open state when he was attempting to deploy them?---Yes. What I can say is that there were no open injuries to Kumanjayi's hand, so if those scissors were in an open position it's possible that he may have injured himself because of the cutting edges of the blades, so like I've explained earlier, if you have the blades open

it depends on how you are going to hold the scissors because you need to keep the blades open. He is only using one hand so it's going to be quite difficult to keep the blades open and then exert enough pressure. If you only stab in the one direction it may be that he is holding onto one cutting edge, but then you would expect to see injuries to his hands, which wasn't there.

Doctor, why are you so desperate to distance this pair of scissors from its potential as being a lethal weapon?

MR STRICKLAND: I object, your Honour, the use of the word, "desperate".

MR EDWARDSON: I will rephrase.

HIS HONOUR: Yes.

MR EDWARDSON: Doctor, why are you distancing yourself from the notion that this particular weapon - this particular pair of scissors, had the capacity to inflict a lethal injury?---Because that is my opinion and I base it on those factors. If it was a very sharp, thin, tapered knife I would have given an opinion based on that, but I have to be fair and I have to look at these pair of scissors, it's very lightweight, it's very small, it's blunt. If you ask me for my opinion that's what I believe.

All right?---And that's why I am sticking to that and you are posing different scenarios and I - - -

I've got no doubt about that?--- - - - explaining how I came to my conclusions, so there were no open injuries to Kumanjaya Walker's hand.

Did you at any stage to any testing at all with these scissors in any realistic way to determine its capacity to penetrate any part of what would be the equivalent of a body?---I haven't done test and as you asked me earlier, I'm not a biomechanic expert but I have handled the scissors, I've held them in my own hands, I know how - - -

HIS HONOUR: Just answer the question. The answer is that you didn't do any tests?---Yes, your Honour.

That was the question.

MR EDWARDSON: Doctor, were you advised by the police or the AFP that they had conducted testing with these scissors?---No.

For example, by putting a loin of pork inside the clothing worn by these men and then deploying the scissors to see the extent to which they could cause injuries?---No, I haven't been informed of those experiments.

Did you conduct any experiments at all?---No, I wasn't asked to.

When was the first time you actually physically saw the scissors as opposed to the photograph that was sent to you by email?---I saw the scissors last week.

So you had already written your report by that stage?---I've written my report in August 2020, yes.

So you were committed to that particular report without ever having actually seen the scissors?---Well, images of the scissors and I've noted the exact - - -

Can you grapple with the question please doctor?---Do I - - -

MR STRICKLAND: Well I object. I think that answer was answered - - -

HIS HONOUR: The question was whether she had actually seen the scissors.

MR EDWARDSON: Of course?---I have seen the scissors, yes.

Doctor, I'll start again. You wrote your report. At the time you wrote your report, you'd never physically seen those scissors?---No.

You didn't have – you weren't – the photographs that were sent to you, were incapable of identifying how sharp they – the scissors were? Do you agreed or not?---If I may your Honour – if I may your Honour, just explain. Often when I do my autopsies, when I'm asked about opinions on weapons, most frequently I'm only sent images, and that's something that I'm accustomed to doing.

Yes?---Often I'm only presented with a weapon for the first time in court, never having actually seen it before. And then asked for an opinion. So I didn't find it unusual. I thought from the images, I can get a very good idea what the exact edges look like. How big it was. The only thing that I couldn't see was the tip of the scissor, and that I explained in my report, there were no photos taken from the front of the scissors. But that's the only thing I felt uncomfortable with. I didn't find it at all unusual not to have actually physically handled or see the scissors.

Could you have a look at exhibit 40 please. They're the only photographs of the scissors you received are they?---Yes, that's right.

So you haven't seen a photograph of the other side of the scissors, in an open state?---Well it's open on – on- in the first photo.

You can see – you can see the hand you can see there, I'm talking about the blades obviously?---These are the blades.

Yes I know. On that side, on the top photograph?---Yes.

Can I ask you this. How do you determine whether they're sharp or not from those photographs?---Because you can see. You can see there's not a – it's not a sharp – a sharply shiny thin edge, I agree with you. It would be better to examine it in its

actual physical state, which I've done. And that only confirmed what I've written in my report. It didn't change my opinion. It's still a blunt scissor.

Your ultimate conclusion is contingent upon the four matters that you've told this jury that you took into account, in arriving at that opinion?---Yes, as it's set out in my report.

They were, the blunt object, as you describe it. Also, as you gave evidence, that to the best of your knowledge, they were always in a closed state?---To my knowledge, yes.

And if there was other evidence that suggested otherwise, that would obviously be different – that would put a different perspective on it?---It would change the dynamics as explained, yes.

Thank you. The speed of the attack?---That's correct.

The higher the speed, the greater the chance of a penetrating injury?---That's right. And especially with blunt objects, you need a greater force. So a greater speed.

We know that this man is a strong man?---Which man?

Kumanjayi Walker, the one with the scissors.

MR STRICKLAND: I object.

HIS HONOUR: Yes.

MR EDWARDSON: Withdraw.

MR EDWARDSON: Doctor, do you say, that by even slowing it down, frame by frame, as you did, and watching this video footage, time and time again, for the purposes of trying to discern what actually happened, do you say that realistically, by reference to that body-worn video, you can make any realistic assessment of the speed and velocity with which he might have been able to deploy those scissors?---When you look at the footage, and I've watched it numerous times, I don't know how much detail you want me to go in, but from watching the video footage at a normal speed, he's partially restrained within three seconds. From the moment the scissors are withdrawn from his right pocket, we presume, it – it looks as if he's fiddling with his hand in his right pocket, within less than three seconds, he's partially restrained by Eberl, who's moving in behind Kumanjayi's back, grabbing around the shoulder and the neck. So that was very fast.

Can I just ask you this about the description that you've given, from your assessment of the video footage. Is that your own assessment, or is that in part what other police officers have told you, or is that what you believe actually happened? What is it?---No, it's my own assessment. This is – I've got all the time on the frames that I've made notes while watching it.

What, all of the time frames?---Not all the time frames. While watching the video, I made notes. Stopped, pause, stop, pause, and I wrote exactly. And then I said – I made my notes. And – so it's based on my opinion, and my own observations.

Have you brought to court the entire file, which will have all of your notes, of all communications with police officers, about this particular topic, and the process that you went about, in trying to determine the opinion which you're now expressing?---I have everything related to the file in my possession. That's not in my computer, it's in this file.

I call for production, because they've not been disclosed and I need to read it. I'm sorry, your Honour.

HIS HONOUR: Yes, well - - -

MR STRICKLAND: Your Honour - - -

HIS HONOUR: - - - they can be produced.

MR STRICKLAND: - - - there has been a call before, request all communications between the – excuse me - between the police and this witness. All the documents that we have, as my learned friend has said, has been produced.

MR EDWARDSON: I'm not criticising the Crown - - -

MR STRICKLAND: We've produced it, so I'm not sure – I don't know – I'm not sure what their call is, is what I'm - - -

MR EDWARDSON: Your Honour, what I – I don't want to protract these proceedings any more than I need to. If I can have maybe ten or 15 minutes, have a look. It may be that for my purposes, I don't need to extend the cross-examination.

HIS HONOUR: Yes.

MR EDWARDSON: But I need to see it to make that assessment.

HIS HONOUR: Yes, I understand.

MR EDWARDSON: So rather than put it – adjourn, I'd – if I could have the court's indulgence of say 15 minutes to have a look through this documentation, compare that to what has been disclosed, and work out where I go from here.

HIS HONOUR: All right.

MR STRICKLAND: Yes, we'll arrange that.

HIS HONOUR: Well members of the jury, would you retire please. It'll take about ten or 15 minutes.

JURY OUT

MR STRICKLAND: Would your Honour just give the witness – would your Honour give the witness the usual warning.

HIS HONOUR: As you're currently in cross-examination, you can't have any discussions with the Crown, and please don't talk to anybody about your evidence during the adjournment?---Okay.

MR EDWARDSON: And your Honour, I assume my learned friends will want to look at this too. I wonder if the doctor could leave her notes behind, and we can look at them in court.

HIS HONOUR: Yes, thank you

If you just leave your notes there, thank you.

WITNESS WITHDREW

HIS HONOUR: I'll adjourn.

ADJOURNED

RESUMED

MARIANNE TIEMENSMA:

XXN BY MR EDWARDSON:

HIS HONOUR: Are we ready to proceed?

Right, can we bring the jury in again, please.

JURY IN



MR EDWARDSON: Thank you for that time, your Honour, I (inaudible)

Doctor, you told us that you spent a great deal of time assessing this incident by reference to the body-worn video supplied to you by police?---Yes.

You told us that that necessarily required you to look at it frame-by-frame, slow it down, look at in real time and so on?---That's correct, yes.

You also told us that you were provided with some still shots that were lifted from one or more of the body-worn video that you'd watched in moving time?---Yes.

You agree with these propositions? Firstly, the incident itself in real time happens incredibly quickly?---That's right, yes.

It's very, very difficult (inaudible) – that's the problem. Do I need to start again? It happened very, very quickly?---Yes.

Matter of seconds?---Yes.

And for you to get any realistic assessment of what you think occurred, it necessarily required you to slow it down, frame-by-frame?---Yes.

And you have been very careful not to express any opinion about what perception Zachary Rolfe or Mr Eberl might have had from their perspective?---That's right.

So you're looking at it from a completely different perspective, aren't you?---I am, yes.

And you're doing it as a forensic pathologist, trying to determine – in response to the question that was asked of you – the capacity of the scissors to inflict lethal harm?---Yes.

And you could not have been able to express that opinion without having the ability to slow it down in the way that you did?---Well, sometimes we're asked and we don't have video footage at all. In this case, I had the footage so I had to slow it down and watch it numerous times, yes.

Yes. That's what I'm saying. In this case, you had to slow it down and that's what you did?---Yes.

All right. And you've accepted, I think, although not qualified, that there may be considerable limitations by reference to body-worn video because it's what's captured by lens, the lighting that the lens might be able to – the image that the lens might be able to capture, in that lighting might be quite different from the naked eye?---Yes.

The positioning of the body-worn video that we've discussed?---Yes, they are- - -

- - -the shutter speed and all those factors and variables are all limitations on whatever opinion you ultimately come up with?---That's correct, yes.

Would you also accept that by slowing down the video, what it doesn't really permit you to do is to conduct any realistic evaluation of what force Kumanjayi Walker might have been able to apply – with the best will in the world – with those scissors?---No, I disagree. As I've explained in my report, the positioning of the parties, I think, is relevant to try and determine the degree of force that he would have been able to exert. And I've gone through those. I don't know- - -

You have- - -?---if you want me to go through them again, but- - -

No- - -?---I think the positioning of the relevant parties are important and that I am able to see on the videos of each.

So, in other words, from your perspective, that's the opinion that you express?  
---That's my opinion, yes.

It's no more than an opinion?---It's my opinion as an expert on my observations.

And you'd agree that experts every day of the week disagree, don't you?  
---Of course.

I mean, some people might have one opinion and other people have another opinion?---This is my opinion.

Just because it's your opinion doesn't mean it's the right opinion, does it?---It doesn't.

No. And one last thing I wanted to ask you about, and that is this, obviously - particularly taking into account whether - for example whether the scissors were closed or whether they were open and we know that the scissors were looped through his fingers?---Yes.

Which is another factor which you no doubt took into account, the capacity to control the object through those looped handles. Would you agree with this proposition, and that is that whilst you say the blunter the instrument and if there's restrictions on movement the greater the forces required for penetration to occur, let alone penetration to the level of lethal force?---Yes.

But that's a relative term, isn't it, because we have no way of knowing what force might - if permitted - what force would, in fact, result in penetration sufficient to cause a lethal injury?---Well, from the reference that I've listed, all the reference say that blunt instruments would require greater force. This is a blunt instrument so it would require greater force.

Of course. And you have faithfully repeated all of the research papers that you've looked at to help you in giving this opinion today, haven't you?---I have, in addition to my expertise.

And you faithfully repeated - can I just finish the question - you faithfully repeated, have you not, exactly what we find in those papers, the blunter the instrument the greater the force that's required?---That's right.

Well that's self-evident isn't it?---I was asked to explain it to the jury.

Of course?---I don't understand your question.

My question is this. Of course the blunter the instrument the greater the force that is necessary for penetration to occur. The question is what does that mean? How much force? And the only way one can determine how much force realistically, is by conducting tests?---Yes.

And that didn't happen in this case?---I wasn't asked to do tests.

Thank you.

Nothing further.

MR EDWARDSON: Your Honour, I don't object to the bundle of documents that was tendered before.

HIS HONOUR: And that was exhibit then, 58.

MR EDWARDSON: Thank you, your Honour.

MR STRICKLAND: Could I have access to exhibit 58 please?

HIS HONOUR: Yes.

MR EDWARDSON: Sorry, your Honour. I have got copies for the jury.

HIS HONOUR: I don't think we have a copy.

MR EDWARDSON: No, no, what happened was, your Honour, my friend hadn't had a chance to look at the documents, so - but now it is now formally received, now the jury have their own copy if they need to.

HIS HONOUR: All right.

REXN BY MR STRICKLAND:

MR STRICKLAND: Could the witness please be shown a copy of exhibit 58?

HIS HONOUR: Yes.

MR STRICKLAND: So these are not paginated but if you go to the email from yourself dated 24 August 2020, 4:18 pm?---August, yes?

Do you have that?---Is it the one from Detective Wayne Newell about the footage, or?

No?---From myself, yes, I've got it. Yes.

From yourself, 24 August 4:18 pm, do you see that?---Yes, I've got it, yes.

And you say there, "In preparation for next week and the proofing on Friday, please find a summary attached of my interpretation on the ability of the scissors to cause serious injury, with relevant references", do you see that?---That's right.

And if you go over the page there is, I think, six pages to your notes, is that correct?---That's correct, yes.

And then if you go to the next document, that's on 30 August 2020 at 10:40 you then provide your final signed attachment. That's what we call "the third report" is that right?---That's correct, yes.

And if you go - and that's the one dated 29 August 2020?---That's right.

And if you go to page 2 of that report?---Yes.

Under the heading, "Object weapon" do you see that?---Yes, I do.

And you have - under the heading you've got "intrinsic properties, type of weapon, shape and size of tip, sharpness of tip and blades" is that right?---That's right, yes.

And you have referred there to the fact that there was no photo available or indication of the thickness of the tip provided?---That's right, yes.

But before giving your evidence you've actually seen that tip, is that right, on the scissors itself?---That's correct, yes.

Yes, thank you. I've finished with exhibit 58 and the last question I wanted to ask you was one of the first questions my learned friend asked you was whether you could tell the order in which the shots were fired?---Yes.

And you said "From the footage you know which one was the first one"?---That's right, yes.

And if you just go, please, to exhibit 57 please? Could the witness be given exhibit 57?---Yes.

And this is the shot when the accused is standing up and Mr Rolfe is standing up, is that correct? I withdraw that - I'll start again. You said from the footage you know which was the first shot?---Yes.

And which of those - of A1, B1 or C1, which do you say is the first one?---A1.

Yes, thank you, your Honour, those are my questions.

HIS HONOUR: Yes, thank you Doctor, that concludes your evidence?---Thank you.

And you may now go?---Thank you.

WITNESS WITHDREW

MR STRICKLAND: Your Honour, I call Adam Eberl.

ADAM CRAIG EBERL, affirmed:

HIS HONOUR: Could you please remove your mask while you are giving evidence. Thank you.

MR STRICKLAND: Can I just ask you to speak loudly and clearly. Everything you say is being transcribed?---Certainly.

If you would like me to repeat a question or you don't understand it, please just say so?---I will.

What is your full name?---Adam Craig Eberl.

And your rank?---Remote Sergeant.

And how long have you been a sergeant, or remote sergeant?---Approximately two years.

When did you join the Northern Territory Police Force?---I think it was June 2015.

And have you also – are you also a member of the Immediate Response Team?---Yes, that's correct.

And when did you join the Immediate Response Team?---I believe it was – could have been back in 2019.

Now you've received various training from the Northern Territory Police in relation to the use of force?---Correct.

I'll ask you about that a bit later. You've also got some martial arts experience?---Correct.

And what is that?---A variety of disciplines, but from Jujitsu to Kung Fu and Aikido and a couple of others.

Yes. And how many years have you practised martial arts?---About – at least 10.

Ten?---Years.

Years, all right. Before 9 November 2019, the day of the shooting, can you say approximately how many times you'd been deployed with the IRT?---Might have been a couple of deployments.

So the 9 November one was approximately your third deployment?---Approximately, yeah that's correct.

And when were the other two?---I can't specifically say the dates. Once was to Harts Range Police Station, and the other one was to Hermannsburg Community.

And how long before 9 November 2019 were those two?---Can't specifically say.

So on 9 November 2019, you deployed with the IRT to Yuendumu?---Correct.

And how did you come to be deployed on that day?---Well it was approximately 2 pm I received a call, while I was at home, off-duty, by Shane McCormack, and he asked if I'd like to come on a deployment to Yuendumu, as part of the IRT.

And you agreed?---Correct.

Did you go to the Alice Springs Police Station?---Correct, yeah that's where we met and had a brief discussion about what equipment, et cetera, we were going to take.

And when you say that's where "we" met, who did you meet there?---Yep, so on the deployment there was myself, Anthony Hawkings, Zach Rolfe, and James Kirstenfeldt, and Shane McCormack was the one who called us.

And do you remember what was said at that meeting, or whilst you met?---Yeah, basically it was what equipment we were to take, and basically we were also looking at a bit of a footage that happened three days prior, to get a bit of an idea who – who we were looking for, and from there, where to go from there.

And what was the footage you saw on that day?---Yeah it was involving an incident out at Yuendumu where Christopher Hand and Lanyon Smith were attempting to arrest an offender in a house where the offender picked up an axe, and charged at the officers to escape custody.

And were you told the name of the offender was Kumanjayi Walker?---Correct.

And were you told anything about him?---Other than that his propensity to violence, obviously what we saw, but didn't know much about him other than that, what I saw on that footage.

How many times did you watch the footage?---Just – just the one time. I believe Zach if we wanted to watch it again, because it was a split screen of both officers' body-worn playing simultaneously on the one computer there.

And when he asked that question, do you want to watch it again, what did you say?---I was happy with just watching it once.

Did you have a discussion about what you saw on the footage with Zach Rolfe?---Think basically all I discussed was what I said, basically, in that I was surprised that they didn't use a firearm in that incident.

What did Zach say to that?---I can't recall what he said.

What did he - - - ?---Only what I said.

Do you remember anything he said?---No, not exactly no. Can't – can't recall anything that he said.

Do you remember what any other officer in the IRT said, about that video?---No.

After you watched the axe incident, did you have any discussion with Zach Rolfe about what you would do, if you tried to arrest Kumanjaya Walker?---No it was just basically what I mentioned just previously, that was basically – basically all I said.

Did you discuss with Zach Rolfe, or did you discuss in his presence, what your reaction would be if Kumanjaya Walker did something similar to – when the IRT tried to arrest him?---No.

Do you know if Mr Rolfe did?---Not that I recall.

Do you know if anyone else did from the IRT?---No.

Were you told why you were going to Yuendumu when you were at Alice Springs?---To try and locate Mr Walker, and arrest him. And that was basically our mission. To locate and arrest.

Were you told there was any other part of your mission?---No.

And who told you that was part of your mission?---That's what we discussed among ourselves, that's why we were being deployed to Yuendumu.

But who told you that?---That was Shane McCormack.

Did Mr Rolfe say anything about what the mission was?---Basically sitting down in front of the computer, that was basically our – what he had mentioned, that this is the fellow we’re going to be looking for, and this happened a few days earlier. Because he had set up the computers, from my understanding.

And did Mr Rolfe say anything else about Kumanjayi Walker?---Not that I recall.

Did you understand you were deployed to Yuendumu as general support for the officers at Yuendumu?---Yeah, after the fact.

What do you mean by after the fact?---Well afterwards, when I learned about an email that was sent from Julie – by Julie Frost. And the surroundings of our – what we were meant to do while we were out there, as general support.

I understand. When you say “After the fact”, what’s the fact you’re referring to?---The incident.

I see, the shooting?---Correct.

Before you went to Yuendumu, did you understand you were to be deployed as general support?---No.

Do you know what the term – did you know then what the term general support meant?---I do.

No, I’m sorry, you say “I do”, as at 9 November 2019, did you understand what the term general support deployment meant?---I – I would have, yes.

And what did you understand that to mean?---Basically to go there and patrol the community as doing general duties, yep.

When you went to Yuendumu, did you understand you would be under the command of the officer in charge of the station there?---Correct, if – if we’re there deployed as general support, then that – that was the case, yes.

But in this particular case, before you went to Yuendumu, did you understand, in relation to the mission you were going there for, you’d be under the command of the officer in charge at Yuendumu?---Yes.

And that was Julie Frost?---Correct.

Had you ever met Kumanjayi Walker before?---No.

So after the briefing at Alice Springs Police Station, you travelled to Yuendumu?---Correct.

Who did you go there with?---I was in the vehicle with Anthony Hawkings.



And did you discuss your mission during that trip?---I can't recall.

Did you discuss during that trip, what you were going to do if you came across Kumanjayi Walker?---Not that I recall, no.

When you arrived at Yuendumu, where did you go?---Directly to the police station.

And did you see other IRT officers at the police station?---Yes, Zach and James Kirstenfeldt were already there.

Okay.

Can I ask the witness please to look at exhibit 2, tab 4? Now, I just want to take you to photograph 18, please?---18. Here we go.

Do you see yourself in that photograph?---I do.

Okay. Are you the first one there or the second person?---I would say at – by the looks – I'm the first one.

All right. And do you recognise that as being in the corridor at the Yuendumu Police Station?---Yes.

And you're heading towards the muster room?---Yeah, through that door to the left is the – into the muster room, yeah. That's correct.

So do you accept that you arrived at Yuendumu at about 6:56 pm on that day?---Correct.

Okay. When you arrived – yes, thanks. I've finished with that for the – just for the moment. I'm happy, just leave it there for the moment. Did you – when you arrived at Yuendumu Police Station, did you meet with Julie Frost?---Correct.

Did you meet any other local officers from Yuendumu there? Police officers?---Yeah, there was Christopher Hand, he was there. And also Alex Alefaio (sic).

Had you met either of those men before?---Sorry?

Had you met either of those officers before?---Felix, I had. But not Christopher Hand or Julie Frost.

Did you speak to Felix Alefaio about the mission that you had?---Not specifically, but I did speak to him.

And what did you say?---He had just mentioned that he'd dealt with Kumanjayi on a few occasions where he made arrest. And often, he just went in and grabbed him, yeah.

Okay. Did he say anything else about Kumanjayi?---Not that I recall.

No, okay. What he – from what you understood – I withdraw that question. Do you recall having a discussion with Julie Frost when you arrived?---Not me personally. I think I was a general, sort of, discussion. Just about what we were going to do.

Yes? And doing the best you can, who said what at that discussion?---I don't – she mentioned something like, if we had arrested him, bring him back to the station and she would put him 137 and we'd – and then we'd – and then she'd deal with the paperwork.

And what's 137?---It's s 137 of the *Police Administration Act*. It's a period of time that we can hold a prisoner under the provisions of s 138 of the *Police Administration Act*.

So who was present during this discussion?---We all were. So all the IRT members that were there, including the two other local officers, other than Julie.

Okay. So she said that. Is there anything else you can recall her saying?---I think she provided a map of the local area and identified the incident where the – of the axe incident, which – House 577, I believe.

Yes?---And that's basically – because I wasn't familiar with the community, so I just needed to figure out where we were going from there, so.

Okay. And is there anything else she said that you can recall?---Not that I recall.

And what did anyone else say at that meeting?---Basically – no, just that we were – I believe Adam Donaldson was also there, briefly. Dog handler, sorry. Not that I recall. Just that – where we were going and, basically, a bit of a plan about cordoning off the house and ascertain who's there.

And who discussed about the bit of the plan to cordon off the house?---I believe Zach was one of the instigators in that conversation.

I'm not asking word-for-word, of course, but roughly – approximately, what did he say about that?---I can't specifically say. It was just a general conversation about what the plan was, just to go to the house and cordon it off and then we'll ascertain if Kumanjayi was at the house, or who was at the house.

And what did you understand was meant by cordoning the house off?---Yeah, so basically Anthony Hawkings and I were going to go to the back of the house. And Adam Donaldson was going to keep to the other side of the house. And then Zach and James, basically – well, there was someone raking some ground at the back of the place and they approached that person – the community member – to ascertain who was in the house.

Okay. I think when you said that last time, so you're talking about – you've already left?---Yeah, correct.

I'm just going to confine, just for the moment, to what was discussed in the police station and I'll get to that in a moment?---Sure.

Is there anything else you can remember about what was discussed during that meeting?---I cannot.

Okay. If you accept from me that CCTV shows you leaving Yuendumu Police Station at 7:06 pm? I can show you the CCTV if you like, but- - -?---That's fine.

- - -do you accept you were there for approximately 10 minutes?---Yeah, it would've been in short – yep, about 10 minutes.

Okay. You remember anything else that Mr Rolfe said in that time that you were there, at Yuendumu?---I can't recall.

Okay. Were you shown any – were you shown, or was there any emails discussed during that 10 minutes you were there?---No.

Can the witness please be shown exhibit 1, tab 14.

So when you were travelling to Yuendumu, was – did you have your mobile phone?---I did.

And were you able to access emails or text messages from your mobile phone as you approached Yuendumu?---Probably, yes.

Did you do so?---I would say yes.

Did you do so?---No.

Okay. Did you see this email sent by Julie Frost to you and others before the shooting?---No.

Do you remember Julie Frost discussing a plan to arrest Kumanjayi Walker at 5 am on thereabouts on the Sunday, 10 November?---No.

Do you remember Julie Frost discussing that she wished Mr Alefaio to accompany you to arrest Kumanjayi Walker at 5 am the following morning, or 5:30 am the following morning?---No.

Do you remember seeing an email at the muster room?---No.

Do you remember seeing any email at the muster room?---Not that I recall.

Okay. When you left the Yuendumu Police Station, what accoutrements did you have on you?---Firearm, OC spray, a baton, handcuffs, spare magazine.

You say a firearm: that was your Glock?---Correct.

Did you wear a ballistics vest?---I didn't wear one, no.

What is a ballistics vest?---It's a vest that protects the body – the upper torso. Has a plate – usually, a plate in it. And the outer, sort of, casing that holds the plate has a material known as Kevlar.

How do you spell that? Kevlar?---Kevlar, yeah. Correct.

So when you were in Alice Springs, do you normally wear a ballistics vest when you're going to arrest someone?---Usually in Alice Springs, at that time, I was involved in the Youth Community Engagement. So we were riding bicycles. So often, I didn't wear one.

Okay. Have you previously – so you brought your ballistics vest with you; is that right?---The one related to the IRT, yeah.

And why did you bring it with you, to Yuendumu?---The IRT one I bought with me, yeah.

Why did you bring it?---In case the – it escalated to a more serious type role.

So when you left the station, at about 7.06 pm, why were you not wearing your ballistics vest?---Because that's part of the IRT uniform, and we were instructed just to wear out usually police uniforms, and not the IRT uniform, but we were instructed that we could take one.

Who instructed you about the uniform?---Originally when I got the call from Shane McCormack, I asked if we were to wear our multicam(?) uniform, or our normal police uniform. And he reckon – he told us just take the normal police one, wear that one, but you can take your cams in case you need to change roles while we're out there.

And cams means?---Like the – the uniform. So it's like a multi – multi cam pattern on the uniform.

Is cam short for camouflage?---Basically, yeah, yep.

So you went to House 577?---Originally, yep, yep, correct.

And who did you go with when you left Yuendumu to go to House 577?---I stayed in the same vehicle as Anthony Hawkings.

And what did you do when you got there?---We went to our position, to the rear of the place. So basically cordoned off the premises, as previously stated, with Adam Donaldson on the other side of the house, the dog handler. And Zach and James approached the gentleman at the rear of the yard, who was raking the yard at the time.

And what happened then?---I believe they were having a conversation with him as to ascertain who was in the house - - -

You said "they", sorry who's they?---So Zach and James.

Yes?---He met – from – from what I gathered that afterwards, that he'd mentioned that no one was in the house. So there was someone than ran past the window. So there still – someone was in the house. And it turned out that was a 12-year old child.

Were you – did you turn your body-worn video on for this, at this time?---I believe it was running.

Did you speak to this – you said there was – an Indigenous man outside House 577?---Correct, a community member, yeah.

And what was his name?---I didn't speak to him personally.

So after – you saw Zach Rolfe speak to him?---I believe he was having a conversation with him, yeah.

And did you speak to Mr Rolfe after that?---We had a discussion afterwards about where we were going, as the community member pointed us to the direction of two houses across the oval.

And what was the discussion you had with Mr Rolfe about that?---Basically our next plan of – plan, to move across over to there, to the two houses, to continue our search for Mr Walker.

And did he name the house numbers?---One was 511, I can't recall the – that was the red house, where the incident happened. And the blue house next door, I can't recall the number.

And so did you drive to that area?---Correct.

In the same vehicle?---Correct.

Were you aware that there was a funeral going on that day?---After the fact I was, I had - - -

You mean, again after the fact, after the shooting?---After the incident.

You weren't told – you didn't know about that before you left Yuendumu Station?---I did not.

Were you told anything about whether Mr Walker was likely to attend the funeral?---I was not.

So you get to house – sorry, after you left 577, what – where did your vehicle go to?--Yeah we parked outside, approximately outside of House number 511, outside the fence.

And what happened then?---And then I walked into the yard, into House yard 511.

Okay, now I'm just going to play you some body-worn video of when you arrived at that location.

I'm going to play exhibit 24, which is called Eberl 2 of 4, the transcript is at exhibit 2, tab 9. If you just pause – just wait until you play it, just for a moment.

I'm sorry, I said – it should be exhibit – transcript's at exhibit 25, tab 9, I'm sorry, not two.

There's a problem with the volume, your Honour.

DVD PLAYED

MR STRICKLAND: Do you recognise your voice there?---I do.

And at the time you spoke to a woman?---Correct.

A community – a woman from the community, and who are you walking with at that time?---I believe it was just myself that time.

She says, can you hear in the video say, "Why has he got a gun?"?---She's – she's referring to Anthony Hawkings, who was walking around to the other side of the house.

I see. And did you see Mr Hawkings carry a gun?---Correct.

Was that the AR15, the assault rifle?---Correct.

And she said – the woman said "I know but he's got it like aimed to shoot someone", and you said "No, he's not aiming to shoot anyone is he." Is that correct?---Yes, she is referring to how he was pointing the rifle, yeah.

Right, and she then says "It's not right." And you say – you said "We don't have a holster for that one, so we have to carry it." Were you referring to Mr Hawkings assault rifle?---Correct.

You then say, "Someone, probably shouldn't run at police with axe hey", or something like that?---Correct.

Had you ever discussed with Zach Rolfe what you thought about Kumanjayi Walker running at police with an axe?---No the only – the only discussion that I had was at the police station in Alice Springs when we were watching the footage, as I've previously stated.

But in that discussion, did you say what you thought, about Kumanjayi Walker running at police with an axe?---Nothing than what I've already said, no.

Which was what? Remind us?---I said "Wow, I'm surprised they didn't use the firearm."

Were you angry that - - - ?---No.

- - - Mr Walker ran at police with an axe?---I was surprised, but angry, no.

Did Mr Rolfe ever express to you how he felt, or what he thought about Kumanjayi Walker running at police with an axe?---Not that I recall.

Had you ever discussed with Zach Rolfe, what you would do, or what he would do, if he ran at any IRT member with an axe, while you were trying to arrest him?---Not that I recall, no.

Or with any edged weapon?---No I think it that it would just fall back to our training.

Is that what you discussed?---No.

Okay, I'll just continue on with this video.

#### DVD PLAYED

MR STRICKLAND: So before you entered House 511, did you suspect that Kumanjayi Walker was in the house?---Correct.

And why did you suspect that?---The gentleman at 577, the community member, he pointed out that he was in one of the two houses.

So before you entered House 511, had you ever had a discussion with Mr Rolfe what you would do, if you saw Mr Walker, and he presented with a weapon?---Not that I recall having a conversation around that.

What was the lighting like inside House 511?---Very poor.

You had a torch on you?---Correct.

Did you turn it on?---I did.

And where was it when you – where was Kumanjayi Walker when you first saw him?---In the back, not the first room, but the – must be a bit of a walkway between some bedrooms, beyond that – that first room.

Excuse me.

Now I'm just going to play for you another body-worn in relation to what happened after you entered House 511.

Your Honour, I'll be playing the exhibit 30. I'll be playing the Birdseye video, I'll find out an exhibit number, I think it's 30 – 36.

HIS HONOUR: Is there some – is there need for a warning to the members of the public gallery?

MR STRICKLAND: Yes thank you, your Honour, thanks for reminding me, yes.

HIS HONOUR: Yes.

The video which is now about to be played may contain confronting material, so that if anyone in the public gallery believes that it may have some effect upon them, they should leave now.

MR STRICKLAND: I'm just playing, for the record, your Honour, what's described as sequence 2, from the Birdseye video.

#### DVD PLAYED

MR STRICKLAND: When you saw Kumanjayi Walker coming towards you, did you see his hand in his pocket? Either hand in either pocket?---When I was there, no, not until watching the body-worn after the fact, I had noticed - - -

Sorry, I'm not asking about that, I'm asking while you were there?---No.

Did you notice him try to walk past you?---Yes.

You – did you believe at that time he was dangerous?---No.

You had previously seen the body-worn of what we call the axe incident?---Correct.

But you did not believe he was dangerous at that time?---That time in the footage, no.

Yes. At any – did you ask him to show his hand – I withdraw that. Did you consider asking him to show his hands, as he was approaching you?---No.

Have you ever trained to do that?---I've done it a few times, yep.



Did you consider at any time, as he was approaching you, withdrawing from the house and doing a cordon?---No.

Okay. Did you consider at any time as he was approaching you, grabbing both of his arms, or grabbing one of his arms?---Not initially, no.

By the way, how tall are you?---Six one and three quarters.

Do you know that in metrics?---184.

Right. And how much did you weigh back in November 2019?---Approximately 95 kilos.

Okay. Okay, if we just continue.

#### DVD PLAYED

MR STRICKLAND: So when he was standing up against the wall, did you see him put his hands in his pockets? Either hand in either pocket?---No.

You saw him – I'm not talking about the body-worn, but you saw him at the time taking his hat off and then putting it back on?---Correct.

You had been trained in defensive tactics; is that correct?---Correct.

Were you – have you been trained that suspects sometimes hid their weapons in their hats?---Correct.

All right. Did you consider at that time that you needed to gain control of Mr Walker?---Not at that time.

You were right next to the door, is that right, of House 511?---It was, sort of, behind us. Sort of, off to my left.

About how far away was the front door at the time when you had him against – when you had Mr Walker against the wall?---Approximately two metres.

Okay. Did you consider withdrawing at that point in time?---No.

Did you consider trying to put distance between yourself and Mr Walker at that time?---No.

Your Honour, I note the time. I'm moving on to a different topic.

HIS HONOUR: Members of the jury, we'll now break for the day. So would you retire, please, and we'll start again tomorrow morning at – I believe we're starting a bit later tomorrow morning, is that correct, gentlemen?

MR EDWARDSON: Sorry, your Honour. Can we start at 10 o'clock tomorrow?

HIS HONOUR: Yes, we'll start at 10 o'clock tomorrow.

JURY OUT

HIS HONOUR: And thank you, you can stand down for the moment.

WITNESS WITHDREW

HIS HONOUR: Anything before I adjourn?

MS CALLAN: Your Honour, yes. I have MFI N, which was the exhibit – not an exhibit, but MFI N. And just the description it's, in fact, four photos not five.

HIS HONOUR: I see, all right. Thank you.

MR EDWARDSON: Nothing, your Honour. Sorry.

HIS HONOUR: Then I'll adjourn.

ADJOURNED 1:14 PM TO WEDNESDAY 23 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON WEDNESDAY 23 FEBRUARY 2022 AT 10:07 AM

(Continued from 22/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes.

MS CALLAN SC: For your Honour's information, when the jury come in this morning, immediately before we return to the evidence of Mr Eberl, there's one matter that the Crown wishes to indicate to the jury about the late disclosure of an email by Dr Botterill. And I've discussed this with Mr Edwardson.

HIS HONOUR: All right, thank you.

Can we bring the jury in then please?

MR STRICKLAND SC: And your Honour, would your Honour – happy for the jury to be brought in. Would your Honour give the usual warning about the material that's just about to be played with Mr Eberl, thank you.

HIS HONOUR: Yes, thank you.

Yes, bring them in.

JURY IN

HIS HONOUR: Ms Callan.

MS CALLAN: Your Honour and members of the jury, yesterday it became apparent that an email from one of the witnesses to be called today, Dr Botterill, had not been disclosed to the lawyers for the accused. Now this was an oversight. And when the oversight was discovered, a copy of the email was immediately provided to the lawyers for the accused. If this caused any disadvantage, we would have deferred Dr Botterill until later this week, but the lawyers for the accused have indicated that's not necessary. If it means that the lawyers for the accused have any additional questions for Dr Towsey, and/or Dr Tiemensma, who you may recall have given evidence on Monday and Tuesday of this week, we'll do our best to arrange for those doctors to return to the witness box.

If we could call Mr Eberl back, your Honour.

HIS HONOUR: Yes, thank you.

MR EDWARDSON QC: Your Honour, as regrettable as that is, we accept that this is an oversight. It was a mistake. It's unfortunate, but we can deal with it, and we won't need to recall other witnesses. We can deal with this doctor today.

HIS HONOUR: All right, thank you.

ADAM CRAIG EBERL, under former oath:

HIS HONOUR: Now, those who are present in the body of the court, I am informed that the Crown intends to again play video today which has distressing content and if any member of the public in the gallery believes that this may adversely affect them then they should leave the court now.

Yes?

MR STRICKLAND: Yesterday, do you remember seeing some body-worn video of Mr Kumanjayi Walker against the wall and you and Mr Rolfe next to him?---Yes, I do.

Did you suspect at that time that that person was Kumanjayi Walker?---Not at that time, no.

I think you gave evidence yesterday that you suspected it was Kumanjayi Walker who was walking towards you?---I suspected Kumanjayi was in the house.

But the person walking towards you in House 511, did you suspect that person was Kumanjayi Walker?---Not at that time.

Just a moment please.

Excuse me just one moment, your Honour.

At what point in time did you suspect or believe that the person that you were dealing with in House 511 was Kumanjayi Walker?---When Constable Rolfe held up his phone with a comparison photo.

Did you see that there as a similarity between the comparison photo and Kumanjayi Walker?---Correct.

Thank you. Now, I just want to continue to play the body-worn video and I will just ask you some questions about that. I will now play exhibit 36. This is the bird's-eye footage which shows all the different body-worn videos playing at the same time.

DVD PLAYED

MR STRICKLAND: Just pausing, your Honour, there are some people leaving so I am just pausing for a moment.

HIS HONOUR: I am sorry?

MR STRICKLAND: I am pausing because there are some people leaving, your Honour.

HIS HONOUR: Yes, thank you.

DVD PLAYED

MR STRICKLAND: Did you hear yourself saying something there?---I did.

And what did you say?---I said, "Just leave your hat off."

But did you hear yourself speak into the radio? Did you have a radio at the time? ---I can't recall if I did or I did not.

Did you hear yourself speaking to Senior Constable Hawkings? In that body-worn we just played?---No

Okay, I will just replay it for you, just a little bit.

DVD PLAYED

MR STRICKLAND: Did you hear your voice there?---I did.

Okay, so Hawkings said, "Adam, you round the front of the red house"? Did you hear him say that?---Not specifically, but I did hear his voice, yes.

You heard his voice. Did you hear you saying, "Just inside the front door mate, stand by"?---Correct.

And is there any - did you say to Hawkings that you were with someone?---I didn't hear that.

Would there be any reason why you wouldn't tell him that you'd located someone in the house?---I think because we were dealing with someone and our concentration was more on what we were doing.

Will just continue playing it.

DVD PLAYED

MR STRICKLAND: Now, what did you do when Kumanjaya began to struggle? ---Basically took hold of his arm and I used a distraction strike to try and change his mindset and to give me a position so I could grab him to try and restrain him.

Which arm did you take hold of?---His left arm.

What is a "distraction strike"?---It's just a short strike, just to change his brain to thinking about that and not about resisting for that split second.

Could you demonstrate what you did with the distraction strike? Perhaps if you could stand up and demonstrate - if you can recall? And so shoulder - fist to the chest level?---No, it's to the side of the face.

To the side of the face. Did you hit him?---I did.

Now, I just want to play this part again, but I'm going to play it in slow motion?---Okay.

And ask you some questions. I just need 30 seconds to change the disc.

And your Honour, in the meantime, could the witness please be given exhibit – and perhaps the jury might want to have a look at it – exhibit 25 tab 8.

I'm just going to play this to you in slow motion, then I'll ask you some questions. Can you just have a look on the screen?

DVD PLAYED

MR STRICKLAND: Just pause there, thanks.

So we're at frame 166 and it's Zulu time 9:51:55. Can you see yourself there in that- -?---I can.

And are you – is that your elbow? Your left elbow?---Yes, it is.

You can see Mr Rolfe's hand?---Yes.



And what are you – at that point in time, what are you doing?---So I've – I've grabbed hold of his left arm, by the looks.

Okay, thank you.

If we can continue on?

DVD PLAYED

MR STRICKLAND: Pause there. Just perhaps – you can do three frames back? Can't go back? Okay. Just pause it 254 – no you can't? Okay, we'll – yes. I'm going to pause you at frame 254. And you can see that in exhibit 8 at tab – exhibit 25 tab 8. There's a frame there. Thank you. Just there, that will do, of frame 255.

Can you see yourself there?---I can.

You're behind Mr Walker?---Correct.

What are you doing there?---I'm trying to move in behind him.

All right. And what are you doing with each of your arms?---Looks like I've trapped his left arm with my left arm and my right arm's across his shoulder here.

Is that called something? A particular hold?---It's a – similar to the seatbelt hold that's taught in Defensive Tactics.

And what's a seatbelt hold?---It's a particular hold that's taught that's used to take down the person to the ground.

A seatbelt like a seatbelt of a car?---Similar to that, correct.

And did you have – can you see – you're holding something in your hand? In your left hand?---Probably a torch.

Did you – did you let go of that torch at some stage?---I do.

When did you let go of it?---Not sure.

Do remember saying something like, "Stop it," or something like that?---Yes.

And what was Mr Walker doing at the time you said, "Stop it"?---Resisting.

Okay.

Okay, if you could just continue on a bit, please.

DVD PLAYED

MR STRICKLAND: Pause there, thank you. Pause there. No – can you go back just a – no, you can't go back. I'm just going to stop it at frame 304.

So your torch – is your torch still in your hand during this time?---Looking at the footage, I believe it is.

Okay. So do you see yourself there?---Yes, still there, holding Mr Walker.

Is that the seatbelt or the modified seatbelt hold?---Well, part of it is. My right arm would be, but not the left arm.

Whilst you were standing up and holding Mr Walker, did you see if he had something in his hand?---At one stage I did, yes.

And which hand did you see it in?---In his right hand.

And what did you see?---Some sort of pointed object.

All right. What did it look like, at the time?---It was fairly dark, so – to me, it could've been a stick or anything. I wasn't too sure, but I knew it was sharp.

Thank you. Did you shout out anything to Rolfe when you saw that? Mr Rolfe?---No, I do not.

Why is that?---Because I was concentrating on what I was doing with Mr Walker.

I'll just continue playing.

DVD PLAYED

MR STRICKLAND: Pause.

Do you see the flash of a gun in that slow motion?---No, I do not.

I'll just play it – replay it once more.

DVD PLAYED

MR STRICKLAND: You see that?---Yeah, I saw a light. Yeah.

You heard a bang; is that right?---Yeah. A dull – a dull thud, yeah.

I didn't hear that, sorry?---A dull thud.

A dull thud. When you heard the dull thud, were you standing up or were you falling or do you recall?---I was standing.

Okay. And what did you think that noise was?---I thought, potentially, it might've been James Kirstenfeldt at the doorway with a beanbag shotgun, because it was not the usual sound of a firearm that I'm used to.

What were you thinking, when you were standing up and struggling with Mr Walker?---It's hard to determine at what stage what I was thinking, other than to try and take defendant down.

I'll just continue playing.

DVD PLAYED

MR STRICKLAND: Just pause it there.

Frame number 391, Zulu 9.52.02, that's 7.22.02. So did you take Mr Walker to the ground?---I did.

Was your – did your body-worn video get dislodged at some point?---It did.

Do you know when it did?---Sometime during the struggle.

When you were on the mattress, or before?---I can't recall.

Do you remember whether you were still holding a torch when you went onto the mattress?---To be honest, I wasn't sure when I dropped the torch.

I'll just keep playing the –

I'm sorry, I wanted to ask the – you can see, we're pausing at frame 366, did you – you can see the mattress there?---Yes.

Was the mattress hard or soft?---Not sure, I can't remember what it felt like to be honest.

And I'll just keep playing through until – from there until 443, that – another couple of seconds.

DVD PLAYED

MR STRICKLAND: Pause there.

So around about frame 417, can you see the flash of the gun?---I could.

And just continue on.

DVD PLAYED

MR STRICKLAND: And can you see – could you see a second flash?---I could.

About frame 433.

Just continue on please –

Sorry, I beg your pardon, 443 to 443, thank you, if you could pause there. At frame 447.

So I played you a bit over two seconds of real time, two and a half seconds, something like that. I just wanted to ask you some questions about the time when you – between when you fell on the mattress and just at the time of – or immediately after the third shot. Do you understand? I'm just asking about those two and a half seconds?---Okay.

So what were you doing to Kumanjayi Walker at that time?---I was trying to restrain him on the ground.

And how were you doing that?---I was holding his left arm.

With – and what were you holding his left arm with?---With my arms.

With both of them?---Correct.

And why were you doing that? Why were you holding his left arm?---Yep, so he couldn't turn on me, to prevent him to try – to try and get me with the – the weapon that he had in his hand.

Did you see the weapon when you were on the mattress?---Not at that time.

You saw it before you were saying?---I said I saw something that was sharp, but couldn't identify what it was until afterwards.

Were you putting your weight on Kumanjayi Walker's body?---On his body, no, on his arm, yes.

What about the upper part of his body?---No I believe it was his arm, from my memory.

How would you describe Mr Walker's position? You don't – from your – what you can recall?---Yeah it looks like he's on his side facing my direction.

Okay, and you say you were holding his left arm to prevent him from turning, is that right?---Correct.

And turning which way?---Any further towards me.

Could you see where his right arm was?---I believe it was sort of underneath his body.

Now were you, what's described as ground stabilising him?---In a sense, correct.

And what is – what does that term mean to you?---Usually ground stabilise is if someone's on their – on their stomach and you put their arm completely on the ground to stop them from getting up from that position.

Were you seeking to do that?---That's what I was attempting to do.

Is that something you're trained to do?---Correct.

Is that part of your defensive tactics training?---Correct.

Now at this time, around frame 447, do you remember, was your head touching the wall, or near the wall?---It looks like it's near the wall.

And can you see your body-worn video in that – where is it please?---Looks like it's above Kumanjayi – on the ground.

That's the body-worn camera, is that right?---Correct.

And is it glowing red?---Correct.

Can you see your OS spray there?---I can.

And can you – just for the jury's sake, indicate where – where that is, or – and what it is?---It's a – it's attached to my accoutrement belt, and it's at the rear there, it looks like – you can see just a little bit of a white part of the spray there at the back of – on my right side.

So what was your right arm doing?---It was also on Kumanjayi's left arm.

Was it around his neck?---No, not at that stage.

Or upper body?---I believe it was on his arm.

From the time that you were on top of Kumanjayi Walker, on the mattress, until the time you heard that third shot, did you see Kumanjayi's right arm move?---Not that I remember, looking at his right arm.

Did you feel it move?---I can't say for sure.

From that time, that is the time you were on top of Kumanjayi Walker on the mattress until the time you heard that third shot, did you see or feel Kumanjayi Walker's upper body move?---I can't recall whether it – I believe he was trying to move the whole time.

But did you see or feel it actually move?---I don't remember.

Were you trying to stop it from moving?---My main focus was on his arm.

I'm just going to play you another part of a body-worn video. This is from Mr Hawkings. Before I do, do you remember you were at the – you were at the police – after the shooting you went to the police station?---Yeah, I do, yeah.

And before you went into the police station, you had some discussions with Mr Hawkings and Mr Rolfe?---Yeah I don't recall those discussions, but I believe yeah, we was talking while we were out the back, yep.

Okay. I'm just going to play you that part –

I'm sorry, your Honour, before I do, I tender what I'll describe as the Sorell body-worn video.

MS CALLAN: Your Honour, I can indicate, it's on a USB. The file name – it's the only file on this USB, is Rolfe, R-O-L-F-E, 10X, and the numbers 095150-095323Z.

HIS HONOUR: That'll be exhibit 59.

EXHIBIT P59: USB Rolfe 10X 095150-095323Z.

MR STRICKLAND: I'm just going to play another body-worn, it just – we have to – it takes 30 seconds to go from one to the other.

HIS HONOUR: All right.

MR STRICKLAND: Pardon the delay.

HIS HONOUR: Very well.

DVD PLAYED

MR STRICKLAND: Did you hear yourself saying anything there?---It was hard in the group hearing specifically what I said.

Did you - do you recall saying anything to Mr Rolfe about whether you could or could not see the scissors?---I could see myself speaking to him but I don't recall what I said.

I will just play it one more time and see - yes please. I am just going to play you a different version of which - whether the sound may be enhanced?---Sure.

When I say - I'm sorry, it may be better?---Okay.

DVD PLAYED

MR STRICKLAND: So we're now playing the same version from the different body-worn perspective. It's the third one that is probably the clearest?---Okay.

So we've heard the first, this is now the second.

DVD PLAYED

MR STRICKLAND: So you can see yourself speaking to Mr Rolfe briefly?

---Correct.

And you're smiling at him?---Correct.

And did you - do you remember saying anything to him at that point in time?

---No, I do not recall.

Could you hear yourself in that body-worn saying anything to him?---I could hear that I was saying something but it's not clear to me what I said.

At the time you spoke to Mr Rolfe - I withdraw that. Do you recall speaking to Mr Rolfe about whether you could see the scissors or not?---I do not recall that conversation, no.

Now I just want to for the final time just play you another part of the body-worn. This Rolfe 2 of 4?---Yep.

I bed your pardon, the birds-eye, exhibit 36, from the time after the shooting for about 20 seconds, okay?---Okay.

So it's from 9 - okay.

DVD PLAYED

MR STRICKLAND: Did you hear yourself say, "Did you fuck"?---I did.

And what were you asking Mr Rolfe at that time?---Mr Rolfe?

I'm sorry. You said, "Did you - fuck" Did you hear yourself say that?---Yes.

What is "Did you" refer to - what were you referring to?---I think in relation to the shooting.

And what were you asking him?---Whether he shot him.

Why did you ask that?---Because I didn't realise that he had shot him.

During the struggle on the mattress or while you were struggling with him standing up, did you see or feel whether Kumanjayi Walker struck you with a pointy object?

---No, I did not.

So I just now want to ask you some questions about your training.

Your Honour, I tender the body-worn video of Hawkings relating to the conversation between Mr Eberl and Mr Rolfe.

HIS HONOUR: Be exhibit 60.

MS CALLAN: Your Honour, the file name is 1001 conversation Eberl/Rolfe and for the record and the court's appreciation, it is a synchronisation of videos which equates to Exhibit 29, which was the Hawkings 3 of 10 part 2 and the transcript is at exhibit 25, tab 11.

EXHIBIT 60 DVD, file name 1001 conversation Eberl/Rolfe.

MR STRICKLAND: I want to ask you about your general training. So when you joined the NT Police Force did you receive some training?---I did.

And can you just describe how long that training went for?---I think the training up in Darwin went for approximately 16 weeks.

And when did you do that?---In 2016.

In that 15 weeks of training did you receive training about the use of force?---I did.

Do you know how long that occupied - that training?---I can't recall.

You received training in operational safety?---We do, yes.

Defensive tactics?---Correct.

And what is defensive tactics?---It's a whole range of training in relation to the use of your tactical options as well as empty hand tactics.

Does it teach you about non-lethal options in terms of the use of force?---Correct.

Such as what?---OC spray, baton, Taser.

Okay. And you're also taught about handling firearms?---Correct.

Both the circumstances in which you should draw your firearm; is that right?---Correct.

You're also taught about de-escalation techniques?---Not so much as a part of the ARP course, but when you initially start your policing you are, yeah.

You said ARP course?---Yep. Accelerated Recruit Program.



Right. Is that when you did your initial training?---With the NT Police, that's right.

That's the 15 weeks of training?---Correct.

So when did you do the de-escalation technique training?---In 2012 with the South Australian Police.

I see. And what were you – what was the essence of what you were trained in terms of de-escalation techniques?---Good tactical communication.

And what does that mean?---Communicating with the suspect- - -

Yes- - -?---in trying to achieve a more peaceful resolution.

What other de-escalation techniques were you taught about?---Tactically withdraw.

And what does that mean?---To move back from the situation and assess and reassess the risks.

When you did you Accelerated – what the full term, please?---Accelerated Recruit Program.

You did you Accelerated Recruit Program, you taught about the 10 operational safety principles?---Correct.

That is, avoiding violent confrontation where possible?---That's one of them.

Using force – or avoid using force wherever reasonably possible?---Yes.

And where force can't be avoided, use the minimum reasonable, necessary force. Is that right?---Correct.

And you were in the NT, you were also taught about the importance of assessing and reassessing risk?---Correct.

This is all part of the operational safety principles?---Correct.

In defensive tactics, were you taught where, to the extent possible, maintain a safe distance from the subject?---Correct.

Now, in your training, did you receive training where an offender presents an edged weapon?---Correct.

And you've heard the expression – were you taught about the expression, knife or edged weapon equals gun?---Correct.

Were you taught that when presented with an edged weapon, you have the option to draw your firearm?---Depending on the circumstances, but potentially, yes.

Depends on the level of threat?---Depends on the situation.

Yes?---Distance, et cetera.

Where you decided to draw – and I'm talking about your training – were you taught that where you had decided to draw your firearm, that presentation gives you various options?---Yes, we will run through different scenarios in relation to that, yes.

Right. I mean, one option may be to fire the weapon?---Correct.

Another option is to de-escalate the situation in some way?---Correct.

Depends on the precise scenario?---Correct.

Have you ever had a scenario in training equivalent to what happened in the situation on 9 November?---Correct.

Sorry, you have?---Yes, yes.

Okay. And when was – when did you receive that?---In Alice Springs during a re-qualification over a period of several years.

Okay. You've given evidence about the de-escalation techniques you were trained in. Were you taught, if presented with an edged weapon, to give tactical commands?---Yes, that's one of the – one of the methods.

And what kind of tactical commands? What are the words that are used?---“Police, drop the weapon.”

Okay. Were you trained when you fired the weapon, where to fire it towards?---Correct.

And where was that?---The centre of seen mass.

What does that mean?---Where you can see the – any of the subject's body, the centre of that – the middle of that body part that you can see. For example, if it's the torso, then the middle of the torso.

And why were you taught to fire there?---To gain subject control via immediate incapacitation.

And were you taught what was likely to happen if you fired at someone's seen body mass?---Can you repeat that question, please?

Were you taught whether the central body mass contained vital organs, or did you know that?---Yes, I knew what.

Were you taught or did you know that firing into the central body mass was likely to result in serious harm?---Yes.

Or death?---Yes.

Were you – when you were trained to fire your weapon, were you trained to only fire it if it wouldn't endanger your colleague?---You're taught four firearm safety principles around firing at the – at your target. Know what it is, what it's in line with and what is behind it.

And what does that mean in terms of if your colleague is close by?---It's all about making sure that you're not hitting anything other than the target.

Including your colleague?---Correct.

Now, you also received training as an IRT member; is that right?---Correct.

And what – that was extra training on top of your normal training as a general duties officer?---Correct.

I meant to ask, as a general duties officer, did you receive annual training?---Correct.

In the matters we've been discussing, operational safety principles?---Yeah, both Defensive Tactics and also Firearms.

And did you attend all those annual trainings?---Correct.

You have to; is that right?---Correct.

And how long are those annual trainings? How many days per year?---It's changed over the years. Usually, Defensive Tactics used to run over two days and Firearms is a one-day requalification, every – annually.

Now, with the IRT, you received extra training; is that right?---Correct.

And how often did you receive the extra training?---We used to go to the range at least once every roster period.

Which is what, every five weeks?---Correct.

Did you also attend that roster training or did you sometimes miss it?---Depending on what you were rostered on to work. So sometimes, you missed it.

I'm talking about you, yourself. Did you miss it sometimes?---I can't recall specifically.

Okay. So when you did that rostered training, what kind of things did you – were you trained in?---It might be going to a vacant house and practicing clearing the house,

going through, searching for offenders in the different areas of the house. Cordoning off the house, for example. Yeah.

Were you given any different training in terms of – from what your general training, about operational safety principles? Were you told anything different?---No, the training's a little bit different but the principles, always, are the same.

Okay.

Would your Honour excuse me just for 30 seconds?

HIS HONOUR: Yes, certainly.

MR STRICKLAND: Your Honour, I have a very brief application, if it's convenient.

HIS HONOUR: Members of the jury, would you retire please.

JURY OUT

HIS HONOUR: Would you wait outside for a moment please?---Certainly, your Honour.

WITNESS WITHDREW

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, there's just one matter I wish to ask this witness. And I'll just hand up the committal transcript.

HIS HONOUR: Thank you. Yes.

MR STRICKLAND: It starts at page 170.

HIS HONOUR: 170.

MR STRICKLAND: 170.

HIS HONOUR: Yes.

MR STRICKLAND: The last question asked by myself, "Have you ever had a scenario in training equivalent to what happened to you in this situation on 9 November?" The answer was "No." His answer today was yes. I just wanted to ask him about that.

HIS HONOUR: Did you want to be heard in relation to that?

MR EDWARDSON: Your Honour, as it happens, when the question was raised by my learned friend I was obviously interested in what he might have to say. That's not been canvassed in any statement that I have seen. I wonder whether the quickest and fastest way, might be for both of us to just quickly speak to him, and to see what he's going to say in response to that question. That is, he said this, what is your – what is the training, and when did it occur. Because it may well be that that's occurred after the time of the committal, given that quite some time's past. And then I may have no objection to it at all.

HIS HONOUR: All right.

MR EDWARDSON: It'll only require literally two minutes for us to go and speak with him.

HIS HONOUR: Look, I don't want to take the morning adjournment at this point - - -

MR EDWARDSON: No, no, not at all.

HIS HONOUR: - - - because we were a bit later starting, so I'm just in – just explaining, so I'll just go off the Bench for a few minutes whilst you do that.

MR EDWARDSON: Yes, your Honour.

HIS HONOUR: And then we can resume.

MR EDWARDSON: Thank you.

ADJOURNED

## RESUMED

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, thank you for that opportunity. I propose just to ask him what he said in the committal in that one question and then to – I understand, having spoken to him, he will give some answers about what his training scenario was and I will ask him about that.

HIS HONOUR: All right. Yes, thank you.

Bring the jury in please.

## JURY IN

HIS HONOUR: The witness will need to be recalled.

ADAM CRAIG EBERL:

HIS HONOUR: Yes.

MR STRICKLAND: So I will just show you a transcript of some committal evidence you gave in September 2020. Do you remember giving some evidence at Alice Springs Local Court in relation to this matter in September 2020?---Correct, yes.

If that transcript could be marked please?

HIS HONOUR: Yes, that will be marked for identification with the letter V.

MFI V Transcript of committal in September 2020.

MR STRICKLAND: If you go to page 170, I think it is marked or tabbed, I ask you the same question I asked just a few moments ago - a few minutes ago. "Have you ever had a scenario in training equivalent to what happened to you in this situation on 9 November?" And your answer was "No". Do you recall giving that answer back then?---Not from back then, no.

Do you accept you did give that answer?---Yes.

You said today that there was a scenario in training equivalent to what happened on 9 November?---Correct.

Which is the correct answer?---So, the whole scenario is still "No" but a specific part of the scenario is "Yes".

Okay. And what is the specific scenario that is the "Yes"?---So - - -

I'm sorry - the part of the scenario which is the "Yes"?---Okay, so in standing in close proximity with an offender or when they are presented with a knife and coming down in a stabbing motion that particular part of the scenario.

I see, and so that refers to the part of the shooting incident where you're standing up next to Kumanjayi Walker, is that right?---The initial - where we're trying to identify and then for that moment as Zach was stabbed in the shoulder.

That's before shot 1?---Correct.

That's the scenario - that's the part of the scenario that was - was similar to your training, is that correct?---Correct.

And the part of the scenario that was not equivalent to your training or not similar to your training was when you were on the mattress, is that right?---Correct.



You hadn't received training similar to that scenario?---Well, the ground stabilisation part of it, yes, but not a specific scenario.

Involving the presentation of a weapon?---No.

And the training in relation to stabilisation is, as you said before, trying to force the person to lie flat, is that right?---Could you repeat that question please?

You said that from your training on the - and the scenario on the mattress and you said that one thing that the training did receive was ground stabilisation?---Correct.

Which is - is that forcing, or pressing the person you're grappling with so he is lying on his back?---On his - on his stomach.

On his stomach, I'm sorry?---Correct.

Now, I just want to show you finally some photographs. If the witness could be shown exhibit 1. If you go to tab 21 and if you go to the last photograph, which is photograph 11, you can see when those photographs were taken, which was 13 November 2019?---Yes.

Four days after the shooting and you can see in those photos there is a scratch on your left axilla - or arm - left arm?---Near my left arm it is, yeah.

When did you first notice that scratch?---It would've been a day or so later.

Do you mean after - a day or so after the shooting?---Correct.

They are my questions, your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Senior Constable - it is Senior Constable isn't it?---Remote Sergeant.

Remote Sergeant - my apologies, sorry. Remote Sergeant, can I ask you some questions firstly about that scenario that had, in part at least, some similarities of what confronted you on 9 November 2019?---Yes.

In answer to Mr Strickland's question you said there was a scenario that was part of training which involved an offender standing up in close proximity to you as the police officer?---Yes.

Armed with a knife and seeking to stab that police officer from above and striking down?---Correct.

What Mr Strickland didn't ask - and I would like you to tell this jury, is what was your training as to how you should respond to that sort of threat?---So, the initial response was to raise up your left arm if you are right-handed.

Can you just stand up and just indicate that please?---So as the person was to come down with a knife the training was as you raised up your arm you drew your firearm from your holster - - -

Yes?---Rotated it up at a 45 degree angle and fired into the subject, again immediate incapacitation.

And how many times did that require?---As many times until the threat was no longer there.

Thank you. Now, I will come to specifics about your training shortly, but can you just tell the jury please what is "My adapt"?---It's a record of all the training that you've received within the Northern Territory Police.

So any police officer who has received some sort of formal training can access this "My adapt" model is it?---Correct yes, it's an application, yes.

It's an application, is it? And did you, at my request, enter "My adapt" for the purposes of printing out your training since you've been in a Northern Territory Police Officer?---I did.

Could you have a look at the document which is now produced to you please? Firstly, can you confirm that that is the printout that you obtained?---It is.

And is that a printout of all of the courses that - all the training that you've actually received?---It is.

I tender that, your Honour, and we've got copies for the jury.

HIS HONOUR: Exhibit 61.

EXHIBIT 61 "My adapt" printout record of training undertaken by Remote Sergeant Eberl.

MR EDWARDSON: What firearms instructor qualifications do you have?---I'm instructed to give qualifications on the Glock, the shotgun, the 308, the AR15.

And do yourself have any specific training for defensive tactics, beyond becoming a police officer?---I have the defensive tactics that they've taught me, but I'm not an instructor with the police.

Thank you. I want to focus, if I can, a little bit on defensive tactics.

And I wonder if exhibit 37 could be presented to the witness please.

Just while that's being sought, I'll just ask you some preliminary questions. When you received your initial training, you received a specific part of that training, which covered the topic of edged and blunt weapon awareness?---Correct.

And was that a PowerPoint presentation?---I can't recall if that was a PowerPoint or not.

All right, but you certainly did receive specific instruction in relation to edged and blunt weapon awareness?---Correct.

And I want you to look at the document which is now produced to you, which is exhibit 37. And I want to ask you to see if you could – can remember whether the topics that are identified in this particular document were covered in part, or whole, as part of your training. And I want to start if I can with this. You'll see under the heading "Introduction", in the second paragraph it reads

"Members should not assume that they will be given warning of an impending edged weapon attack, allowing for time and room to prepare. A person carrying a small easily concealed weapon, with a very limited range, is unlikely to reveal it, until they are within range. Members facing edged weapons can have fractions of a second to respond, if the weapons are employed at very short range. People who are attacked with edged weapons often don't see it coming until it is too late."

Is that consistent with the training that you received?---Correct, it is.

And indeed, if you reflect on that passage, and consider what's been put to you by the prosecution, as you've observed the body-worn video from various angles, would you agree with this proposition. Firstly, this happened in a matter of seconds?---Correct.

Kumanjaya Walker had a concealed, edged weapon?---Correct.

At the time you knew he was – well, at some – one stage, whilst you were both standing up, you knew that he had a sharp object in his right hand, but you didn't know precisely what that object was?---Correct.

You now know that the object was a pair of scissors?---Correct.

And that is properly described, as an edged weapon, consistent with your training?---Correct.

Once the identification was completed by Zachary Rolfe, by holding up that phone next to his face, at that point in time, that was the first time that you realised that he was in fact Kumanjaya Walker?---Correct.

You had no idea at that stage that he was actually armed, and that he had secreted, no doubt in his pocket, this pair of scissors?---Correct.

We now know that he deployed those scissors, and he stabbed Zachary Rolfe?---Correct.

You've told us that when you finally got to the ground, and you were trying to restrain him, you've told us that you were not aware that he had been shot?---Correct.

You knew that he had something – some weapon of some sort, but you didn't know what it was?---Correct.

And you were trying to control him, so that he could not stab you?---Correct.

Mr Strickland spent something like, I think on my calculations, about 20 minutes or more, taking you through, question by question, frame by frame, each individual action that occurred, as we've seen on the video?---Correct.

And he's asked you questions about, if I go to frame say 407, what were you thinking at that time?---Correct.

How realistic is that, given what actually happened, and what we know happened in real time?

MR STRICKLAND: I object.

HIS HONOUR: On grounds?

MR STRICKLAND: Well your Honour, I object on the basis that how – what's the – how realistic are the questions, in my submission, it's – the relevance of it is - - -

HIS HONOUR: You could simply ask the witness whether he had an opportunity to turn his mind to any of those.

MR EDWARDSON: I'm grateful to your Honour.

You understand where I'm going with this, obviously?---Yes.

Did you have an opportunity – sorry, I'll just – I'll just start by doing this. Can you assume this, on the evidence, that the first shot – sorry, the time lapse between the first shot and the second shot, is 2.06 seconds, and the third shot is .53 seconds thereafter. Taking up what his Honour's just suggested, which I embrace, did you realistically, have any opportunity to try and think about the sorts of things that were put to you by Mr Strickland, as he did, frame by frame?---No.

In your mind, what was your primary focus?---To get Walker on the ground, to then arrest him.

And to protect yourself from being stabbed?---Correct.

Back to this document if I may:

“By definition, an edged weapon is any weapon, purpose designed or improvised, that has potential to cause injury by cutting, slashing or penetrating. Any object capable of penetrating the skin, or of cutting, slashing or drawing blood, it does not have to be sharp.”

That’s the training that you received?---Correct.

And if you turn to page, what is 66 of an 83 module, which describes amongst a whole host of different things that might be properly described as edged weapons, you’ll see that it also includes what are described as stationary scissors?---Correct.

We now know, of course, that Kumanjayi Walker had secreted, and did in fact deploy, a pair of scissors from his pocket?---Correct.

That would fall within the definition, as trained by – your training indicated, could potentially cause damage?---Correct.

Fatal damage?---Correct.

Now I want to move if I can to – if I can, briefly to tactics and training. Obviously, there are a whole host of topics that Mr Strickland traversed, about your training. For example, de-escalation, alternatives such as distancing. Removing yourself from the target. Stepping back. All of those sorts of things are part and parcel of your teaching, as you’ve told us?---Correct.

But they all depend upon the situation that confronts the police officer on the occasion that presents itself?---Correct.

In other words, if somebody’s 20 or 30 feet away, you’ve got a lot more time to think about other alternatives, than for example, pulling your firearm and discharging it?---Correct.

You can, for example, say, put your weapon down. You can keep your distance. You can do all those sorts of things that are part of tactics, that are taught, depending upon the situation that confronts the police officer?---Correct.

What time did either you, or Constable Rolfe, have in this instance - - -

MR STRICKLAND: I object. It’s the word “Or Constable Rolfe”, he can’t speak for Constable Rolfe.

MR EDWARDSON: From your –

Quite right.

From your perspective, did you have any opportunity, for example, to say put the knife down, or put the scissors down?---I could have said that, but that's not what happened, no.

You could have said that, but you didn't even know, as I understand it, a) that they were scissors?---Correct.

All you knew was that he had a sharp object?---Correct.

We know that it's only a matter of seconds between the first shot, the second and third. One of which is while you're both standing upright?---Correct.

But you didn't even know that the shot had been fired?---Correct.

You're trying to control this man, who is resisting police?---Correct.

He's completely and utterly non-compliant?---Correct.

And indeed, it's the case is it not now, that as we saw on the video when Zachary Rolfe said, "He was stabbing me, he was stabbing you," and he takes hold of the scissors – he's got scissors in his hand and we saw that on the video footage- -?---Correct.

- - -he was still non-compliant then, wasn't he?---Correct.

Despite the fact that he'd been shot three times?---Correct.

In other words, even then from the way in which he presented, he did not appear to be totally incapacitated?---Correct.

Your training is, is it not, that you don't render first aid or do anything of that nature until that person is secure?---Correct.

So once the handcuffs were in place and that lethal – potentially lethal weapon was removed from his right hand, first aid is immediately started as soon as he's moved from that dangerous situation that we see on the footage?---Correct.

Can you turn to the last page of the exhibit 37? I'm sorry, not the last page, but page 68 of 83. And you'll see that there's what called, heading, Timetable of Death. And it indicates different parts of the body which, if cut – arteries, things of that nature – if severed by an edged weapon, the potential time for how long it will take for a person to die. Was that part of your training as well?---I can't recall whether that was specifically, yeah.

Thank you. But you'll certainly remember this much, don't you: you were told that an edged weapon can be very dangerous and fatal to a police officer?---Correct.

In fact, you are also taught, are you not, that sometimes an edged weapon – particularly in close proximity – is more dangerous than a gun?---Correct.

Is there a distance that you're taught about – what I'll call a safe distance or a danger zone, if somebody's presenting with an edged weapon?---Yeah. Originally, it was 21 feet or approximately seven metres, originally.

In what context?---Both in South Australian Police and originally with the Northern Territory Police.

Thank you. Now, I want to just do a little bit of repetition, I'm sorry. When you first get the call, it was mid-afternoon. And I think it was Paddy McCormack that contacted you?---Correct.

And at that time, you were off-duty, you've told us?---Correct.

And that's the first time that you were asked – or you were asked whether you would be part of this deployment?---Correct.

And you understood, at that stage, that the deployment would include four IRT members plus a dog handler, Mr Donaldson?---Correct.

And the four members, as we've heard, are Hawkings, yourself, Rolfe and Kirstenfeldt?---Correct.

And you all meet up at the Adelaide Police Station (sic)?---The Alice Springs- - -

Alice Springs, sorry. Apologies. Alice Springs Police Station?---Correct.

And at the Alice Springs Police Station that's where, for the first time – I think, was it the first time that you saw what we called the axe incident video?---It was.

And that's the events which occurred with Officer Smith and Hand on 6 November, three days before?---Correct.

And others were present when it was played?---There was the four of us.

Yes?---And Shane was alternating between his office and where we were.

And I think it was your evidence that it was a split screen?---Correct.

So you had, effectively, Hand and Smith's body-worn video playing at the same time?---Correct.

So you could see it – a bit like what's been called the – whatever it's called?---Correct.

The three – right. So when you saw that – and I want you to think about your training again, not only back in the day when you started, but also as an IRT member and the like – clearly, an axe is, potentially, a lethal weapon?---Correct.

It's an edged weapon?---It is.

And he had – certainly, as anybody could see on that video – had he chosen to, Kumanjaya Walker could've deployed it against either one of those police officers?---Correct.

And he got very close to both of them, didn't he, with that raised axe?---He did.

Would you accept that that's an incredibly confronting piece of footage?---It is, definitely.

And had they pulled their weapon – as you said before, "Wow," I think your remark was, "Wow, I'm surprised they didn't" - -?---"Use the firearm."

- - "Use the firearm." Because a firearm would've been perfectly consistent with your training, had it been deployed in those circumstances?---Correct.

And so that informed you a little bit about the potential threat that Kumanjaya Walker might pose to police officers when and if you found him and you attempted to arrest him?---It did.

So obviously, when he approached you – as we saw on the footage – he emerges from the darkness. The lighting's not good. But you've got a torch on him?---Correct.

He certainly didn't appear to have any form of weapon on him as he approached?---Correct.

And the way in which he presented to you – although you didn't know it was Kumanjaya Walker at that stage – was very different from the Kumanjaya Walker that's seen when he decamps the bedroom and then, ultimately, the house on 6 November?---Correct.

So when you initially – that's you and Zachary Rolfe – approach him and speak to him and he's moved I think, sort of, slightly towards the wall?---Yes.

Is there a reason for that?---Basically, to contain him until we could identify who he was.

Right. And he, first of all, gives a false identify by saying, "My name's Vernon Dixon." And he repeats that on multiple occasions?---Correct.

And so you address him as Vernon, as we saw on the video?---Correct.



And he says, "She's my aunty," and he points somewhere that we can't see on the camera?---Yes.

Do you know who he was pointing to?---I think it was the lady out the front of the house.

Was there a lady at the front of the house?---Initially, yes. When I arrived.

Same one that you – when you arrived?---Correct.

All right. But it's not until he's formally identified that you knew it was Kumanjayi Walker?---Correct.

And you certainly didn't see that weapon coming?---No, I did not.

You didn't know that he had it secreted?---No.

And you had no chance to stop what he was doing at that stage?---No, I did not.

Now, after – and please accept this in terms of the timing and what everyone's seen on the video, rather – I can play it again, if you need to. But certainly, we hear you say: "Stop fucking around or I'll smash you"?---Correct.

That is after the third shot has already been discharged?---Correct.

And that's because he was still, "Fucking around," he was not incapacitated?---Correct.

Indeed, it's quite some time after that that, eventually, the handcuffs are placed on his wrists and he's then secure?---Correct.

Now, before that happened, you've told us already that you'd seen, at least, Kumanjayi Walker with a – with something in his right hand and that was when you were both standing upright?---Correct.

You didn't know they were scissors. You've told us that?---Correct.

But you certainly knew that it was some sort of sharp object?---Correct.

So you knew that he was armed at that stage?---Yes.

And he certainly was not complying, as you've told us, in any way with your attempts to restrain him?---Correct.

He was resisting at all times?---Correct.

And you never actually got control of his right arm, did you?---No, I did not.

And your control and focus, as we've heard, was on the left arm. And whilst you rolled him – I think you said – on the ground, you tried to roll him over but you were never able to actually get hold of his right arm?---Correct.

You mentioned in passing, I think, in response to one question that was put by Mr Strickland, that you were taught four firearm principles?---Correct.

Can you just do this a bit slower for me, because I couldn't get it down. What were those four firearm principles, please?---You treat every firearm as if it is loaded.

Yes?---Never assume it's empty. Be sure of your target, know what it is, what it's in line with and what is behind it. Never shoot at anything you're not positively – you have not positively identified. Never let the muzzle cover or point at anything you're not willing to destroy. And - - -

That's more than four but anyway - - -?---Yeah, keep your finger off the trigger - - -

That is four?--- - - - and outside the trigger guard until your sights are on target and you've decided to fire.

Thank you. And the expression that you used when edge equals gun, sorry, the area that you shoot for, is what?---The centre of seen mass.

The centre of seen mass. So in other words if the torso presents itself in close proximity to the gun, you would firstly try and ensure if somebody was next to that torso, such as yourself, you would ensure that that person is not in line of sight?---Correct.

And you would aim for the torso that being the largest area of the body that presents itself closest to the muzzle?---Correct.

Was there any training about how many shots you need to fire - or should fire - in any given scenario, or does it depend on the circumstances but your goal is to gain subject control by immediate incapacitation.

And so by gaining subject control by immediate incapacitation it might require one - it might require two - three - or even more?---Correct.

One thing that you are trained - in coming back to exhibit 37, is that it may be, for example, that particularly offenders who are on some form of drugs such as ice or whatever it might be, might require considerably more shots than the average person?---Correct.

And, of course, much depends on where the shots actually land as to whether that person is or is not incapacitated?---Correct.

Regardless of whether it is the central body mass?---Correct.

I think I have finished, your Honour. Nothing further, thank you, your Honour.

HIS HONOUR: Yes.

REXN BY MR STRICKLAND:

MR STRICKLAND: You were asked some questions from my learned friend about a training scenario where you are presented with an edged weapon, you're standing up and then you draw your firearm and fire it. Do you recall those questions?  
---Correct.

Why didn't you draw your gun at House 511?---Because at that time when I was first restraining him, I wasn't aware of any such weapon.

When you were - when you did become aware of it, why didn't you draw it?  
---Because his right arm was out and it wasn't in front of me trying to stab me at that time.

You were asked some questions about training in relation to safe distance?  
---Correct.

I think you said 21 feet?---Correct.

Did that scenario involve an assailant running or walking quickly towards you with a knife?---No.

What scenario was that?---Could you rephrase the question?

Yes, of course. Your evidence was about the safe training in relation to distance?  
---Correct.

And I think you said, a safe distance was 21 foot or thereabouts?---Correct, yes.

Was that in - did that training involve a scenario if someone with an edged weapon approach - running at you with an edged weapon?---Yes, correct.

Thank you. They are my questions, thank you, your Honour.

HIS HONOUR: Thank you, you may go.

WITNESS WITHDREW

HIS HONOUR: We will now take a short break, so members of the jury would you retire?

JURY OUT

ADJOURNED

## RESUMED

HIS HONOUR: Now, I don't think I had said so earlier in as many words, but because we were late starting today I was going to finish half an hour later.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: All right.

MR STRICKLAND: Your Honour, we have one - we were going to call Dr Botterill.

HIS HONOUR: Yes.

MR STRICKLAND: He is not available after 12:30 but we have other witnesses to call so I think we - we have got three more witnesses, we may be a little bit short of 1.45 depending upon the evidence.

HIS HONOUR: All right, thank you. Now, is there anything we needed to do before the jury comes in?

MS CALLAN: No, your Honour.

HIS HONOUR: Thank you. Bring the jury in please.

## JURY IN

MS CALLAN: Your Honour, I call Dr Matthew Sorell.

MATTHEW JAMES SORELL, affirmed:

XN BY MS CALLAN:

MS CALLAN: Sir, could you tell the court your full name?---Matthew James Sorell.

Is it the case that you hold a PhD in Information Technology from George Mason University?---Yes, I do.

Bachelor of Engineering and Computer Systems from the University of Adelaide?---Yes, I do.

A Bachelor of Science in Theoretical and Experimental Physics from the University of Adelaide?---Yes, I do.

At present, are you a Senior Lecturer at the School of Electrical and Electronic Engineering at the University of Adelaide?---Yes, I am.

And does that – do you specialise in telecommunications and multimedia systems?---Yes, as well as digital forensic science.

You've undertaken some work in relation to videos of – body-worn video footage in your capacity as a digital investigations consultant?---Yes, I have.

Now, it's the case isn't it, Dr Sorell, that back in December 2019, you received from police – from the Northern Territory – a USB which contained four video files?---Yes, that's right.

And you understood that they were sourced from body cameras worn by four police officers at Yuendumu on 9 November 2019?---That's right.

Sir, you made a statement in relation to the work that you've undertaken in this matter. In fact, several statements. If you need to refer to those statements, subject to Mr Edwardson's position, I'd ask for you to indicate that you proposed to do so. If you, for instance, want to check any details?---Yes, thank you.

MR EDWARDSON: I'm sorry, I should've said that. I have no objection to this witness referring to any notes he has, your Honour.

HIS HONOUR: Yes. So you may refer to any notes- -?---Thank you, your Honour.

- - -in relation to the matter.

MS CALLAN: The video files that you were provided back in December 2019, were they – first, file of Eberl, Adam? Body-worn video?---Yes.

And your Honour, for the record, that's been tendered as exhibit 26. Sorry, 24.

HIS HONOUR: Thank you.

MS CALLAN: A file, Hawkings, body-worn video and – did you receive that file?---Yes, I did.

And your Honour, for the record, that's exhibit 28.

Kirstenfeldt, body-worn video?---Yes.

For the record, that's exhibit 22.

And Rolfe, body-worn video?---Yes.

And for the record, that's exhibit 26.

Now, is it your observation, Doctor, that the footage that was contained in those four files was at a resolution of 1280 pixels?---Yes.

And by 720 lines?---That's right.

At a frame rate of 29.97 frames per second?---Yes, that's right.

So nearly 30 frames per second?---Yes. So this is a very standard resolution and frame rate for video.

You were asked to process those video files in order to provide as clear a record as possible?---Yes.

And is it the case, Doctor, that amongst the various tasks that you've undertaken in that respect, you have slowed down the footage?---Yes.

You have synchronised the footage?---Yes.

You have taken steps to what's called brighten the footage?---Yes.

And you have taken steps to enhance or clean up the audio that's captured in the footage?---Yes.

And in association with that work, have you produced a series of video products?---Yes, I have.

And a series of frames of that video product?---Yes, I have.

It's the case, isn't it, that an early stage you prepared a video which synchronised the footage from all four cameras?---Yes, I did.

And that from that, you prepared what might be described as a derivative segment, being the synchronised footage from all four cameras, predominately showing events inside the house at the time of the shooting on 9 November 2019?---Yes, that's right.

And you gave that the file name – that video, Inside House Four Cameras.mov?---Yes, that's right.

Did you also prepare a video which synchronises footage from Rolfe's body-worn video with Eberl's body-worn video inside House – the house?---Yes, I did.

And that captured some 17 seconds of footage from Zulu time 9:51:50 to 9:52:07?---Yes, that's right.

And the way – is this correct – that you prepared that video is that you maintained the footage from Constable Rolfe's camera at original resolution?---Yes, that's right.

And size. And that you incorporated the footage from Eberl's camera at 50 percent scale?---Yes. And just for clarity, normal modern, high-definition video can contain those two videos side-by-side at that resolution.

The – I can describe it, full-speed video that you created, did you name that file Shooting Rolfe 1x – or one times – and then TC bright?---Dot – yes. As a movie. TC meaning for timecoded.

So that – so – and the bright, does that indicate that you took steps to brighten or improve what can be seen?---So I – in that case specifically, I adjusted the contrast of Rolfe's footage to improve the visibility of features in his footage.

Did you also – did you produce another video, that same synchronised footage, but slowed down to one-tenth speed?---Yes, that's right.

And did you name that file Shooting Rolfe 10x?---That's right.

To indicate it's one-tenth of the speed?---That's correct.

TC?---Timecode.

Bright?---Bright.

.mov?---That's right.

Can I ask for witness be shown a USB.

Doctor, can I ask you to accept – and if there's a difficulty, we'll deal with it. But that's a USB which has saved on to it the three files you've just given evidence about?---I'll accept that as a premise for the moment, yes.

Could I asked for that USB to be marked for identification, your Honour.

HIS HONOUR: That will be marked for identification with the letter W.

MFI W USB with three files by Dr Sorell.

MS CALLAN: And just to be clear for the record, the files contained on that USB are Inside House Four Cameras.mov, Shooting Rolfe 1x TC bright.mov, Shooting Rolfe 10x TC bright.mov.

Dr Sorell, did you subsequently prepare a video which synchronised the footage from three officers?---Yes, I did.

That is Officers Rolfe, Officer Eberl and also Officer Hawkings' camera?---Yes, that's right.

And in that exercise, did that video you create show a total of 1 minute and 33 seconds of footage?---I'll now need to refer to my notes - - -

Yes?---Specifically.

It's your third paragraph, par 8?---There are two related - - -

Yes?---Statements here, so could you be more specific please.

The time code 9.51.50 through 9.53.23.

HIS HONOUR: Which statement?---Which statement are we? This was done in two stages. And so hence the – hence the - - -

MS CALLAN: Your statement dated 16 September 2020, par 9?---Yes so at this first stage, that's correct.

And in that video product, do you maintain the footage from Constable Rolfe's camera at original resolution?---Yes I did.

The footage from Constable Eberl's camera at 50 percent scale?---That's right.

And the footage from Hawkings camera at 50 percent scale?---That's right.

And it's the case isn't it doctor, that you first created that in its form at full speed?---Yes I did.

And then you created it at 1/10th speed?---That's right.

If the witness could be shown exhibit 59, that USB. Should be labelled Rolfe 10X.



Doctor, do you see the USB you've just been shown, which has been tendered as exhibit 59 in these proceedings, has been labelled with the file name that you gave that file you've just – video you've just described, "Rolfe 10X" or 1/10th speed, 9.51.50 to 9.53.23?---Yes.

If that USB can be returned, thank you.

And can I ask the witness be shown exhibit 25, tab 8.

Doctor, beyond the transcript which appears at the beginning of tab 8, there's a blue page, and then there is a series – there is three photographs, I'll get you to turn over, until you get to a page with the label "Frame 36"?---Yes.

Doctor, when you created that video containing footage from Rolfe's camera, Eberl's camera and Hawkings camera, you exported the corresponding 2818 video frames, as a sequence of still images, didn't you?---Yes I did.

And take the time you need, but do you recognise the frames which commence behind tab 8 at frame 36, as being some of those frames?---Yes I do.

Doctor, did you undertake, what I might describe as a similar task, of synchronising the video of the three officers, Eberl, Hawkings and Rolfe, but on this occasion, maintained Hawkings camera footage at original resolution, and the footage from Eberl and Rolfe's cameras, respectively at 50 percent scale?---Yes, that's right.

And did you produce, not only the video that that – you created, but also the frames for the – that video?---Yes, that's right.

Could you turn, still with exhibit 25, to tab 11. Passing through the transcript to – and there's a blue piece of paper, do you then see images with frame numbers on them?---Yes I do.

Do you recognise those as the frames that you produced with Hawkings footage at original resolution, and then Eberl and Rolfe's footage at 50 percent?---From the September statement, yes, that's right.

Doctor, were you subsequently asked to consider two further files of body-worn video, including – and I'll give you some assistance, suggest this is dealt with in your, it's described as your second statement of 12 April 2020?---Okay, I have that here.

I'll just get a copy shown to you?---Yes, yes I have that. I do have that, sorry, yes.

You do have that, all right. You were provided by police with two video files, the first is BWV Kirstenfeldt, James 1 of 2.

And your Honour, I can indicate for the record that's been tendered as exhibit 21.

Do you recall you received that file?---I did, yes.

And you received a second file, BWV Rolfe, Zach, 1 of 4?---Yes.

And your Honour, I can indicate for the record, that's been marked exhibit 32.

And did you consider that footage, and produce a series of frames, and take other steps to produce the images, certain images, including those found behind tab 6 of exhibit 25?---I'm now looking at exhibit 25, tab 6. Yes, so I produced those – those frames, with associated close-ups. Yes.

Doctor, were you also asked, and for your reference, dealt with in your third statement that is dated 16 September 2020?---Which I now have.

At par 17?---Yes.

Did you, on the request of police investigating – doctor, at the request of police investigating this matter, did you take steps to synchronise the certain footage from the videos of – on the cameras of Eberl – sorry, of Kirstenfeldt, Hawkings and Rolfe?---Yes I was.

Could the witness be shown exhibit 60, it's a USB.

Can I direct you to the label which appears on that USB which is 1001 Conversation Eberl/Rolfe, Doctor, as requested, did you take steps to synchronise the camera footage of three officers in relation to a particular conversation between Eberl and Rolfe?---Yes, I did, with specific synchronisation of the audio.

Yes, and did you create - and I might describe it as three iterations of that same synchronised footage in each occasion using a different combination of the audio? ---Yes, that's right.

With the aim being to try to achieve the clearest version of the conversation?---That's right.

If that exhibit can be returned, thank you. And finally, sir, or Doctor, I want to ask you about the matters that you addressed in what I will describe as your sixth statement which is dated 20 August 2021 and it concerns photographs captured on a mobile phone?---Yes.

And if for that purpose, if the witness could return the folder marked "exhibit 25" and be shown exhibit 1? Could you turn please, to tab 16. Doctor, you were asked, weren't you, to consider certain image files captured or contained on an Apple iPhone?---Yes, that's correct.

Including the way in which an iPhone captures what I might describe as geolocation metadata?---Yes, that's right.

Now, you've had significant experience in the analysis of iPhone databases haven't you?---Yes, I have.

That means you have training and experience in, amongst other things, the way that an iPhone captures metadata?---Yes, that's right.

Including in relation to the geolocation or the coordinates where an image might be recorded as having been taken?---That's correct.

Now, were you asked, amongst other things, to consider the photograph which is dealt with at page 5 of this series of pages behind tab 16?---Yes, I was.

And by reference to certain information on this page, do you see there is a copy of the photograph towards the top of the page?---Yes, I do.

And underneath that there is the blue word "Save" and then there's a series of – I might describe them as "headings" with information next to that?---Yes, there is. Just excuse me while I change to reading glasses, because the writing got small here.

Yes?---Thank you.

And does that information - could that broadly be described as information that captures associated with that image including the metadata?---Yes, that's right.

And metadata is literally data about data isn't it?---That's correct.

So in the context of a digital photograph it is information other than the content of the photograph itself which describes some features of the photograph?---That's right.

Including, for instance, the time at which the photograph was taken and the date?---Yes.

And in some cases the geographical coordinates, that is the latitude and longitude when the photograph was taken?---That's right.

Now, the information that is captured here includes, do you see against the heading "Created and modified" date 9/11/2019?---Yes, that's right.

And then the time, 18:37 pm?---That's right.

Do you see the latitude and longitude, if you work down the page, is captured, so there's the blue - a grey box that has the word "metadata"?---Yes.

And then the last heading are the words, "LAT/LON"?---So latitude and longitude, that's correct.

And you proceed on the basis that that latitude and longitude is the location of the Alice Springs Police Station?---Yes.

Were you asked to assume that the photograph was taken at Yuendumu Police Station and not Alice Springs Police Station?---Yes, that's right.

And were you asked to consider - and can you tell the jury, how the location coordinates might be - come to be incorrect?---Yes. So the location data is the recorded location that the phone has through a navigation process, that is established by a combination of a connection to a mobile phone network, potentially connected to a Wi-Fi access point inside a home as well as signals from a satellite navigation system such as the GPS satellite system. Normally that location data would be updated on a regular basis but if there is a situation where the phone is, for example, not connected to a mobile network and not otherwise requiring up to date location information then what will be stored is the last time that a location measurement was logged. In this case - and I cross-referenced this to several other photographs, I put forward the explanation that what we are seeing here is the last time a location was recorded, not time stamped and such that when this photograph was then taken at 6.37 pm - and I note that the metadata is consistent with the file data - then what was logged here was the last known location rather than the current location. And there's an awful lot of technical detail that goes behind that assessment that I can explain if that is what you want me to do.

Thank you, no, Doctor, I think that is sufficient.

And those are my questions.

XXN BY MR EDWARDSON:

MR EDWARDSON: Dr Sorell, I went to ask you some questions, if I can, about the limitations on body-worn video such as the footage that you've analysed?---Yes, you can.

And you are an expert in this field and so you can give evidence, can you not, as to those limitations and the difference, for example, about eye perception as opposed to lens perception, if you understand me?---Yes, I limited in providing an explanation of eye perception but certainly on the camera perception.

I want to ask you about the camera perception first. The fact that we see a particular image on any particular body-worn video, whether it be Mr Rolfe or Mr Eberl or anybody else for that matter, does not necessarily capture whatever it was that he or she was able to see?---There are two parts to the answer to that question. The first is that it is at a different angle, at a different position from the human eye.

Yes?---The second aspect of this is that the - what is captured on a camera is a - is effectively a series of still photographs, which are then compressed in a digital format. What is perceived by someone seeing something, is a different interpretation than what effectively comes in through the optics of the eye. And so the second part

of your – of the answer to this question, is that what you see is a combination both of optics and the processing of the brain of what is put in front of you.

Well obviously a person's head or eyes might be pointing in a completely different direction from example, the body-worn video?---Within limitations, yes that's - - -

Of course?---That's an example of the optics that we're talking about.

Yes, I mean let's say I'm looking towards the jury, but – sorry, the camera's looking towards the jury on this side, but I'm actually looking on the other side of the court room. The body-worn video's going to capture the images of this side of the jury, but I'm actually looking at the other side of the jury?---Yes, yes quite right.

And there's no way of knowing is there, by reference to the footage itself, what angle, or what way that individual is in fact looking?---Unless you've – unless you've captured them on another camera. So there are a small number of examples here where - - -

Yes?---Where the officers are facing each other, and so you can reasonably infer where they are looking as well. But from the footage itself, whoever's wearing the footage, you can't directly what they're seeing.

Now I want to ask a little bit about the lens itself on these cameras. What type of lens do they have?---So this is a wide-angle – wide-angle lens.

What is that?---So that effectively means that it is designed to capture a wide area, rather than if you like, a narrow – a narrow focus in front.

Is there any difference, for example, between what image might be captured with a wide-angle lens, as opposed to the naked eye?---There is. We don't – we don't tend to notice it, because in fact the human eye is constantly moving, and integrating everything that we see around us. But the purpose of the wide-angle lens is to capture a wide range, rather than just the narrow focus of what we – what we would normally focus on with our human eyes. So what happens in the periphery, in other words, on reply at slow speed on a video, will show detail. The human eye will focus its attention predominantly on what's happening the centre of field.

So in other words, the image that's captured on a wide-angle lens, in this case the body-worn video, might create a completely different perception from the person who's actually looking at whatever it is?---Yes, it's – the idea that you can perceive what might have been seen, at the time, by the – by the person wearing the camera, from watching the video is an interpretation that needs to be taken with some caution.

Do the camera lens, or the cameras themselves, adjust the brightness level?---To some extent.

How do they do that?---I've been unable to actually find the specific specifications of the Axon Body 2 Camera, in relation to that specific question. But broadly speaking, there are three ways. The first, and it's not clear whether this camera has this feature, is to adjust the – the iris size, or how much light can come in through the lens. Which is exactly how the human eye works. We adjust – the body – the human eye adjusts the iris so that we can let in more light. The second is that we can capture light for a longer time. So there is approximately 30 frames per second here. So we have up to 1/30th of a second to capture light. Now if we use all of that time, under low light conditions, the video will result in quite smeared movement. So therefore there's a limit to how far you can do that before it – before it ceases to be useful. The third way in which a camera does this, is that – it can also just amplify. You can think of that as just turning up the volume.

Yes?---The result of that is that you do end up with some speckle and noise in the background. A better way of thinking of that though is that a bright light, we reduce the time that we capture the light. So very short shutter speed, for want of a better way of putting it. And also, we can if you like, turn the volume down, so that we don't completely saturate the video. So under low light conditions, we lift what's called the gain, the amplification, and we capture the light for a little bit longer.

All right. I want to ask you, you've told us I think this already, but as I understand it, the timeframe, or this particular – or these particular cameras, operate on 1/30th second of the frame, is that right?---That's right.

So what does that mean?---That means that the – the camera is effectively taking 30 photographs per second, for want of a better way of putting it. They're not capturing that for the full 30th of a second, because if they did so, all we would see is smear when there's movement.

Right?---So I'm unable with the information that's in front of me, to do an analysis of how long that – that is. I've - - -

Sorry to interrupt you?---Yes.

In simple terms, I don't need to descend quite into that detail - - - ?---Sure.

- - - I don't need to for present purposes, but it takes 30 frames per second?---That's right.

Now, we know that it also has the capacity to record sounds?---Yes it does.

Audio?---Yes.

If – and you broke this down didn't you, so that effectively we ended up with frame by frame by frame?---That's right.

Which of course is not what the human sees?---No that's right.

In fact – anyway. When we look at a particular frame, and we hear a sound, at that point on the frame, or on the film, does that noise necessarily correlate with that frame? Do you follow what I'm saying?---Yes I do. There are two limitations – the audio and the video are coded in a separate way, in the same file. And the intention is, in the way in which the coding works, is that they are synchronised throughout. There can be an offset, or a delay between audio and video, which can be caused by, for example, the action happening at a distance, since it takes – audio actually travels quite slowly. So if – if we have our two- if we have two cameras, for example, that are a 100 metres apart, then there'll be quite a substantial difference in the sound, even if we're looking at the same object. The second thing that can happen is that even with the best coding, there can be delays embedded in the – in the digital coding. So the coding is offset in time.

Right. And finally, can I ask you this. You've told us that this has a wide-angle lens, and you talked about how the lens operates, compared to say the human eye. With the human eye we have what we call peripheral vision?---Yes.

Is peripheral vision the same as the sort of image that we get captured by a wide-angle lens?---It's related in so far as the – so the – this part of the physiology I can talk to. The human eye has a concentration of its optical nerves in the centre of the – in the centre of the eye, and therefore, for example, from where I'm sitting, I can see in front of me, approximately the bench in front of me. I can perceive the existence here, but I'm not paying attention to it, I'm not – and I'm not seeing it in focus. So however, it's commonly known, and we've done some work on insect vision specifically on this, that biological vision systems have evolved to respond to movement, even in the periphery, without a full interpretation of what you're seeing, the human eye and the human – well, biological systems respond very quickly to movement, even in the peripheral field.

And is that different from a lens?---It's different in – we're crossing over now into the biological side of things.

If you're not able to - - - ?---No, no, so I need to be – the key – the key point there is that on replay, if we pay attention to the side view of a video, that's not the same as what the human eye would have seen at the time, since it's in the periphery of the human visual field.

Thank you.

Excuse me, your Honour.

I want to ask you something about what's captured on the camera. Specifically something that's reflective?---Yes.

If there is something reflective captured by the camera, will that appear more enhanced by virtue of the lens?---If it is reflected – not by virtue of the lens, but by virtue of the fact that there's a bright – so there's a bright reflection, so that might – it might be, for example a – any – any shiny object in the field, that just happens to

flash, will result in a bright spot. Under low light conditions, if that object is moving, it will appear as – it may appear as a streak.

Thank you. And what about the presence or – of a torch?---If the torch – are you talking about the torch being shone towards the camera or from the torch being- - -

Or providing some light, for example? Or both, actually. If it's shone towards the lens or, alternatively, going away from the lens to create light in the direction of where the lens is pointing?---So there – there are two different scenarios here. Let me address the simpler one, which is that if the – if the camera is pointing towards the camera – sorry. If the torch is pointing in towards the camera lens, that can saturate the sensor, which means that what you, essentially, see is a washed-out image. And it's not, essentially, useful for analysis or it has very limited use for analysis. If a torch is, effectively, being used as a backlight – which is predominately the case in this footage – torches that are present are the dominant light source that we're seeing inside the house. Generally speaking, they're providing the illumination, just as any light would. But if there is a shiny object that happens to reflect that torch light in towards the lens, that will show up as particularly bright. And if the object is moving, then that may show up as a smear.

When you say it might show up in those circumstances as being particularly bright, might that image captured by the camera be quite different from the processing of the natural light?---Yes, it might.

And finally, I want to ask you this, because you've been asked to basically slow everything down and have it frame-by-frame-by-frame, 35 frames, what was it? A second?---29.97, if we want to be absolutely pedantic.

29.97 frames per second. If you watched this over and over again, you're obviously going to take in more detail each time?---Yes.

And that would, obviously, mean that the ability to review would be distorted, would it not?---Over time, you capture more details. You see a different feature. You integrate that into your understanding of the scene. And so you end up with a narrative – for want of a better way of putting it – of the sequence of events and features that are seen in each frame that inform that narrative.

Thank you. Nothing further, thank you, Doctor.

HIS HONOUR: Is there anything arising?

MS CALLAN: No, your Honour. If the witness could be excused?

HIS HONOUR: Yes, thank you. You may go.

WITNESS WITHDREW



MR STRICKLAND: So your Honour, before the next witness, I wish to tender a bundle of documents within a folder. It's called NTPF, Northern Territory Police Force Orders and Guidelines folder.

HIS HONOUR: Thank you. And that will be exhibit 62.

EXHIBIT 62 Northern Territory Police Force Orders and Guidelines folder.

MR STRICKLAND: Your Honour, MFI P – P for Peter – which is Defensive Tactics, that is part of this folder.

HIS HONOUR: Thank you.

MR STRICKLAND: And I'll have a copy given to each member of the jury.

HIS HONOUR: Thank you.

MR STRICKLAND: Your Honour, I call Lee Bauwens.

LEE BAUWENS, sworn:

XN BY MR STRICKLAND:

MR STRICKLAND: Can I ask you to speak slowly and clearly. Everything you say is being recorded?---Yes.

If there's anything I ask you, you don't understand or would ask me to repeat, please say so?---Yes.

What's your full name?---Lee Bauwens.

Spelt?---Sorry?

Could you spell your surname?---B-A-U-W-E-N-S.

And what's your rank?---Sergeant.

Where are you currently stationed?---Alice Springs Police Station.

Where are you stationed in 2019?---Alice Springs Police Station.

When did you join the Northern Territory Police Force?---2000.

Now, in 2019, you were a sergeant stationed at Alice Springs?---That's correct.

And were you also the officer-in-charge of the Immediate Response Team?---Yes, I was.

Were you on duty or were you involved in the deployment of the IRT to Yuendumu on 9 November 2019?---No.

What were you doing on that day?---I was in Darwin. I was on medical leave.

I'm sorry, you were on- - -?---I was in Darwin. I was on medical leave. I had broke my hand.

Were you – or have you ever been a member of the Tactical Response Group?---Yes.

When was that?---It was from 2004 to 2014.

Okay. Were you a trainer for the Tactical Response Group?---Yes.

In what areas were you a trainer?---I was a trainer in close personal protection, driver training, marksman and CQT.

I missed the last bit?---CQT.

That's Close Quarter- - -?---Close Quarter Tactics.

- - -Tactics. What does that mean – involve?---CQT or CQR, it's the skills of dynamically entering a stronghold or a house or a situation, locating, challenging and engaging targets or offenders.

Were you transferred from Darwin to Alice Springs in 2014?---Correct.

You have any role with the TRG after that?---No.

Tactical Response Group?---Yes.

Are there differences between how the TRG operate and how the IRT operate?---The skillset in what they do is basically the same. But the – between the two groups, there are some major differences.

What are the major differences?---TRG is a full-time section, where the IRT is a part-time section.

What does that mean, a part-time section?---The people involved in the IRT have normal jobs. They have different roles within a police station, general duties or whatever. And they take extra training to facilitate IRT requirements.

That's one difference. Are there any other difference – are there any other differences between TRG and IRT?---There are the – there are response differences.

What does that mean?---Well, the major one is the IRT only respond to - can only respond to high risk incidents. They can't do planned response, they do unplanned response and their primary role is to cordon and contain.

That's the IRT?---That's their primary role.

And what does "Cordon and contain" mean?---It's cordoning a situation which has been declared a high-risk situation and they cordon and manage that situation until further resources arrive, namely TRG.

Was the IRT originally called the "Cordon and Contain" unit?---Yes, it was Alice Springs Cordon and Containment team.

When did it become the IRT?---I believe it was around 2017.

Are there any other differences between the IRT and the TRG?---Well, they don't perform as many roles obviously as the TRG.

I beg your pardon?---They don't perform as many roles as TRG. TRG do bomb disposal, close personal protection, search and rescue, diving and - yeah, so their response is basically limited to a cordon and containment section.

That's the IRT?---Correct.

Is the IRT is often deployed for general support, is that correct?---That's correct, as - in addition to a declared high-risk response they also respond to a general response.

What does that mean?---Well, they can be tasked on and take duties regarding arresting armed offenders, social disorder, general support is also attending for extra manpower - it could be a range of things but they are the main criteria.

Is the TRG ever deployed as general support?---Yes.

And let me just ask you about - you had a role in creating the IRT, is that correct? ---That's correct.

And what was your role?---I initially - my role was to get the section moving from when I started in Alice Springs.

In 2014?---2014, correct. There was - it wasn't really an operational section at that stage, so I took it on myself as an interest to get the section operational as best I could.

And did you recruit people to join the IRT?---That's correct, yes.

How many people were members of the IRT in 2019?---At that stage I believe we had 15 fully trained members.

And how were the members recruited?---There was an expression of interest via email sent out to the members of Alice Springs asking - pre-requisites - not pre-requisites, sorry - just outlining their experience and what they could bring to the section and then from there it went to a panel with a ranking officer, myself and another officer and they would decide on the applications.

Was previous military experience relevant to whether a person would be accepted?  
---It was taken into consideration.

In a positive way?---Generally, yes.

How often in 2019, about how often was the IRT deployed?---How often?

Yes?---I haven't got the exact numbers. In 2019 we did start recording all our deployments on the - on a system. I haven't got the number in front of me.

Approximately how often was the IRT deployed?---It is hard to say, sometimes nothing for months and sometimes for a couple of weeks we're just busy.

And what does "busy" mean? How many times?---Just going - three or four jobs.

For?---It is hard to say because it was just spasmodic. I haven't got the exact number but like I said - for months we would do no deployments and then certain situations, as police work dictates and we'd be busy.

So were you aware that Constable Zach Rolfe became a member of the IRT?---Was I aware?

Yes?---Yes.

And did you train him when he - or were you involved in his induction into the IRT?  
---Yes, when Constable Rolfe was trained through the IRT he - TRG at that stage were running the courses - the two-week course. I was on that course assisting as a senior member.

And what year was that?---That was - I believe it would be either very late '17 or early '18.

I will just show you a document?---Yes.

Do you recognise that document?---Yes. Yes, I - - -

And how would you - it's described as a "Cordon and Containment course, Southern Command joining instructions". Was this document used when Zach Rolfe was inducted into the IRT?---Yes, there was a second one. We basically used the same one.

What do you mean by "the second one?---Sorry, yes, on this one Zach was on this course, yes.

I tender that.

HIS HONOUR: That will be exhibit 63.

EXHIBIT 63 Cordon and Containment course, Southern Command joining instructions.

MS CALLAN: Your Honour, we have copies for the jury and we will have a working copy for your Honour as soon as possible.

HIS HONOUR: that's all right.

MR STRICKLAND: If the witness can be shown exhibit 63 again?

If you go to page 2 of the first of the staffing for the course. Course director, Sergeant Mason, Lester Smith and instructor was Constable Ricardo De Silva. Were there other instructors apart from Constable Ricardo De Silva?---I believe those were the main two instructors.

But you were also an instructor on that course?---I was - I participated in it and assisted as more of a team leader role though.

And if you go over to page 5, you can see if there is a description of the course roster going over several days? I would just like you to have a look at that. You've seen this document before today haven't you?---Yes, I have.

What I wanted to ask you, moving from pages 5 to 14, is that an accurate description of the course that Zach Rolfe did when he joined the IRT?---Yes, I believe so.

So if you go to page 5 on the first day, from 1 until 4 pm on the left hand column, 1300 t 1600 there's a description of ICENCIRE - sorry - I-C-E-N-C-I-R-E?  
---Correct.

And can you confirm whether that was, in fact, presented on that day?---That what, sorry.

Do you confirm that that course was likely to have been presented on that day?  
---Yes.

I will come back to ICENCIRE in a moment. Thank you.

Can the witness please be shown exhibit 14?

Do you recognise that as – that document?---Yes, I do.

Did you have any hand in creating it?---It was mainly created by Senior Sergeant Mike Williams, but we spoke about it, and I had input in it, yes.

If you go to page four of that document – sorry, I beg your pardon, I'll stop at page two. So can you see that this Standard Operating Procedure says "They are to be applied with consideration to Police General Orders and the relevant policies, procedures and legislation"?---Yes, I think that's what it says there.

So is it the case that standard – the policies in relation to say defensive tactics, or use of force, still operate, is that correct?---Yes IRT are governed by the legislation there. All police officers are.

Okay. So if you then go to page four, under the heading "Part 1, Operations and Deployment", it refers to the difference between high risk deployment, and general support operations?---Yes.

I won't read it out. As at November 2019, had the IRT ever been approved for a high risk deployment?---No, not at that stage.

So it was always general support?---Yes.

When the IRT is deployed as general support, are they subject to the command of the officer in charge at the local police station?---Yes, the IRT an asset, and fall under the – the authority of whoever deployed them, or the local station.

And when the IRT go out on a particular deployment, is there supposed to be a leader within that IRT team?---Generally there is a person who is running the team.

I beg your pardon? There is someone who - - - ?---Generally there's someone who is in – one person in charge.

Is that normally the most senior of the IRT people? That is, those that have been longest in the IRT?---It's – it can be. It depends on who, if I guess, is deployed.

When an IRT team is deployed as general support, what uniforms do they normally wear?---General support is generally blue uniforms. But we have had camouflage uniforms on general support as well. It's – depends on what we're requested to do.

Okay, thank you. Now I'd like you to have a look please at exhibit –

Could the witness please be shown exhibit 62.

Now I'll just take you quickly through some of these tabs. If you go to tab 1. Are you – you're familiar with what are called General Orders?---Yes.

What's a General Order?---Guidelines, orders, we – they govern our actions as police officers.

Do you understand who issues the General Order?---They're empowered by obviously a *Police Administration Act*, so they're binding by law to (inaudible).

You dropped your voice there, I didn't - - - ?---Yes, they – so they're legislated.

Are they issued by the Commissioner, to your understanding?---Correct, yes.

So they bind everyone who works as a Northern Territory Police Officer?---That's correct.

And would you be familiar with this particular order, relating to arrest?---Yes.

A – in the training of police officers, are they trained in relation to this particular order?---Yes.

If you go to tab 2, there's another General Order, about operational safety and use of force. Is that the same – I'll ask you the same questions, is that something that police officers are trained to have regard to, or to consider?---I believe so, yes.

Your – if you go to tab 3, you're familiar with this document, "Operational Safety and Use of Force"?---Yes.

And again, are officers trained in relation to this document, or these principles?---Yes.

I'd like you to go to tab 4. I assume you would be familiar with this document, "Defensive Tactics"?---Well, I don't read it, but I know it exists, and I know some parts of it, so I'm familiar with it, yes.

When you say you've – you know it exists and you've read parts of it - - - ?---I mean, sorry, I'm not 100 – it's a big document there, I'm – I don't know everything in it, but I know the document exists, "Defensive Tactics" and it's a training that we train, so yes. I'm aware of it.

How many years did you teach officers at the IRT?---Since 2000 – and basically '15, to 2019.

Is this a relevant document used as part of your training?---Defensive tactics, defensive tactics is more of a general duties, or normal policing tactics. It's – the defensive tactics is something we didn't have to train in IRT because they're already through requal's in general policing.

When you say "requal's", what does that mean?---Re-qualification every year. We have to go through a defensive tactics re-qualification.

So when you did IRT training - - - ?---Yep.

- - - when you – so you delivered IRT training?---Correct.

Did you teach anything in relation to this document, "Defensive Tactics"?---Obviously without reading the whole document, and being over it, our – our training was higher level than GD's training. And it obviously incorporated some of these things. I couldn't tell you specifically right now without looking at them. But our training was different from the general duties response, in that it was a tactical response to a high risk situation, which does incorporate some of these things, but I – without going through I couldn't tell – link to each one of them. But yes, it's something that's incorporated in everything we do.

Are you saying that you're not familiar with the detail of this document?---What I'm saying is it's – it's a – our training builds from this document. The – each member has that basic skill, defensive tactics, and is competent in that area, then the IRT training, trains them for different scenarios and situations which they would use the skills which they'd learned from their general duties policing, and adapt them to what we do in IRT.

Are the principles in this document, "Defensive Tactics", relevant to high risk deployments, or high risk situations?---Yes they don't – they don't change. But the tactics that we teach are different. I mean, it's – it's – it's a bit hard to explain in that the thing we do use – everybody- every police officer uses these skills in defensive tactics. In every situation that may arise. What I'm trying to say is IRT just – we train for different scenarios in a high-risk situation.

Well, you've given evidence before that you – if you go –

Can the witness be shown exhibit 63?

You notice, on page 5, they're trained in ICENCIRE – sorry, ICENCIRE?---ICENCIRE, yes.

So that's part of the general training of police officers, isn't it?---Yes. So ICENCIRE is taught at the general duties level.

Also at the IRT level, according to this document?---Yeah, it forms part of seize management strategy.

Okay. So I'll take you to page 21 of this document. I'm on tab 4, the Defensive Tactics?---I'm sorry, the Defensive Tactic one. What page, sorry?

Page 21?---21.

You got that? See, at the bottom right-hand page, there are page references. You go that?---Is it part 2, Operational Safety Philosophy? Yeah.

That's it. As an instructor for IRT and indeed, as a previous instructor for TRG, were you familiar in particular with this part? And take your time to look at it?---Yes.



So if you go to page 22, for example. The force philosophy is stated: "The success of an operation will be primarily judged by the extent to which the use of force is avoided or minimised"?---That's correct.

Is that the basis of IRT training as well?---That's the base of every police officer.

Okay. There are references at the bottom of that page to, "Any force by a member of the NT Police" – sorry, any force used by a member of the NT Police must, "Be justified in terms of the Criminal Code Act and conform to the principles and instructions set out in the Operational Safety Training and Procedures manual and any other policy procedure, general order or training manual." Is that something the IRT was trained in relation to?---Sorry, I am actually a little bit deaf.

Okay, I'm sorry. I'm speaking too soft?---Yeah.

You read. I won't read it again. Can you read the last bit of page 22?---Yeah.

"Any force used by a member" – have you read that?---Yes. Has to be justified, yes. Correct.

Yes. Was that also part of IRT training, in terms of the general philosophy of use of force?---Yes.

If you go over to page 23. It describes the different types of force. That is, it defines this notion of minimum force?---Yeah.

I'm sorry, it describes the minimum force. And then it describes unnecessary use of force. Again, are they – are they part of the training of the IRT?---They're part of all police training.

Okay. If you go to the next page, page 24, under the heading Lethal Force. The heading, Points to Consider. "Lethal force is defined as any use of force that's likely to cause death or serious harm." And then it says, "Must be the option of last resort." Is that something that is consistent with IRT training?---Yes.

One of the points to consider is, "Is an officer or third party in jeopardy." You see that?---Yes.

Is that part of what the IRT members are trained? Namely, that in deciding whether to use lethal force, one must consider whether your colleague is in danger?---We – yes. We're under the same restraints as every other police officer.

Okay. If you go to page 26, there's reference to the 10 Operational Safety Principles. You'd be very familiar with that?---Yes.

And is that, again, something consistent – those principles, are they reinforced in the IRT training?---Yeah, they form part of our training.

If you go to page 27, there's what's called a Tactical Options Model. Do you see that?---Yes.

"Common theme," it says, "Is a safety-first attitude together with communication skills, which are used to promote de-escalation of the incident, and thus ensure the use of minimum force." And then there's that wheel you can see there. Again, is that part of IRT training, when you're training in relation to use of force?---Yes.

You can see in that wheel there's references to "Communicate," in green?---Yes.

You're familiar with this particular wheel, I take it?---Yes.

And what does that refer to? Why is "Communicate" in green, covering the whole circle?---Well, it refers to every situation, communication is important to de-escalate.

Communication with the potential assailant?---Yes.

Why is it important?---Well, as in the 10 Safety Principles. If you can minimise force.

Sorry, can you repeat that?---As in, for the 10 Safety Principles. If you can minimise force by communication, that is a desirable option.

Okay. That's something that officers are trained in?---Every officer. That's our basic training, yes.

Is that reinforced at the IRT training, communication?---When – as mentioned, IRT, when they deploy – if it was a high-risk situation, our primary role is to cordon and contain. If there is any one situation where we would take an affirmative or a tactical action- - -

Beg your pardon, I missed that last bit?---Affirmative or a tactical action, there's only one situation where we're authorised to do that.

Right. What's that situation?---That's called an Immediate Emergency Action.

Yes? And what – can you explain what an Immediate Emergency Action is?---Yep. Well, in a declared high-risk incident where IRT are cordoning a situation, for example, maybe a house. And we are cordoning that unit, containing it until the arrival of a Tactical Response Group, which is situated in Darwin. And geographically, that's six hours to the next day away for a response. So we have been – we were approved to commit to an IEA if needed, which is an Immediate Emergency Action. And basically that means if, within the situation we are controlling, if a life-threatening situation would occur within that situation, we are authorised to enter, identify, challenge and – and form an arrest of an offender and save the lives of the person within the stronghold.

When the IRT is deployed as an Immediate Emergency Action, does it require specific authorisation?---Yeah. High-risk deployments have a very set protocol and

very strict guidelines. Basically, they have to be authorised by Assistant Commissioner as per TRG. When deployed, there are our four plans which we are authorised to act on, or to – and they are cordon and containment plan, arrest/surrender plan, negotiate an escort plan and an Immediate Emergency Action plan. Now, those formal plans which have to be filled out by a team leader, or a sergeant, then those plans are reviewed by a tactical commander, which generally could be the OIC of TRG. And then the Police Forward Commander has to approve those plans.

But do you know whether the deployment to Yuendumu on 9 November was deployed as an Immediate Action Plan?---No, it wasn't.

It was not. Okay. Is that because it was not regarded as a high-risk deployment?---It was a general – general response deployment.

General support deployment?---General support, sorry. Those plans do not apply to that.

Just going back to this document, at the bottom of the page, it says, "Physical confrontations are not static but are dynamic by nature the tactical options wheel turns in either direction, moment by moment to the appropriate option, depending on all the circumstances. These circumstances may include factors such as size, special skills, age or sex of the subject and the police officer". See that?--Yes.

And the - on the outside of the wheel there are various options which include negotiation, tactical disengagement, firearm, cordon and contain" et cetera?  
---Yes.

Is your understanding - what is your understanding of the training in relation to this particular model?---That particular model, it can be adapted or used in all aspects of policing. It is taught through college and applies to all general duties policing . That obviously has - it could be applied to all situations.

Go over the page, I think the first statement is a statement of the obvious. "The role of a police officer is to apply the correct tactics and communication in an endeavour to bring about a peaceful resolution to the incident." I want to ask you about the next sentence, "The escalation and de-escalation of the incident may be in some cases dictated by the officer's correct choice of tactics." What, when you do your IRT training what training is done in relation to the notion of escalation and de-escalation?---I could say our basic training is to - is CQT - Close Quarter Tactics and it's basically obtaining the skills to - like I said - to expediently enter a house, whether it be forcibly enter or locate and apprehend offenders. So that's basically the skill set and there are some specific skills to do that, that aren't taught through the general duties program.

Are the Close Quarter Tactics - CQT?---Mm mm.

Are they taught in relation to high-risk deployments?---Yes, that's basically high-risk deployment.

Not general support?---General support, no.

But does that mean most of - do you mean by that answer that the majority of or all of the training for IRT relates to high-risk deployment?---It focusses on our core function, which was high-risk deployment. It's a perishable skill that needs to be reinforced as often as we could.

Can I just refer you to page 28 and 29. Each of those matters in the wheel are then elaborated upon under the heading "Tactical Options", do you see that?---Yes.

"Presence other weapons, ASR" et cetera. It says, "Empty hand tactics" what is that?---Defensive tactics, hands on basically.

Grabbing the subject? Is that right?---Yes, holds, grabbing.

Are one of the holds you are taught is a seat-belt hold, is that right?---A seat-belt, yes, that is one of them.

Negotiation- over the page now - I will just pause at the "firearm" do you see there are ten, sorry nine dot points in relation to firearm, do you see that?---Yes.

"Verbal warning, continuous assessment, hand on firearm, draw firearm, aim firearm, reassess your situation, verbal warning, discharge firearm." And then "assess situation"?---Yes.

So there's as series of escalating steps, is that right, before the firearm is actually fired?---Depending on a situation.

Is that something that is taught to police in their either induction training or annual training?---Yes.

If you go to - and is that also reinforced when you do IRT training? Those escalating steps?---Yes, they form part of our training, it's like I said, none of the IRT training supersedes any of the general duties training.

If you go to page 38 please? Still part of part 2. There is a reference at the top of the page to "Planned response". "When officers receive a call to attend an incident they should always follow the same planning process" then there are details of various things. Are you familiar with this part of the manual?---Yes, I am now.

When you say you "are now" were you before now?---Yes, it forms everything we do. I am reading it now, I go - I am familiar with it.

Okay. So it says, "Obtain as much information as possible" and there were the nine information - types of information and then it's got "assess the situation when in

possession of the facts, develop an action plan. Work as a team, request assistance on route to the scene, consider a plan of approach, what resources may be required. Upon arrival at the scene reassess the situation, approach and evaluate the scene" and over the page, "arrest". "Assess the threat level" et cetera". Do you see all that?---Yes.

Is that part of what the Northern Territory Police Force are trained in when they are trained in defensive tactics?---Yes.

And is that reinforced at the IRT, the need to develop an action plan and reassess, approach and evaluate the plan?---It's - this forms basically what general duties do every day when they go to a situation, and again it transfer to IRT, no changes.

Okay. Go to page 39, "Above all, remember that an unplanned response or approach may precipitate a confrontation. It is only possible to be threatened if you place yourself in a position where you can be threatened." Is that something that is drilled into Northern Territory Police in their training?---I wouldn't say "drilled" but it's part of our training.

But when you say - is that an important part of the training?---Yes, it's all important.

"Utilise communication skills. Be persuasively assertive. If the use of force is necessary" and there's a number of matters, 'Does the problem justify the action' et cetera. If you go over the page - I want to pause on this. "Remember" and that's in red, "Stop, slow down" number one. Two, Step back. Three, Assess and reassess. If then thinking" and then "risk assessment". Is that part of training for Northern Territory Police?---Yes, we're all trained in those aspects.

Is that reinforced in the IRT training?---As mentioned, our training does not over-supersede anything from general duties training.

And then it describes, "If then thinking" "You must always be a step ahead of a potential violent subject or situation by applying 'If then thinking' practices". Are you familiar with the notion of "if then thinking"?---It's just - it's situational awareness and - yes, it forms basically what we do every day, whether we are conscious of it or not I guess.

But it's basically "If someone does this, then I will do that" - is that what "if then thinking" is?---You could see it that way, but I guess it's depending on the individual.

Now, if I can take you to page 45, there's a reference to unplanned incidents. "Many incidents that occur can be classified as 'unplanned' these incident unfold without any warning and occur quickly with little, if any, time to develop a plan of action. Officers from time to time will be confronted by a threat requiring immediate action, with no time to allow for disengagement or retreat." Is that something that is, to your knowledge, the Northern Territory Police are trained in, unplanned incidents?---Yes we are trained in unplanned incidents.

Is that something that the IRT focuses on?---Well IRT's – we have – they're all – all ours are planned responses.

Okay, I see. But that doesn't – that doesn't really apply in this case?---No we – we know a lot more information, and we have the situation that's in front of us, and we can formulate plans. That's just – yeah.

I'll just ask you now in terms of your knowledge of the general training, it says "Always attempt to convert an unplanned incident into a planned response." Is that part of the general training?---It's just part of normal policing, yes.

So de-centralised, what does that mean, de-centralised? See those nine points?---Yes, yeah I guess it means consider other options basically.

Okay, do you mean other options, other than lethal force, is that what you mean?---Depending on the situation.

No what I'm asking you is, you said de-centralised means consider other options. Other options to what is what I'm asking?---Other options to what's being presented in front of you. It's – it's hard to say what to do unless – situations are all different for policing.

Of course?---And time and distance determines what – what we do.

But these nine matters?---Yep.

Are matters that the police are trained to do when confronted with an unplanned incident?---Correct.

Correct? "So disengage and withdraw, where appropriate", is that correct?---Yes.

"Isolate where appropriate"?---Yes.

"Cordon and contain when appropriate", et cetera?---Yep.

Just on six, "Negotiate with the offender", and eight, "Communications should continue throughout." Are those two matters central to how to deal with an unplanned incident?---It's – it's hard to comment on – policing is – incidences are vast and varied. If – if you're given the opportunity, by all means, communicate.

I'll take you to the next tab please. And if I could just perhaps this and then I'll conclude. The next document is "Operational Safety". You familiar with that document?---Operational Safety, I believe so.

By the way, before I ask you that, the Defensive Tactics manual I just showed you - -  
- ?---Mm mm.

- - - do you accept that was applicable, as at 2019?---I believe so.

Okay?---I – without looking into it, it looks like the current one.

Okay?---I'm not a defensive tactics instructor.

Okay, if you go to Operational Safety. You familiar with that document, "Incident Management", that is s 2, "Incident Management"?---Yes.

All right. If you go to page 63, you said before when you were talking about ICENCIRE that it relates to siege and barricade situations?---Yeah, the IRT builds up on – builds from ICENCIRE and GD's platform to the tactical and develops it from there, and so there are different requirements from ICENCIRE from a tactical view point.

I understand. The situations of this particular – are you familiar with this document that I'm looking at? Part 5 "Siege and barricade situation"?---Yes.

And you can see its application includes, if you go to page 63, "Armed resistance to lawful arrest", do you see that, on page 63?---63?

Under heading "Type of Situations". "Hostage taking, kidnapping, barricade" and also "Armed resistance to lawful arrest"?---Yes.

If you go to page 72, it talks about the application of ICENCIRE – or sorry, principles. It talks about this model. "Introduces a model for dealing with siege, barricade and other serious high-risk situations. The principles can be applied in a much wider variety of jobs and situations". Do you see that?---Yes.

So – and that is – that is something, ICENCIRE, that is specifically taught in the IRT?---Yes, that forms part of our siege management strategy.

And if you go to page 64, and I'll just let – I'll just finish with this page. It's got the police plan "ICENCIRE", do you see that?---Sorry, what page was that?

64?---Yep.

So "In response to the above situations, which include armed arrest, a simple effective and manageable plan called a police plan (inaudible)". And then it's got the five points of ICENCIRE. "Isolate, contain, evacuate, negotiate, conclude, investigate, rehabilitate, evaluate." And those particular points are then spelt out in examples. Do you see that?---Yes.

Is that consistent with what is trained – with what Mr Rolfe would have been trained in, in the course I showed you about, exhibit 63?---Everybody gets trained in ICENCIRE, it forms a part - - -

That's not what I'm asking you sir?---Yeah, sorry - - -

Exhibit 63, which I took you to- that's – have you got that in front of you, the (inaudible) instructions?---Yeah, I'm having trouble hearing you again.

Okay, I'll speak louder. If you go to page five. Exhibit 63 is the Cordon Contain Course, you got that? Yes that's the one?---Yep.

If you go to page five, I've asked you this before, about the ICENCIRE course that was taught?---Yep.

Is the content of ICENCIRE accurately reflected in page 64 of the document I've just taken you to?---Yes, it's.

Thank you.

Is that a convenient time, your Honour?

HIS HONOUR: Yes, it is.

So members of the jury, would you now retire for the day, and we will reassemble and commence again tomorrow morning at 9.30.

JURY OUT



HIS HONOUR: Thank you Sergeant, you can stand down, we'll continue with your evidence tomorrow morning.

WITNESS WITHDREW

HIS HONOUR: Are there any matters that need to be raised?

MR STRICKLAND: No thank you, your Honour.

HIS HONOUR: Then I'll adjourn.

ADJOURNED 1:48 PM TO THURSDAY 24 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 24 FEBRUARY 2022 AT 9:35 AM

(Continued from 23/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes.

MR STRICKLAND QC: Can I just advise your Honour of the plans for the next two days and - - -

HIS HONOUR: Certainly.

MR STRICKLAND: My learned friend and I have had some discussions to try and shorten things, and we've agreed that in relation to the expert, Dr Matthew – Dr Mackintosh, his reports will be tendered. And Dr Ackland's reports, subject to some redactions will also be tendered, and that will reduce the time significantly. Dr Mackintosh will be called after morning tea today.

HIS HONOUR: Yes.

MR STRICKLAND: And Dr Barram – sorry, Sergeant Andrew Barram will be called tomorrow. My learned friend understandably won't be in a position to start cross-examining him tomorrow, and I won't be able to finish examining him tomorrow. He's the last major witness.

HIS HONOUR: Yes.

MR STRICKLAND: What I propose would be to call him last. I will do some preliminaries with him. Should go for half an hour, 45 minutes, and then he'll be the last witness. And I expect he'll be finished sometime after morning tea tomorrow - - -

HIS HONOUR: All right.

MR STRICKLAND: I've deferred him until Monday. And I expect the Crown case will finish, I expect, roughly at the end of Monday.

HIS HONOUR: All right, thank you.

MR EDWARDSON QC: Your Honour, can I just follow up on two things in that respect. Firstly, in so far as Dr Botterill, I think he's got some commitments tomorrow. I'm more than happy if he wants to be – if my learned friend wants to interpose him, so that we can deal with his evidence. That's the first thing. As far as Mr Ackland's concerned, who's the defence biomechanics expert, that depends on whether we go into evidence. I haven't made a final decision as to whether we will go into evidence, and if so, in what terms. But if he is called, then obviously the report will go in, as my learned friend's indicated.

HIS HONOUR: All right, thank you.

Then we'll bring the jury in.

JURY IN

MR STRICKLAND: Yes, your Honour, can Lee Bauwens be recalled to the stand.

HIS HONOUR: Yes.

LEE BAUWENS:

HIS HONOUR: You're still subject to the oath that you took yesterday?---Yes, your Honour.

Mr Strickland

MR STRICKLAND: Thank you, your Honour.

XN BY MR STRICKLAND:

MR STRICKLAND: I just finally want to ask you some questions about Mr Rolfe. Did you consider him to be an experienced member of the Immediate Response Team in 2019?---Yes I did.

Did he, Mr Rolfe, help train IRT members?---He didn't help train, but there were certain situations where he assisted me and showed me some of his skills he had learned and - yes.

So he assisted you in the training of others, is that correct?---Yes, on certain occasions. Not all the time but just - he did at some stages, yes.

Could the witness please be shown exhibit 1, tab 41. Members of the jury if you - I am going to turn to it, it's called "IRT Training Summary"?---Yes.

Have you got that? Go to page 5 please? I just want to go through the entries relating to Zachary Rolfe. Do you see that at the bottom of page 5?---Yes, I do.

"ASPIRT" - is that Alice Springs IRT?---Correct.

And there is a number 3638. Do you know what that number refers to? In the heading - the black - in bold print?---That's Constable Rolfe's number - operation number - service number.

Every officer has their own unique number, is that right?---That's correct.

Just going to the first entry. Alice Springs IRT General Training and then on 13 July 2019 it's got "IRT Qualification Shoot passed 15/6", can you tell the court what that means?---Yes sure. The Qualification Shoot is - forms the part of our weapons handling and training qualification. It consists of a 12-metre shoot which is conducted at the range with live fire in full kit, which is ballistic vests, helmets, camouflage uniform. It consists of the primary - our primary weapon and the Glock weapon. At 12 metres we have three mags of five of the primary weapon and two of

six of the Glock. It's a shoot which is a walking and turn shoot, so if we're walking - -  
-

A walking and what - sorry?---Walking and turn shoot, so it's not a static shoot. The members are a static first - - -

Just wait for one moment. Yes, go ahead, sorry?---Yes. So it's a shoot which is static but then are directed to go right turn - left turn - and they're walking along a line.

Yes?---Just 12 metres from the target. On the command of "Up" they shoot with their primary weapon, one shot at a desired target. When a naturally occurring stoppage occurs - which is does because there's only five rounds in the magazine - - -

Slow down if you don't mind?---Sorry. When a naturally occurring stoppage occurs - it's a stoppage drill because the three magazines only have five rounds in them, so after five rounds we have an empty magazine, then the drill is to go, to drop that, go the Glock and to fire two rounds then to go back to the primary weapon and correct the stoppage and be ready for the next sequence. And the pass mark is 15 and 6.

I will go to that in a moment. What is - when you said the "primary weapon" what are you referring to?---That was the AR15 or - yep.

So what is the part - what does 15 over 6 mean - 15/6?---That means he's got scored 15 for the primary weapon, which is 3 of 5.

I beg your pardon?---Three of five rounds.

Yes?---Because as I stated, there were three magazines of three rounds each, so that would be 15 rounds.

So he got a perfect score?---Yes, he did.

Yes, go on?---And the 6 signifies the Glock rounds which is two rounds - of two magazines of three, so six rounds.

He got a perfect score for that too?---Correct.

In your experience was Mr Rolfe a good marksman?---Yes, he was.

Now, the next entry says, "Alice Springs IRT less lethal validation". Do you see that entry?---Yes, I do.

And he completed that course on 6 June 2019?---Yes, he did.

And it's got "12G bean bag only". What does that relate to?---That relates to our 12 gauge pump action shotgun which is a less lethal option that the IRT has. This shotgun has been marked so it is solely to be used for less lethal applications and it

fires a round which is basically called a "bean bag round" which is - roughly speaking, it is a little bag, Kevlar bag full of lead shot with a tail for stability and that is used for obviously less lethal targets when they arise.

The next entry says, "Alice Springs IRT general training completed 24 April 2019. Do you see that - the third entry?---Yes, I do.

Is that the annual training you have given evidence about before?---The annual training?

That's right. You've given evidence that each officer engages in, I think you said "requals" - was that your expression - requalifications every year?---On the bean bag shotgun, yes, that's a requalification to stay current.

Do you know what the third entry refers to?---Yes, that's basically another way of saying the IRT qualification shoot. It's been referred here as the "ANZNCT shoot" which is Australian and New Zealand - - -

I'm sorry to interrupt Mr Bauwens, I am not talking about that one?---Sorry.

I know it's a little hard - I'm talking about the third entry?---Sorry, "CQT completed"?

It's got - I'll just read it to you; "Alice Springs IRT general training", it's the one completed on 24 April 2019 and there is no entry in the right hand column under the notes. That's the one I'm talking about?---All right, yes, I've seen it.

Do you know what that's about?---No, it's - that training hasn't been added to it.

The next one is - again "IRT general training completed on 14 February 2018" and it's got CQT completed". What does that refer to?---CQT is our Close Quarter Tactics. That would refer to a five room test which we also complete as part of our CQT training, we do requals of that every six months. That would be a drill where we - as mentioned, do house clearance or stronghold clearances, entering the stronghold, identifying threats, challenging them, engaging them in a safe manner and it consists of five rooms and that's tested every six months.

And you give evidence yesterday that is - that relates to when you have high-risk deployment, is that correct?---Yes, that's for a high-risk deployment to comply with the siege management strategy.

Which is specifically authorised by the various plans you've given evidence about?---Yes, as per the siege management strategy, which is a national strategy recognised in all police forces. It runs on the same program so they're all interoperable with other states.

You're talking a bit too quickly?---Sorry, interoperability with other states, so basically all the states - police tactical groups are on the same page and we have the same training because we often go to other states to train.

The final entry is "Alice Springs general training" the course completed on 1 November 2017 and it's got, "All members passed IRT-ANZCTC shoot". First, what does ANZCTC refer to?---Yes, sure. The ANZ - it's Australian New Zealand National Counter-Terrorism Committee, it's basically - - -

What is it - counter-terrorism - what does the "C" stand for?---Committee.

Committee?---Yes.

Yes, thank you?---It's basically another word of the IT qualification sheet because we adapt the same shoot which TRG also adapt, the use that 12 metre walk and turn shoot and it's also the shoot that is used in the provocation for interstate courses. So we have used that as a qualification for ourselves.

Is that the same as the first entry?---Yes, it is.

They are my questions, your Honour.

HIS HONOUR: Thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: Sergeant, if you can just try and bear with me when I ask you questions and just try and slow down a little bit because I do have a little bit to get through and I need to hear exactly what - we all need to hear exactly what you have got to say. First thing I want to ask you about is exhibit 62, which – the NTPF Orders and Guidelines folder. Now, you've given evidence so far about what I'll call general policing, or general police duties, on the one hand. And on the other – and the training that goes with being a police officer – and on the other, members of the IRT. And you've tried to explain – and I want to develop this shortly – the difference between general police duties and the capacity of the IRT, depending upon the situation. Do you understand?---Yes.

All right. Now, you've been asked some questions about this particular folder. And, in particular, the Northern Territory Police Force Orders and Guidelines folder. Can I cut to the chase and say, these general orders apply to all serving police officers in the Northern Territory, do they not?---Yes, they do.

And so for example, when we're looking at operational safety and the use of force, those general orders apply to everyone?---Yes, they do.

And they apply to members of the IRT, too?---Yes, they do.

And likewise, Defensive Tactics? The same applies to every single police officer that's involved in the force?---Yes, they do.

So when you were taken to part 2, in particular, page 21 – which is the Operational Safety Philosophy and Tactics, that is not something that's unique to IRT members. It's something that applies to every single member of the Northern Territory Police Force?---That's correct.

So it goes without saying that there is a general philosophy, as we can see on page 22, to the force. Namely, the success of an operation will primarily be judged by the extent to which the use of force is avoided or minimised?---That's correct.

Now, it may come as a great surprise to some, but isn't it plain, common sense that all police officers are taught and told that you only use force when necessary?---Absolutely.

And the force must be reasonable and proportionate?---Yes.

In other words, if somebody's brandishing a chopstick, you don't pull out your gun, do you?---Generally, no.

No. On the other hand, if they produced an edged weapon which is potentially lethal, then you're told you're entitled to deploy your weapon and you have to, if necessary, be prepared to pull the trigger?---That's correct.

As we can see and as Mr Strickland took you to at the bottom of page 22, any force used by a member of the Northern Territory Police Force must be justified in terms of the *Criminal Code Act* and the sections as specified?---Yes.

Well, we're all bound by legislation, police officers included. It's true, is it not, that that's no more than a reflection of the legislation which binds the police in that respect?---Correct.

"Conform to the principles and instructions set out in the Operational Safety, Training and Procedures manuals and any other policy, procedure, general order or training manual." Again, these are general orders which cover the day-to-day responsibility of police officers in their duties. Correct?---That's correct.

And then, as you were taken to before, the different types of force that might be applied, as we can see on pages 23 and 24 of these general orders – sorry, have you got it in front of you?---I have got it, there's a - - -

Sorry, can you turn to tab – my apologies – tab 4, which is the Defensive Tactics. And can you go to page 23 where there are definitions of minimum force, unnecessary use of force and so on. Do you have that?---Yes, I have that.

And if you turn to page 24 – because for present purposes, it's probably of more relevance – lethal force.

"Any use of force that is likely to cause death or serious harm. Points to consider. Must be the option of last resort, could the subject cause death or



serious harm, is there the opportunity for the subject to cause death or serious harm, is an officer or third party in jeopardy, is there any less than lethal alternative that is likely to be effective.”

Now, that’s a broad statement of what is plain, common sense. You don’t inflict lethal force unless it’s necessary and required in the circumstances?---That’s correct.

And your training – and I’ll come to IRT in a minute – your training as a police officer over many years is that there are certain circumstances which warrant the deployment of the Glock and the pulling of the trigger?---That’s correct.

Which always has the potential of lethal force?---Correct.

And it’s true, is it not, that your training as a police officer is that if you deploy that weapon, that Glock, you should shoot at the central body mass?---That’s correct.

And that is the training of every single police officer in the Northern Territory?---Yes, it is.

And you’re also taught, are you not, that you are to pull the trigger to incapacitate the individual?---That’s correct.

And you keep firing until that person is incapacitated?---Yep, till the threat no longer exists.

I beg your pardon?---Till the threat is no – no longer exists.

So until the threat no longer exists. And that may require one shot, it might require two, or might require many more?---That’s correct.

Every case depends upon its own facts and circumstances?---That’s correct.

I want you turn if you can, now – I’ll come back to the Operational Safety Principles which, of course, apply to every single police officer in the Northern Territory. But I want you to look – turn to – or perhaps if you can have exhibit 37, because it’s convenient to me, if you don’t mind. It’s actually in the folder, I think. Sorry, it is in this folder. If you turn to part 4, which is page 64 of the document in front of you.

Which, for the members of the jury, is the same as exhibit 37.

Do you have page 64, down the bottom?---Sorry, it’s page 64?

64, part 4, Edged and Blunt Weapon Awareness. Take your time. You got that?  
---Yes, I’ve got it.

I want to focus, if I can, on the last paragraph in the introduction which is the model, can I suggest, for all police officers in terms of their training and understanding of edged and blunt weapon awareness.

“Members should not assume that they will be given warning of an impending edged weapon attack, allowing for time and room to prepare. A person carrying a small, easily concealed weapon with a very limited range is unlikely to reveal it until they are within range. Members facing edged weapons can have fractions of a second to respond if the weapons are employed in very short range. People who are attacked with edged weapons often don’t see it coming until it is too late.”

That is something that is taught?---(No audible response).

Something that all members understand?---Definitely, yes.

And the danger of an edged weapon is that it can be easily concealed?---Yes, it can.

And if deployed in close circumstances, it can have catastrophic consequences?  
---Yes, it can.

Fatal consequences?---Yes.

Police officers are often exposed, for example, in the neck region?---Yes, our vests don’t go higher than the vest – than the neck, sorry.

And so – I’m sorry, I cut you off. In the context of an edged or blunt weapon, if it’s deployed to that region – as you well know, consistent with your training – it can have fatal consequences?---Yes, it can.

You have an arterial bleed; what does that mean?---It – arterial bleed in the neck is very hard to control because you can’t put any pressure on it, basically. And yes, your life expectancy is very low.

Thank you. Now, what I want to do now is ask you a little bit about specific training and particularly, in circumstances where a person has an edged weapon and they’re in very close proximity to you. You’ve received some training in that respect?---Yes.

What sort of training?---That training forms part of our general duties training.

Yes?---Which is through our – and reinforced in our firearms training each year. The training basically consists of a procedure called, from what I remember, as the shove and shoot.

Shove and shoot, yes?---I believe. Where a target is placed at a very close range- -

Stand up and just indicate what shove and shoot is, please, for the members of the jury?---We – at the range, a paper target is placed in a very close proximity to the person. On the command of – on the command, we are to simulate an attack from a knife. Arm goes up to either push or deflect. At the same time, the firearm is drawn

and shot from the hip area. So it's an immediate drill to fire the gun as quickly as possible to counteract the knife attack.

Now, at my request, did you source some photographs, which are an indication of this method of teaching?---Yes I did.

Can I ask you to look at the two photographs which are now produced to you. Are they the two photographs?---That's correct.

I'd ask that they be put on the screen please, one in turn.

Right, what's that show?---That shows a assailant who is with the green pants, obviously, and person is signifying a police officer, who's responding to an attack from edged weapon, or open handed there, but edged weapon, and a firearm being drawn, and utilised, as close as possible. As a - - -

Show the second photograph please, as well?---It may not be an exact reproduction of what we actually train, but this is very close to the situation.

That's the best visual simulation that you could find, so that we can depict, or imagine - - - ?---It is.

- - - the sort of – the training that you received?---Correct.

I tender those two photographs, your Honour, I've got copies for the jury.

MR STRICKLAND: No objection.

THE WITNESS: Our training's actually the – the Glock stays a lot lower.

MR EDWARDSON: Thank you.

HIS HONOUR: That'll be exhibit 64.

EXHIBIT D64 Two photos depicting training of attack with edged weapon provided by Lee Bauwens.

MR EDWARDSON: Now Sergeant, perhaps if you could return that exhibit. I'm – and could you have in front of you exhibit 63 please, which is the Cordon and Containment Course, Southern Command, for the eighth to 19 May 2017. Actually keep exhibit 62 with you, because I'll come back to it in a moment.

Sorry, Madam Usher, if you wouldn't mind leave that one, thank you.

For the moment I want you to focus on exhibit 63, which is the Cordon and Containment Course, Southern Command, and the evidence in this trial is that that's the course that was undertaken by Zachary Rolfe, Sergeant?---Yes.

And you were – your attention was directed yesterday to page five of that document?---Yes.

And in particular, the course, dealing specifically with what's described in that document as PP03 ICENCIRE, I-C-E-N-C-I-R-E?---Yes, ICENCIRE.

ICENCIRE. So that indicates that Zachary Rolfe participated in that particular course?---That's correct.

And you remember that yesterday you were asked some documents – some questions about that, and I'll just remind you what Mr Strickland asked you. You were shown exhibit 14. You were asked whether – who created it, and you said it was mainly created by Senior Sergeant Mike Williams. Do you remember saying that yesterday?---Standard Operating Procedures, yes.

And – and what I want to do is ask you specifically about the questions that were asked about ICENCIRE. ICENCIRE, sorry, my apologies. At the bottom of page 76, you were asked this, "So when you did IRT training?" Answer, "Yep."

MR STRICKLAND: Sorry, your Honour, 76?

MR EDWARDSON: 746, sorry, 746.

"So when you did IRT training", answer, "Yep."

"When you – so you delivered IRT training?---Correct."

And then on to 747, question, "Did you teach anything in relation to this document, Defensive Tactics?---Obviously without reading the whole document and being over it, our training was higher level than GD training, and obviously incorporated some of these things. I couldn't tell you specifically right now without looking at them. But our training was different from the general duties response, in that it was a tactical response to a high risk situation, which does not incorporate some of these things" - - -

MR STRICKLAND: Says "Does".

MR EDWARDSON: "Does incorporate some of these things. But I – without going through, I couldn't tell, linked to each one of them."

And what I really want to do is just summarise what you were saying there, if I can. What you were taken to, in relation to defensive tactics, was of course the document that we've discussed ad nauseum, as applying to all Northern Territory Police Officers?---That's correct, yes.

The IRT has a specific training module?---That's correct.

And it's training – is trained for a specific purpose?---That's correct.

The primary objective, as I understood your evidence yesterday, was to cordon and contain?---That's correct.

And the idea is to cordon and contain specifically, until for example, TRG, could then attend?---That's correct.

That's the Tactical Response Group?---Yes.

So that's what you're trained to do, or the IRT members are trained to do. But is it not true, that the cordon and contain is a situation where, for example, you know that there's an offender inside a house?---That's correct. We have prior knowledge of the situation.

And the idea is you're quarantining a particular zone with skilled members?---That's correct.

Until such time as TRG arrive?---Yes, that's correct.

Sometimes that may not be possible?---Yep, that's true.

It may not be possible because TRG can't get there in time, and something changes, the landscape changes, at the crime scene?---Yes, that's correct.

You mentioned at one stage what's called an Immediate Emergency Action. What is that?---Immediate Emergency Action, it was developed to enhance our cordon capabilities. It was addressed that if police are managing a high-risk situation, that we have to have a plan for all scenarios that can develop within that situation. And at that time, when I started, there was – there was no IEA, and we were lacking in that area. So basically an IEA is a plan, and it's a formulated plan and approved plan, that if the situation changes within the strong-hold, for instance, there is a real apparent risk of life threatening situation, that the IRT are trained, and authorised to expediently enter the house, conduct CQT drills, which are Closed Quarter Tactics, in effort to locate and apprehend the offender, and save the lives of the person who was – had their life in danger.

Let's say we've got a siege, and let's say there are hostages. At the moment you cordon – you've got cordon and contain. You've been deployed. It's a high risk deployment in those circumstances, is that right?---Correct.

And so the idea is, if in a perfect world, you cordon, contain, and wait to TRG to arrive?---That's correct. We formulate all those plans - - -

Yes?---Beforehand, and in case situation changes, but we are cordon, and report and record.

But if the situation changes, the difference is, that you have the TRG skills, if I can put it that way in simple terms, to enter the house, should that be necessary?

---That's correct.

And that's what the IEA is for, an Immediate Emergency Action?---Correct. We can only respond to an incident we have to – we cannot plan to go in there on our own accord. We have to wait for an emergency to develop.

Right, just bear with me a moment please.

Excuse me, your Honour. Sorry, your Honour, I'm just trying to find that - - -

HIS HONOUR: Yes, that's all right.

MR EDWARDSON: - - - ICENCIRE –

In exhibit 63, have you got that in front of you? (inaudible). Your attention was directed to I think it was page 5, which indicated that they're trained, and I've mentioned before, Mr Zach Rolfe was trained in ICENCIRE?---Yes, that's correct. ICENCIRE is a plan which is taught to all police from college, and reinforced during defensive tactics re-quals – qualifications, every year. IRT builds onto ICENCIRE, utilises and builds on to it with our training.

Thank you. Can you turn now to tab 5 please of exhibit 62. And do you recall that you were asked some questions specifically about this part of the general orders that deal – which apply to all police officers?---Yeah, that's correct.

And specifically, ICENCIRE's set out, I think on page 64 of that document, Isolate, Contain, Evacuate, Negotiate, Conclude, Investigate, Rehabilitate and Evaluate. Do you see that, page 64?---Yes I see.

Right, what you weren't taken to, and I want to direct your attention to, is page 63. The ICENCIRE police plan is clearly and plainly directed towards siege and barricade situations is it not?

MR STRICKLAND: Your Honour, I object. I object to the prelude which "You weren't taken to page 63." He was.

MR EDWARDSON: All right, we'll I'll take you to page 63.

HIS HONOUR: Yes.

MR EDWARDSON: It's directed, is it not, to siege and barricade situations? ---It's primarily used for that, and also high risk situations.

All right. But we can see, can't we, the types of situations envisaged in this instruction, are "hostage taking, kidnapping, redacting, barricade or siege situation, armed resistance to lawful arrest, aircraft high jacking"?---That's correct.

All right, now we know that from what you've told us yesterday, that this particular, I'm talking about the deployment of Zachary Rolfe and his colleagues, and the other – that is the other members of the IRT, on 9 November 2019, that that was a general duties deployment, although they were all members of the IRT?---Yeah general – general support group.

General support. In other words, it was not a high risk deployment?---It wasn't categorised as a high risk deployment.

But there is a difference, is there not, between a high risk deployment, and a high risk offender?---Yes there is.

Now, I want to ask you some questions if I can, about Kumanjaya Walker. You have now seen, have you not, what's been described in this court, as the axe incident?---Yes I have.

And in broad terms, it shows Kumanjaya Walker, at the time that two officers, Officers Smith and Hand, were seeking to lawfully arrest him, he accesses an axe, and uses that axe as we saw graphically in the video footage, to escape?---Yes.

That plainly is a weapon that could have had lethal consequences, had he deployed it?---Yes.

And plainly, it would have indicated – it would have indicated to you, at least, that his presentation in that fashion, is such that he is a person who potentially is a high risk offender?---Yes.

Because, if cornered, by police officers, in circumstances of arrest, he may well access a weapon?---Yes.

A lethal weapon?---Yes.

And as we've heard, sometimes police officers have to respond to – in split – and make split second decisions, in circumstances where they're confronted with an edged weapon?---Correct.

Would you agree with me, when I put to you, that plainly, he would be properly categorised as a high risk target?---Yes.

So even though it was a general duties, or general support deployment, it was a general support deployment to arrest a high risk target?---Correct.

And all four members of the IRT had the requisite skills to deal with a high risk target, in those circumstances?---That's correct.

I have nothing further, thank you, your Honour.

MR STRICKLAND: Excuse me, your Honour.

REXN BY MR STRICKLAND:

MR STRICKLAND: You were asked some questions about the Immediate Emergency Action?---Yes.

Something you developed?---I – I didn't develop the Immediate Emergency Action, I had it added to our capabilities.

And that relates to what's described as the high risk deployment of the general support deployment, is that right?---No, that's – that's an action plan for a high risk.

Deployment?---Yeah, high risk deployment, yes.

Not the general support deployment?---No.

Thank you.

Thank you, your Honour.

HIS HONOUR: Yes, thank you, you may go?---Thank you, your Honour.

WITNESS WITHDREW

MS POOLE: Your Honour, the next witness to be called is Elizabeth Snape, and she'll be appearing via audio-visual link.

HIS HONOUR: Yes, thank you.

MS POOLE: I call Elizabeth Snape.

HIS HONOUR: Can you hear us?

There was some difficulty apparently this morning in getting the equipment to work.

MS POOLE: Yes, your Honour.

HIS HONOUR: We'll try and reconnect, but if not, we may need to take a quick break - - -

MS POOLE: Yes, your Honour.

HIS HONOUR: - - - and get it working.

We can hear you, can you hear us?

I don't think so.



All right, we're going to have to fix this, so would you retire just for a few moments please, members of the jury.

JURY OUT

HIS HONOUR: I'll adjourn until the connection's made.

ADJOURNED

RESUMED

HIS HONOUR: Just before that, we'll need to bring the jury in, thank you.

JURY IN

HIS HONOUR: Yes.

ELIZABETH SNAPE, affirmed:

XN BY MS POOLE:

MS POOLE: Is your name Elizabeth Snape?---Yes.

And you are from Katherine; is that right?---Yes.

You were visiting Yuendumu on the day of the shooting incident on 9 November 2019; is that right?---Yes.

And you were visiting Yuendumu for your partner's uncle's funeral?---Yes.

And Kumanjayi Walker is your partner's nephew; is that right?---Yes.

And you had only known him for a few weeks at that time?---Yes.

But Kumanjayi called you Aunty?---Yes.

And on Saturday 9 November 2019, you were outside House 511 when the police arrived there; is that right?---Yes.

You were sitting on a – you were sitting – you were outside in the outdoor area of the house?---Yes.

I'm just going to play a short part of footage for you and then I'll ask you some questions about that.

Your Honour, for the record, the footage that we're playing, it's Eberl – Adam Eberl 2 of 4, Actual Incident, from the beginning to 9:49:57.

HIS HONOUR: Thank you.

MS POOLE: That's exhibit 24, your Honour. And the transcript is at exhibit 9, tab 2. Apologies, the – I'll come back to you with the transcript exhibit number, your Honour. That was incorrect.

DVD PLAYED

MS POOLE: Ms Snape, was that you that you saw in that footage?---Yes.

And you were carrying your daughter?---My son. That was my son.

Your son. How old was your son at that time?---2.

Were there other children around also at that time?---Nah, just my two.

Okay. Now, you were asked – you asked police why one of the other police was carrying a gun. Can you describe the gun that you were referring to?---I think it was a rifle.

And you said that he's got it aimed, "It's like he's got it aimed to shoot someone." Was that because of the way that the officer was holding that gun?---Yes.

What did you see? How was he holding it?---(No audible response).

Where was the gun pointing?---Just pointing as he was walking.

What direction was it pointing in?---Forward, this direction, how you're walking, holding the gun.

Okay. Do you mean straight ahead?---Yes, straight ahead.

The police officer said to you, "Somebody probably shouldn't run at police with an axe"?---Yeah.

Did you know what the police officer was referring to?---No.

Excuse me for a moment?---I do.

Now, did you tell your son – or you told a child, "Come here, come here"?---Yeah.

Which child were you speak to then?---My daughter.

How old was she at that time?---I think she was – how old, three?

And why did you tell her to, "Come here, come here"?---Because of – because I could see all the police around, you know? Wanted her to come to me. Like, stand up with me.

Your Honour, I have no further questions.

MR EDWARDSON: I have no questions of this witness, your Honour.

HIS HONOUR: All right, thank you. That concludes your evidence. We'll now break the audiovisual link?---Thank you.

WITNESS WITHDREW

MS CALLAN: Your Honour, I call Timothy Simpson.

TIMOTHY IAN SIMPSON, affirmed:

HIS HONOUR: Could you remove your mask while you are giving evidence please?---Thank you, your Honour.

XN BY MS CALLAN:

MS CALLAN: Sir, could you tell the court your full name?---Timothy Ian Simpson.

And you have a Bachelor of Forensic Studies and a Bachelor of Applied Science with Honours?---That's correct.

What is your current occupation?---I'm a forensic chemist with the Australian Federal Police.

How long have you worked for the Australian Federal Police?---Since July 2007, so approximately 13 years.

And over those 13 years have you undertaken duties in your capacity as a forensic chemist?---That's correct.

Do those duties include the examination of various items submitted to what is described within the AFP as the "chemical criminalistic team"?---That's correct.

And the examination you undertake is for the purpose of recording collecting and preserving potential evidence?---That's correct also, yes.

And also subsequent analysis of chemical trace evidence for comparison or identification?---Correct.

You also completed a number of training courses and workshops and subsequently have a degree of experience in the interpretation of textile damage?---That's correct.

Mr Simpson, commencing in March 2020, were you requested by the police investigating this matter to undertake textile examination of several items?---Yes, that's correct.

And that commenced, did it not, on 12 March 2020 when you were asked to identify any textile damage areas of interest?---That's - - -

On a set of items?---Yes, that's correct.

And that involved you examining and indicating the mechanisms that may have caused that damage?---Yes, that's also correct.

At that - and it's the case you received the items - and I will take you to them in a moment, but at that stage there were four in total?---Yes, that's correct.

You received - when you received them and conducted your initial examination, were you provided with any information as to the circumstance in which those items had

been dealt with?---If I may, I'll just explain the initial process for textile damage examinations, so it's better and clearer as to how we approach textile damage examinations.

Yes, thank you?---So, initially with textile damage examinations the information that we are provided by investigators or those involved in the investigation of the case is very limited. In most circumstances our request literally just reads, "Please conduct textile damage examinations on these items." The reason why we do that is so that we eliminate - or we try and reduce, at least, the amount of contextual bias that is applied to us. So we don't want any information and the reason why we want that is because we want to look at those items holistically without any information that will lead us towards any interpretation initially and it also allows us - affords us - the opportunity to look at the item holistically and find all areas of damage rather than just being boxed into the areas of damage which we expect to find based on the case circumstances. So in this case the request to us was, "Please just conduct textile damage examinations on these items" and then from there we went through our examination process.

Right and so to be clear, at that stage you were given no information which as you described, would give you a context as to those items?---That's correct.

Can I show you a bundle of photographs? Mr Simpson, do you recognise that bundle I just had placed before you, as comprising an index and then 27 photographs that you took in the course of the work you undertook for this matter? ---Yes, that's correct.

And just to avoid confusion, is it the case the very last page of that bundle is just a blank black page?---it is.

Indicating the end of the bundle?---That's correct, yes.

Your Honour, I tender the bundle which commences with a document titled, "Index to photographs supplied by Timothy Simpson".

HIS HONOUR: That will be exhibit 65.

EXHIBIT 65 Index to photographs supplied by Timothy Simpson.

THE WITNESS: Your Honour, I also have hard copies of that bundle printed if that assists the court in any way.

HIS HONOUR: I suspect that that has been done.

MS CALLAN: Yes?---Okey-dokey.

MR EDWARDSON: Can I have a copy please?

MS CALLAN: Yes.

MR EDWARDSON: I prefer that. We will manage.

MS CALLAN: Your Honour, the witness has indicated that he has brought to court a spiral bound equivalent and the quality of the photographs is better than the reproduced images which has been tendered as exhibit 65. Could I ask that the spiral bound equivalent form part of exhibit 65? Plainly enough there is not enough copies of the spiral bound for the jury. What they do have is - can I describe it as an "acceptable equivalent" but they may well want to inspect - - -

HIS HONOUR: I don't think there will be any problems with that. So if we can have one of those spiral bounds. How many have you got?---I've got 11 spare copies, your Honour.

Well.

MS CALLAN: We'll let the members of the jury decide how they are to be distributed, perhaps.

HIS HONOUR: Yes, well we'll take hold of those if we can, and they can form part of the exhibit.

MS CALLAN: Yes, your Honour, thank you.

If I may, Mr Simpson, by reference to the photographs first take you to the initial four items that you received and were the subject of your initial examination. If I take you to photograph number one. Do you recognise that as a blue T-shirt that you received, and was the subject of examination by you?---Yes, that's correct.

Your Honour, I can indicate for the record, that this is what's described in these proceedings as Constable Rolfe's blue T-shirt, which has been tendered as exhibit 43. And those exhibits have been laid out on the table. I might ask if Mr Simpson could be shown exhibit 43.

HIS HONOUR: Yes.

MS CALLAN: Mr Simpson, do you recognise that as the t-shirt which you captured in photograph number 1?---Yes, that is the same exhibit, yes.

Okay. And then the next – and I'll come in a moment to your – the various observations you made in relation to these items, but just to work through what the four were that you examined, could I take you to photograph number 9. Do you see at photograph number 9, do you recognise that as a – I'll describe it as a blue police shirt. You can see from the image that there is a name plate bearing the name "Z Rolfe"?---Yes, that's correct.

You inspected that blue police shirt?---That's also an item I examined, yes.



For the record, that's been tendered as exhibit 42. If I can ask that to be shown to the witness.

Mr Simpson, do you recognise that as the blue police shirt of Constable Rolfe, that you examined?---Yes, that is the item I examined.

And the third item that you examined, if you turn back to photograph number 5. That's a tactical vest. You received and inspected that item?---Yes I did.

And for the record, your Honour, that's been tendered in these proceedings as Constable Rolfe's tactical vest, exhibit 44. I'll ask that to be shown to the witness.

Mr Simpson, do you recognise that as the tactical vest that you inspected and examined?---It appears to be the same item, yes.

And finally, the fourth item you received, if you turn to photograph number 15. Do you recognise that as another blue police shirt that you received and examined?---That is an item I examined, yes.

And for the record, your Honour, that's been tendered in these proceedings as being Constable Eberl's blue shirt, exhibit 45. And I ask that to be shown to the witness.

Mr Simpson, do you recognise that as the fourth of the clothing items, or articles, that you examined?---Yes, that is an item I examined.

Now you've already given some introductory evidence about the nature of textile damage examination. In particular, the reasons why you seek to conduct that examination with as limited as information as possible, to avoid contextual bias. Can I ask you, it's the case isn't it, that there is a set of protocols that you follow when you undertake textile damage examination?---Yes, there is a set of protocols that we generally follow for textile damage examinations. That protocol is a guide. There are some instances where we will deviate from that, but we will record that if we do.

Okay, in – I'll take you through some of the – those aspects of the protocols now. In doing so, can I ask you to indicate if you deviated from the protocols in this particular instance in the four items that you inspected?---I can.

So the first aspect of the protocol is that the purpose of textile damage examination is to determine the cause of textile damage? For instance, if it has resulted from a cut, a tear, a puncture, an abrasion, a burn, or normal wear and tear?---That's correct.

And in – is it the case that the textile is first examined macroscopically?---Yes, so - -  
-

And any trace evidence of significance removed. Now what does macroscopically mean?---So macroscopically is essentially using your eyes to examine the item. You

can further interrogate that item microscopically, obviously with the aid of a microscope, if you need to. But first and foremost, you start from your broader general easily observed trace evidence. And then you'll move into your more microscopic stuff.

Okay, and is your purpose to identify the – if it be present, the location, shape, size and characteristics of all damaged areas on the textile?---That's correct. So again you start from the general features of the damage, so the size and the shape, and the location of it. Sometimes the orientation of that damage, relative to the fabric. And then you'll move into the more specific features of the damage, such as the edged characteristics of that damage, or individual features that you can notice on that damage.

In doing so, are all damaged areas measured, are notes taken, and photographs taken?---That's correct.

Now do you classify the cause of textile damage, based on both the observed macroscopic, that is, using your eyes, and microscopic characteristics, that is using a microscope?---That's correct.

Is a determination made as to whether or not the damage is indicative of being quote, "fresh"?---Yes, that is correct. And I can explain that term further if you would like.

Yes please?---Okay, so the – the reason why we don't use the term in lieu of fresh, and we don't use recent, is because if I was to create damage on a textile item now, fold it up neatly, placed it in a cupboard, and it could exist there for years. And that – those damage features would be retained. Okay, the reason damage will change, and then be more indicative being not fresh, is through either prolonged activity, so activity applied to that area of damage. So, you know, if it's an area that would be moved during the wearing of the fabric, or through laundering, a couple of times through the washing machine will generally change the features of the damage. And it will be recognisable that that damage was no longer fresh. So when we use the term "fresh", it relates to the damage hasn't undergone an extensive amount of activity, or it hasn't gone through a laundering process. Rather – rather than a short timeframe.

Okay. Is it the case that bloodstaining can obscure features of the damage to textile, particularly once dry?---Yes, that's correct. Especially when you got heavy damage. If the blood tries along the edge – the edges of that damage, it's almost impossible to actually see any edge characteristics. It's just – you can't get through the blood to see the features, so.

And I'll come to it more specifically in a moment, but of the four items that you inspected for the purposes of this case, did that limitation arise?---No. There was dried bloodstaining noted, but it was in sufficiently low amounts that it didn't inhibit our ability to do textile damage examinations.

And now it's the case isn't it, Mr Simpson, that after conducting your initial examination of each of the four items, you were then provided with a pair of scissors and asked whether, in your view, the scissors be excluded as the cause of textile damage you had identified on each of those four items?---Yes, that's correct.

Can I ask you to turn to photograph number 7 and photograph number 8? Do you recognise that as photographs of the scissors that you received?---Yes, they are the scissors I received for examination.

Your Honour, for the record, those scissors have been tendered and marked exhibit 41 in these proceedings. If exhibit 41 could be shown to the witness, please?  
---Thank you. Thanks.

Mr Simpson, do you recognise that article marked exhibit 41 as the scissors that you were provided, and which you then used in relation to some of the work that you undertook in relation to the textile damage?---Yes, they are the scissors that I examined.

And you confirm the date you received – or you were provided with those scissors was 25 May, 2020?---If I may, can I please refer to my statement and report, your Honour?

Is there any difficulty with that, Mr Edwardson?

MR EDWARDSON: No, sorry. I have no objection to this witness referring to his statement or report.

HIS HONOUR: Yes, you may refer to your statement and report?---Thank you.

MS CALLAN: So it's the case, isn't it, you prepared a report detailing the examinations you undertook and the processes associated with that?---Yes.

And if I turn your attention to – and you – the report is dated 11 June 2020. If I turn your attention to par 2.3?---Yes.

I'll ask the question again. Did you receive those scissors, marked exhibit 41, on 25 May 2020?---Yes, that's correct.

To be clear, you received those scissors after having conducted your examination of each of the four items?---That's correct.

In order to address the question you were asked to consider – that is, whether these scissors could be excluded as a cause of textile damage – did you conduct simulation experiments?---Yes, that's correct.

In order to determine the appropriate constraints or the type of simulation experiment to be conducted, did you seek some further information from the police as to the

suggested context in which those scissors and these particular items of clothing had been used?---Yes, that's correct.

Can I show the witness a document?

Mr Simpson, do you recognise the document I've placed before you as an email from Wayne Newell, a Detective Sergeant with the Northern Territory Police Force, to you, dated 25 May 2020?---Yes, that's correct.

And you see the subject line is, "NT Police – Circumstances of Incident"?---Yes, that's correct.

And you see the email sets out what's described as a brief synopsis of the actual incident involving the scissors?---Yes, that's correct.

And attached to the email, if you turn to the second page, you see those are two images which are taken – you were told were taken from body-worn video. You recognise that as what was attached to the email?---Yes.

Can I ask that document be marked for identification, your Honour.

HIS HONOUR: That will be marked for identification with the letter X.

MFI X Email document from Detective Sergeant Wayne Newell to Timothy Simpson, 25/05/2020.

MR EDWARDSON: Your Honour, I would prefer that it was tendered, if you don't mind. If they don't, I will.

MS CALLAN: I'm happy to tender it.

MR EDWARDSON: This is the email?

MS CALLAN: Yes.

MR EDWARDSON: Yes, please.

MS CALLAN: Okay. All right, your Honour. I withdraw- - -

HIS HONOUR: Then we'll withdraw the marking for identification. It'll be now exhibit 66.

MS CALLAN: Yes, your Honour.

EXHIBIT 66 Email document from Detective Sergeant Wayne Newell to Timothy Simpson, 25/05/2020.

MS CALLAN: And I can provide a working copy for your Honour, and we'll have some copies made for the jury.

HIS HONOUR: All right, thank you.

MS CALLAN: Can I ask you some general matters in relation to the protocols which you consider or may apply when conducting simulation experiments?---Yes.

And recognising, as you've said, protocols provide guidance, but there may be circumstances in which you deviate where necessary or appropriate?---That's correct, yes.

Now, Mr Simpson. The first of the protocols I wanted to ask you about was if a suspected implement – in this instance, scissors – is submitted, it is first examined under a stereo microscope for the presence of textile fibres and any other potential trace evidence of significance, prior to using it for any testing?---As part of our protocol, that is correct. But in this circumstance, that did not occur.

Okay. And why was that?---Because those items were referred to us from an external policing jurisdiction, which had already undertaken trace evidence collection from those scissors. So there was no need for us to do it again.

Okay. Did you then undertake testing using the suspected implement? That is, the scissors, on either a similarly constructed garment or on the article itself which contained the textile damage, where possible?---That's correct. In ideal circumstances we would conduct our simulation experiments on the actual garment that has the evidential damage. If it is not possible to do simulation experiments on that garment we then try and secure a garment with similar construction and fabric composition as the evidential item to best replicate what we would expect that evidential garment - the performance of that evidential garment.

In this instance in the simulation experiments you conducted, did you use the actual garment?---That's correct, albeit item number 1.

So the first item I showed you, which was the blue T-shirt marked exhibit 43, and I will come back to it but is it the case that you considered that that garment was already of such a fabric condition that it was too fragile to gain a reliable representation of the performance of the scissors on that fabric?---Yes, that's correct, so that garment itself was in a very poor condition, I guess, very old - very worn - very poor and the quality of that fabric changed over the - over a single panel of that fabric, so for us to then conduct simulation experiments using that same garment, it might be actually misinformative for us to conduct simulation experiments elsewhere on that garment. It would not be representative of that specific area where the damage was located. Additionally, finding another garment with similar construction also wouldn't be representative because it hasn't gone through the same ageing process as that fabric, so.

Okay. In terms of the actual garments that you conducted simulation experiments on, that occurred in relation to what I will describe as "Constable Rolfe's blue police shirt"?---Yes, that's correct.

And "Constable Eberle's blue police shirt"?---That's also correct, yes.

And in terms of the protocol, that provides that the characteristics of the test damage conducted in the experiment are compared to the damaged areas that you had observed when you received the item?---Yes, that's correct.

The protocol goes on to indicate that simulation experiments can never be an exact replication of an event. Variables such as position, action, body weight and forces used are unknown and cannot be replicated"?---That's correct. There's a lot of variables that occur in the instance where an implement is used against someone else and it would be quite time-consuming to explore all those avenues.

In the simulation experiment that you set up and conducted in the present case, can you tell the - first of all did the information in the email, which has been marked exhibit 66 inform the way you determined you should conduct your simulation experiment?---That's correct. That information provided us with the constraints around which actions would be relevant in this case so that we had, I guess, a starting point as to what actions needed to be explored. If I am presented with scissors without any context you could go from anything from using the scissors to cut the fabric as per normal, all the way up to using them as an implement to, you know, stabbing into the fabric.

The information that you were provided, as set out in exhibit 66 included,

"There is a standing struggle during which Walker retrieves the scissors from his person (most likely a pocket) and using his right hand, appears to strike from at or above Walker's head level down towards Rolfe's left shoulder."

Did that - you talked about constraints, giving that a more practical meaning, what does that information do - cause you to do in terms of the simulation experiment that you created?---Yes, so the - based on that information the primary action there that we are trying to investigate, I guess, is an overhead downward swing. So, starting with our fist raised above sort of head height, coming down onto an object.

The information that the strike down onto the object being Constable Rolfe's left shoulder, what did that mean in terms of the simulation experiment you designed? ---To clarify, do you mean - are you inferring the substrate that we used to - well, the substrate that we used for those experiment?

Is it the case that you use a substrate for the experiment?---That's correct.

And what is - does that mean a material underneath the textile?---Yes. So, to explain the simulation experiments in a little bit more detail, the simulation

experiments are set up in a way to best replicate the circumstances of the incident and in most cases that is going to require a medium to be - for the implement to be applied against. There has been a lot of research over the last 30 years to try and develop a medium that best replicates human flesh starting in the 1978 I believe, they had - they came up with pork or porcine material and in most circumstances during that period of research most of the stabbing incidents that occurred were around the abdomen area. So based on the research that a lot of guys did in that period, the best representation that they had was pork belly and we continue to use pork belly up and to this day. Like there is current research right now to develop synthetic materials that represent the human body, most notably polyurethane foam with a silicone medium over the top to represent the skin. Unfortunately that, at the time of these examinations, wasn't a validated medium to use so I needed to defer back to the pork belly.

The information you were provided included that the striking action of the scissors was down towards the left shoulder. Just considering the shoulder region, does that - is that best replicated by using pork belly?---Yes, that's a good question. The pork belly again is the only validated medium that we have and again, there are limitations in the simulation experiments that we use. Based on the anatomy of the human, the shoulder area isn't going to be best replicated by a pork belly. To be honest, the part of the pig what would - say, you know, the shoulder of the pig would probably be best represented but then we deviate into areas which are unvalidated, so it's - you are constrained by what the scientific community deems appropriate for you to use within those circumstances. We could have deviated to pork belly - sorry - to pork shoulder after the pork belly but after the original simulation experiments that we conducted using the pork belly, there as sufficient information there to get the results that we needed, so then we didn't defer into that - that realm.

In conducting your simulation experiments did you place each of those garments, the two blue police shirts, over the top of the pork belly to simulate effectively, a human body wearing that garment?---That's correct. Most of the time we'll place it over the top of the pork belly and then we'll tuck the fabric in underneath, to apply a mild tension to the fabric which would be representative of a normal drape of a garment when being worn.

And did you then use the scissors in a stabbing type action?---that's correct, multiple stabbing type actions, yes.

What are the variables in the simulation action, the stabbing using the scissors? ---So with the overhead downward swing, the variables that can exist in the first iteration I guess of the experiments that we do is the whole process is reviewed. So after we do some experiments we will gain more information then we might adjust those simulation experiments further and then continue to do simulation experiments after we have that information. In the first iteration the variables that we were changing were the orientation on which the cutting edge of the blade was orientated, so away from the wielder or towards the wielder and then also 90 degree angle to the wielder as well as the level of force that was used. Generally for myself, I will start with a moderate amount of force. And that's arbitrary, okay, because we can't

measure neutron forces against the examinations that we're doing, because we just don't have the equipment for it. Generally speaking, my moderate amount of force is a nice mid-point to start. If during the simulation experiment, like I said it's a iterative process, if during the simulation experiments, I'm either generating the damage that's completely different to what I'm seeing, or I'm not able to penetrate through fabric, I might increase that force. But generally speaking, those are the variables that we will try and adjust, or experiment against, in the first instance.

The scissors themselves, and I ask you, by reference to photograph eight, you conducted an initial examination of those scissors to be clear about information such as the length in total, and from hinge to tip?---That's correct. When we get an implement, or a suspected implement for examination, we'll conduct basic examinations of that item, being the recording of the dimensions and shape and size of that implement.

Okay, in this instance you measured the scissors as being 130 mm in total, and 50 mm from hinge to the tip of the blades?---That's correct.

Now to be clear, the hinge, is that the small circular object by which the two blades are connected?---That's correct, yes.

May we observe that the two blades are different in their shape at their tip?---That's correct.

One, which in this image, is at the top, as the scissors are depicted here, has a blunter tip than the other?---That's correct.

Is that given a particular name in the work that you do?---That type of blade profile is generally referred to as a Sheep's Foot Blade Profile.

Is there a reason for that?---Probably because it looks like a sheep's foot, I would say.

Right. Have you also heard of that blade on a pair of scissors described as the static blade?---No I have not heard of that terminology before, not have I used that terminology.

The other blade of the scissors, which has the more pointy tip, what term do you use to describe that type of blade profile?---Blade of that nature, where the cutting edge and the spine of the blade converge towards each other, generally at the same angle, we generally refer to that as a Wharnclyff (?) Blade Profile.

Is there a reason for that?---The – so the terminology that we use is actually terminology used by knife manufacturers and the knife industry, I guess.

Yes?---And we use that terminology for our reporting purposes.



So in knife terminology, what you've described being the pointier blade is – is – the term is Wharncliff?---That's correct.

All right. Now on your examination you found that the maximum blade width for both blades was approximately 8 mm, what does that – can you just clarify what you mean by that?---Yeah, so if you were to make a measurement from the cutting edge to the spine, at the thickest part of that blade, that measurement was 8 mm. So in the – if we refer to that image - - -

Yes?---Just in front of the – the hinge there, where the cutting edge terminates, around that area there was 8 mm from the cutting edge through to the spine. So, perpendicular to the access of the blade, if that makes sense.

Yes.

HIS HONOUR: Crown, is that a convenient point?

MS CALLAN: Yes, your Honour.

HIS HONOUR: Members of the jury, would you retire please for the morning adjournment.

JURY OUT

HIS HONOUR: And you can stand down from the witness box for the moment?  
---Thank you, your Honour.

WITNESS WITHDREW

HIS HONOUR: And I will adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Yes, bring the jury in, please.

JURY IN

TIMOTHY IAN SIMPSON:

XN BY MS CALLAN:

MS CALLAN: Your Honour, we have jury copies of the email which has been marked exhibit 66.

HIS HONOUR: Yes, they can be distributed. Thank you.

MS CALLAN: Mr Simpson, before the morning tea break I was asking you about the simulation experiment that you created and conducted in relation to this matter. By reference to the scissors, as I said, and a photograph is at exhibit 65, photograph number 7 and photograph number 8. Photograph number 7 shows the scissors in a closed position?---Yes, that's correct.

And photograph number 8 shows the scissors in quite an open position?---Yes, that's correct.

Coming back to photograph number, is it your observation that depending on the style or nature of scissors they may over-close?---Yes.

And what does that mean?---So overclosing of scissors is, if we look at the image - image in number 7, if you were to squeeze the two finger eyelets, I guess, together and actually get them to pass each other - so not close together but actually pass each other, you will actually get a circumstance where the cutting edge of the scissor blades will actually be slightly exposed, so they won't be closed over the top of each other, they will push past each other and the cutting edge of each will be slightly exposed.

When you inspected the scissors you were provided exhibit 41, did you make any observation as to whether they mechanically could overclose?---Yes, that's correct. It's kind of hard to describe the reasons why I did that without actually first covering the evidence that I found from the items but I will do my best. But the reasons why I specifically tried to overclose those scissors was because the damage that I observed needed a cutting edge exposed and when presented with the scissors in a closed position, neither of the cutting edges were exposed, therefore I then went through the process of trying to find situations in where you would have an exposed cutting edge and one of those being where you overclose the scissors. In this particular case, with these scissors, they are manufactured in such a way that is of high quality, being that the blade thickness themselves is very thick and also the hinge quality is of a good quality so it was very difficult to achieve that overclosing sort of mechanism that we're talking about.

In the simulation experiments you conducted on the two items, the two blue police shirts, did you do any experiments using the scissors in a closed position?---No.

Why not?---Again, based on the findings from the initial examinations, the requirement for that damage to be created was that there had to be an exposed cutting edge and in the circumstance where the scissors are closed there is no exposed cutting edge.

So you didn't attempt to conduct any simulation experiments with the scissors in a closed position?---That's correct.

Can I take you then to your findings on your initial examination of each of the items and then where relevant, your simulation experiments on at least two of those items? The first I wanted to ask you about was the blue T-shirt which has been marked exhibit 43 in these proceedings. Your observation in terms of the features of that T-shirt included that it was constructed from a single jersey knit fabric and was generally in poor condition?---That's correct.

Looking at the photographs that you took commencing at photograph number 1, is the descriptor "poor condition" informed, for instance by what can be observed as holes and fraying, for instance under the armpits?---That's correct. There was holes and fraying under the armpits, there was other areas on that garment that had small holes and then there was areas that appeared to be becoming threadbare, so the fabric itself was starting to thin out so such a point that it was almost about to fail.

Could you turn to photograph number 2. Is that a closer up photograph of the front left shoulder area of that T-shirt?---That's correct.

And did you find an area of interest - that is of textile damage?---That's correct, and that's marked with the yellow tab in that photo.

So is that the yellow tab adjacent to what appears in the photograph as a hole? ---That's correct, yes.

Now, you measured that and worked out certain things, for instance, where it was located relative, for instance, to the shoulder seam?---That's correct, yes.

And you found that it was approximately 25 millimetres below the shoulder seam? ---Yes, that's correct.

The shoulder seams at the top of the T-shirt?---That's the seam that runs from the neck down towards the shoulder.

And you found the damage there was multi-segmented?---That's correct.

And consisted of a section of damage that was straight in shape, measuring approximately 9 millimetres in length?---That's correct.

And an irregular shaped section of damage that measured approximately 14 millimetres in length?---That's correct.

And did you consider this area of damage had features indicative of a fresh stab-type cut with associated tearing?---That's correct.

And you - based on your training and experience, conclude this damage could have been created by a single smooth edge blade measuring 8 to 10 millimetres in maximum blade width at depth of penetration?---That's correct.

And you found - you considered it's likely to have a blunt tip and an edge in an average condition when used in a stab and drag action?---That's also correct.

What informed you, in terms of your conclusion, that the damage could have been caused by a blade measuring 8 to 10 millimetres in maximum blade width?---If I may I will refer to image number 3 and then we can describe the damage using the aid of that image.

Yes?---So, based on that image you can see that there is one larger sort of hole, I guess, at the top of the damage. That damage is somewhat diagonal to the course of the fabric, so the horizontal construction of the fabric and that damage itself has - well, we will start from the left hand side of that area, so there is a widening of that damage, so it's pushed outwards. It's a little bit wider than what you would expect from a nice neat, clean, sharp knife, but along that edge there's features that would indicate that it's been cut as opposed to being torn. The most notable one is if you direct your eyes to the bottom edge of that larger hole there's like a little s-shaped piece of fabric - sorry - yarn and that's what we call a "snippet". Snippets only occur when a cutting edge goes through the fabric and actually severs the yarns. So based on that information alone, there had to have been a cutting edge to actually break those yarns. If there was no cutting edge exposed and it was torn, for instance, you wouldn't get that singular piece of yarn severed in both places, it would just snap in one and then you wouldn't have a snippet as indicated by the image. So, based on that section of the damage you have a stab type cut and the reason why I've gone further and said that it's got a blunt tip as well as the condition of the blade edge was in the average to good condition was because of the slight irregularities along that edge. So it wasn't nice and neat, for lack of a better description, as well as the widening of that initial point of entry indicates that the tip wasn't so pointy that it could go through the fabric without actually distorting it a little bit first. So following that, you then underneath that you have the tear-type damage and which is indicated, I guess where the pin enters into the fabric there you can see that there is, you know, a slightly more fluffy appearance to the fabric. And that's indicative of yarns that have broken under tensile strength, okay. So you've pulled those yarns to such a point that they've actually snapped, and flared out. Underneath - so that's the tear section of the damage. And then underneath that, you've got probably what appears to be another section - another small section of cut type damage. However, that follows along the horizontal access of the fabric, so the features there aren't as clear. You can get circumstances in knitted fabric, for at least short distances, where it appears neat like a cut, but it's actually a tear. So that's why we've kind of just lumped that classification into its cut and tear, without being too specific in that area. Because there's no enough features to make that call.

All right. The significance of an appearance of a fabric tearing, what does that suggest, in terms of the mechanism by which that occurred?---So looking at this damage, and this damage alone, if I was to make an informed decision as to what implement type created that damage, as well as the mechanism in which that implement was used, again, the implement type would have been a smooth single edge blade, with a, you know, bluntish point. That blade edge would have been in an average to good condition. It wouldn't have been brand new, but it also wouldn't have been completely dull. That would have initially created that stab type cut that we're talking about at the top, the larger area. But then subsequent to penetration of the fabric, if the implement was rotated 90 degrees, so in a clockwise direction, you would then tear the fabric at one edge. And then if that rotation terminated at 90 degrees, and then the blade was removed from that fabric, you would then also get that subsequent little bit of cut type damage down the bottom. So based on that information collectively, a blade with those characteristics, as well as that mechanism, is a possibility for how that damage was created.

And you've explained this, but just to confirm, you did not conduct any simulation experiments on this blue T-shirt?---That's correct.

Did you form any view as to whether that damage on this item, this blue T-shirt, could have been created by the scissors, which are exhibit 41?---Okay, so the part of the textile damage examinations as well includes assessing whether or not – especially if you've got layers of fabric. So you've got a T-shirt under a jumper, under a jacket. If damage was created on the outer layer, and it penetrates all through all three layers, then we say that that – that damage was created in one action, okay. So the implements gone through all three layers simultaneously, essentially. With this garment, again because the garment condition was of such poor quality, and I really didn't want to go down doing simulation experiments with a garment, which in itself, had a lot of variables associated with it, I chose not to go with that. And then just inferred that that damage, or the mechanism which created the damage on the outer shirt, so the police shirt, was created in the same manner as the damage that was created to the under shirt here. So - - -

All right. I'll take you then to the observations you made in relation to the blue police shirt worn by Constable Rolfe, which is exhibit 42 in these proceedings. You use the word "infer" or "inference", were you – did you make observations, or were you otherwise provided with information to suggest that the first item, the blue T-shirt, was worn underneath the blue police shirt of Constable Rolfe?---Yes, so those items were submitted to me as clothing items worn by Constable Rolfe. And based on my inference, I guess, I couldn't imagine that he was wearing the blue T-shirt as his outer garment. It made more sense that he was wearing that as an under shirt, to his police shirt.

That shirt that you first examined, that is Constable Rolfe's blue police shirt, is it your observation, in terms of your initial examination, that it was constructed from a woven fabric, and was generally in good condition?---That's correct.

It's the case isn't it, that you identified two textile damaged areas of interest?---That's also correct.

And if we look at photograph number 10. Is that a photograph showing one of the textile damaged areas of interest on Constable Rolfe's blue police shirt?---That's correct.

Now you observed that was on the front left shoulder?---That's correct.

And it consisted of two segments which formed a sideways L shape?---That's correct.

If you turn to photograph number 11. Is that a closer up photograph of this L shaped, as you've described it, area of damage?---That's correct. And just for the benefit of the court, to get the correct orientation of that damage, as if you were looking at while someone was wearing it, you'll need to rotate that image counter clockwise 90 degrees. So that way.

Now it was your observation that one segment was straight in shape and measured approximately 14 mm in length, and the other segment was slightly curved in shape, and measured approximately 23 mm in length?---That's correct.

By reference to this photograph number 11, that captured there, that is, there's a longer area of damage and a – if I can describe it this way, a shorter area of damage?---Yes. So at the top of the damage, the shorter area of damage which is generally straight, that's the former that you mentioned. And then the curved area is obviously the part that's underneath it.

Okay. Did you form any views as to whether that damage was fresh?---Yes, that damage was determined to be fresh.

And did you make any observations, or draw any conclusions, as to the type of damage that this was?---Yes. So that damage was classified as combination damage. Which was stab type cut, in combination with a drag type cut.

You conclude, could have been caused by a single smooth edged blade, measuring 12 to 14 mm in maximum width?---That's correct.

"Likely to have had a blunt tip, and in average condition when used" – sorry, "And edge in average condition, when used in a stab and drag action"?---That's also correct, yes.

And you've already explained to the jury what you mean as to how you conclude why an area of damage is likely to have been caused by a stab and a drag?---That's correct.

Could you turn to photograph number 12. Does that show the back of Constable Rolfe's police shirt?---That's correct.



Did you identify, on examination, an area of damage which is captured in this photograph with a little yellow sticky label adjacent to it?---That's correct, yes.

If you turn over to photo number 14. Is that a close-up image of that area of damage on the back of the shirt?---That's correct, yes.

You measured or observed that damage to be straight in shape, with a slight direction change about 18 mm from the top, and measured in total length, 33 mm? ---That's correct.

Did you form any views as to whether the damage there was fresh?---That damage was determined to be fresh.

And was it your view that the damage had features indicative of a stab, drag-type cut, which could've been caused by a single, smooth-edged blade, measuring 16 to 18 millimetres in maximum width?---That's correct. So just to explain that a bit further, if I may?

Yes?---So the damage itself, if you look at – make reference to the image and you look at the top area of the damage, there's an area which is, essentially, a small hole, I guess, with yarns that have been torn and cut together. So that area there itself appears to be the point of entry of the implement. Progressing below that, you can see that there's yarns exposed – individual yarns – that are all, essentially, the same length, okay? And what we – we refer to that as planar array and that's a key indicator as to fabric that's been cut by an implement. Especially when the yarn ends are so neat, when they've been cut. You can see about halfway down that there's, on the left-hand side of that damage, there's a little bit of damage that comes off to the left. That's the direction changes that I was talking about in that description that you previously gave. From that point down, the damage – the edged characteristics of that damage change. You can see, if you look closely at some of those yarns that are now exposed, are of different lengths. And then the yarn ends themselves are a little bit more frayed. That – those features are indicative of more of a tear-type action rather than a cut-type action. So based on the information that's provided here, you've got a point of entry for the implement at the top, then you've got a cut that progresses downwards to a point. And then from there, it becomes a tear-type damage. The 16 millimetres – just to give clarification as to why the total area of the damage was 33 millimetres but the – the assessment of the damage was created by a blade that was 14 to 16 millimetres, is that correct? Or 16 to 18?

16 to 18?---16 to 18 millimetres – is because we make our judgments based on the stab-type cut area. So essentially, this top cut area of that damage could've been created by a blade, whereas the bottom area was probably tear.

Now, in terms of the simulation experiments you conducted on this item, being Rolfe's blue shirt. Could you turn to photograph number 20? And assisted by the index which appears at the beginning of exhibit 65, the description of this photograph

is, "Simulation damage resulting from overhead downward stabbing action, using Wharncliffe blade of item 3." So item 3 were the scissors?---That's correct.

And then it's got, "(Spine inwards) on item 4." And item 4 was Rolfe's blue police shirt?---That's correct.

So can I ask, what was your finding as to whether the Wharncliffe – or can I say, the pointier blade of the scissors, could penetrate the fabric of Rolfe's blue police shirt? ---That's correct. So the first thing, obviously, with an implement that's being used in a – or a suspected implement – that's been used in a stabbing incident is to determine whether or not that implement itself can actually penetrate through the fabric. If the implement itself cannot penetrate through the fabric, then we'd exclude that implement. In this circumstance, the Wharncliffe blade – so the pointer scissor blade – was able to penetrate through the fabric.

The first image at number 20, based on the description index, shows damage resulting from a downward stabbing action, using that pointy end of the – the pointier blade, with the spine inwards?---That's correct.

And then number 21 is – was with the spine outwards?---That's correct.

Both instances created damage?---Yes, that's correct.

And then photograph number 22, according to the index, that was, "Overhead, downward stabbing action using the Wharncliffe blade, spine inwards, followed by a twisting action of the blade"?---That's correct.

That also produced damage, as captured in that photograph, number 22?---Yes, that's correct.

And do you see photograph number 23? Is that – capture – is it a form of yellow chalk that you've used to- - -?---Yeah, they're Chinagraph- - -

- - -two areas on the- - -?---Yeah, they're Chinagraph pencils.

Okay. And you've given one a great big number 4 and the other a great big number 5?---That's correct.

And does that simulation experiment you conducted on Rolfe's blue police shirt – but this time using the sheep's foot blade? That is, the blunter of the blades?---That's correct.

And the number 4 area and the number 5 area indicate your efforts with the spine inwards and then with the spine outwards?---That's correct.

And in either of those instances, did that penetrate the fabric?---No. The resulting damage from that action with the sheep's foot blade was firm compression of the fabric, but no penetration was able to be achieved.

Dealing with that latter finding that is reflected in the photograph at number 23, did that cause you to arrive at any view or conclusion as to whether the Sheepsfoot blade of the scissors could be excluded as the cause of damage to Constable Rolfe's police shirt?---That's correct. So based on the simulation experiments that we conducted, as well as the gross morphological features of the implement – so the size, shape, the edge characteristics – those – that information combined with the results from the simulation experiments, led me to exclude that – that blade – or that blade profile from having caused the damage that we observed on the – the evidential items.

That is on Rolfe's blue police shirt?---That's correct.

And what about the Wharncliffe blade of the scissors? We've seen in photographs that I've taken you to, commencing with photograph number 20, then number 21 and number 22, what is your view or conclusion as to whether that could be excluded as a cause of the damage that you observed on Constable Rolfe's police shirt?---So based on the simulation experiments using the stab action only – using the Wharncliffe blade – so the comparison between the simulation results that were in the photos that you mentioned, versus the damage that we observed on the police shirt – that blade also – again, clarifying, in the stab-action only – could be excluded from causing the damage.

And what about when the blade – that is, the Wharncliffe blade – was used in a stab and drag action?---When the Wharncliffe blade was used in a stab and drag action, the implement could not be excluded. I mean, I'll make reference to that last image, number 27. Sorry, correction. Number 24. That's the stab and drag action using that Wharncliffe blade.

Can I turn then, to Constable Eberl's blue police shirt which is exhibit 45 in these proceedings. Commencing with photograph number 15, when you conducted your initial examination of this blue police shirt, did you identify one textile damage area of interest?---I believe I've got two textile damaged area of interest marked on that item. Albeit one of those is not relevant to the context of the case.

Explain what you mean by that?---So on further examination of one area that shows damage, the cause of that damage was determined to be contact thermal damage which was then assessed to be, you now, just the iron was left on that area a little bit too long.

I see?---As an example.

So you - upon arriving at that conclusion didn't proceed any further to consider or photograph that?---That's correct. And like I said before, with textile damage examinations you really want to use a fishing analogy I guess, is cast a wide net first and then assess each individual fish you catch first and then figure out which ones are relevant to keep. In this circumstance I identified that there as damage there and it was thermal damage but later on as the examinations progressed and more

case context information was provided to me, that area of damage was then deemed to be irrelevant to the case circumstances, so it wasn't examined any further.

That of thermal damage adjacent to the yellow flag which appears on the front of the police shirt in photograph number 15?---That's correct.

Turning to photograph number 17, was that an area of textile damage on the back of the shirt, on the right rear shoulder blade area that you identified?---That's correct.

Did you - and perhaps - the general area is indicate by the yellow tag that's been applied to the shirt as shown in photograph number 17?---That's correct.

And then is it more closer version appear - photograph number 18 at least in terms of its proximity to the police labelling and photograph number 19 a closer up again photograph of that textile damage?---That's correct.

You found the damage to be a small hole measuring approximately 2 millimetres in diameter that had associated upwards and downwards laddering?---That's correct. So making reference to that image, adjacent to the 10 millimetre marker, I guess, for the benefit of those using the images, that's the area that the 2 millimetre hole exists and then above and below that is the laddering that is described.

You observed the damage had features indicative of puncture type damage with associated laddering that could have been caused by a pointed object with a blunt tip?---That's correct.

Was this damage fresh?---This damage was assessed to be fresh, yes.

Now, did you conduct - you conducted simulation experiments using the scissors, exhibit 41 and this - that is Eberl's blue police shirt, exhibit 45?---That's correct.

And that captured - and using the index again as a guide, photograph number 25 through to photograph number 27?---That's correct.

Did you conduct any simulation experiments on Eberl's blue police shirt with the scissors using the sheepsfoot blade - or the blunter of the blades?---No, I did not.

Why not?---The assumption for this case was that one implement was involved. Based on the examinations that I had already conducted on the police shirt belonging to Rolfe and that implement was excluded, there as no need to then further do more examinations related to that implement.

You made the decision not to attempt the experiment with the sheep's foot blade on Eberl's blue shirt?---That's correct.

In terms of what you did do by way of simulation experiment on Eberl's blue police shirt did you do a series of downward stabbing actions with the scissors, using the Wharncliffe blade?---Yes, that's correct.

And you did so with the spine inwards and then the spine outwards?---That's correct.

And that is captured in what appears in photographs number 25 and 26?---Yes, that's correct.

And just - I've used the term "spine inwards" and "spine outwards" as being a description you've given to the variables in your experiment. Coming just briefly back to this image of the scissors at number 8, photograph number 8, can you explain what you mean by "spine inwards" and "spine outwards"?---Yes, so the spine is the opposite side of the blade from the cutting edge, so not the sharp part, essentially and the reason why we do spine in and spine out is because the stabbing action is not a straight up and down, it is not perpendicular to the fabric, it's actually an arc and so the interaction between that implement and the blade can actually change - slightly - but it will change, depending on the blade profile that it is and that arc in which the stabbing action is conducted. So, if you are coming in in an arc and the blade is inwards, the sharper point of the implement is exposed to the fabric first. If you use the spine towards you and you're coming in at that arc, it's generally the spine that makes contact with the fabric first.

When you were holding the scissors for the purpose of conducting our simulation experiment were your fingers placed through or in the single finger holes?

---Yes. So the grip that was used during the simulation experiments against the Wharncliffe and both the sheepsfoot blade was my index finger was through one of the finger eyelets and then the other three fingers were around, I guess, the shaft of the scissors and then the other blade was then perpendicular to the hands, so.

Your findings in relation to Eberl's blue police shirt, the third simulation experiment captured in that regard, I think in photograph number 27 per your index, was, "The damage that resulted from overhead downward stabbing action using Wharncliffe blade, spine outwards, with subsequent horizontal stretching of the fabric." Can you explain if you can by reference to photograph number 27 what the subsequent horizontal stretching of the fabric refers to?---Yes, so after the implement had created that initial puncture type damage the resulting damage for action 3 was very similar to those that appear in images 25 and 26, so just the hole - it's puncture type damage but if you applied a lateral force against that fabric - so just pulled the fabric slightly, that then started generating that laddering feature.

Okay so the laddering was not caused directly by the application of the scissor blade but by the tension of the fabric after the puncture had occurred?---It could have been both. In the simulation experiments that I created it was the puncture damage followed by applying tension to the fabric but if the implement was still embedded in the fabric and then the implement itself was - tried to be moved sideways it would then also create that tension across that fabric which then could also generate the laddering.

Based on the simulation experiment that you conducted in respect of Eberl's blue police shirt, did you arrive at any conclusion as to whether the sheep's foot blade of

the scissors could be excluded?---So the conclusion based on the simulation experiments and the evidential damage that I'd already examined, the assessment is that the Wharncliffe blade could not be excluded from having caused the damage to Eberl's shirt.

I was asking about the sheep's foot blade, sorry just – if I caused any confusion. What's your view as to the sheep's foot blade?---So again, using the assumption that there's only one implement used in this circumstance, the sheep's foot blade was excluded from having caused the damage.

And then I diverted you, in terms of the Wharncliffe blade, your finding that it could not be excluded as having caused the damage?---That's correct. Could not be excluded.

And in what type of action?---In a downward stabbing action. That's what was assessed in the simulation experiments. But I guess, any interaction between that implement in a thrusting or stabbing action, would also create damage that was similar.

Can I direct your attention to your report at par 4.6.3?---Sorry, could I have that paragraph reference again?

Yes, 4.6.3?---Yep.

Is it your finding that when used in a stabbing action alone, it was – that is using the Wharncliffe blade of the scissors, it was not possible to create damage with similar shape, dimensions, and edge characteristics. The evidential damage observed on either Rolfe or Eberl's police shirts?---That's correct.

On that basis, is it your conclusion that the Wharncliffe blade of the scissors can be excluded as the cause of the damage, when used in a stabbing action only?---That's correct. With the clarification, "In stabbing action only."

Yes. But moving to an action of stabbing, followed by dragging action - - -

MR EDWARDSON: Well, stab and drag (inaudible).

MS CALLAN: Sorry, stabbing action, in the open position, followed by a dragging action, through the fabric, is it your finding that the Wharncliffe blade created puncture damage, but was not able to penetrate the fabric sufficient to create subsequent cut type damage on Eberl's police shirt?---That's correct.

On that basis, is it your conclusion that the Wharncliffe blade on the scissors cannot be excluded as the cause of the damage, that you identified, on Eberl's police shirt, when used in a stab and drag action?---I'll have to get you to ask that question again, because - - -

Yes. I'm – the question is posed by reference to par 4.8.1?---Yes.

HIS HONOUR: Would you frame the question again please.

MS CALLAN: Yes I will.

Is it your observation that the damage created in the simulation experiment, on Eberl's police shirt, was round in shape, measured 2 mm in diameter and had associated lathering with features similar to the evidential damage that you observed on Eberl's police shirt?---Yes, that's correct.

And was it your conclusion that the Wharncliffe blade of the scissors, cannot be excluded as the cause of the damage, when used in a stab and drag action?---That's correct.

The fourth item that you were asked to examine was a tactical vest. You've confirmed that before morning tea. When you examined that tactical vest, I think a photo of it commences at number five, in exhibit 65. Can you tell the jury what you observed upon examining that item?---Yes. So again, with minimal, if not no context associated with the incident, that entire item was examined for textile damage. And based on that examination, no textile damage areas of interest were identified.

Is it – were you subsequently asked by reference to two photographs of an area of that vest, to provide some further clarification on the textile damage examination that you had conducted, upon that black tactical vest?---Are you referring to the subsequent request from Detective Sergeant Wayne Newell to look at some images provided - - -

Yes?---And then make an assessment?

Yes?---Yeah, so after the examinations that I conducted for the textile damage examinations, the items were returned, and the – a Northern Territory forensic officer, which was unnamed to me, then provided information to Detective Sergeant Wayne Newell, saying I actually think there's some damage here. In which case they provided images to me, indicating the area that they thought damage existed.

Can I show you the photographs that you were sent. Do you recognise those as the photographs that you were sent, accompanied by the request from Detective Sergeant Newell, for further clarification, as to the textile damage examination you had undertaken in relation to the tactical vest?---That's correct.

Your Honour, I tender those images.

HIS HONOUR: Exhibit 67.

EXHIBIT P67 Photographs of black tactical vest for further analysis

MS CALLAN: And we have copies for the jury, and a working copy for your Honour.

HIS HONOUR: Thank you.

MS CALLAN: Mr Simpson, the first two photographs have – appear to be blue arrows drawn on them. Were those arrows present on the photographs, as you received it?---Yes, that's correct.

And did you consider the photographs that you were sent, along with the notes and photos that you took at the time of your initial damage examination?---That's correct, yes.

And what was your conclusion as to the area on the tactical vest to which your attention was being drawn, in these photographs?---Yes, so in my initial examination it was noted that the tactical vest had areas of general wear and tear. That is not unexpected for a tactical vest. Given specific – being drawn specifically to this area that we're talking about, it's noticed that it's on the inside of that shoulder strap, so closest to the neck. And the damage appears, based on the images that I have, the damage appears to have features of minor surface abrasion, and then an exposed thread end. Based on that information, it is – and those features that are exhibited in that image, it was then classified as general wear and tear, and not examined any further.

Were there aspects or features of that area which indicated anything to you about whether it was fresh or otherwise?---Yeah, the – based on the images, it's a little bit harder to determine freshness. And, I guess, a little bit more inference was used based on the area in which that damage existed. But if you direct your attention to the image which is a little bit more of a close-up, the blue arrow points to where the thread is actually frayed out and more exposed. And that in itself is somewhat indicative that it's thread that's been rubbed against a bit more, rather than actually just a severed and therefore, fresh. Additionally, I guess, above that blue arrow on the shoulder strap, you can also see that there's more surface abrasion on that – that shoulder strap as well. So that whole edge of that shoulder strap showed that surface abrasion. I think the – and it's probably inferring a little bit more than I should, but the forensic examiner probably noticed that area because of the frayed thread.

But your – it was your – to the extent that you could detect or observe, it was not severed in a way which indicated a fresh area of damage?---That's correct.

Thank you, Mr Simpson.

Your Honour, those are my questions-in-chief.

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Now, Mr Simpson. On 3 February this year, you participated in a Zoom conference with me and my legal team, did you not?---That's correct.



For the benefit for the jury, it's perfectly understandable that the defence or prosecution will proof or discuss, particularly with expert witnesses, the evidence that they might give?---Yes, that's correct.

Now, in the course of that proofing, did you disclose something that doesn't appear in your reports? Namely, communications that you had had between yourself and Detective Senior Sergeant Wayne Newell?---That's correct.

And specifically, did you disclose – quite properly – the existence of email exchange between you and him?---Yes, that's correct.

In respect of the reports that you'd subsequently provided?---Yes, that's correct.

And the communications that you'd had with him?---Yes, that's correct.

And you understood from that conference that the defence were completely unaware of the existence of that email exchange?---During the conference, it was apparent- -

MR STRICKLAND: (inaudible).

A PERSON UNKNOWN: (inaudible).

HIS HONOUR: Yes?

MR EDWARDSON: Were you asked, as a consequence of that disclosure by you, to provide copies of the email correspondence from Detective Sergeant Wayne Newell and yourself regarding the circumstances of the incident dated 25 May 2020?---That's correct. After disclosing that information to you, you were – then requested of me to provide that information to you.

In writing, and asked you to provide that to the Commonwealth – sorry, to the DPP and in turn, to us?---That's correct.

And you did exactly that, did you not?---I did.

I would like you to look at the email which is just now produced to you. There are two emails, you'll see, in the documents I've just handed to you. One is from my instructing solicitor, (inaudible) Sutcliffe(?) to Collette Dixon of the DPP, referring to our proofing session, do you see that?---That's correct, yes.

And then on the first page, you'll see that you responded on 24 February 2022 at 10:40 am: "As per the request from David and his team" – that is me and the defence team, that you then attached the email correspondence from Detective Sergeant Wayne Newell and yourself regarding the circumstances of the incident, dated 25 May 2020?---Yes, that's correct. Yes, that's correct.

I tender that, your Honour. I'm sorry, your Honour. I said 10:40, that's actually 11:22 am on 3 February.

HIS HONOUR: All right. Exhibit 68.

EXHIBIT 68 Two emails from Timothy Simpson.

MR EDWARDSON: Thank you. I want to ask you a little bit about information that you have. And just I'm completely clear, or we're all completely clear, on the process. As I understand it, when you were asked to – and I'll cut to the chase, if I can, and just identify four essential exhibits. What I'll call the Rolfe clothing- -? ---Yes.

The scissors themselves and the Eberl clothing. And if you don't mind, when I'm referring to the scissors, I'll call it the sharp blade and the blunt blade, all right? ---Okay, yep.

Thank you. Now, when you first conducted a visual examination of the clothing of these two men, you did so without any preconceived notion of how any identified structure – or problem associated with that item might occur?---That's correct. To the best of my knowledge, yes.

In other words at that stage, you had not been briefed at all as to the circumstances in which this clothing may have been damaged?---That's correct. So no case context, no images, no videos. Like I said before, the request probably, literally, just read, "Please conduct textile damage examinations for these items."

And the reason for that, of course, is that you don't want you to be – have some sort of preconceived notion about how particular damage – or how particular damage on any section of the clothing might occur?---That's correct.

So the first step in the process is to look carefully at the clothing, identify any damage and describe that damage?---That's correct.

And you photograph that damage when it presents itself to you?---Yes, that's correct.

And you've told us – and I'll very quickly repeat these, if you don't mind, by reference to your report. Firstly, in relation to the blue T-shirt worn by Mr Rolfe – it was item 1, I think, in relation to your report. That's exhibit 42. You described that as, "A blue-grey, plain, short-sleeved T-shirt, size M"?---Yes, that's correct.

The T-shirt had some dry, brown staining on the left shoulder?---Yes, that's correct.

And was that consistent with blood?---Okay. So that – I can only answer that as a layperson, because no testing was done to determine whether or not that was blood, but- - -

(inaudible:)?---Yep.

But you – it was also that that stain – that brown staining that was visible by you on the left shoulder, was the approximate location of what I'll call a puncture mark – my description, not yours – through that and the other items?---That's correct.

You went on to say – that what you described as, "TDAO1 (sic) was identified on the T-shirt, on the left shoulder, approximately 25 millimetres below the shoulder seam"?---That's correct. And benefit the court, TDAOI is an acronym for Textile Damage Area of Interest.

I said T-shirt. It's police shirt, my apologies. "The damage", you said – that's from the visible – the visual examination. "The damage could've been caused by a single smooth-edged blade measuring 8 to 10 millimetres in maximum blade width, a depth of penetration that is likely to have a blunt tip and an edge in an average condition when used in a stab and drag action"?---That's correct.

MS CALLAN: Your Honour- - -

MR EDWARDSON: But that was the opinion that you expressed, was it not, from the visual examination; is that right?---That's correct.

That's the textile examination- - -

HIS HONOUR: Just one moment.

MR EDWARDSON: Sorry.

MS CALLAN: I just want to raise something with my friend. I think this has had confusion being - - -

MR EDWARDSON: Sorry, it's all right. I'll start again. You were right the first time.

Item 1 is the T-shirt. That's what I'm dealing with at the moment, not the blue police shirt. So item 1 is the T-shirt and it had some dry, brown staining on the left shoulder we've heard about. And as you've just said, "The damage which was identified at that location could've been caused by a single, smooth-edged blade measuring 8 to 10 millimetres in maximum blade width, that is likely to have a blunt tip and an edge in an average condition when used in a stab and drag action"?  
---That's correct.

That's, effectively, the opinion that you expressed purely from a visual examination?  
---From visual examination and inductive reasoning, yes.

And at that point in time, you had not had disclosed to you the scissors, or had you?  
---I had not been exposed to the scissors at that point.

You hadn't been told how that particular damage might've been caused?---No.

All right. So moving now to item 4, which is the short – or the shirt belonging to Mr Rolfe. And that's at par 3.5. You described that as, "One navy blue short-sleeve collared shirt with zipper and button fasteners down the front." And you describe other things that are visible on the face of the shirt. And you describe it as, "Having been constructed from a woven fabric, generally in good condition"?---That's correct.

And you said that on the left – sorry, on the front left shoulder, above the Northern Territory Police badge, there was damage which consisted of two segments, which formed a sideways L shape?---That's correct.

And you went on to say that the damage had features indicative of a fresh stab drag type cut, that could have been caused by a single smooth edged blade, measuring 12 to 14 mm in maximum width. That is likely to have a blunt tip and an edge in an average condition when used in a stab and drag action?---That's correct.

So again, that opinion was expressed purely on the basis of your visual inspection? ---That's correct.

And again, when you were looking at this specific item, again, the same pre-conditions apply, that is, you had no preconceived view or knowledge of how that damage might have been caused?---That's correct.

There was a second area at the rear of the shirt, which also had damage, and I think you said "This damage was straight in shape with a slight direction change at 18 mm from the top. And measures 33 mm in total length"?---That's correct.

And again you described that as "Indicative of a fresh stab drag type cut, which could have been caused by a single smooth edged blade, measuring 16 to 18 mm in maximum width, at the depth of penetration, that is likely to have a blunt tip, and an edge in an average condition when used in a stab and drag action"?---That's correct.

I'll move now very briefly to Eberl's – Mr Eberl's shirt, which was a police issue shirt belonging to him, item five in your report. In that case, you said that

"There was on the rear right shoulder blade area damage, which was a small hole measuring approximately 2 mm in diameter and had associated upwards and downwards lathering. The damage had features indicative of puncture type damage, with associated lathering that could have been caused by a pointed object with a blunt tip, used in a stabbing or thrusting action, with subsequent stretching or distortion of the fabric surrounding the puncture area"

?---That's correct.

All right, so again, the same pre-conditions apply to Mr Eberl's shirt. No preconceived view or knowledge. Purely a visual inspection, but none the less, all three of those particular damaged areas have one thing in common, do they not, that is that it's likely to have been caused by what we call a stab and drag motion?

---That's correct.

Now a little bit later, you start having email exchanges with Detective Wayne Newell, did you not?---Yes.

And he then provides you with more information. He provides you with information of the scenario that might have given rise to the damage which you now have identified?---That's correct.

And it's then against that background that you decide to conduct some experiments?---Generally when an implement is provided, we will always try and conduct simulation experiments to then justify our – the inductive reasoning to start off with okay.

All right. So what happens is this, you're provided with the scissors?---That's correct.

Which is said to have been deployed by Kumanjayi Walker as we've heard in this case, against both officers?---I was provided with the scissors, but I wasn't provided with any information at the time, as to how they were employed.

I'll come to what was provided to you by Detective Wayne Newell shortly. But when you received the scissors, you would have examined the scissors. At that time, at that point in time when you got hold of the scissors, had you – you had not been informed as to how those scissors might have been deployed?---That's correct.

Right. When you saw the scissors, did either one of the blades, as they presented themselves to you, appear to be consistent with the damage that you had identified purely from a visual inspection?---Yeah, so when I received the scissors, it was actually a surprise to me, because the scissors in a closed position, did not actually fit into that general description that I had previously come to the conclusion of. Therefore I went to further examinations for the scissors, and then started looking at each individual blade profile by themselves, and then based on that examination of the blade profiles, as well as the blade conditions, it was my assessment that the sheep's foot blade, so the blunt blade, probably didn't cause the damage, whereas the Wharncliffe blade probably could have.

Thank you. So the sharp blade probably could have?---Yes.

So as this develops, and you test the opinion, and as I understand it, the process you go through is not inclusion but exclusion?---That's correct. So we – using exclusionary examinations because the implement itself can have features very similar to any other implement. So in this case the scissors, could have the same features as say a pocket knife, or you know, a Swiss army knife. You know, it might have a blunt tip with a blade edge that's in relatively poor condition, and the same blade profile. But the damage will not be representative of individual implements, which is why we use exclusionary examinations. So it's either definitely not, or it's a part of a group that could be.

Thank you. And of course scissors by their very nature have two blades?---That's correct.

In this case, you've described them, and their differences, by reference to what I call blunt versus sharp, or blunt versus pointy?---That's correct.

Right. So obviously it's self-evident, is it not, that if the scissors are deployed, open, such that both blades are exposed, then immediately it means that the sharp blade has the capacity to cause a penetrating damage, as you've described, in relation to those three locations?---Penetrating damage to fabric, yes.

And it's quite possible, is it not, that if they are deployed in that way, that is open, that one blade might result in damage, penetrating damage to fabric, but the sharp blade – but the blunt blade not?---That's correct.

Now you went about your responsibilities, after you've looked at that, and considered even further, and clearly this – these pair of scissors were not excluded, once they were presented. If anything, it was more confirmatory of what your preliminary assessment had been, by way of vision inspection?---By way of visual inspection, without any simulation experiments, I could not exclude the scissors, so the sharper blade, but there was features on the other blade, and also the closed scissors that would then lead me to exclude those implements.

Now in order to be able to conduct any simulated experiment, or examination, you need to know more?---Sorry, say again?

To be able to conduct a simulation experiment, as you did, you need to know more, don't you?---I do.

Because there's no point in you just blindly stabbing a lump of pork without it having some sort of relevance?---Well that's right. We wouldn't – had – at that stage I didn't even know that I needed to stab the pork. I could have slashed, could have cut, could have used that implement in multiple different ways.

So the next step was for Senior Constable – sorry, Detective Senior Constable – I'll just say Detective Sergeant Wayne Newell, my apologies, to provide you with a precis if you like, of the exchange that took place between Kumanjayi Walker, as known to police, and the two officers, Eberl and Rolfe?---That's correct.

And that was then provided to you?---Yes, that's correct.

And it was – did you actually see any body-worn video?---I am yet to see anybody-worn footage.

Did that – that wasn't shown to you at any stage, or provided to you?---No.

It was offered to you?---No.

No. All right, well in any event, having been told of the scenario that gave rise to the exchange between Kumanjaya Walker on the one hand, and the two police officers, you then set about conducting what you call, simulation experiments?---That's correct.

Now the simulation experiments you've explain, why pork is regarded as being the appropriate way in which you can, for example in this case, put the clothing over the top of the pork, and use the exact same clothing so – but using a different part of the clothing, to see whether you can replicate the damage that you had previously identified by visual examination?---Yes, that's correct.

One thing that I wanted to ask you, I don't think it appears anywhere in your reports, but when you went about trying to replicate damage, and seeing whether stab and drag would result in comparable, similar damage to the textile concerned, obviously penetrated – if you were able to replicate it, you obviously penetrated the fabric? ---That's correct.

Which must mean that you went into the pork?---That's correct.

Did you measure how far into the pork you went?---No I did not.

Do you have any recollection of the depth that you managed to achieve with these scissors, into the pork?---Yes, so generally with the moderate level of force that I used, from recollection, and recollection only, it went about three quarters of the way in. So not all the way to the - - -

All the way?---Not all the way to the hinge, but the majority of the blade.

And that's with moderate force?---That's correct. In ideal circumstances, with moderate force.

And the idea of this is to replicate the human body?---The substrate that's used is to replicate a medium similar to the human body, yes.

Thank you. All right, so – and of course when we come to consider the conclusions that arise as a consequence of the textile damage simulation, what we can say, and I'll put it very simply, in respect of the three damaged locations, two – one on the front, and one of the back in the case of Rolfe, and in the case of Mr Eberl, on the back, they were all consistent with, or you could not exclude, the sharp blade, or the sharp – yes, blade, of the scissors?---That's correct.

In other words, that blade could have caused all three?---That's correct, that blade or any other implement with the exact same gross morphological features as that implement could have caused that damage.

Exact same?---Gross morphological features, so size, shape, edge quality, edge characteristics, point sharp - - -

As those scissors?---As those scissors.

But we know that these scissors are the ones that were actually deployed against both of these men by Kumanjayi Walker?

MS CALLAN: I object.

THE WITNESS: I cannot answer that.

MS CALLAN: I object to that question. This - - -

HIS HONOUR: The witness has answered it and has answered it in such a way that really, there is no point in maintaining the objection. I think you are probably correct.

MR EDWARDSON: Excuse me, your Honour.

Do you agree with this, that the damage observed in Mr Eberl's clothing versus the simulation, is remarkably similar?---I would agree and I could make reference to some of the images that we have.

Please do?---Let me just confirm the images that I am talking about. So I'd say if we compare and contrast and I don't normally like doing this because I don't like other people with less experience making their own judgments, but if we compare and contrast image number 14 and number 24 the features that are observed in both the evidential damage in image number 14 versus the features of the damage observed in the simulation experiments of image 24, as you say, are remarkably similar.

Thank you.

Nothing further.

REXN BY MS CALLAN:

MS CALLAN: Mr Simpson? Just - I'm sorry. Sorry, your Honour.

HIS HONOUR: Continue.

MS CALLAN: You've just compared the damage which appears in photograph number - was it 17?---The images that I just spoke of?

Yes, Mr Eberl's shirt?---I think it was 14 and 24, let me just check that. Yes, 14 and 24 and then Eberl's shirt will be 19 to 27.

Yes, it's just - I just wanted to clarify, you compared what appears at photograph number 14 with what appears at photograph number 24?---That's correct, so the image number 14 is the evidential damage, so the damage that was created during



the incident and then the image in 24 so the damage - sorry - in image 24 is the damage that was created during simulation experiments.

And that was - so the item in photograph number 14, that is Rolfe's police shirt?  
---That's correct.

And the item at photograph number 24, that is Rolfe's police shirt?---That is also correct, yes.

Not Eberl's?---That's correct.

Insofar as you agreed that the damage which appears at photograph number 14 when compared to photograph number 24 was remarkably similar, how do you understand that expression?---So, remarkably similar from a lay point of view, I guess, would be that the shape of the damage is similar, the edge characteristics that are observed are similar, so when I say "edge characteristics" I mean the nature and shape and size of each one of those individual yarns as well as any other features that exist in that damage, so in the circumstance of image number 4 there is a point of entry - - -

Fourteen?---Yes, image number 14, there is a point of entry which is slightly sider and a little bit more of a distortion to the fabric which then progresses into a cut type damage and then the same as replicated in 24. So at the top of that damage you've got a slight distortion to the fabric which then progresses into cut type damage with short yarns which appear to be cut and then terminates at the bottom. The differences between 14 and 24 are that 14 has that additional tear damage underneath whereas 24 does not.

Insofar as you have concluded that that blade - that is the Wharncliffe blade or an item with - I think you used the word "exactly the same morphological features"?  
---Yes, gross morphological features".

Could have caused this damage?---That's correct.

What do you mean when you say, "An item with the same gross morphological features"?---Yes, so as previously answered, the gross morphological features that we are talking about are both the blade profile - so the shape of the blade, as well as the point condition. So sometimes you will have - so with a brand new knife that point will be very small, like needle sharp whereas if that point has been used it becomes blunter and becomes wider and then you've also got the edge characteristics of the blade. So if the blade is older and has been used and not resharpened, that blade quality can be anywhere from average to very dull, or if it is a brand new knife it can be exceptionally sharp. So those features in itself, in addition to the blade width are gross morphological features.

What is your view as to the possibility that other blade - blades - another blade not the Wharncliffe blade of these scissors or an item with the same gross morphological features could have caused the damage that you observed in these clothing items?

MR EDWARDSON: I object to that question, your Honour. That's not proper re-examination. This officer's evidence on the topic is absolutely clear. He said "It's consistent for another" – I can't remember his exact words - "another blade of the same morphological features".

HIS HONOUR: Gross morphological features.

MS CALLAN: In my - - -

HIS HONOUR: You're asking him whether it could have been caused by a blade which had different gross morphological features.

MS CALLAN: No, I wasn't. If my question conveyed that intention then I've confused matters. What I do seek to do is ask the witness about the potential for other blades - not scissors - to have caused the damage he observed.

HIS HONOUR: One would think that the witness has not confined his evidence to scissors, he has referred to a blade with the same gross morphological features.

MS CALLAN: Yes, your Honour. I will move on.

Insofar as you used pork belly for the purpose of your simulation experiments, do you have any training or expertise in terms of comparing the quality of pork belly to the features of a human neck?---No, so our expertise is limited to the textile itself, not onto the substrate or the flesh.

So you can't comment on whether the human neck would - sorry, I withdraw that. And does the same answer apply to the differences that might exist between pork belly and human shoulder?---Yes. So on a - from a lay point of view I can tell you that the abdomen of a human being is probably going to have different performance characteristics to a shoulder. However, as previously detailed, validation studies that have been shown as to which substrate to use, were constrained to pork belly. Now there have been instances in previous cases where I have gone outside of that, and I've actually sought to get, you know, pork legs, or other parts of the pork, to replicate the – the part of the body that was impacted by the implement. But in this case, like I said, there was no need to go to that additional step, because I'd already achieved the information that I needed from the using of pork belly.

You gave some evidence about your reaction when you initially received the scissors. I think you used the word that you were "surprised" when you saw the scissors?---That's correct. At the point – to clarify, at the point of where I'd completed my examinations initially for the items, in my head, the implement that I was looking for, was something similar to like a small blade, small folding knife, like a Swiss army knife sort of blade. When I was presented with the scissors, I was I like, I'm going to have to think about this a bit more, about how that implement could then be used to create that damage.

Your evidence in answer to questions from Mr Edwardson on that point, you I think accepted the proposition that the Wharncliffe blade probably could have caused the damage?---That's correct.

What do you mean by that?---So - - -

Or what do you understand that phrase to mean?---Yes, so on assessment of the implement itself, without actually doing any simulation experiments, that implement fits into that broad category that I'd already nominated based on the original examinations that I did. So it had a tip that had a blunt point. It had a blade edge that was in an average, to good condition. And then the blade profile width, was also within the realm of what I expected it to be. So it was less than the damage that we observed on the evidential damage. So based on that information alone, we couldn't exclude the implement at that point, which is why we then progressed into simulation experiments.

You were shown an email, which has been marked exhibit 68.

Could I ask that the witness be given exhibit 68 and exhibit 66, which is another email.

HIS HONOUR: My associate has pointed out to me apparently that exhibit 68 has not been distributed to the jury yet. I think it may have been provided to the Sheriff's Officer, but it hasn't been distributed yet.

MS CALLAN: I'll let them –

Mr Simpson, the email which has been marked exhibit 68, which is from you, dated 3 February 2022, do you have that there?---I do.

And do you see, you write, "Good morning all, as per the request from David and his team, please find attached the email correspondence from Detective Sergeant Wayne Newell and myself regarding the circumstance of the incident, dated 25 May 2020"?---That's correct.

Now attached to this email, which is exhibit 68, did you attach a copy of the email which has been marked exhibit 66?---Yes, that's correct.

That is the email from Detective Sergeant Newell to you, on that date, 25 May 2020?---That's correct.

Your email at exhibit 68 goes on to state "Note the email mentions a phone discussion prior"?---That's - - -

And we can see that in the first line of exhibit 66?---That's correct.

The – Detective Sergeant Newell commences, "Good afternoon Tim, as per our phone discussion", and then coming back to exhibit 68, you write, "It is my

understanding that I phoned Wayne prior to the conduct of the simulation experiments for this case, in order to better inform the experimental design"?---That's correct.

You – that is you asked Detective Sergeant Wayne Newell, for some information to – so that you could – which would inform the experimental design?---That's correct.

When did that conversation occur, relative to this email of 25 May 2020?---I believe it was the morning before that email was sent, so.

And you go on to write, if you move past what appears in the brackets, "The content of the email is reflective of the information that he shared with me over the phone"? ---That's correct, so - - -

That – so the content of the email at exhibit 66, dated 25 May 2020, reflected information he shared with you earlier that same day, over the phone?---That's correct.

And he also provided the two images from the body-worn video, which we find attached to that email of 25 May 2020?---That's correct.

And that was, you wrote, "To show how the implement could have been held or gripped"?---That's correct.

And did you have regard to those images in the way in which you held or gripped the scissors when you were conducting your simulation experiments?---Yes, that's correct.

Can I come back to your use of pork belly in your simulation experiments. You accept that pork belly is not the same substrate as a shoulder?---That's correct. Based on my, I guess, relatively limited understanding of human anatomy and physiology, the pork belly would generally have a higher fat content and skin thickness than what I would expect on a human shoulder.

And what about the neck. Is pork belly not the same substrate as a human neck? ---Again, I'd have to answer that as a layperson. But I would say that there's probably a lot more fat and skin thickness in pork belly than there is the neck.

In terms of comparing pork belly to the human shoulder or neck, is the substrate of the shoulder or neck harder?

MR EDWARDSON: Your Honour- - -

HIS HONOUR: This witness made it clear- - -

MS CALLAN: Yes, your Honour.

HIS HONOUR: - - -made it clear that he's answering from- - -

MS CALLAN: A lay perspective.

HIS HONOUR: - - -non-expert point of view at the present time.

MS CALLAN: You have, in your experience of the experiments you've conducted using pork belly, is that substrate easier to penetrate than structures in the human – certain structures in the human body?

MR EDWARDSON: I object to that, your Honour (inaudible) about stabbing the human body.

HIS HONOUR: Yes, I think you'd have to demonstrate that he has some expertise in this area.

MS CALLAN: Can I just have a moment, your Honour?

HIS HONOUR: Certainly.

MS CALLAN: Thank your Honour.

Those are my questions.

HIS HONOUR: Thank you. Thank you, that concludes your evidence. You may now go?---Thank you, your Honour.

WITNESS WITHDREW

HIS HONOUR: Now, I propose to release the jury at this time, unless there's something that either counsel want to bring up?

MR STRICKLAND: No, thank your Honour.

HIS HONOUR: All right, thank you. Well, members of the jury. You may now retire and we'll resume tomorrow at 9:30. Thank you.

JURY OUT

HIS HONOUR: And I'll adjourn.

ADJOURNED 1:11 PM TO FRIDAY 25 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 25 FEBRUARY 2022 AT 9:34 AM

(Continued from 24/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes.

MR EDWARDSON QC: Your Honour, before the jury come in, can I just mention two matters if I may. The first is that Mr Ben McDevitt is present in court, and sitting behind me. He's, as you know, the expert whose provided a report for the defence. He's here because he's relevant to a number of the witnesses that are to be called. And I – technically, there has been an order for all witnesses to be excused from the courtroom. I'd seek leave for him to be exempted.

HIS HONOUR: Yes.

MR EDWARDSON: My learned friend's consented.

HIS HONOUR: All right, I'll make that order.

MR EDWARDSON: Thank you. And secondly, your Honour, as you know, you issued, or permitted a subpoena to be issued and served on the Commissioner of Police. And today was the return date. The subpoena, as drafted, we acknowledged in writing, was way too wide. And so, through negotiations with the solicitor for the Commissioner of Police, Ms Ruth Brebner, we've confined the subpoena significantly, and again, last night, down to really the 9th to 13 November 2019. And specifically, in relation to the meetings that took place, and the decisions that were made to arrest Zachary Rolfe. We understand that they can't comply with that by today. We understand that it's likely that they'll be able to comply by Sunday, or if not, Monday morning.

And that's fine as far as we're concerned, given the way that we're tracking. Because Mr Pennuto will not be called until Monday. And it's obviously going to be relevant to his evidence, because he's made meticulous notes of the lead-up to, and the matters that were considered at the time of charging Zachary Rolfe. And we need to address those matters. In the case of Assistant Commissioner Anticich, we've been told, orally at least, that he made no notes of anything. We'd just like our friends to obtain an affidavit to that effect, and confirm that there are no notes forthcoming from him, despite his attendance at the various meetings that will be adduced in the course of these proceedings. If your Honour pleases.

HIS HONOUR: Before I bring the jury in, I'll have my Associate hand to the parties a document which I had prepared. It's a draft document. As will be obvious. Which is intended, or at least I intend to provide it to the jury during the course of my directions at the end of the trial. I'm not asking for you to look at it now. I'm giving it to you so you can look at it over the weekend.

MR EDWARDSON: Very helpful, and thank you, your Honour.

HIS HONOUR: And I should add, that it's not intended to be in substitution for oral directions.

MR EDWARDSON: Understood.



HIS HONOUR: Yes, thank you.

MR STRICKLAND SC: Your Honour, just on that topic, a) I'm indebted to your Honour for providing that, b), in relation to anything I say on the law, what I propose to do is just to put it in writing, give a copy to my learned friend, and also give a copy to your Honour. Not for the purposes of vetting, but if there is anything that is controversial, perhaps – and I hope it won't be, and I expect it won't be, but perhaps it could be discussed before addresses.

HIS HONOUR: All right, certainly.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Thank you.

Bring the jury in please.

JURY IN

MR STRICKLAND: Your Honour, with the consent of Mr Edwardson, I intend to tender the reports of the next witness.

Members of the jury, I know that will increase the amount of material you've got to lug around, but it will reduce the time in court.

I call Dr Andrew McIntosh.

ANDREW STUART MCINTOSH, affirmed:

XN BY MR STRICKLAND:

HIS HONOUR: Yes.

MR STRICKLAND: Thank you.

MR EDWARDSON: Your Honour, I consent, obviously, to the tender of Dr McIntosh's report.

HIS HONOUR: Thank you.

MR EDWARDSON: And should he require to consult any notes, I have no objection.

HIS HONOUR: Thank you.

MR STRICKLAND: Can I get you to speak loudly and slowly. Everything you say is going to be transcribed. If you need me to ask any questions again, please say so?---Yes.

What's your full name?---My full name is Andrew Stuart McIntosh.

What's your profession?---My profession is – I'm a biomechanist.

And that is the study of biomechanics?---Biomechanics is a study of the effects of forces on the human body and how those forces are generated. That's a very simple definition.

In this matter, you've been asked to provide three reports; is that correct?---Yes, that's correct.

You've also prepared a curriculum vitae, setting out your qualifications, your training and your experience?---Yes.

I want to show you a folder. Does that folder set out your three reports and your curriculum vitae at tab 4?---Yes, that's correct.

I tender that folder, your Honour.

HIS HONOUR: That will be exhibit 69.

EXHIBIT 69 Folder containing three reports of Dr Andrew McIntosh.

MR STRICKLAND: Doctor, I'm not going to go through your curriculum vitae. But I just want to ask you what actual experience you had in preparing reports in relation to human movement and the application of force. Can you explain what kind – in general lay terms – what experience you have had in that area?---So I studied – originally, I studied a Bachelor of Applied Science in Physiotherapy. So I trained as a physiotherapist originally, in the early 1980s, and studied as part of that anatomy and physiology and qualitative assessment of movement and forces acting on the body. So we did biomechanics as part of that undergraduate training. Then I worked for a couple of years, then I started studying biomedical engineering. And I – while I was studying biomedical engineering, I studied – let's say, more of the engineering approach to biomechanics. So the – how forces are developed in the human body, the measurement of those forces, how to measure human movement, the types of forces involved in different activities, the effect of those forces. That includes musculoskeletal force, forces acting in organs – for example, the heart and the circulatory system. Then I started a doctorate in biomedical engineering where I was looking at injury biomechanics, particularly looking at the effect of impacts on the body, head injuries, falls for different activities, motor vehicle crashes. And the – measuring those forces, measuring the effect of those forces on the body in terms of injuries and movement of the body. Then, when I started working as an academic in the mid-1990s, I recombined some of my interests, both looking at human movement aspects – so how do people move, what are the forces involved in people moving, as well as what are the forces involved in injuring people and how do you try and manage those to prevent injury. And I've continued doing that since I started doing my doctorate in the early 1990s. In terms of specific cases, I've been working on cases involving personal injury or assaults, somewhat, from the mid-to-late 1990s. So they've involved civil cases where people have fallen over or been in a motor vehicle accident, to criminal cases where people have been assaulted, stabbed, shot and people falling off buildings and various things like that.

And in the course of that work, have you looked at body-worn video or CCTV footage?---Yes, I have. I think the first time I looked at CCTV video in the context of a criminal matter was around 2000.

And you're familiar with the limitations of body-worn video?---Yes, I am.

I'll come back to that in a moment. Now, can I ask you, please, to turn to your first report, dated 20 May 2020.

Members of the jury, that is in – behind tab 1.

If you go to par 5 on page 3. You were asked to provide opinions in relation to the following: (1) it has been identified that both a Mr Rolfe and Mr Eberl had possibly

sustained injuries during their interaction with the deceased. You have been asked to provide an opinion about how the injuries may have been caused; is that right?---That's correct.

Secondly, the ability of the deceased – Mr Walker – to cause injury or harm to Constable Eberl and Constable Rolfe during their engagement and struggle, taking into account their positioning?---Yes.

You feel qualified to provide those opinions?---Yes.

Let me ask you about the material that you've been given to assist you in providing that opinion. First, you were given a document described as "Brief Circumstances"; is that correct?---Yes.

And you set out the essence of that document in your report from par 16 on, is that correct?---That's correct.

You've also given - I am not doing this in the order of your report - but you were given some photographs of some scissors, is that correct? If you to - can the witness please be shown exhibit 40?---Thank you. I have seen these before. I can't recall whether I saw these at the time that I wrote the report in May 2020.

But you've seen them before, at least some of your reports, is that right?---I have seen these before, before some of my reports, yes.

And that is the four photographs of the scissors?---That's correct, I have seen these before.

Thank you. You were also shown some body-worn video, is that correct?---Yes, that's correct.

You were shown some body-worn video from Mr Rolfe, is that correct?---That's correct.

Your Honour, I can confirm that is now exhibit 26.

And you were shown some body-worn in relation to Mr Eberl, is that correct?---Yes.

I can confirm that is exhibit 24. You - for the purposes of preparing your opinion you looked at the body-worn video of both those officers in real time, is that correct?---Yes.

That is in time it actually happened?---At the normal playback speed of a video, yes.

Normal playback speed, thank you. You were also shown - you also received slow motion footage, is that correct?---That is correct.

Where it was slowed to ten times slower than normal playback speed, is that correct?---That's what they said it was slowed to, yes.

Your Honour, I can confirm that is exhibit 59.

You were also shown a number of stills, is that correct?---Yes.

And you've reproduced some of those stills in your report, is that correct?---Do you mean the stills from the video or stills of photographs of Officers Eberl and Rolfe?

Thank you, I will be clearer - stills of the video?---The stills from the video are stills that I extracted from the video - well, a colleague of mine extracted them on my behalf, just to be clear.

Okay, so let's just go to page 20 of that report. Is that what you mean by "the stills that were extracted from the video"?---That's correct, that's an example of those stills.

And if you just go to page 21, for example, can you see that you have - there is yellow circles?---Yes.

On those. Who put those there?---I did.

And for what purpose?---To highlight aspects of the image.

And under each image you've given your interpretation of what you can see, is that correct?---Enough for the figure that isn't already in the text of the report, yes.

You were also shown what we've described here as the "bird's-eye footage" that is the footage of body-worn video showing simultaneously the body-worn from three different sources, is that correct?---I have seen that.

I can confirm that is exhibit 36. You were also shown some photographs of Mr Eberl's injuries, is that correct?---Yes.

Could the witness - and you've tendered - so in your report you've extracted some of the photos you see in relation to that?---Yes.

Your Honour, can the witness please be shown exhibit 1?

HIS HONOUR: Yes.

MR STRICKLAND: I will get you first to go to tab 18 first. So you were shown some photographs of Mr Rolfe's clothing and his injuries, is that correct?---Yes, I have seen those photographs, I was provided with those, yes.

And if you go to tab 19. Were you shown photographs of Mr Rolfe's injury?---I have seen these photographs. I am not sure whether these are the ones that were provided to me when I wrote the report in May 2020.

In your report do you - if you go to page 14 of your report, are they the photographs that you were provided?---The photographs that I was provided - - -

If you just go to page 14 of your report under the heading "Figure 2"?---Those are the photos in tab 18.

Yes, that's correct. Is that correct?---That's correct.

Thank you, it's exhibit 1, tab 18. If you go to exhibit 1, tab 20, are they some hospital records?---Yes, they are hospital records.

And was that provided to you as well?---I believe so, yes.

Now, you've also viewed the mattress upon which the struggle with Mr Eberl and Mr Walker took place, is that correct?---Yes. I've viewed and inspected the mattress.

Can that just be shown. I am not going to have it unravelled, your Honour. Do you recall seeing a mattress?---Yes, I do.

I tender that.

HIS HONOUR: Exhibit 70.

EXHIBIT 70 Mattress on which struggle between Eberl and Walker took place.

MR STRICKLAND: You also viewed an autopsy report from Dr Tiemensma, is that correct?---That's correct. I can't remember the name of the pathologist but I - - -

But a report from pathologist?---Yes.

That is MFI S. You also read some statements provided to investigating police by Adam Eberl, is that correct?---Yes.

And by Mr Hawkings?---Yes.

You also read a report from Bryan Chiles regarding the limitations of Axon body-worn video?---Yes.

And also from Mr Sorell?---Yes.

And since this trial began you've also read the transcript of the evidence of certain witnesses, is that correct?---That's correct.

You've read Mr - what - you've read the transcript of the evidence of Mr Eberl?

---Yes.

Mr Hawkings?---Yes.

And Mr Sorell?---Yes.

Is there anyone else you've read the transcript of?---I was provided with a transcript of the committal hearing and my evidence that I gave in the committal hearing.

Thank you. So let me ask you about your understanding of the limitations of the body-worn video that you have viewed. Can you go to par 70 of your report? Now, you set out there that you are aware of and you have considered, the many limitations in the body-worn video, is that correct?---Yes.

And one of the reports that assisted you on that was Mr Chiles - Bryan Chiles' report?---That assisted me specifically with this system.

I see, and you've also read Mr Sorell's evidence in this court about that?---Yes.

When you prepared your reports had you considered - you've considered those limitations in coming to your opinion?---I've been considering the limitations of video practically from the early 1990s in the work that I do.

And in coming to your opinions, did you also consider that the incidents, that are the subject of your opinions, happened extremely quickly?---Yes.

And again, is that something that you are familiar with in your work?---Very familiar. A lot of the work that I've done has been videoing high speed incidents. Either impacts, or high-speed human movements. So I'm very familiar from a – the perspective of trying to measure things with video, what those limitations are.

Now I just want to go to some particular aspects of your report, and just ask you some further questions about that. First, can I ask you to go please to par 120, page 38?---Yes.

Now I just want to ask – here you provide some opinions about the injury to Mr Eberl's left shoulder. Can I just take you to par 3.

And before I do that, can the witness just be shown exhibit 41.

Now can I ask you this. You haven't actually seen, Dr McIntosh, the actual scissors, is that correct?---No, I've seen photographs of them.

Okay?---Yes.

Just wanted to you and - - - ?---Can I - - -

If that could be – beg your pardon?---Can I look at them?

Yes please?---Do I need to double-glove as well? Thank you. Thanks very much.

Thank you. Now you've given evidence of all the material you've seen. I just want to ask you some questions about the injuries, but the first question you were asked, which is the injuries to Mr Eberl and Mr Rolfe, (inaudible). And if I can just break it up into the incident when the three men are standing up. That's Mr Eberl, Mr Rolfe, and Mr Kumanjaya Walker?---Yes.

Which is at, or just before the time of shot one. So I'll call that the first incident. And then when they're -- Mr Eberl and Mr Walker are on the mattress, I'll call that incident two. And I'll just break those two things up. So if you go to par 100 and -- we'll start with 119. And I'll -- again, I'm now going to break it down to Mr Eberl and Mr Rolfe. Your opinion is that on balance, Mr Eberl sustained minor injuries, consistent with a physical struggle, i.e. minor superficial injuries?---Yes.

And by the physical struggle, you mean in either one of those two scenarios? Either when they're standing up, or on the ground, is that correct?---That's correct.

And so what you've done in par 20, is you've assumed that Officer Eberl's left shoulder injury was caused during the struggle, is that right?---That's correct.

And that's the -- the injury is the one I've taken -- the photographs that I've taken you before to, in your report?---That's correct.

You said in subpar 2 of 120, you were not able to identify any specific sequence during which Walker's right hand moved towards Officer Eberl's left shoulder?---That's correct.

And then you said "For long periods of the struggle, Officer Eberl's left shoulder is behind and to the left of Walker." Are you referring there to scenario one, when they're standing up, or scenario two when they're on the mattress?---Incident one I think is how you referred to it.

Right, which is when they're standing up?---When they're standing up.

And you say, "It's plausible that an object on Eberl or Walker's clothing, or Eberl's wrist watch, may have been pushed against Eberl's shoulder during the struggle." Again, are you talking about incident one?---That's correct.

"However, the video provides no conclusive evidence of this." You then said "At approximately 9.51.59 Zulu Time" --

And your Honour, that is 7.21.59 in Central Standard Time.

Now can you go to figures nine and 10 please. That's page 26 and 27. Perhaps start with page 27. Now you've watched this scenario in real time, and in slow-motion, is that correct?---That's correct.



Several times?---Many times, yes.

Many times, okay. And your opinion is that what is circled – you see, on those circles there are – could you just identify which – there are a number of circles, what does each circle represent, or what does it contain, in your opinion?---So in figure ten on page 27, in the top image is what I would refer to as frame 1788.

Yes?---And on page 25, figure eight, the top image has frame 1788, but there's no highlights on that. That's the image from the camera.

Yes?---What I've highlighted in yellow are what I believe are Walker's arms, at the time – at that time. And it's the same in the lower image on figure ten, page 27, which is frame 1790. I've highlighted what I believe are Walker's arms.

Okay. And so that's the basis upon which you conclude at 1204, that Walker's arms appear to be unrestrained?---That's correct.

But that's in scenario – or incident one?---That's in incident one.

And you say "It's plausible that Walker could strike with his right hand, from right to left, and contact Eberl's left shoulder"?---Yes.

That's during incident one?---Yes.

You then go on to say "The video provides no conclusive evidence that this occurred"?---That's correct.

Could you see any occasion in incident two when Walker's arms appear to be unrestrained?---Not to the extent that it could cause an injury to Mr Eberl's left shoulder, no.

Now, let me ask you about injury to Officer Zachary Rolfe. First, you've taken to account the medical notes about the puncture wound; is that right?---Yes.

The photographs of the injury?---Yes.

And you say, "The wound appears to be related to blunt force impact." What's blunt force impact?---So that's – describes a contact with a blunt object that causes the injury, as opposed to a sharp object – sharp object causes a slightly different injury than a blunt object does.

You then say, "The wound does not appear to be an incised wound, i.e., a cut by a sharp blade." Why do you say that?---Because the wound has a characteristic of skin just being gouged out, as opposed to sliced open.

Thank you. And you – just to be absolutely clear – you're referring to the wound at page 14 of your report? As shown on page 14 of your report?---Yes. In the top

left-hand corner.

Thank you. You then go to say at par 121: "The blunt nose of the scissors is likely to cause local contusion." What's that? What's the word contusion mean?---So bruising.

Okay. And, "Depending upon the applied force, abrasion, laceration or ulceration," which you described as loss of skin?---That's correct.

At par 122 you say that, "On balance" – now, "On balance," what do you mean? On balance of probabilities; is that right?---That's correct.

"The injury to Mr Rolfe's shoulder is consistent with the action of a person striking downwards with a blunt-nosed scissors; is that correct?---Yes.

Okay. And you note that, in the body-worn video, there was at least one sequence of movement that could represent Mr Walker striking Rolfe, with Walker's right hand in a downward action?---Yes. I think there's one sequence that very definitely could be associated with that. And there's one which might be.

Okay. By the way, we've mentioned balance of probabilities. Do you mean more likely than not?---Yes, more likely than not.

And you said at par 125, you couldn't determine any other mechanism other than the downward motion of the scissors as causing that injury; is that correct?---On what I could see on the body-worn video, no, I couldn't see any other explanation.

Now, I now want to take you to the second opinion you were asked to consider, which is the ability of Mr Walker to cause injury or harm to Constable Eberl and Constable Rolfe during their engagement and struggle, taking into account their positioning. And again, I want to break it down into these two different incidents. Incident 1, before shot 1 when they're standing up and then Incident 2, when Mr Eberl and Mr Walker were on the mattress. Do you understand?---Yes.

So am I correct in saying – or am I correct in assuming – that pars 126 to 131 relate to that first incident, when the three men are standing up?---Yes.

Okay. So just dealing with that first. You say that again on balance, more likely than not, the potential existed for Mr Walker to cause injury or harm to Constable Eberl and Constable Rolfe, correct?---That's correct. What – the phrases or the terms, "Engagement" and "Struggle," I think, align with what you're referring to as Incident 1.

I was just about to say?---Okay.

Thank you. And when you say, "In any struggle, there is the potential for minor injury." Now, is that a general statement you made?---That's a general statement, yes.

And you're – at par 128, you say, "If it is assumed that Walker retrieved the scissors during the struggle" – again, you're talking about Incident 1; is that right?---That's correct.

"And maintain the same hand grip until he was subdued, the possibility existed for Walker to be able to cause injury to both Rolfe and Eberl." Correct?---That's correct, yes.

You then say, "Once Eberl and Walker separated from Rolfe, the threat to Rolfe diminished, while Eberl was restraining and controlling Walker"?---Yes.

You then conclude that, "On balance, at the time Rolfe first shot Walker, Walker was unlikely to be a direct threat to Rolfe." You adhere to that?---Yes.

"But immediately prior to the first gunshot, Rolfe was separated from Walker"?---That's correct.

And your opinion on balance, leading up to the first gunshot, "Walker may have been a direct physical threat to Eberl because of the scissors." Is that right?---That's correct.

And again, that relates to Incident 1?---That's correct.

Okay. But you say, "The body-worn evidence regarding this threat and the presence of the scissors is inconclusive"?---That's correct. And unfortunately, the paragraph reference dropped out of the report. But I think it may be, generally, on page 118.

Thank you. Page 118 of what?---Of my – sorry, par 118- - -

Par 118, I see- - -?---of my report.

Thank you. Now, I'll now ask you about the second incident – that's when they're on the mattress. Your conclusion at 132 is in your opinion, on balance, Mr Walker was unlikely to be a direct threat to Rolfe at the time of the second and third gunshots?---That's correct.

And is that because of the conclusion in your next sentence that Rolfe and Walker were separated and Walker was being controlled, to an extent, by Eberl?---That's correct.

Right. I now want to take you to 133 and I'll just take a bit more time in relation to that. Your conclusion in relation to this incident is that, in this, Walker was likely a low threat to Eberl at the time of the second and third gunshots?---That's correct.

And does that include the time that they were on the mattress, up until the second and third gunshot?---Yes.

Okay. Now, you – in forming that opinion, or in making that opinion, you take into account a number of different factors; is that correct?---Yes.

I'll just break those factors down. The first factor relates to the position of Mr Kumanjaya Walker's right arm?---Yes.

And your opinion is it was likely pinned under his own body, is that right? Mr Walker's own body?---Yes.

And it was pinned between Mr Eberl and the mattress; is that right? I beg your pardon. Between his own body and the mattress?---That's right. Mr Walker was on his right side with his right arm in between his body and the mattress.

Okay. And you've said you read Mr Eberl's evidence; is that correct? In this trial?---Yes.

And you read his evidence that he was asked – this is at page 703 – Mr Eberl was asked, "Could you see where Mr Walker's right arm was?" He said, "I believe it was, sort of, underneath his body." You've taken that into account?---Yes.

Okay. Now, assuming that to be the case, does the position of Mr Walker's right arm restrict – would that restrict the movement of his right arm?---It does. It depends on how much of his right arm was under the side of his body. Can I stand up and- -

Yes, please?---So if – imagine there's a mattress on this – on my right-hand side. If my right arm was down by my side with my hand on my thigh and I was lying on my right side, then it would be very difficult for me to move my right arm at all. If my right elbow was bent and my forearm was out from underneath my body, I'd have a little bit more movement of my forearm and wrist and hand. If my shoulder was brought forward a little bit, or upper arm, then I have a little bit more movement. So I can't see on the video how far – how much of the right arm is actually underneath the side of Mr Walker's chest. But that explains the position. So the – if it was a whole arm, then it would be very restricted. If it's the upper arm only, then it's still restricted, but not as restricted as if it was the whole arm under the side.

Thank you. Now that's a convenient time to take you to your second report where you deal with that issue. So I'll just – I'm going to ask about your second report, as it feeds into this par 133. So you were asked – you were also given some opinions of Dr Ackland, is that correct?---That's correct.

And there was in effect an exchange between you, as to your different opinions, and what you had in common, and where you disagree, is that correct?---That's correct.

So I can take you to your second report please. That's the one dated 11 August 2021. Now, if you just go to par 8, sorry I beg your pardon, there's a different – if you go to page seven of eight. Now I think you were referring – I'm now going to par 8 there. And I think you're there referring to what you've just demonstrated. Which is what happens if the upper arm is pinned, you see that?---Yes.

And you've said this, "However, as explained, even if the upper arm is pinned, it's greatly constrained as the potential movements of the forearm, and hand and use of scissors as a weapon"?---Yes, that's correct.

Does that refer to the scenario you've just demonstrated?---Yes.

And why is that so?---Could you rephrase that question please?

Yes. I'm asking you about your opinion you've expressed at par 8 in your second report?---Yes.

I'm asking you to explain why you say it is the case, that even if the upper arm was pinned, this greatly constrains the potential movements of the forearm and hand, and use of scissors as a weapon?---So – so first of all, most of the movement of the right arm is lost, because it's blocked by the mattress. So this movement where you can elevate your arm by your side, is completely lost. You can move your – possibly move your upper arm forward. That involves the resistance presented by the mattress as well. So it limits let's say, by half, the amount of movement of your arm, in total, and restricts it to your forearm and wrist. Because essentially you can only move your arm forward, away from your body. And the other factor in this, is that that means that you're not really able to thrust with your hand. So if you're using a weapon in your hand, and your arm is pinned in that way, then it's very difficult to develop force with the weapon that you have. Because you can't accelerate your arm, reach any velocity, reach any momentum, and exert a force onto someone else, that you can if your arm is unrestrained.

Just so we define terms, and for the record, upper arm is what part of the body? From where to where?---So I'm referring to the upper arm as this.

So from the shoulder to the elbow?---Shoulder to the elbow. And forearm from the elbow to the wrist. And obviously your hand is here.

Okay. So cutting to the chase, if the upper arm of Mr Walker was underneath his body, pinned between underneath his body and the mattress, only his upper arm, you say do you, that that would significantly restrict his ability to deploy the scissors against Mr Eberl?---Yes it would restrict his ability in terms of placement of the scissors. So it would reduce the range of motion that he could move the scissors through, and his reach that he – with the scissors. And it would reduce his ability to generate force to push through the scissors with, if he engaged with Mr Eberl.

And do you say that if both his upper and lower arm was pinned between his own body and the mattress, that would restrict it even more so?---Yes.

Would you be able to deploy, in your opinion, would you be able to deploy the scissors at all, if his – both his upper and lower arm were pinned between his own body and the mattress?---He would have, at most, very limited motion with his wrist, that he might be able to turn the – his hand around, and put it in a position, but no

I don't – I would be barely able to deploy the scissors, as a weapon.

Thank you. Okay, so that's the first factor. The position of Mr Walker's right arm. Now the second factor you mention at par 133 is the position of Mr Eberl's body, on top of Mr Walker's upper body?---Yes.

And what you describe at 133 as "The resistance applied by Eberl's body mass", and you've got "In addition to active restraint forces", that's your term?---Yes.

What does that last phrase, "Active restraint forces" mean?---So if let's say someone was laying on the ground, and someone lays on top of them, and does nothing, then the body weight of the person on top, is applied through the person underneath. So that's a totally passive force acting on the person underneath. The person on top could put themselves in a position where they can use their legs, or their arms, to apply further force actively. So Officer Eberl is in a position where he is able to exert is body weight force, so that's a passive weight, as well as some active forces, generated when he contracts his muscles in his arms and legs and trunk.

Now I want to put two different scenarios to you on this factor, about where Mr Eberl's body weight is directed to.

MR EDWARDSON: Your Honour, it's important that the witness does confine his evidence to what he can actually physically see on the video, not what he might have been told, or what others might have said.

HIS HONOUR: Yes.

MR EDWARDSON: And I'll deal with this in cross-examination of course, but we're getting into an area of conjecture here.

HIS HONOUR: Mr Crown.

MR STRICKLAND: Now you – you say you've read Mr Ackland's report, is that correct?---Yes.

Reports, plural, and you're familiar with what – I'll start again. In your report, go to your second report please, at page four. You describe, at par 4, that, "In your opinion Mr Eberl is applying a proportion of his body weight" – I'm sorry, it's par 16(4). Sorry, so page four of eight, par 16, and you're referring to what Dr Ackland says?---Yes.

And you can see what Dr Ackland has reported as saying as "At this time, the majority of Eberl's body weight appears to the left of Walker's trunk and legs", you see that? This is in your – in the italicised part?---Yes.

"And the majority of Eberl's body weight still appears forward, to the left of Walker's trunk and legs." Now you've said – you said "I agree with the description of the

body- position of Eberl's body, covering Walker's head, left shoulder and upper chest." That's based upon your viewing of the body-worn video?---Yes.

Okay. Now assuming that to be true, what effect would that have on the ability of Mr Walker to deploy the scissors against Mr Eberl, whilst on the mattress?---That means that Officer Eberl is able to use a large proportion of his body mass. So the mass of the trunk of a person is about 50 percent of their body mass, so if he weighted say 90 kilograms, he can - there's about 45 kilograms that can be pushing straight down through Mr Walker's chest, sideways from the left to the right and that's exerting a force through Mr Walker's chest with a supply to Mr Walker's right arm.

So what effect would that have on Mr Walker's ability to deploy the scissors whilst on the mattress?---It would have the effect that I've described, that it would limit his ability to move his right arm.

Now, you are familiar with what Mr Eberl gave - said in his evidence, again at 703, he as asked:

"Were you putting your weight on Kumanjayi Walkers' body?---On his body, no, on his arm."

"What about the upper body of his - what about the upper part of his body? ---No, I believe it was his arm, from my memory."

And he referred to - he was holding - that is Mr Eberl was holding Mr Walker's left arm with both of his arms?---Yes.

Do you recall that? Now, assuming that evidence was true, how would that affect the ability of Mr Walker to deploy scissors against Mr Eberl whilst he was on the mattress?---So, in the posture that Mr Walker is in and Mr Eberl - Officer Eberl was in, if Officer Eberl's right hand is on the upper arm - that is Mr Walker's upper left arm, then he can apply a force down through Mr Walker's chest which is effectively pinning his right arm against the mattress, so it has - it is consistent with what I've written in my report.

I am just going to play just part of exhibit 59 to you.

So exhibit 59, members of the jury and your Honour, is M Sorell's slow motion body-worn slowed 10 times normal playback speed. So I am just going to play it from 342, which is about - around about the time of the first shot.

DVD PLAYED

MR STRICKLAND: Now, can you describe what you have interpreted from that first part of Eberl and Mr Walker being on the mattress?---So, my interpretation of this image is based on watching the whole video, not just this single frame. Before I saw this single frame it would be difficult to say anything, so I've seen what occurred

before and afterwards. Mr Walker is on his side, Officer Eberl is over Mr Walker and you can see Officer Eberl's left arm which is reaching down - which would have been in front of Mr Walker's chest. You can't see where Officer Eberl's right arm is so if he is in a position above Mr Walker - sorry - Officer Eberl is in a position above Mr Walker and he is able to exert a downward force through his arms and through Mr Walker's chest, which would be pinning a part of Mr Walker's right arm between his body and the mattress.

Just go a little bit further please? 372.

DVD PLAYED

MR STRICKLAND: Can you see any part of Mr Eberl's right arm there?---Yes, you can see his right upper arm and it's in a position where his - you don't really know where his hand is. His hand could be on Mr Walker's shoulder, as he described, or it could be around behind Mr Walker's head.

Yes, if you can continue please?

DVD PLAYED

MR STRICKLAND: Pause.

Now, what can you see there?---So Officer Eberl was in a similar position on top of the upper part of Mr Walker. You can see the - this sash or whatever it is, around Mr Walker's clothing - - -

The red sash?---The red sash. You can see Officer Eberl's upper left arm and upper right arm and obviously you can see Officer Rolfe's left arm and his right hand and weapon.

And what do you say about the ability of Mr Eberl to exert force on Mr Walker onto the mattress?---He is still capable of exerting the same force that he was in the earlier part of the sequence that you showed.

Thank you. And what do you say about - I withdraw that.

Can you just continue on, 443.

DVD PLAYED

MR STRICKLAND: Now, I've played you from 365 to 443. That is something like two and-a-half – two to three seconds. Do you see any noticeable change in the position of Kumanjayi Walker's upper body between that period - in that period? ---No, I don't. We obviously see a different perspective because Officer Rolfe is moving and the camera position is moving, but using relative to Officer Eberl and relative to - I think that's his body-worn video camera or something that's fallen onto the mattress, relative to those other points, they appear to be in a very similar



orientation with Mr Walker on his right side. Officer Eberl on top of Mr Walker and there's limited movement of Mr Walker's upper body during that time.

And does that fact signify anything to you about the force that Mr Eberl is applying on M Walker's upper body during the period we just talked about.

MR EDWARDSON: I object to that. How can he possibly answer that question?

MR STRICKLAND: Well that's his area of expertise.

MR EDWARDSON: No, it's not. I maintain my objection, your Honour. How can he possibly - by reference to this video - determine the extent to which there was force and how much force was applied?

MR STRICKLAND: I press it, your Honour. Perhaps it needs to be ventilated.

HIS HONOUR: All right.

Members of the jury, would you retire please?

JURY OUT

HIS HONOUR: Would you wait outside for a moment please, Doctor?---Sure.

WITNESS WITHDREW

HIS HONOUR: Mr Crown, I could understand the witness being entitled to express an opinion as to how much force could have been exerted by Constable Eberl in that position, but I don't understand how this witness' qualifications enable him to say, merely by reference to the video, how much was actually exerted?

MR STRICKLAND: I understand. Obviously, your Honour, I understand that point. This witness doesn't – and I should clarify, give his opinions just on the body-worn video, but – I will modify the question accordingly.

HIS HONOUR: All right.

Does that deal with your objection?

MR EDWARDSON: Well, your Honour, he pressed – but yes, I gather it's a retraction, so, yes, it does.

HIS HONOUR: All right.

Then we'll bring the jury back, and then bring the witness back.

JURY IN

ANDREW STUART MCINTOSH:

HIS HONOUR: Mr Strickland.

MR STRICKLAND: Thank you. Your Honour, I withdraw that question, and I'll ask another one.

So I've played for you the body-worn video from the time they're on the mattress at frame 366 until frame 443, about a period of about two to three seconds?---Yes.

And you've given evidence about the fact that there is – what you've been able to see about the relative lack of change of position from this perspective, the body-worn video perspective, of both Mr Eberl, and Mr Walker?---Yes.

Does that fact say anything to you about the force – the degree of force that Mr Eberl could have applied to Mr Walker's upper body, during that period?---It – so what it says is that – I'm trying to answer the question. I – could you rephrase that question please?

What does the evidence you've just given, about the respective similarities in the position of the two bodies, say to you, if anything, about the force that Mr Eberl could have applied to Mr Walker's upper body, during that time?

MR EDWARDSON: I object to that question too, your Honour. I mean, why is that relevant? He either – if he can't – he can't possibly say what force was in fact applied.

HIS HONOUR: Yes.

MR EDWARDSON: And so, whether he could have, or did, or didn't, he doesn't know, how could he possibly answer that question. And how does it assist the jury? I object.

MR STRICKLAND: Well, your Honour, I press it. Mr – this witnesses expertise relates to the application of force. Obviously what he's doing is he's making – as he – his opinions are as good as the assumptions he's making.

HIS HONOUR: Yes.

MR STRICKLAND: But he's qualified, based upon those assumptions, he's qualified to give an opinion about - - -

HIS HONOUR: Look, I'm going to allow it, but as long as the witness understands that what you're really asking him is, what degree of force was Constable Eberl in a position to exert during that period of time.

MR STRICKLAND: I'm happy to put it in that more precise manner.

HIS HONOUR: Yes.

MR EDWARDSON: Yes, your Honour, thank you.

MR STRICKLAND: So, you heard what his Honour said?---Yes.

Can you answer that?---During that period of time, Officer Eberl was able to exert the force that – he needed to maintain that position between his body, Mr Walker’s body, and the mattress. In terms of a precise number, that would be at least approximately the weight force of his upper body. So if – if Officer Eberl weighed 90 kilograms at that time, that would be 45 kilograms, which is half of his body weight, times approximately 10, which is gravity. So that’s about 450 newtons, plus there could be additional force that he’s applying through his leg – the muscles in his legs and his arms, on top of that.

Okay, thank you. Now I’ll just go back to these factors at par 133 of your first report?---Yes.

And just talking about the different factors that feed into your opinion that Mr Walker was likely a low threat to Eberl at the time of the second and third gunshot?---Yes.

And by – and what I –

and we can – I can take that video off the screen, your Honour, that was exhibit 59.

Now do you take into account, in your opinion, the respective size differences between Mr Eberl and Mr Walker?---Yes.

Now another factor which I don’t think is included in your report, is the mattress itself?---In the first report, no.

Yes. So but that is a matter that you have considered, is that right?---I have, yes.

And that’s the subject of your third report. I wonder if you could turn to your third report please, in tab 3. So you’ve taken – you’ve seen – you’ve been shown some – you’ve been shown some photographs of the mattress, is that correct?---Yes.

And then now you’ve actually – since then, you’ve actually seen the mattress, is that right?---I’ve inspected the mattress. I’ve pushed on the mattress, I’ve – and I’ve seen the mattress, yes.

Now you say at par 16, “That assuming the mattress is a typical foam mattress, which the photographs indicate, as more force is applied to the mattress, the deformation of the mattress will increase.” What do you mean by “deformation”?---It compresses.

Okay, pushes down?---It pushes – the material itself is squashed underneath the person, or the – or where the force is being applied.

And you say, “Further, the deformation will occur locally around the object that is against the foam.” What do you mean precisely about that?---So if – if I put my arm on the mattress and push it down, it’ll deform around my arm.

Deform? In that – this context means?---It distorts and moulds around my arm. So it squashes below my arm and this – there’ll be, like, a wall created around my arm.

Okay. And what effect does that have on the ability of Mr Walker to deploy the scissors?---So that – that means that there’s an additional resistance, because if the arm is pushed into the mattress and it squashes under the arm, as he tries to move his arm, he has to push against the resistance of the mattress to move his arm out from that position.

Thank you. Now, if you go back to your report at 133 – the first report at par 133. You say that another factor leading your opinion that Mr Walker was likely a low threat to Mr Eberl at the time of the second and third shots, you say, is considering the weapon itself. You see that?---Yes.

And what do you mean by that?---It’s a pair of scissors with a blunt end on them when they’re closed. And the way it’s – they’re held in his hand, that we see after the event – so they’re not protruding by a long distance from his hand. There’s a short distance that they’re protruding from – from, I mean, from Mr Walker’s hand.

Okay. And another factor you mentioned in 133 is the distance that Mr Walker could, potentially, thrust the scissors. Do you see that?---That’s correct.

And what do you mean by that?---So because the – at least, the upper arm is pinned, there’s a small envelope that the scissors – the hand can be moved into. So that’s – that’s what I mean. There’s a small distance that the scissors can be thrust through.

And you then say the available movement in Mr Walker’s upper limb would limit potential for injury, do you see that?---That’s correct.

And what do you mean by that?---So in order to cause an injury to someone with a weapon like the scissors and the way they’re being held, they have to be – a force has to be exerted. And the way you can do that is by thrusting your arm and accelerating your hand and using that to exert a force through the scissors on to a person. Or opening the scissors up and manipulating them, but you can’t open a pair of scissors with one finger through the – through the ring on the scissors, in the way they’re being held in the – by Mr Walker.

You’re talking about when he held them at the time that you saw the scissors in the body-worn video; is that right?---That’s correct.

Are there any other factors that have formed your opinion that Mr Walker was likely a low threat to Mr Eberl at the time of the second and third shots?---No.

They're my questions, your Honour.

HIS HONOUR: Thank you.

XXN BY MR EDWARDSON:

MR EDWARDSON: When you trained to become a physiotherapist before you became an expert in the field that you're now talking about, you understood that you obviously studied anatomy?---Yes.

And you've now seen and sighted – I think for the first time – the actual scissors themselves?---In – I've seen photos of them before.

Yes?---But in the flesh as it were, yes.

In the flesh. And you've now seen those scissors today?---Yes.

In fact, you examined them in your hand, didn't you?---Yes.

It's true, isn't it, that if deployed to the right region – the right location – a pair of scissors such as the ones that you've just seen on the – today, have the potential to be lethal?---I agree with that, yes.

I mean, we know about – there's obviously different part of the body, carotid artery, things of that nature, which that particular item has the capacity to sever?---Yes, yes. Or puncture.

Or puncture?---Yes.

All right. Now, I want to turn to your report and just put it into proper context if I can, please. Quite properly, can I suggest, you have identified the limitations – or constraints, if you like – of your capacity to determine the extent to which that particular weapon might have been deployed against Mr Eberl or Mr Rolfe? And you express those limitations and set them out, don't you, in your report?---I – I – is that the question?

Yes?---Okay. I – I believe so, but I'm wondering what, specifically, you mean.

All right. Well, I'm talking specifically about the body-worn video?---Right.

Now, right at the beginning of your first report, you say this, don't you – just bear with me a moment, I'm sorry. First of all, the Brief Circumstances, which are set out at par 2.1, page 6 of 46, pars 15 and onwards. Are they your words? That is, your description?---The – in the italicised- - -

Yes- - -?---text is cut and pasted from the – the documents. So the Brief Circumstances- - -

Yes- - -?---that's cut and pasted from the Brief Circumstances. The – say, for example, under Constable Eberl's statement 1, what's in italics is from his – his statement.

Right. So you've cut and pasted, as it were, from various documents that were provided to you for the purposes of you providing your opinion?---That's right, yes.

Thank you. And if you turn to page 15 of 46, the video of the incident. You explain there that you reviewed the video using QuickTime version 10.5 on an iMac running macOS Mojave version 10.14.6?---Yes.

"I've watched the video at normal playback speed, frame by frame and scrolled through in forward and reverse"?---That's correct.

So in other words, you looked at it in real time?---Yes.

You then slowed it down?---Yes.

You then tried to look at it frame by frame?---Yes.

And so, of course, that extends significantly the time of the actual incident?---It extends the time of me looking at the incident, but the incident happened- - -

In seconds?---The – what – my looking at the video later doesn't change the time of the incident.

No, no. Of course not. But what I'm suggesting to you is that what you did by slowing it down frame by frame is, basically, to slow down the incident as it unfolded as opposed to real time?---As I observed it, yes.

Yes. And you say in par 69: "The analysis presented below is largely qualitative or descriptive. The analysis based on my visual review of the available video and consideration of the movements and actions on video from biomechanical perspective"?---That's correct.

And when I said to you before that all of your opinion was qualified, you set that out, don't you, specifically in par 17? And I want to turn to that, if I can. Do you see that on page 16?---Yes.

And I want to deal specifically with the body-worn video. You understand, don't you, that both Constables Eberl and Rolfe had body-worn video and you've seen their footage from each of their equipment?---Yes.

And do you know specifically where the body-worn video was positioned on their person?---On the front of the body.

So clearly, the position of the camera lens on the body-worn video is different from the eyesight perspective of both officers?---Yes.

You say in your – par 70: “I’m also aware of and considered the many limitations in video. For example, parallax error and shutter speed, which can give rise to artefacts and/or the potential to misinterpret movements and actions. An object can appear elongated or distorted, for example, as a result of movement of the camera or object while the shutter remains open. The object will typically be blurred as well. These issues are described in pars 23 to 25 of Bryan Chiles’ statutory declaration”?---Yes.

I want to take you through that, if I can. Bryan Chiles is an expert who provided a declaration in respect of – amongst other things – the body-worn video, how it functions and the limitations of it?---Yes.

And you have regard to that?---I don’t have that report in front of me, but I’ve read it, yes.

No, no, no. But you regard to that for the purposes of expressing this opinion?---That’s correct.

And from your own experience you’re acutely aware, aren’t you, that body-worn video or film footage – call it what you will – certainly has considerable limitations, as expressed in par 70?---Yes.

With a wide-angle lens – and we know that both of these body-worn videos had a wide-angle lens – that can and does – when one sees the image – appear to be – a person appears to be much closer, for example, on the camera lens as opposed to the real distance between the two?---It’s hard to determine the exact distance from the camera to the object, that way - - -

Of course, what I am simply saying is that the image as presented on video footage is different, is it not, from what you might see with the naked eye?---Yes, and the best example of that is for any cricket fans in the jury, is all the debate what occurred around whether different bowlers were bending their elbow or not when they were bowling from two dimensional images and it looks like someone is bending their elbow when their arm is just moving through a different plane and on a two dimensional image it looks like they are bending and straightening their elbow but in reality they might have their elbow in a fixed position, so that’s for the cricket buffs in the jury.

So assuming that there are a few cricket buffs in the jury and your description, what I am simply pointing out to you is that it is one of those limitations that we have to be aware of when one is viewing video footage?---That’s correct, yes.



The other thing, of course, is that the position of the camera itself is different from the position of the natural eye and perspective of the individual?---Yes, the person could be looking with their head to their left and the camera is still facing forward, yes.

Precisely, so in other words what it is that is captured on the video might be quite different from the image that is caught by constables Eberl and Rolfe in this case? ---They may be paying attention to something quite different than the camera is capturing, yes.

Yes, so what they see might be different from the image that is captured on video? ---If they were looking at the same area it should be similar, but if they were looking somewhere else it would be different.

And there's no way of knowing that, of course, simply by reference to the video footage?---About what?

What it was that they actually saw as opposed to what is captured on the body-worn video?---I would say there's an overlap between the two.

Well there might be - you don't know though, do you? We can't tell from the video? ---Well, I think you can say that there is an overlap because what is captured on the video is also what happened and what they saw is also what they saw, so there is an overlap between the two.

One thing we do know though, from your report, is that the first time you actually see the scissors is after the first - second - after the second and third shots have been discharged?---That's correct.

The first time you see the scissors is when you actually see it in the hand of Kumanjayi Walker - his right hand - and you see Constable Rolfe take hold of the scissors of the blade end of the scissors and utter those words?---I - I think they are visible before you - before Constable Rolfe grabs them, but yes - - -

Around that time?---Approximately at that time, yes.

Certainly after all three shots have been discharged?---I could not see any conclusive evidence of the scissors up until that point on the video.

Thank you. On the other hand, from the perspective of Constables Eberl and Rolfe, they may have been able to see the videos even - sorry - the scissors - even though they were not captured on the body worn video - we just don't know?---That's - I - that's a reasonable point, yes.

Thank you. And the next point is that, of course, you talked in terms of balance of probabilities, do you remember that expression?---Yes.

More probable than not?---Yes.

For the members of the jury and certainly you would understand, that that is the onus of proof in a civil court isn't it?---That's what - I agree, that's correct, yes.

Whereas, of course, we are in a criminal court here today, aren't we?---Yes, but - - -

And that is, "beyond reasonable doubt" which is a very different onus, is it not?

MR STRICKLAND: Your Honour, I object.

HIS HONOUR: Yes.

MR STRICKLAND: He is not called as a legal person.

HIS HONOUR: Yes.

MR EDWARDSON: What I am trying to establish - and I will ask the witness in this way, your Honour, you understand the possibilities are one thing. The actual realities of the situation is quite different.

HIS HONOUR: Or may be different.

MR EDWARDSON: May be different?---Can I explain what I mean by that term?

Yes, please?---So I work in the field of science. I publish research. We use the equivalent of "on balance" is actually - there's a 95 percent likelihood of something being correct, so I generally apply that in the work that I do. I actually, if - I believe a much higher standard of proof in the reports that I write and the opinions I give than the actual - that I understand the legal system does.

But even applying that higher standard, you are only as good as what you can actually see on the video?---Yes, I agree.

And in the video are you able to ever actually see the extent to which Kumanjaya Walker's forearm - right forearm - is being controlled by Constable Eberl? ---You cannot see Mr Walker's right forearm - or arm - when - - -

At all?--- - - - when Mr Eberl is on top of him.

No. And we know that it's that hand - that right hand - that is in possession of the scissors and being controlled by Kumanjaya Walker?---I think that's a correct statement, yes.

I just want to take you very briefly to the opinions that you have expressed and put them into context, if I may. I am turning now to page 38 and in particular pars 119 onwards. You qualify the opinions that you express specifically on - by reference to assumptions that you've made in par 120, is that so?---Could you just repeat that please? I didn't quite follow the question.

You qualified your opinions by reference to the assumptions that you made specifically in par 120?---The assumption is that Officer Eberl's left shoulder wound was caused during the struggle - that's the assumption.

Yes. Even though you can't actually see it on the video?---That's correct.

You are not able to identify any specific sequence during the struggle that explains the causation of the wound?---That's correct.

Because you can't see it on the body-worn video?---That's correct.

But you know, as a fact, that Zachary Rolfe was stabbed by Kumanjayi Walker?---This is - this paragraph refers to Officer Eberl.

I am sorry - I am sorry, I am talking about - yes?---I don't know for a fact. I assume that, you know, I assumed that that injury to Officer Eberl was caused during the struggle.

You also qualify in par 121, do you not, your lack of qualifications to comment on the consistency between the scissors and clothing damage?---That's correct.

Before giving evidence in court today were you made aware of any evidence from an expert in respect of textile or clothing damage?---I understand that an expert gave evidence but I haven't read the transcript.

And the extent to which that might have been caused by the scissors in question to the clothing of both Eberl and Rolfe?---I don't really know the answer to that, no.

Thank you. You say in par 2, "I am not able to identify any specific sequence during which Walker's right hand moved towards Officer Eberl's left shoulder"?---That's correct.

And that's because you simply can't see, if you like, his right forearm and hand and the scissors?---That's - well, it doesn't matter whether I can see the scissors, I just can't see the right hand moving.

And that's why you've got this limitation on the extent to which you can interpret the video footage?---That's correct.

You say for long periods of the struggle Officer Eberl's left shoulder is behind and to the left of Walker. It is plausible that an object on Eberl or Walker's clothing or Eberl's wrist watch may have been pushed against Eberl's shoulder during the struggle." Now, whilst that is possible, we can't see that?---That's correct.

"However, the video provided no conclusive evidence that this occurred"?---That's correct.

"In a proper qualification because of the limitations of the body-worn video"?

---That's correct.

You then identified a specific point in time in par 4 that, "Walker's arms appear to be unrestrained"?---Yes.

"It is plausible that Walker could strike with his right hand from right to left and contact Officer Eberl's left shoulder"?---That's correct.

"However, the video provides no conclusive evidence that this occurred"?---That's correct.

In other words, we simply don't know by reference to the video?---We don't know that that wound was caused at that time.

Or that there was a strike or an attempted strike in regards to - - -?---We don't know. We know that it's anatomical or biomechanically possible that that could happen.

So it's anatomically or biomechanically possible but we can't see it on the video?---That's correct.

So the only person that can tell us are the two people that were in the room?---I don't understand the law well enough to answer that question.

Well, if you are physically present they might be able to tell us whether there was such a striking motion, for example?---They might, and a third party or an observer might be able to add to what is on the video, yes.

Because they're looking at it potentially from a very different perspective from the body-worn video itself?---Yes, we've established that, yes.

Thank you. Can you go to par 122 on page 39. You say, "In my opinion on balance the injury to Rolfe's shoulder is consistent with the action of a person striking downwards with blunt-nosed scissors." Do you see that?---That's correct, yes.

If the scissors were separated, such that both blades are exposed, would you accept that that striking action, as described in par 122, might have resulted in the injury to Rolfe's shoulder, but with the sharper of the two blades?---It's possible. It – with the way Mr Walker was holding the scissors when we see them at the end, after the third gunshot.

Yes?---He's holding the scissors through his index finger only.

Yes?---As he – the most effective way of using scissors, is to hold – in that way, is to hold a fist, which I've explained in the report. If you open your hand up, which would then allow the – the two blades of the scissors to open up – sorry, you lose some of the effectiveness of actually being able to strike. Because your hands open. So it's possible that that's what happened.

Yes?---But that wouldn't be the most effective way of delivering a blow to someone.

Well it's true, that it might lose the effectiveness of a blow in that manner, but by separating the blades, it means that you can access the sharper of the two blades, correct?---Except you can't target them very well.

Well you might not be able to target them very well, with precision, but nonetheless, it's still capable – you're still capable of using it in that way?---It's capable of causing that injury, yes.

And the other thing that you would have been told, and would know, that insofar as Mr Rolfe sustained an injury to his shoulder, it was a piercing wound, which went through two lots of clothing?---That's correct. That's – you can see that on the photos, yes.

And you say there is at least one sequence of movement, in par 122, "That could represent Walker striking Rolfe with Walker's right hand in a downward action?---That's correct.

In other words, you can't actually see whether that's in fact what happened on the video, but it's consistent with it occurring at that point in time?---That's correct.

And that's why you say in par 123, "The time point when the scissors were introduced as a weapon by Walker is not visible on the body-worn video"?---That's correct.

And so as you say, there is a long period leading up to the struggle, when Walker's hands are not visible?---That's correct.

So in other words, by reference to the body-worn video, we have no way of knowing, just by looking at the video, where the scissors came from, how he accessed them, how he deployed them or used them, during that time frame, which is not visible on the video?---That's correct.

So ultimately you conclude at par 125, based on your review of the body-worn video, you were not able to determine any other mechanism for Rolfe's shoulder injury?---That's correct.

All right. I want to turn now to par 2, on page 39, pars 126 onwards. You say, "In my opinion, on balance, the potential existed for the deceased to cause injury or harm to Constable Eberl and Constable Rolfe, during their engagement and struggle"?---That's correct.

And by that you mean, cause injury or harm, or even fatal injury or harm, if deployed in the right location of the body of either one?---More generally, in a struggle, someone can fall over and have a fatal head injury, without any weapon being involved.

Of course, but in this case, I'm asking you about the weapon?---Yes.

And so again, at par 128, "If it assumed that Walker retrieved the scissors during the struggle, and maintained the same hand grip until he was subdued, the possibility existed for Walker to be able to cause injury to both Rolfe and Eberl"?---That's correct.

Can I go to par 133 please? Which is where you characterise the threat as being low, do you see that?---Yes.

You've chosen your words, can I suggest, very carefully and properly in par 133, again qualified. You say, "In my opinion on balance, Walker was likely a low threat to Eberl at the time of the second and third gunshots. Walker's right arm was likely pinned under his body." Do you see that?---Yes.

You chose those words carefully didn't you?---Yes.

Because whilst that might likely have been the position, we can't actually tell from the video, can we?---We can't. We know from standard anatomy where Walker's right arm was.

Yes, but the extent to which he was able to deploy those scissors, with that right arm, we can't actually tell, by reference purely to the video?---No, the video has to be interpreted.

That's right. And part of that interpretation, as you've told us, involved you slowing it down to frame by frame?---Yes.

That permitted you, and particularly with your qualifications and expertise, to try and interpret what was happening and shown and captured on the body-worn video?---That's correct.

Would you accept that of course, neither Officers Eberl or Rolfe, had the luxury of being able to slow things down frame by frame?---No, of course they didn't, no.

They, of course, were dealing with this situation, this dynamic situation, in a matter of seconds?---That's correct.

And from their perspective, it might be quite different, as we've acknowledged, from the body-worn video?---Yes.

And the perception about whether the threat was real, low or high, might be quite different from their perspective, as opposed to the way in which you have sought to interpret this body-worn video?

MR STRICKLAND: I object. Your Honour, this witness – this witness doesn't have expertise in what another person's perception is. He can't answer what - - -

HIS HONOUR: But he has interpreted the video - - -

MR STRICKLAND: Yes.

HIS HONOUR: - - - and I think that he may be questioned about – and has in fact been questioned about the basis upon which he came to that interpretation. And I don't think there's anything wrong with him being asked whether somebody else might come to a different interpretation, if they have not got the ability to analyse the video in the way in which he has.

MR STRICKLAND: But your Honour, the question is not someone else's interpretation. He's being asked about Mr Eberl and Mr Rolfe's perception.

HIS HONOUR: Well it's the same thing really isn't it?

MR STRICKLAND: In my submission, he's not qualified to give an opinion about their perception at the time. That's a different field - - -

HIS HONOUR: He's not being asked to give an opinion about their perception. He's being asked whether their perception may well have been different to his, based upon his actions.

MR STRICKLAND: The question objected to is more specific than that, your Honour. I've made my submissions.

HIS HONOUR: All right, I'm going to allow it.

MR EDWARDSON: Thank you.

Are you able to answer that question?---Could you just repeat it please?

I was hoping you wouldn't say that. I'll try again. With your expertise in biomechanics, and the limitations, the quite proper limitations that you've identified, explicitly in your report, you had the luxury of slowing down the video, we've acknowledged that?---Yes.

And looking at it frame by frame, from the body-worn video perspective?---Yes.

Do you accept that the perception, or perspective, of both Officers Eberl and Rolfe, may be quite different from your analysis?---Yes.

And whatever opinion you have expressed, as to the threat, and whether it was low or not, must be seen in that light?---I agree with that, yes.

And you're not for a minute seeking to impose your opinion about the extent of the threat, or the perception of that threat, on either of those two officers?---I don't think I've been asked to do that and I - - -

And you're not?---No, no.

Now, Mr Strickland kept referring to incident one and incident two. And he divided incident one as being when they're both upright and the first gunshot, and incident two, what's happening on the floor?---Yes.

Clearly it's one incident. It's a dynamic situation. It's not two incidents.

MR STRICKLAND: I object. I object to the preface, "Clearly it's one incident."

HIS HONOUR: Yes.

MR STRICKLAND: Prefacing the question by the assumption.

MR EDWARDSON: Try again.

Mr Strickland referred to incident one and incident two. It's one ongoing course of conduct involving three people, isn't it?---Yes, although I broke it down into different phases of the same incident - - -

Thank you?---Because it's easier to consider it like that, yes.

Absolutely, I'm – all I'm simply pointing out is it's simply different phases of one incident, that happened over a matter of seconds?---That's correct, yes.

Thank you.

Nothing further.

HIS HONOUR: Re-examination?

MR STRICKLAND: One matter, your Honour.

REXN BY MR STRICKLAND:

MR STRICKLAND: When you were asked some questions about 133, and the position of Mr Walker's right arm, you said, "We know from standard anatomy where his right arm was." That's when it was under the mattress. What did you mean by that?---Well the right arm is attached to the right side of the chest, at the shoulder. That's where it's going to be, if – your right arm isn't suddenly going to be sitting on your left shoulder. It's – your right arm is attached to your thorax, or your chest, at the right shoulder. So that's where it's going to – where your right arm's going to be positioned, due to standard anatomy. That's what – exactly what I mean.



So when you wrote, "His right arm was likely pinned under his body, likely pinned under his body by Walker's posture and the weight of Eberl on Walker's upper body", you're basing that on your own knowledge of standard anatomy, is that right?---That's correct, yes.

Thank you, your Honour.

HIS HONOUR: Thank you.

Thank you, that concludes your evidence and you may go?---Thank you, your Honour.

WITNESS WITHDREW

HIS HONOUR: Now we will take the morning adjournment at this point, so members of the jury would you retire please.

JURY OUT

HIS HONOUR: I'll adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Bring the jury in, please.

JURY IN

HIS HONOUR: Yes.

MR STRICKLAND: I call Dr Botterill.

PAULL BOTTERILL, sworn:

XN BY MY STRICKLAND:

HIS HONOUR: Yes.

MR STRICKLAND: Can I ask you to speak slowly and clearly? Everything you say is being transcribed. If there is anything I ask you don't understand or I speak too quickly, just ask me to repeat it, okay?---Certainly.

What's your full name?---Paull Botterill.

Spelt?---P-A-U-L-L, B-O-T-T-E-R-I-L-L.

What's your occupation?---I am a medical practitioner employed as a pathologist, specialising in forensic pathology.

And you're based in Cairns, Queensland?---These days I alternate between Cairns and Townsville.

How long have you been practising as a pathologist?---I've been a pathologist since the beginning of 1990 and practising as a full-time forensic pathologist since the beginning of 1994.

Now, you prepared a two-page Curriculum Vitae; is that correct?---Yes, I did.

I tender the Curriculum Vitae of Dr Paull Botterill.

HIS HONOUR: Exhibit 71.

EXHIBIT 71 Curriculum Vitae of Dr Paull Botterill.

MR STRICKLAND: Now, you were asked to prepare a report in relation to this matter; is that correct?---Yes. I was contacted by Detective Newell from the Northern Territory Police, and asked to provide an opinion relating to photos that were sent to me of clothing, injuries and some objects that may have been responsible for those.

In response to that, you prepared a reported dated 2 June 2020?---Yes, that's correct. It was a five-page report.

And you've got a copy of that in front of you?---Yes, I do.

I tender that report.

HIS HONOUR: Exhibit 72.

EXHIBIT 72 Report of Dr Paull Botterill 02/06/2020.

MR STRICKLAND: Your Honour, could copies of both the CV and the report be distributed to the jury?

HIS HONOUR: Yes.

MR STRICKLAND: Dr Botterill, you are allowed to have access to your report until you're told you're not, do you understand?---I think so, yes.

MR EDWARDSON: No objection, your Honour.

MR STRICKLAND: You can look at your report?---Thank you.

Now, in order to answer the questions that you were asked - the opinion you were asked to provide, you looked at a number of things, is that right?---Yes. I was provided access to an internet folder which contained a number of sub-folders which had various photographs.

I will just pause you for a moment because I am just going to go through it in a way that will hopefully help the jury. So you were provided with four pages of Emergency Department clinical notes, is that right?---That's correct, yes.

That is exhibit 1, tab 20. You were also provided with some photographs of some scissors used by Kumanjayi Walker, is that correct?---There were a number of scissors. One of the folders was called, "Scissors used".

Yes?---The other folders were labelled, "other objects" which were a series of knives and scissors. There was a folder called, "Yuendumu Health Clinic scissors" which were another set of five photos of scissors - of a pair of scissors. There was also a folder labelled, "Injuries to Rolfe" which showed four photographs of clothing and of a skin surface.

I am just going to pause you there for a moment. I just want to focus on the scissors?---It's okay.

"Scissors used." How many photographs were you shown there?---I was shown two photographs. They were labelled respectively, "DSC\_0063" and "DSD\_0064" and they were a pair of scissors in the closed fashion and slightly opened fashion.

Are you able to show the jury the photos - are you able to show the photos - the scissors - show the photograph of the scissors you were shown? Can you do that? ---Well, this is a - I'm not sure this shows up too well.

Yes?---But that's a printout of the two photos.

I see, thank you.

Your Honour, it's a bit difficult to have that marked remotely. What I might do is I will have those marked.

Could I ask you, Dr Botterill, to send - after you've finished your evidence could I ask you please to send a copy of that page to my instructing solicitor please?---Certainly.

So could I have that marked in the interim?

HIS HONOUR: When it's available it will be marked for identification. Just one moment, with the letter X.

MR STRICKLAND: Thank you.

MFI X Printout of two photos.

MR STRICKLAND: Were you shown any other - you've mentioned a number of scissors you - photographs of scissors you were shown. Are there any others that you understand were the scissors that were used in this particular incident on 9 November 2019?---At the time of completing the report, no. Two days ago, I did receive an Adobe Acrobat file which was labelled 202202220909126 which was also had in the top right-hand corner, the handwritten word, "Exhibit 40" - four zero.

Thank you. That was four - photograph of four scissors, is that correct?---Yes. So there were four images I thought of the one pair of scissors, but they were images of the whole of the scissors on the first page, and on the second page the tips of the scissors are opened, and also an image of a - of part of one of the arms near the finger space.

Thank you. Now, you also said you were shown photographs of the injuries to Mr Rolfe, is that right?---Yes, that's correct.

And that is exhibit 1 tab 18 and tab 19. You were also shown some photographs of injuries to Mr Eberl, is that correct?---That's correct.

That is exhibit 1, tab 21. You were shown a body-worn video of Mr Rolfe, is that correct?---I was subsequently sent a copy of that video, yes.

When were you sent that?---I don't recall the actual date of the receipt but I don't believe that was at the time of the initial inspection of the other materials.

But certainly you've watched it now?---Yes, yes.

That is exhibit 26. You were also shown a video - body-worn video of Mr Eberl, is that correct?---Yes.

Exhibit 24. Were you also shown a bird's-eye video, that is a body-worn video where there were several body-worn videos played simultaneously?---Yes, it was a composite made up of the previous two videos as well as a recreated two dimensional floor-type diagram and also a third officer's videos as I believe.

That is exhibit 36. And you were also shown some individual frames, is that correct - individual stills?---I was subsequently sent two frames that were labelled "Frame 1151 and frame 117.

1175?---Yes, 1175 and 1151.

Thank you. That is from exhibit 25, tab 8. Were you also shown a post-mortem report from Dr Tiemensma?---Yes.

And you know her well?---Yes, yes.

Is she well regarded?

MR EDWARDSON: I object to that.

THE WITNESS: Extremely - she is extremely competent - - -

HIS HONOUR: Just one moment. Just one moment, there is an objection.

MR EDWARDSON: Yes, there is an objection. It's not for my learned friend to ask questions and get a character reference for the other pathologist.

MR STRICKLAND: Well, her credibility - her credibility was questioned, your Honour.

MR EDWARDSON: That's a matter for the jury though.

HIS HONOUR: Yes, it is.

MR STRICKLAND: The court pleases.

You read Dr Towsey's report, is that correct?---Yes.

Thank you. Okay, let me turn to your report please. If you go to par 19?---Yes.

You were asked this question, "What object caused the injury to Mr Rolfe"?---Yes.

And your answer is at par 20, you say, "The puncture injury to the left shoulder is likely to be the movement of a sharp or pointed projecting surface into the skin's surface"?---Yes.

You said, "The superficial incised injury over the left forearm". Now, can the witness please be shown exhibit 1 tab 18. And if you could go please, to photograph 3. If

that could be shown to the doctor. Can you see that?---No, I'm afraid - yes, sorry, now I can, yes.

You can see that?---Yes, I can.

Is that the injury you are giving an opinion about?---Yes. So in my opinion that is a puncture injury over the left shoulder region. And as I indicated in the report, I think it's due to movement of something sharp or pointed, into that skin surface.

Now I think, is it correct to say, cutting to the chase, your opinion is, you can't state with certainty, what implement has caused that injury, but it's consistent with being stabbed by the scissors?---Yes.

And by – and the scissors – the photographs of the scissors, you refer to in exhibit 40, is that right?---Yes, that's correct.

And when you say, "Consistent with being stabbed by the scissors", what does that mean in lay terms?---Simply that it could have been due to that. So I – I can say that it can't be excluded as an explanation for it, but it's by no means the only type of implements. In other words, I can't say it was necessarily that specific pair of scissors, and I can't say that it hadn't been some other implement that may also have a sharp point on it. But again, it's – it's – I certainly can't exclude it as causing that.

And Dr Botterill, I'm sorry, I should have asked you this before, but would you agree, with all due modesty, that you have vast experience in looking at injuries and what causes them?---That's part of what forensic pathologists do, we assess people who have passed away. Look at the injuries, and try to correlate what we see with what caused them.

Thank you. Now you were also asked to give an opinion about the age of that injury, or how old it is when it was sustained. What's your opinion about that?---It's always difficult from – well even examining directly anyway, but certainly from photographs to be very specific about the dates. All that I can say is that because it didn't have any features that to me suggested healing, it's likely to have occurred within about a day of the time of the image being taken.

Thank you. Now I want to ask you, if you can go please to par 29 of your report. And you were asked some specific questions in relation to Mr Eberl?---Yes.

Could the witness please be shown exhibit 1, tab 21. And in particular, photograph six.

Can you see that on the screen, Doctor?---Yes I can.

Is that the injury – is that a photograph of the injury that you were asked to give an opinion about?---Yes it was the only injury that I could identify amongst that group of photographs, yes.



And you were shown several photographs of the injury, close-up, and further away, is that right?---Yes, and also with a scale nearby, yes.

Well perhaps what I'll do, is if you could go to –

Put on the screen, photograph eight please.

That's the scale you're referring to?---Yes.

Okay. And your opinion is, as expressed in par 30, "It's not possible to state with certainty what implement caused that injury." Is that right?---Yes, it's likely to be due to something either sharp or with a pointed edge, passing across that skin surface, but there's no way of being able to identify what the – what that object (inaudible).

Can you say anything about the age of that injury?---Again, with the same caveats that I mentioned before, it is difficult. But there did appear to be some changes around the edge of the wound that suggest that it might be healing. And there was also an area of scabbing at the lower most portion of it. The scabbing suggests that there's been bleeding from that surface within the last day. But the other changes would suggest to me that the injury may be older than a day. But again, I can't give you any more specifically and numerical figure than that.

So I'll just show you one final photograph of that.

Can you go to photograph 11 of that same tab.

So you refer to some healing or scabbing. Can you just identify on that photograph if you can see that?---So if you look at the – the number three on the scale, and the number point five, before the number four, and go immediately parallel to those lines, you're looking at the edge of the wound, which is furthest away from the centre of the body, and closest to the lower part of the body. And there's a dark red area there, which to me is suggestive of development of eschar or a scab, which is what happens when blood and blood associated fluids start to congeal. So that feature again would, to me, indicate that there's been bleeding at that point within about a day of the time of it being – injury being sustained. However, I should mention, that in the same way that we all know this from any injury that we have, you – if you irritate it or brush against a recent injury, it can re-bleed. So it may simply be that there's been a re-bleeding at that point.

So can you see the date of that scale is 13 November 2019, you see that?---Yes, I can.

Can you say how long before that date that scratch or injury was sustained?---No, I can only say that from the – I did not look at that date, that was not an element that I – I was trying to look at it from the physical characteristics alone, and from those physical characteristics alone, I'd merely say that it is likely to be more than a day old.

Can you say, and if you can't please say so, can you say anything about whether it was more than a day old?---I believe it's likely to be more than a day old. It's unlikely to be very many days old. It's unlikely, for example, to be two weeks old. By then there should have been much better healing. But the truth is, it's a very inexact science.

So you can say with any precision whether it's two weeks old or – that is less than two weeks, anywhere between less than two weeks or more than one day?---Off the photograph alone, no I don't. It may have been possible for the emergency physician who – if there was an emergency physician, to have examined the wound closer to the time of being sustained, they may be in a position to more accurately assess it. But I don't believe that you can be adamant about it being a lessor figure than – than what I've suggested.

Thank you. You were asked if there was any evidence to indicate that the injury was self-inflicted, and with what. And you said, "The wound is superficial – is a superficial location, readily accessible to the subject, and could have been self-inflicted. However, there appears to be no features such as hesitation marks that might specifically suggest self-infliction." What are hesitation marks?---In a different context, people who harm themselves will generally harm themselves in a way that they can easily access. And usually those points of harm are more superficial. They're less deep. And that's because it hurts, and sometimes there is an associated hesitancy to injure oneself, so that even more superficial preliminary attempts at harming oneself can show up as, we call them, hesitation marks. So less – less deep, nearby marks are again a feature that makes self-infliction more likely to be the case. In truth, it's possible that they – that such an injury could be self-inflicted, but there is no features that really suggest that to me necessarily.

So par 34 you say, "In my opinion, the wound" – and again, the wound that you're talking about is the scratch that is photographed there; is that right?---Yes, that's correct.

"The wound was not caused by direct perpendicular contact towards the skin surface. So can you see me now? Can you see my – so by direct perpendicular, do you mean a movement like that? That is, that I'm moving my arm from my – can you see it? From my- - -?---Unfortunately, you're in a minimised viewing window, so I can't see quite see.

Well, I'll get – perhaps more significant, I'll get you to demonstrate it. What do you mean by, "Direct perpendicular contact towards the skin surface." Can you demonstrate what you mean by that notion?---Certainly. So let's assume that this pointer is the implement and my hand is the surface. A direct perpendicular contact would be in that direction whereas a swiping contact would be more parallel to the surface.

Thank you.

Your Honour, I'll try and have that recorded for the transcript.

So can you just – just so I can record it for the transcript. So the first motion was direct – can you just do the first – so for the transcript, the- -?---So this is perpendicular to the surface.

Yes. So the – would your Honour like to try describing that?

HIS HONOUR: So that the object which is inflicting the wound is at 90 degrees to the surface?---Yes.

MR STRICKLAND: Thank you.

So just to pause there, you – in your opinion, the wound was not caused by that motion; is that right?---Yes, I think that's very unlikely.

You can take that board down for the moment. And what's the basis of that opinion?---For something to – for any type of contact to result in that long a wound to be perpendicular, it would – it would need to be something that's roughly that sort of width, which would be, you know, something like a chisel or something like that would need to be of that sort of width to create a wound of that size. Also, if it had been applied in that direction, it's much more likely to have penetrated deeper and projected into the underlying tissues as a stab wound. Whereas I think, in this instance, the contact has been more at a glancing angle, which is why it's resulted in a scratch rather than a penetration of the deeper tissue.

Thank you. Now, after providing that report, you received an email from Wayne Newell to yourself, dated 15 July 2020; is that correct?---Yes, that's correct.

And you then got a follow-up email on 28 July 2020; is that correct?---Yes, a courtesy reminder to get a move on, yes.

Right. And then on 28 July, you replied to the questions you were asked by Wayne Newell; is that correct?---Yes, that's correct.

I tender that email chain, your Honour. It's – the front of it is – I tender that email chain.

HIS HONOUR: Exhibit 73.

EXHIBIT 73 Email chain between Dr Paull Botterill and Detective Sergeant Wayne Newell.

MR EDWARDSON: And your Honour, so the jury understand the context of that exhibit, that's the exhibit that, regrettably, wasn't provided to the defence until Tuesday.

HIS HONOUR: All right, thank you.

MR STRICKLAND: And can I indicate from our side of the Bar table, we were unaware of that.

HIS HONOUR: All right, thank you.

MR EDWARDSON: Accepted.

MR STRICKLAND: So Dr Botterill, you were asked – if I go to the first part of the email on 15 July 2020 – you were asked three questions, A, B and C?---Yes.

And you have given your answers to each of those three questions. Do you see that?---Yes, I have. Yes.

I'm just going to ask you about A and B for the purpose of today?---Okay.

So first, you were asked if you believed you were qualified to give an answer to those questions – the first question being your view as to the extent to which the scissors and the position of Arnold Walker had the capacity to inflict a serious or potentially fatal wound to a police officer and clearly, you have the expert – you say you've got the expertise – it's accepted you do – to give an answer to that question; is that right?---Yes.

Then it's – you were asked, "If you assume that none of the three gunshot injuries sustained by Mr Arnold Walker would have caused any immediate immobility to his right arm, your opinion as to the potential for him to inflict a serious or potentially life-threatening injury on a police officer"?---Yes.

Now, in answering those questions, did you have regard to all the material that I've previously taken you to, which you have for your first report?---I had access to the videos from the officers' cameras and the hybrid combined video. But I did not have, at that time, access to the two individual frames that were sent on Tuesday. That is frame 1151 and frame 1175.

Right? So that you've received those two images since providing this email? Is there anything else you've been provided with since you wrote this reply email on 28 July 2020?---And that would also be the exhibit 40 with the pictures of the scissors.

Okay. Thank you. So if I can just take you to your opinion on those two questions. First, being the capacity of the scissors to inflict a serious or potentially fatal wound to a police officer. You first say that the overwhelming majority of sharp force wounds, slashing, stabbing or thrusting, are not fatal. That's the first- -?---Yes, that's correct.

And that's your experience as a pathologist over many years; is that right?---Actually, that's a difficult one to answer. As a pathologist I, by definition, see people who have died because of their injuries. So that in my experience as a pathologist, I'd say that

a sharp force injury is very frequently associated with death. But that's a very misrepresentative view of the totality of stab and incised wounds that people sustain. So within the community, no, my experience is jaundiced towards those cases that are most lethal. But it is true that if you look at a standard medical, clinical practice, practice of emergency physicians and the general community, then it is – it's true to say that the overwhelming majority of stab and incised wounds are not fatal.

Okay. You say that your opinion is that the scissors – that exhibit 1 – sorry, exhibit 40 photograph of the scissors – I'll start again. You say the scissors which were said to be in the possession of Arnold Walker, had the capacity to inflict a serious or potentially fatal wound; is that right?---Yes, I believe it's – that's true.

And what are the factors that you say that are necessary – that feed into that opinion?---Certainly. So it really is a multi-factorial thing. And there were a number of different factors that will impact upon whether a stab or an incised wound has the potential to result in death. One is the area of the body that's in question. Most of our body surfaces, thankfully, if they sustain a stab or an incised wound – whilst they might result in localised bleeding – will only very rarely result in death. However, areas – some areas are more susceptible than others, and so things such as the front and sides of the neck, and the chest are unfortunately more prone to – to sustaining an injury that may have the potential to result in death. It's related to also the – the individual characteristics of the weapon. So that a sharper knife, or a more sharply pointed knife, is more likely to penetrate, and therefore project into deeper tissues, and then potentially damage underlying tissues. It's related to if there are things such as clothing that get in-between the skin surface and the weapon, so that is more likely to impede progression of anything through to the skin surface and then beyond. It's related to the amount of force that's applied. So that minimal force is much less likely to result in penetration. Whereas a greater degree of force is more likely to result in that penetration. It's related to just how sharp the edges and the point are. The actual angle of contact matters. So that as mentioned before, if there's a perpendicular contact, it's more likely to result – the same degree of force is more likely to result in penetration. Whereas if it's a glancing contact, it's more likely to simply scrape across the surface. And also in truth, there's also the issue of the individual themselves. So a healthy person who is stabbed or has an incised wound, whilst they may sustain an injury, is less likely to die, than say somebody who is frail, or who has skin characteristics, or a bleeding characteristic that would tip then over the edge, as it were. So all of those things have a role to play. And it makes it extremely difficult to be able to say that in any individual instance, that a contact would necessarily be fatal. All that you can say is that statistically, amongst all the range of stab and incised wounds that occur in the community, it's an uncommon event. How uncommon is hard to tell. If you look through the literature, it's very hard to see. Because again, not surprisingly, there are very few volunteers who will submit themselves for a trial to show just how lethal these things are. But in at least one classic study which was in a prison population where you – you're more likely to have all of the stab wounds that occur, to be documented, and to have adequate treatment, in that context, the – the fatality rate was of the order of three percent. And that's probably reflective of the sort of risk that's involved. But again, that doesn't help in the individual case to know whether any of those characteristics that

I've mentioned, will add together, plus the bad luck of being struck in a place where you are prone to being – to sustaining a severe injury occurring. It's difficult to predict that that would be the case.

You say that – and you're talking of course in – the answer to are you just talking in generally aren't you, you're not talking about the facts of this particular case? That is, on 9 November 2019?---Yes - - -

In answer A?---Yes, that's correct.

In answer A?---Yeah.

And you say – do you say that – is the essence of the rest of opinion A, that a thrusting type of wound, that's where the – where it's perpendicular to the surface of the victim, is more likely to have the capacity to result in potentially lethal injury, as distinct from a slashing motion. Is that correct?---Yes, so both have the potential, but you know, the thrusting or stabbing, or perpendicular to the skin surface type of injury, is more likely to penetrate deeply. And again, depending on where that is, that may mean that slightly deeper structures, that are vital, might be affected. It is still however possible with a slashing wound. Again, if you're unlucky enough to have it over a – parts of the neck where the vital structures are quite superficial and close to the skin surface, there is still the potential. But that potential is less than it would be for stab type wound.

The second question you were asked to consider is this. "If you assume that none of the three gunshot wounds sustained by Arnold Walker would have caused any immediate immobility to his right arm, your opinion as to the potential for him to inflict a serious and potentially life-threatening injury on a police officer"?---Yes.

Do you – the assumption that you were asked to – that was the basis of that question, that is whether the three gunshot wounds sustained by Walker, would have caused any immediate immobility to his right arm, you have no information whether any of those gunshot wounds did or did not, is that correct?---I have access to the pathologist's autopsy report.

Yes?---And based on that alone, again, I'd have to defer to Dr Tiemensma's opinion there, but based on that alone, I don't believe that there would have been a reason why there would be immobility of his right arm because of those three gunshot wounds. But again, I would defer to Dr Tiemensma's opinion upon that.

Now you say – were you asked in that opinion, did you understand that opinion you were asked – did you understand you were asked to consider the actual scenario that occurred in this case? That is, in terms of answering your – in terms of answering that question?---Yes, although in – in my statement I did include some further assumptions. So the assumption that I was not aware of, which is whether the gentleman concerned had normal strength, and if the gentleman concerned had any pre-existing abnormality that may have affected his ability to move his upper limbs. And assuming that there was no such immobility, then a further assumption

would be, if the limb – the arm that had the weapon in it, if that were unencumbered, in other words, if there as free movement of that arm.

I see?---Now assuming that he was of normal strength, that there was no pre-existing injury, and that there was unencumbered movement of the arm, then my opinion was yes, it was possible for the – that weapon to result in potentially life-threatening injury.

Thank you. Is the extent – when you say the extent of his limb mobility, the limb you're talking about is the arm that he's carrying the knife in, is that right?---Yes.

So is that a – and when you say, "limb mobility", you're talking about the range of the limb's movement, is that right?---Yes. I probably should just clarify that. You mentioned the knife, I - - -

Did I say - - - ?---Whether it be knife or scissors or whatever - - -

I'm sorry if I said knife, I meant scissors. You - - - ?---But yes.

So I'll just start again. When you say, "limb mobility", you mean the ability of the arm to move freely, is that right?---Yes.

Is that issue of the limb mobility important in determining the answer to your question?---In my opinion, yes. The – if the limb was not able to freely move, then the only way that an implement such as those scissors could have resulted in a serious life-threatening injury, would be if there was movement of the other party, the police officer, up against that immobilised weapon. And it's very unlikely to – to result in a potentially fatal injury. Again, it's theoretically possible, but very unlikely. The difficulty of course is that even looking through the video, and looking at the still images that are provided, I'm not able to say with certainty that there wasn't inhibition of movement of the arm. Certainly in the frames that were shown to me, the arm does appear to have at least one of the hands of the officer in place. But again, I don't know whether that actually relates to truly being restriction of movement. So I'm not sure that I can answer that question. I – I'd certainly say that if it were that the limb were encumbered, and unable to move, it does make it even less likely that a lethal injury could be sustained.

When you say, "Even less likely", do you say it would make it very unlikely?---If the limb was completely immobilised, yes, I think it's very unlikely.

And you're not able to say the extent to which the limb was immobilised at the time Mr Walker was on the mattress, is that right?---No, I can't make that – I mean I've made it – I tried to, you know, reviewing the video and – but I don't believe that I can make that assessment.

Yes, they're my questions, thank you, your Honour.

XXN BY MR EDWARDSON:

MR EDWARDSON: Doctor, just a few, if I may. Can I direct your attention to your first report please, which is dated 2 June 2020 and in particular par 20?---Yes.

And Mr Associate, could I have put up on the projector please, tab - sorry, exhibit 1, Tab 18, photo 4. Are you able to see that photograph?---Yes.

In par 20 you say, "The puncture injury to the left shoulder is likely due to movement of a sharp or pointed projecting surface into the skin surface that will lead to this photograph, the superficial incised injury over the left forearm between the elbow and the wrist is likely due to movement of a sharp or pointed edge across the skin surface?---Yes.

And is that a reference to the injury that we can see in the photograph now presented to you?---There are a number of injuries that are present in that photograph. The injury that I am referring to is below the elbow.

Yes?---Not quite at the edge of the tattoo and it's a red line that goes across the skin surface.

Is that consistent or could have been caused by the skin coming into contact with the scissors that you now know Kumanjayi Walker was armed with?---Yes. So that that could be from contact with the sharp edge of either of the arms of the scissor blade or from the point of either of the arms of the scissor blade. It's most likely to be, again a glancing blow against the skin surface, rather than directly perpendicular into the skin surface.

And if, in fact, the scissors that were in the right hand of Kumanjayi Walker did, in fact, cause those injuries, would that be consistent with what is often described as a "defensive wound"?---Yes. There's very little - there are very few features that enable us to say that something was definitely a defensive rather than an offensive wound. In other words, if one had thrown a punch and there had been a sharp object there, it could still result in the same picture, but defensive wounds are typically located in areas where one tries to protect oneself and the forearms and the back of the hands are the commonest areas for defensive wounds to be seen.

Thank you. Now, you've identified the specific wound that is referred to in your report. You said that photograph show other wounds or injuries, I should say?---Yes.

Can you just indicate what you were referring to?---So, there is a red mark next to the point of the elbow, about an inch and-a-half away from the point of the elbow.

Yes?---And that appears to be an area of clot or eschar that's - or scabbing over an area of ulceration. I think that's an injury that's probably older than a day old but again, as I mentioned before, it's very difficult to definitively state the age of injuries. There is also an area of redness which is difficult to see and certainly particularly in the images I can see it there, between where the shoulder would be and where the elbow is, so an area of redness across the surface, which I've described as an area



of abrasion which is more likely to be a blunt force contact, something dragged across a surface, again I am unable to state what that particular surface was. It's also theoretically possible that the edge of something such as the arm of a pair of scissors, if dragged across a surface rather than along the long axis of the scissor, but rather at - sweeping across the surface, might result in grazing or abrasion of that skin surface, so those are the injuries that I can see there.

Thank you. Could I now turn to your second report, which is by way of an email to Detective Sergeant Wayne Newell on Tuesday 28 July 2020?---Yes.

And specifically your opinion in respect of the potential lethal nature of the so-called scissors at the hand of Kumanjaya Walker?---Yes.

The first thing I want to ask you is this. It seems to follow from the opinion that is expressed in writing and indeed, the answers that you gave to Mr Strickland a moment ago, that if deployed to the right region and the right location, the scissors, which were in the hand of Kumanjaya Walker had the potential to cause lethal harm? ---Yes, that's correct.

Now, you talk - and you talked in your report about any thrusting type of stab wound that penetrated the skin of the neck or chest wall would have the capacity to result in a potentially lethal injury/---Yes.

I just want to explore that. Firstly, can I ask you this, is penetration of the skin a pre-condition to a lethal injury?---Well, in truth, no. It's also possible that if there was a contact where the skin isn't penetrated but the force nevertheless is transmitted to the deeper tissues, you could - you could certainly theoretically result in an area of underlying bruising, if that bruising, for example, happens to be next to a carotid artery that has the potential for that carotid artery to be compressed and result in a stroke-like effect. Again, if the contact - even if it doesn't penetrate the skin surface, nevertheless transmits the force through to the delicate structures of the voice box. It's certainly theoretically possible to damage the hyoid bone or part of the thyroid cartilage and that injury could result in bruising and swelling that might theoretically result in obstruction of an airway - which again, itself has - it's extremely uncommon, but has the potential to result in lethality.

Now, you referred to the different factors that might be important in the context of determining whether a lethal penetrating wound results in death?---Yes.

Once penetration is achieved is there any particular depth that might be required for lethal force to be the result?---It really - it depends on the area in question. If one is talking, for example, about the chest wall, a penetration of merely two centimetres would have the potential to breach the lining of the chest cavity and result in a collapsed lung. In a very small number of cases if that collapsed lung is associated with a so-called, "tension pneumothorax", that can be lethal. In the neck, a depth of penetration of less than a centimetre - if it happens to be over the carotid artery or a jugular vein, allows the potential for blood loss from the artery and the vein and with the vein there is also the possibility of allowing air to get into the bloodstream and

result in the condition called, "air embolism." Again, they are extremely uncommon events but nevertheless they are certainly possible with penetration of the order of (inaudible).

And what about the sub-clavicle (sic) artery?---That's a little bit deeper, that would probably be couple of centimetres, but again, a couple of centimetres deep from the skin surface could allow for the subclavian artery to be damaged and the vein that is near there similarly if it is damaged, would require a little bit more penetration but might also allow air to get into the bloodstream and result in air embolism.

Thank you.

Nothing further, thank you, your Honour.

MR STRICKLAND: Nothing arising, thank you, your Honour.

HIS HONOUR: Thank you Doctor, that concludes your evidence. We will now break the audio-visual link?---Thank you, your Honour.

WITNESS WITHDREW

MR STRICKLAND: Your Honour, I just need to speak to my learned friend for a moment.

Your Honour, there are two more experts, Dr Johannah Lee and Senior Sergeant Andrew Barram. Senior Sergeant Andrew Barram is here but by agreement we think he should be the last expert called, so in short, I wonder if we could have an early mark today because Dr Lee is not available today but she - so what I propose to do on Monday is call Dr Lee then my last - the last expert witness will be Senior Sergeant Andrew Barram, then I will call the OIC, so I would expect the Crown case to finish probably early Tuesday. Something of that order.

HIS HONOUR: All right, thank you.

Well, Members of the jury, we are now going to break for the day and I would ask that you reassemble on Monday morning at 9:30. Thank you.

JURY OUT

HIS HONOUR: Yes?

MR EDWARDSON: Your Honour, can I just raise a housekeeping matter, if I may?

HIS HONOUR: Yes.

MR EDWARDSON: For the convenience of counsel, I hasten to add. Your Honour, when – after the close of the Crown case, obviously, I have to make a decision as to whether we will or will not give evidence. But regardless, I would certainly like to have a day out to prepare for a final address?

HIS HONOUR: Yes, all right.

MR EDWARDSON: And I think we both will need that time and it will make it a much more effective address, in any event. So when we get to that stage, could – would the court, at least, accommodate us in that respect?

HIS HONOUR: I don't see any reason why not.

MR EDWARDSON: Thank you, sir.

HIS HONOUR: Unless there's anything further, I'll adjourn.

ADJOURNED 12:41 PM TO MONDAY 28 FEBRUARY 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 28 FEBRUARY 2022 AT 9:37 AM

(Continued from 25/02/2022)

Transcribed by: EPIQ

MS CALLAN SC: Your Honour, further to the agreed facts, which appear at exhibit 1, tab 1, there is an additional fact that the parties in the proceedings have agreed is not for the purposes of the proceedings to be disputed.

HIS HONOUR: Yes.

MS CALLAN: And with your Honour's leave, under s 191(3)(b) *Evidence (National Uniform Legislation) Act*, I propose to state, before the court, as I said, with the agreement of the accused, that fact. It concerns the position as to Zulu Time and Central Standard Time, which has been referenced in terms which indicate it's not controversial, but to be correct about it, it should be a matter which is stated.

HIS HONOUR: All right, thank you. That can be done as soon as the jury are brought back in.

MS CALLAN: Yes, your Honour.

MR EDWARDSON QC: Your Honour, one further matter if I may. The subpoena that your Honour authorised the issue of, that's been served, apparently it has been – a return has been made to the Registry this morning.

HIS HONOUR: Yes.

MR EDWARDSON: So I'd seek your Honour's leave for us to uplift and copy and inspect the documents that have been filed.

HIS HONOUR: Yes.

Does the Crown wish also to have access to those documents?

MS CALLAN: Yes, your Honour.

HIS HONOUR: All right. That can occur. The accused will have first access to the documents, and then the Crown.

MS CALLAN: Yes, your Honour.

MR EDWARDSON: Thank you.

HIS HONOUR: Thank you.

MR STRICKLAND QC: Your Honour, the next witness is Dr Lee. I wonder if we could just – the witness after that is Detective Sergeant Barram. Could we just have three or five minutes between those two witnesses please?

HIS HONOUR: Yes, certainly.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: All right, bring the jury in please.

JURY IN

HIS HONOUR: Yes?

MS CALLAN: Your Honour, there is further to the agreed facts in tab 1 of exhibit 1, an agreed fact that the parties to the proceedings have agreed is not in dispute and I wish to inform the jury of that set of facts, as it is.

HIS HONOUR: Yes.

MS CALLAN: Ladies and gentlemen of the jury, it is an agreed fact that is not in dispute that Yuendumu is in the Australian Central Standard time zone. That the Australian Central Standard time is nine hours and 30 minutes ahead of Z-time, also known as Zulu time and, as an example, 9:50.56 am in Zulu time is 7:20:56 pm in Yuendumu and, your Honour, the members of the jury I anticipate are alive to this but the body-worn video is captured in Zulu time.

HIS HONOUR: Yes, thank you.

MS CALLAN: I call Johannah Lee.

KATHERINE JOHANNAH LEE, affirmed:

MS CALLAN: Ma'am, could you tell the court your full name?---My full name is Katherine Johannah Lee.

Is it the case that you have, since 2018, been the Director of the Forensic Science Branch here in the Northern Territory Police Force?---Yes that's correct.

In terms of your qualifications, you've been a forensic biologist since 1998?---Yes, that's right.

And you have a PhD, is that the position?---Yes, that's correct.

In what field?---In forensic biology.

Can I provide you with a copy of a resume?---Certainly.

Dr Lee, do you recognise that as a resume document that you've prepared, setting out your experience, qualifications and various positions you've held over the last 23 years?---Yes, that's right.

I tender that document, your Honour. I have a working copy for your Honour and copies for the jury.

HIS HONOUR: Thank you. That will be exhibit 74.

EXHIBIT 74 Resume of Katherine Johannah Lee.

MS CALLAN: Dr Lee, over the years that you have worked as a forensic scientist have you examined, tested, analysed, statistically evaluated and reported on many thousands of items of evidence?---Yes, that's right.

Have you attended numerous crime scenes for the purpose of biological testing and evidence collection and/or conducting blood stain patter (sic) analysis?---Yes, I have.

I should say pattern analysis. It's the case that you've passed proficiency testing relevant to forensic biology and bloodstain pattern analysis in accordance with standards set by the NATA?---Yes, that's correct.

And the NATA is what?---The National Association of Testing Authorities. It's an accreditation board that provides independent accreditation to each of the forensic facilities.

In addition to passing proficiency testing in those areas, you've presented training courses, for instance in relation to hair and bloodstain pattern analysis?---Yes, that's correct.

And, for instance you have - as reflected in your resume, sat as the chair of the Bloodstain Pattern Analysis Technical Advisory Group back in 2020?---Yes, that's correct.

As Director of the Forensic Science Branch of the Northern Territory Police Force, do you supervise a number of forensic scientists?---Yes, I do.

Does that include Kate Cheong-Wing?---Yes.

Is Ian Spilsbury in your team?---Yes, he is.

Moving to the circumstances of your involvement as an expert in relation to this case, you were requested to undertake bloodstain pattern analysis in relation to a blue police shirt worn by Constable Eberl on 9 November 2019?---Yes, that's right.

Now, is it you inspected that shirt and then used techniques to examine that shirt and in due course you took samples which you submitted for DNA analysis?---Yes, that's correct.

I show the witness a small bundle of photographs, your Honour.

Dr Lee, do you recognise the bundle that is four pages I have had placed before you as comprising four pages of a photographic index, being photographs that you took and then information that you imposed over those photographs when you inspected Constable - then Constable Eberl's blue police shirt?---Yes, that's right.

I tender that document, your Honour.

HIS HONOUR: Yes, exhibit 75.



EXHIBIT 75 Bundle of four pages of photographs by Dr Johannah Lee.

MS CALLAN: And I have working copies for your Honour and copies for the jury.

HIS HONOUR: Yes.

MS CALLAN: Can I ask that the witness be shown exhibit 45, which is then-Constable Eberl's blue police shirt?

Dr Lee, do you recognise that item – exhibit 45 – to be the blue police shirt that you inspected and, as is captured in these photographs, labelled exhibit 75?---Yes.

And I'll come to the particular observations you made and work that you did in relation to your examination of that shirt. But in terms of other information and documents you were provided –

Can I ask the witness be shown exhibit 1, tab 21?

Dr Lee, were you provided with a copy of the photographs which appear behind 21, being 11 in total?---Yes, I was.

And did you, upon receiving a copy of the photographs, take steps to request those photographs in their original form?---Yes, I did.

And you were provided with those?---Yes, electronically.

Electronically?---Yes.

Were you also provided with a report prepared by Kate Cheong-Wing in relation to this matter?---Yes, I was.

And can I suggest, relevantly, in relation to her inspection of then-Constable Eberl's blue police shirt?---Yes.

Can I ask the witness be shown exhibit 54 and 55?

I take you to exhibit 55. Dr Lee, do you recognise that as an extract from Kate Cheong-Wing's report, being her findings in relation to Constable Eberl's blue police shirt?---I can't say I recognise it specifically, but it does appear to be similar to what I remember being in that document.

Yes. And just turning back to exhibit 54. Did you have regard to the photographs that accompanied Kate Cheong-Wing's report and this – in exhibit 54 are the photographs which were taken and some labelling and indications by Kate Cheong-Wing in relation to Eberl's blue police shirt?---Yes.

Those exhibits can be returned, thank you.

For the purposes of considering the matters upon which you asked to provide your expert opinion, I take you through some information which was either provided to you or which you observed from the contents of Kate Cheong-Wing's report and the photographs of Constable Eberl? And to be clear, is this information which you treated, in effect, as assumptions for the purposes of the opinion that you then expressed?---Yes, that's correct.

So number 1 was that Constable Eberl was in close proximity to Kumanjaya Walker when he was shot?---Yes.

Number 2, that Constable Eberl was involved in the attempts to resuscitate Kumanjaya Walker and assisted in the movement of Kumanjaya Walker after he had been shot?---That's correct.

Number 3, that there was blood on the clothing of Kumanjaya Walker and on the floor in the location where he was shot?---Yes.

Number 4, that there was substantial blood staining, some of which matched the profile attributed to Kumanjaya Walker, on the uniform pants or trousers of Constable Eberl?---That's correct.

Number 5, that Constable Eberl was not wearing a bulletproof vest at the time of the incident?---Yes.

And number 6, that the photographs that I took you to at exhibit 1 tab 21, were taken on 13 November 2019?---That's correct, yes.

You were asked to identify and classify any bloodstain – and/or bloodstained patterns on the police shirt of Adam Eberl?---That's correct.

And you were asked to consider and if you could provide an opinion as to the most likely actions or events that could explain any such bloodstain evidence?---Yes.

Including the likelihood of the source of any bloodstain evidence being the injury shown in the photographs of Constable Eberl which, in these proceedings, are contained at exhibit 1 tab 21?---That's right.

Now, in order to consider and express your view in response to those questions, did you conduct an examination of the shirt in circumstances where the original examination – that is conducted by Kate Cheong-Wing – had not been conducted for the purpose of bloodstain pattern analysis?---Yes, that's correct.

In the examination that you conducted of Eberl's blue police shirt, did you use four techniques to screen or examine what appeared on that shirt?---Yes, that's correct.

And you took a number of samples, which you submitted for DNA analysis?---Yes.

Can I show you a document? Dr Lee, do you recognise that one-page document as an extract from the report you prepared in relation to this matter. Which sets out the DNA results, and interpretation of the samples that you obtained, and submitted?---Yes, that's right.

I tender that document, your Honour.

HIS HONOUR: Exhibit 76.

EXHIBIT P76: One-page extract from Dr Lee's report.

MS CALLAN: And I have copies, your Honour. And if I could ask the witness have available to her exhibit 75 and 76.

Dr Lee, could I have you turn to page two of exhibit 75. It depicts the front of Constable Eberl's blue police shirt. Did you observe an apparent spatter stain, with the appearance of blood, located on the reflective police logo on the front of the shirt?---Yes, I did.

You observed that it was elliptical in shape, and measured approximately one millimetre at its longest?---That's correct.

And you tested – and it – the result was weakly positive to a presumptive test for blood?---Yes that's right.

And did you then take a sample, which you submitted for DNA analysis?---That's correct.

And the general location of the sample, is that shown in the red marking 25F?---Yes, that's correct.

And referring to exhibit 76. The second last row on that page sets out the results for the swab you took at that location, at 25F?---Yes, that's correct.

And your finding – well the result was a partial DNA profile, unsuitable for identification purposes?---That's correct.

Using two of the techniques of the four that you utilised, being the crime light and poly-light flare techniques, did you observe the presence of fluorescent staining, predominantly on the collar, front mid-section and outer left sleeve?---Yes I did.

And was this staining consistent with sweat?---Yes, it was.

But could have been the result of other material being present?---That's correct. There are various different substance that can fluoresce.

Did you take a tape-lift from the outer front of the left shoulder?---Yes I did.

And you turn to page four of exhibit 75, there's a white square and in yellow, the label 25G?---Yes, that square is actually yellow.

Sorry, yellow. And is that – can you assist please as to the location, where you took the tape-lift?---Yes.

Where was that?---Sorry, the area within that square indicates the area where that tape-lift was taken.

And was the – is the tape-lift, could you explain to the jury what that technique means, and why you do it?---So tape-lift is quite simply like a piece of sticky-tape. That piece of sticky-tape is applied to a surface, and any particular that might be present on that surface is transferred onto the piece of tape. That enables us then to do a DNA analysis on that tape, rather than trying to do it on the whole piece of fabric, or sub straight that you are collecting from.

Now you conducted a general screen for blood from this area which tested weakly positive to a presumptive test for blood?---That's correct.

And for the jury's assistance, how did you conduct the general screen process?---So when we do a general screen, we take a piece of filter paper. We apply that paper to the surface where we're testing, and that can be quite a large area or a smaller area. And then we apply two different chemicals to that piece of paper, and in the presence of blood, you will get a colour change.

And the general screen that you conducted for the area – if I can ask you by reference to the photograph at page four, where did you conduct that general screen?---So similar to the tape-lift, that screen was done in the area included within the box.

And does the weakly – sorry. Weakly positive to a presumptive test of blood, indicate the presence of blood somewhere within that area, that square, that box?---Yes, it's in an indicator for that.

The tape-lift that you took, and submitted for DNA analysis, that dealt with, in exhibit 75 in the last row, 25G?---Yes, that's correct.

And the results were that a mixed DNA profile was obtained?---That's correct.

The major components matched components attributed to Adam Eberl?---Yes.

And minor components were unsuitable for identification purposes?---That's correct.

Can you explain for the jury, what it means to obtain a mixed DNA profile?---So a mixed DNA profile is simply a DNA profile that comes from more than one individual.

And when you take a sample, in this instance using the tape-lift method, what kind of – what kind of cells may be involved in the DNA recovered?---So the tape-lift will

collect any material that's present. So that might be any cell that contains DNA. So for example, white blood cells, any biological fluid, for example, saliva, semen, and/or any actual skin cells. So skin cells can be lost from the surface of the skin and can be retained on items such as clothing.

In circumstances where the tape-lift results produced a mixed DNA profile, and the major component was attributed to Adam Eberl, how is the jury to understand that finding, along with your finding that through a general screening process, the presence of blood was located somewhere within that area?---So there's multiple scenarios that could lead to this. When we examine a person's clothing it is very common to find their own DNA present on that clothing and that's generally from the presence of their skin cells that have been transferred onto that clothing. Alternatively there can be other biological material that has transferred onto that item, so in a scenario where there is blood in the vicinity then blood can be transferred onto that area as well. In this instance we have a very weak positive result to blood so it is not specifically possible to say whether that DNA came specifically from skin cells or whether it could have come from the blood that might have been present.

You used the word, "transfer" the area within which you study and specialise has, amongst other things, identified that DNA can be deposited directly onto an item or be present as a result of a transfer event?---Yes, that's correct.

And does that mean, for example, that DNA could be deposited onto one item and then transferred onto another item as a result of contact between the two items? ---Yes, that's correct.

And I will come to it in a moment, but one of the assumptions, or upon which you proceeded was that Adam Eberl's uniform pants - or trousers - had substantial bloodstaining, some of which matched Kumanjaya Walker's DNA?---Yes, that's correct.

And did you regard that as relevant in your consideration of the possible sources of blood identified on Adam Eberl's shirt?---Yes, that's highly relevant.

Can I take you back to photograph number 2, page 2, of exhibit 75? I've already addressed the steps you took in respect of the area labelled in red as 25S. Could I ask you about the boxes which are respectively labelled 25B, 25C, 25D and 25E? ---Sure. So these areas are areas where we did further collection for DNA with a tape lift and also did further screening for the presence of blood.

And when you did your screening did the area test negative to a presumptive test for blood?---Yes, it did.

But you recognise it is possible that blood may have been present and removed during the initial general screen that Kate Cheong-Wing did?---Yes, that's correct.

Or transferred to the tape lift that you conducted prior to doing your general screen?

---Yes, that's correct.

The tape lift that was submitted for DNA analysis, do the results of that analysis appear on exhibit 75 at rows 25B through to 25D?---To E I believe. Sorry, E you are quite right, and we see them set out at exhibit 76?---Yes, that's right.

Would it be fair to say that in respect of each of 25B, C, D and E first a mixed DNA profile was obtained?---Yes.

Major components attributed to Adam Eberl?---That's correct.

Minor components unsuitable for identification purposes?---Yes, that's correct.

And in respect specifically to the tape lift in the location 25B the profile was interpreted as coming from four individuals and statistical analysis did not support Kumanjayi Walker as being a contributor?---Yes, that's correct.

Can I ask you then coming back to page 1, photograph 1 of exhibit 75. Dr Lee, does this photograph depict the inside of the front of Adam Eberl's police shirt?---Yes, that's correct.

And why did you examine the inside of the police shirt?---So I was asked in relation to an injury that was present on Constable Eberl, so I was examining the area of the shirt that corresponded to the general location of that injury.

That is the inner left sleeve?---That's correct, yes.

Did you examine that area in detail?---Yes, I did.

Did you observe any visual indication of the presence of blood?---No, I did not.

Did you take a tape lift prior to conducting presumptive blood testing?---Yes, I did.

The tape lift, was that in the box bearing the label in the middle, "25A"?---Yes, that's correct.

And the result of that is - we find in exhibit 76 if the first row?---Yes, that's correct.

And that produced a DNA profile matching the profile attributed to Adam Eberl?---That's correct, yes.

A general screen for blood from this area was then conducted?---Yes, it was.

And it tested negative to a presumptive test for blood?---That's correct.

What does that mean in terms of the biological material containing DNA which was obtained in the tape lift and matched the profile attributed to Adam Eberl?---It indicates that there was no evidence of a bleeding injury present. In the case of a

bleeding injury, much like a tissue, if you apply it to an injury you would see that blood is soaked into that area and there was no indication of that being present. With a bleeding injury, because it is wet blood it is likely to soak into the fabric somewhat and on that basis it is less likely to be lost or removed from that surface and on that basis it is my opinion that there was no indication present of a bleeding injury, meaning that the DNA result that we obtained is most likely to come from skin cells.

Now, in terms of bloodstain pattern analysis and your findings, can I turn to photograph 2 on page 2 and that area indicated in red at 25F. Now, you've told the jury that the only blood stain that could be classified on the shirt was an apparent spatter stain at that location?---Yes.

Its' the case isn't it, that spatter staining can be created as a result of a number of forces?---Yes, that's correct.

Including gunshot injuries?---Yes.

In this instance, you were not able to determine the precise mechanism that led to the creation of that apparent spatter?---That's correct.

Now having regard to the information, documents that you were given, and the assumptions upon which you proceeded, is it your view that it would be probable to expect some blood from Kumanjaya Walker on the shirt of Constable Eberl?---Yes.

And that could be due to a number of mechanisms that occurred either during, or after, the shooting incident?---That's correct, yes.

In terms of the weakly positive presumptive results for blood on Constable Eberl's shirt, what is your opinion as to the circumstance in which that is most likely to have occurred?---My opinion is the most likely scenario is as a result of transfer either directly from coming in contact with Kumanjaya Walker and his blood stained clothing, or being in an environment where you – the shirt is coming in contact with wet blood of Kumanjaya Walker.

And just to be clear, Dr Lee, your expertise do not extend to determining whether the injury shown in those photographs of Adam Eberl, would result in bleeding?---That's correct, yes.

Those are my questions in-chief, thank you, your Honour.

MR EDWARDSON: I have no questions, your Honour.

HIS HONOUR: Thank you, you may go?---Thank you.

WITNESS WITHDREW

HIS HONOUR: Now members of the jury, I understand that we need to take a short break before the next witness is called. And I'm told it won't be very long. So would you retire please.

JURY OUT



MS CALLAN: If it's convenient, your Honour, Mr Strickland's proposed approximately five minutes. I'll endeavour to ensure that we maintain that timeframe. But could we let your Associate know - - -

HIS HONOUR: Yes.

MS CALLAN: - - - when we're ready to resume?

HIS HONOUR: Yes.

MS CALLAN: Thank you.

HIS HONOUR: I'll adjourn.

ADJOURNED

## RESUMED

HIS HONOUR: Now before we bring the jury back in. The issue was raised this morning about access to the documents produced under subpoena. It has been brought to my attention during the short break that a letter accompanied the documents, in which the Senior Director of Legal in the Northern Territory Police Force, whilst producing documents, refers to a single email dated 13 November 2019, in which there is one sentence referring to a police investigation, said to be wholly unrelated to the present proceedings and said to fall outside the scope of the subpoena. There is a request made in the letter, that a redacted version be made available to the parties. Now, I'm not inclined to comply with that request.

MR EDWARDSON: If your Honour pleases.

HIS HONOUR: Simply because, it appears to me that whilst there is a reference to another matter, it is not wholly unrelated in the sense that it is a reference to what occurred in another matter, which may inform the thinking about what was to occur, with respect to the accused's matter.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: But to be completely fair, I think I will change the arrangement in terms of access to the documents, to allow the Crown to have first access to the documents, to determine whether there is to be some suggestion that only a redacted version should be given to the defence. I might also add, that from my personal knowledge, the matters that are referred to, as referring to another matter, are within the public domain.

MR STRICKLAND: I'm indebted to your Honour. I will need to arrange for the solicitor who was here, but is no longer here, to be instructed. Because I don't intend to make any argument to your Honour - - -

HIS HONOUR: All right.

MR STRICKLAND: - - - about this issue. And if another lawyer will, then that's a matter for them. I don't intend to enter the fray - - -

HIS HONOUR: Well there's been no formal objection to the production of the document, it was simply a request.

MR STRICKLAND: No, I understand. I understand, thank you, your Honour.

HIS HONOUR: And as I said at the present time, I'm not minded to accede to that request. So, in the circumstances where you don't propose to take any attitude or approach in relation to the request, I will then grant the defence access to the documents.

MR STRICKLAND: Your Honour, I'm very happy for the defence to be granted first access, but in relation to that issue, could we – could we have first access to that document - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - and then I will make – get another lawyer to get instructions about it.

HIS HONOUR: All right, I'm happy for that.

MR STRICKLAND: And the remainder, I'm happy for my learned friend to have first access.

HIS HONOUR: All right.

MR EDWARDSON: Sorry, your Honour, what I was going to suggest, if your Honour will give leave, we can get my instructor or assistant to take it to Tindall Gask Bentley, they can copy the documents, with the exception of that one page. We'll do a copy for the Crown at the same time. It doesn't look like there's a huge amount of material there.

HIS HONOUR: No.

MR STRICKLAND: Yes, we're indebted to my learned friend.

MR EDWARDSON: And we'll provide a copy. That means we can access it both.

HIS HONOUR: All right, thank you. Now - - -

MR STRICKLAND: That single email has been – will be given to us, is that correct?

HIS HONOUR: Yes, all right.

MR STRICKLAND: Thank you.

HIS HONOUR: It's marked quite obviously in the documents.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: I'll hand the un-redacted copy down now.

MR STRICKLAND: If the court pleases.

MS CALLAN: Your Honour, the Solicitor for the Northern Territory is instructed by Legal at the New South Wales Police – sorry, the NT Police Force, in relation to the subpoena. It's somewhat – for reasons of efficiency, the Senior Director of Legal, Sandy Lo(?) has indicated to me that that Solicitor from the Northern Territory – from

the Solicitor for the Northern Territory is no longer present in court, but Ms Lo has conveyed that the particular line in that email is – they don't wish to press any resistance.

HIS HONOUR: Thank you.

MS CALLAN: If I can put it that way.

HIS HONOUR: Yes, thank you.

MR EDWARDSON: Your Honour, can we have – the other document?

HIS HONOUR: Yes.

MR EDWARDSON: Only to stop the – I'll just send somebody over to sort it out then, thank you.

HIS HONOUR: Now we're ready then to proceed?

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: All right, can we bring the jury in please.

JURY IN

HIS HONOUR: Yes?

MR STRICKLAND: Your Honour I call Detective Senior Sergeant Andrew Barram.

My learned friend has just drawn something to my attention. It doesn't require proceedings to stop but can we have a morning tea break at some stage, even if it's a brief one?

HIS HONOUR: If you let me know when you want to do that, I'll do it.

MR STRICKLAND: I will, thank your Honour.

ANDREW JAMES BARRAM, sworn:

MR STRICKLAND: Can I ask you to speak loudly and clearly. Everything you say is being recorded?---I understand.

If you would like me to repeat a question or you don't understand it please say so?  
---Okay.

What is your full name?---Andrew James Barram.

And what is your rank?---Detective Senior Sergeant.

How long have you been in the Northern Territory Police force?---25 years.

During your police career, can you just describe the different roles you've had?  
---After recruit training, like everyone else, I went into general duties. I was initially at Darwin station for about four years and then Casuarina station. Then I worked in crime area and then I worked in intel for a number of years during which time I did a number of courses around defensive tactics, firearms et cetera and also spent a number of relieving periods at the college during those years. I then transferred to Alice Springs, again, initially into general duties then I was in drug squad in Alice Springs and then CIB.

What is CIB?---Criminal Investigation Branch, so another detective role, then I was promoted to sergeant and back into general duties.

When were you promoted to sergeant - approximately?---About 2008, I think.

Yes, and then continue on?---So I did close to five years as a sergeant in Alice Springs, transferred back to Darwin and then I was at the police college in the operational safety section, so full-time - - -

From what year?---Sorry?

From what year?---2012.

What is the police college?---That's where we look after - well, where we train police recruits and run the annual requals for in-service members from.

Requals is requalifications?---Yes.

And you said the office - you said the OSS, you mentioned the Office of - - -?

---Yes. Operational Safety Section.

And what is that - what is the function of that section in the police college?---So that section does all the specialist skills training, so the firearms, defensive tactics, driver training and we were also teaching first aid at that point.

You are head of that section, is that correct?---Yes.

Since when?---After - well, there was a senior sergeant in place when I first arrived but he resigned and I was acting senior sergeant from when he resigned until I was promoted into the position and then I was Senior Sergeant OIC of the OS section.

And what were your duties as the officer-in-charge of the OS section?---To oversee all of the firearms defensive tactics, training, also at that point manage the police armoury and review and write training manuals et cetera and to represent NT Police at national forums and instruct the forums.

I am going to show you a document please?---Thank you.

Now, is that your Curriculum Vitae?---Yes, it is.

Yes, I tender that.

HIS HONOUR: Exhibit 77.

EXHIBIT 77 Curriculum Vitae of Detective Senior Sergeant Andrew James Barram.

MR STRICKLAND: I will have copies later for your Honour.

HIS HONOUR: Thank you.

MR STRICKLAND: Can the witness please be shown exhibit 62?

Can you please go to tab 2 please? I'm sorry - if you go to tab 4, I beg your pardon?---Four?

Tab 4. You are familiar with that document, is that right?---Yes.

Defensive tactics?---Yes.

Did you have any role in drafting any version of that?---Yes.

Which version?---I'm just looking at the document history. The module review on 28th of the 5th 2012.

Yes?---Also importing it onto the new template on 1st of the 10th 2012.

What was your role in are you referring to page 3 of 83, is that correct?---Yes.

What was your role in writing the module review?---Just checking that everything was up to date, we were also introducing an "Empty hands tactics package" at the time, so just making all of that meld into the one document.

And what is an, "empty hands" - what does, "empty hands" refer to?---Empty hand tactics package was introduced when we stopped directly teaching striking techniques, so it was more around controlling person with grappling and holds.

If I can just pause a little bit on your Curriculum Vitae, you refer to the fact that you were defensive tactics instructor, is that right?---Yes.

Firearms instructor?---Yes.

A simunition instruction, what is that?---Simunition, it's a training ammunition that - it's kind of like paint marker but it allows us to convert some of the real Glock pistols by changing out certain parts to fire the paint round. So it adds realism to the training.

And what's an Incident Management Instructor?---So teaching incident management principles to recruits and in-service members.

And what's incident management principles?---How to manage incidents. So introducing the ICENCIRE police plan, Ten Operational Safety Principles and such concepts.

And how long have you been instructing in those different areas?---Well, I got my instructor quals at different times throughout my career. It's a bit hard to answer that directly.

Well, when – just when did you get your instructor qualifications?---Again, I got them at different times throughout my career. So I think the first- - -

From when 'til when?---I don't recall, I'm sorry. I think about 2006 I got my first qual.

Now, you've also been instructed on Tasers; is that correct? The use of Tasers?---Yes.

You also hold numerous instruction qualifications for the teaching of combat; is that right?---Martial arts.

Martials arts combat? And what are your qualifications there?---I've done a number of instructor courses in Krav Maga.

In what, sorry?---Krav Maga.

Is that K-R-A-V new word M-A-G-A?---Correct.

Yes, go on? What is that?---That's the Israeli close quarter combat system.

Yes?---I have a second degree- - -

You have a black belt in that, do you?---For the styles that have a ranking system, yes. Some styles in Krav Maga don't have a ranking system.

Just go on, continue on?---I've got a second degree black belt in Zen Do Kai karate.

That's Zen Do Kai, is that right?---Yep.

Z-E-N new word D-O new word K-A-I?---Correct.

Go on?---I've got a third degree instructor rank in Muay Thai kickboxing.

That's M-U-A-I?---M-U-A-Y. New word, T-H-A-I.

Okay. Yes, go on. I think I've got a fifth-degree black belt in progressive Krav Maga, which I wrote part of the training manual for that.

In any rate, you have various martial arts qualifications; is that right?---Yes.

Over how many years?---Over 30 years.

Now, in your years, have you reviewed incidents involving the use of force against members?---Yes.

By members?---Yes.

And how many times have you done that?---Actually reviewed them, I don't know. Lots.

Okay. And what's the process of reviewing use of force incidents?---Well, as a general duties supervisor, you review the Use of Force case note entry that your constables add every time that they use force or have force used against them. You review it to make sure that it correctly reflects what actually happened. And also that the use of force was justified or reasonable in the circumstances.

Now, you have given evidence in a number of criminal cases in this jurisdiction; is that correct?---Yes.



In relation to your – you've given evidence as an expert about police use of force issues?---Yes.

About how many times?---In the Supreme Court, at least once. In the lower court, several times. And also once in the Arbitration Tribunal.

Okay. You've also given evidence in civil cases on the same type of issues?---I haven't had to give evidence. I've given an opinion.

You've given reports. So expert reports, thank you. And you've given your opinion about use of force in Internal Police Investigations, the Professional Standards Command; is that right?---Yes.

What does that involve? What are – what's Professional Standards Command?---Professional Standard Command look after the ethics and integrity side of the police force. They make sure that police are doing the right thing and they investigate when there's a possibility that a police officer hasn't done the right thing.

You've also given reports in relation to Workcover and Workplace Health Safety investigations?---Yes.

In relation to where there's been an injury incurred by when police use force; is that right?---Yes, and while people have been injured during training.

And you've given written responses on behalf of the NT Police regarding police use of force training; is that correct? In relation to briefing to ministers and- - ?---Correct.

- - -coronial recommendations- - -?---Yes.

- - -responses to ombudsman's request?---Yes.

And briefings to NT Police executive leadership?---Yes.

You've been accepted as an expert in the Supreme Court in another case?---Yes.

Now, you have been asked, in relation to this case, to review a number of materials; is that right?---Yes.

And to give opinions in relation to the use of force in this case?---Yes.

I want to ask you about the materials or the documents that you've been provided with. First, you're aware of the Expert Code of Conduct; is that right?---Yes.

And what, in essence, is that?---That, in essence, tells me that I'm to provide opinions based on my experience to assist the court in an unbiased manner.

And the specific opinion you were asked to provide was an opinion on the force used at the shooting at Yuendumu on 9 November 2019?---Yes.

And you have prepared a report on that matter- -?---Yes.

Do you have that report with you?---Yes, I do.

That's a report dated 13 March 2020?---Yep.

Yes.

Could that be marked for identification, your Honour?

You'll need to just bring that report out. You've got that report in front of you?

Yes, could that be marked, please, your Honour.

HIS HONOUR: It will marked for identification with the letter Y.

MFI Y Report by Detective Senior Sergeant Andrew Barram.

MR STRICKLAND: And we'll get a clean copy of that, your Honour.

HIS HONOUR: Right.

MR STRICKLAND: Now, I provide a clean copy for MFI Y.

Now, to provide that opinion, you have looked at various body-worn footage; is that correct?---Yes.

You've looked at the body-worn footage on 6 November in what's described here as the axe incident; is that correct?---Yes.

And both for the body-worn of Senior Constable Chris Hand and Senior Constable Lanyon Smith?---Yes.

And your Honour, that's exhibits 3 and 4.

You were given body-worn footage in relation to a number of IRT members who attended Yuendumu on the evening of 9 November?---Yes.

And they are the footage of a Mr Hawkings, Mr Kirstenfeldt, Mr Eberl and Mr Rolfe?---Yes.

And I can indicate, your Honour, that the following exhibit numbers have been reviewed by this witness. I don't intend to play them and have them reviewed. This is the convenient, shorthand way of doing it. He's reviewed the followed: exhibits 11, 12, 21, 22, 23, 24, 26, 28, 29, 30, 31 and 32.

You also reviewed a – what's called a compilation body – I'm sorry, you also reviewed a slow motion compilation- -?---Yes.

Where it was in slow motion; is that correct?---Yes.

That's exhibit 59. You also read the statement of a number of officers who – that is, Northern Territory Police Officer statements; is that correct?---Yes.

And I'll just read those and you can confirm it. The statements of Lee Bauwens, Breanna Bonney, Adam Donaldson, Adam Eberl, Julie Frost, Christopher Hand, Anthony Hawkings, Michael Hickey, Evan Kelly, Robert Kent, James Kirstenfeldt, Lanyon Smith and Ian Spilsbury?---Yes.

You also had regard to – you looked at the photographs of the injury to Mr Eberl, is that correct?---Yes.

Exhibit 1, tab 21. And also the photographs of the injuries to Mr Rolfe?---Yes.

One, tab 18 and 19. You also looked at the crime scene photographs prepared by Ian Spilsbury?---Yes.

Which is exhibit 1, tab 23. You also had regard to the post-mortem report from Dr Tiemensma?---Yes.

And medical records from Mr Rolfe's admission to the Alice Springs Hospital?---Yes.

Exhibit 1, tab 20. You had regard to the training records for Mr Rolfe, is that correct?---Yes.

Exhibit 1, tab 41. And you've also had a look at the Adapt(?) records for the IRT officers, is that correct?---Yes.

You also – excuse me – also visited – did you visit Yuendumu itself?---Yes.

And you visited Yuendumu, that is House 511?---Yes.

And House 577?---No.

Just House 511, and you visited there in – twice on December 2019?---Yes.

Now you've also had – you've also read the evidence of some of the witnesses in this case, is that correct?---Yes.

That is – I'm sorry, you've read the transcript of the evidence they've given in these hearings?---Yes.

In this hearing. And you've read the evidence of the following witnesses, Officers Kent, Hand – Chris Hand, Lanyon Smith, Evan Kelly, Julie Frost, Jody Nobbs, Paddy McCormack, Hansen, Bonney, Williams, Donaldson, Alefaio, Kirstenfeldt, Wurst, Hawkings, Eberl and Bauwens?---Yes.

Thank you. Now you've also had regard to a number of documents. Can I ask you have a look again at exhibit 62? You've had regard to all of those – all the documents in that exhibit?---Yes.

You've also had regard to the National Guidelines Compendium, Police Use of Lethal Force, which is an annexure to your affidavit, is that correct?---Yes.

I'm sorry, annexure to your statement?---Yes.

Which is MFI Y. I'll show you this document?---Yes that's the document.

Your Honour, I tender that, and if admitted, that go behind exhibit 62 in the last tab.

HIS HONOUR: So do you want that to be marked as a separate exhibit?

MR STRICKLAND: No, your Honour. I wonder – I think it'd be more convenient if the jury could put that in exhibit 62.

HIS HONOUR: All right.

Is there any objection?

MR EDWARDSON: No, your Honour.

HIS HONOUR: All right, then that can be admitted as part of exhibit 62.

EXHIBIT P62: Addition to exhibit, Annexure to Sergeant Barram's affidavit, National Guidelines Compendium, Police Use of Lethal Force

MR STRICKLAND: I'll hand out copies to the jury.

Now I want to ask you to go to a different area, that is an overview of the training in relation to Operational Safety Tactics and the Police Use of Force. Do Northern Territory Police receive instruction on both on the practise of the use of force, and the underlying philosophy?---Yes.

And do they do that at recruit training?---Yes.

How long does recruit training go for?---Between six and seven months.

And then you say there are annual qualifications – re-qualifications?---Yes.

And how long do those – how many days does the annual re-qualifications go for?---Now it's defensive tactics is one day, firearms is one day.

Say that once more?---Now, defensive tactics is one day, and firearms is one day. Previously, defensive tactics went for two days.

When did that change?---About – or not long after I left the area, so about two years ago.

So about 2019 – 2020?---Around that.

So before then, defensive tactics was two days annually?---Yes.

Okay. Now were there – at the recruit training, did recruits have to sit exams?---Yes.

And they needed to pass those exams to qualify as a police officer?---Yes.

And you needed a 70 percent pass mark?---Yes.

To do so. I'm just going to show you a folder. In that folder there should be, I think your curriculum vitae, is that correct?---Yes.

And there's also a series of – are you aware that Mr Rolfe sat and completed some exams during - - - ?---Yes.

- - - his recruit training?---Yes.

And there's also in that folder, something I'll come to later, which is some photographs or some stills of body-worn in relation to House 577. Is that correct?---Yes.

I'll come to that later.

Your Honour, I tender that folder. And just for convenience, one of the – one of the documents in there is already exhibit 77.

HIS HONOUR: All right, well that will be exhibit 78.

EXHIBIT P78: Folder containing Sergeant Barram's Curriculum Vitae and still photographs of body-worn in relation to House 577.

MR STRICKLAND: We have copies for the jury, your Honour.

Now with the – when you complete an exam, there are three officers that assess that exam, is that correct?---Generally, yes.

I'm sorry?---Generally, yes.

To assess the competency in relation to each particular module, is that right?  
---Yes.

And to your knowledge, Mr Rolfe passed all of those recruitment exams, is that correct?---Yes, he has to have had - or he would never have graduated.

He scored very highly in fact?---Yes.

Could you please have a look at exhibit 62 again?---Thank you.

If you go to tab 4. If we could look at page 21, and I am really going to ask you some questions about part 2 in particular. You've read part 2? You're very familiar with part 2, is that right - the contents of part 2?---Is that the page, "Force Philosophy?"

So, sorry, it's tab 4, page 21 of 83?---Yes.

It's called, "Operational Safety Philosophy and Tactics?---Yes.

And I take it you are familiar with the contents of this?---Yes.

And does this reflect the content of the training of Northern Territory Police Force Recruits at the police college?---Yes, it does.

And you have taught those principles to recruits?---Yes.

And you have not just taught the principles, but you've applied the principles in various scenarios, is that right?---Yes.

And practice?---Yes.

If you go to page 22, are members taught about what is regarded as "justification" in terms of the *Criminal Code* when force can be justified or not?---Yes.

Legally?---Yes.

Would you to page 23. Are they taught about the principles of minimum force and unnecessary use of force?---Yes.

In particular the use of unnecessary forces defined in s 4 of the *Criminal Code*?  
---Yes.

Do you give training to police who are issued with firearms - you give police training about obviously the use of firearms?---Yes.

And when they can use them, is that right?---Yes.

If you go to page 24 about Lethal Force. I just want to ask you a few things about that section. So you train police about when lethal force can be used, is that right?

---Yes.

Are police officers trained it must be the option of last resort?---Yes.

And are they trained in all those matters you can see under the heading "Lethal Force"?---Yes.

In terms of points to consider, what - the second dot point is self-evident. "Could the subject cause death or serious harm" the "subject" there refers to what?---The offender - the bad guy.

These are the points to consider when - as to when to use lethal force?---Yes.

One of the points to consider is is an officer or third party in jeopardy?---Yes.

And what are examples of the less than lethal alternatives?---Other force options that we are issued with such as Taser, spray, baton, empty hand tactics, handcuffs, that kind of thing.

So the principle in 4.3, "Where there is" and then in red letters, "no immediate threat to life a member should assess the incident in order to determine what non-lethal techniques would best de-escalate and bring the incident under control in a safe manner"?---Yes.

That's an important principle that is taught?---Very important.

The notion of de-escalation - is that an important part of the training?---Yes.

What is the training, in essence, about de-escalation?---Trying to calm the situation or bring it down from a high level of threat to a lower level or not level of threat preferably.

What are the main de-escalation techniques that are taught to recruits?---All manner of techniques from verbal commands, negotiation right up to pointing the firearm at the person and saying, "Drop the weapon" and every area in between, so you know, presenting a Taser, presenting your spray, presenting a baton and giving verbal commands to the person to stop what they're doing or drop the weapon, such as - so those sorts of commands.

And that feeds into 4.4, "Members authorised to use non-lethal force techniques and "OST" stands for?---Operational Safety Tactics.

Equipment, the resolution of incidents. What are Operational Safety Tactics Equipment?---Well, it's what we're talking about, the tactics and training around defensive tactics, firearms et cetera.

Now, if you go to - under the heading, "Non-lethal Force" and then over the page to, "Excessive Force" do you see at the end of that it's got, "National minimal guidelines for incident management"?---Yep.

Is that the document I just showed you a few minutes ago?---Yes.

Which is now tab 6. If you can go to page 26. Do you train officers in relation to the ten operational safety principles?---Yes.

In relation to risk assessment, what is the essence of what is taught in relation to risk assessment?---Thinking about what you're doing and assessing danger to yourself as opposed to the goal that you are trying to achieve.

Are you taught to continually assess?---Yes. Assess and reassess is the term that we teach.

Now, under the heading, "Planned response" what kind of things are taught about, "For an unplanned response every effort must be made to develop a plan of action" what is the essence of what is trained there?---The essence of that is, well the step-back principle. Stop, step back for a moment, assess, reassess, do you really need to go in there, and then application of the police plan to the incident, which is the ICENCIRE plan. It's all about not rushing in.

Why do you need to continually assess and reassess and step back? What are you training about that?---Because - well, time is on our side, so we utilise time to try and come up with a less forceful option than rushing in and perhaps causing an incident that doesn't need to happen.

Your Honour, is this a convenient time?

HIS HONOUR: Yes.

Members of the jury, would you retire please?

JURY OUT



MR STRICKLAND: Your Honour, before your Honour breaks, there is one legal issue your Honour will be required to resolve.

HIS HONOUR: Yes.

MR STRICKLAND: I propose to tender, as part of the accused's training, a – an assessment was done on 10 November 2016 in relation to a particular scenario. If I could – and I understand it's objected to. I'm sorry, the witness should step down, I'm sorry.

HIS HONOUR: Yes, would you wait outside please.

WITNESS WITHDREW

MR STRICKLAND: I'll just hand this up to your Honour.

MR EDWARDSON: And your Honour, it's correct, that we do take exception to – or objection to this particular document. Can I take your Honour to the scenario? If your Honour moves to about point – halfway through the document. You'll see at the end of the questioning. Your Honour will find there should be a – which heads at the top, "Summary case 6393467" - - -

HIS HONOUR: Yes.

MR EDWARDSON: - - - which is a PROMIS entry. And your Honour will see that the – it's – sorry, mine's not page numbered. But your Honour will see – and your copy may have a page at the bottom, which is page 10.

HIS HONOUR: Well I have page nine, but - - -

MR EDWARDSON: Page 10.

HIS HONOUR: - - - it continues on page 10.

MR EDWARDSON: Thank you. If your Honour looks, your Honour will see that this is the, if you like, the factual background to the training that was conducted. The text of which is set out on the following page. And your Honour will see that the text says as follows. "At 1320 members Rolfe 3638 and Lannigan 3627 attend Palmerston Bus Exchange in response to a call." And then basically the scenario is set out in the subsequent paragraphs.

HIS HONOUR: Yes.

MR EDWARDSON: It's a siege situation, in essence, your Honour. Your Honour will see that the accused is alleged to have pulled a knife and begin – and began threatening police.

“Members Rolfe and Lannigan(?) both pulled their Glocks and created distance. Ordered Smith to drop the knife. Lannigan re-holstered his Glock and pulled out a Taser. Smith dropped the knife, and members holstered their weapons to conduct a hands-on arrest. Smith took up a fighting stance, and member Rolfe pulled his ASR and sprayed Smith. Smith was unaffected by the spray. Rolfe sprayed Smith again. Smith continued to bite. Lannigan Tasered Smith which was effective, and both members conducted the arrest, placing Smith in handcuffs.”

Your Honour, it's our submission really, in simple terms, that that scenario, which formed part of the training, has no correlation to the circumstances of this case. And it's difficult to see how it could possibly be relevant, other than just being an example of some training that he received. Now in a general sense, that's been put before the jury in spades, about the sort of training and issues. But the jury's focus obviously must be directed, in my submission, to the actual incident in question, which is not one where he was in the position to put distance between himself and the accused, because of the speed at which Kumanjayi Walker executed the scissors against him initially, and then in turn, against Mr Eberl. In other words, that scenario, the scenario in this document, has no correlation at all, to the circumstances that the jury have to consider.

HIS HONOUR: I'll need to hear from the Crown as to exactly how they say it's relevant.

MR EDWARDSON: Exactly.

MR STRICKLAND: Your Honour, we say it's relevant because the training – the training that the accused received in relation to the use of force, is relevant for the issues in the trial, for the reasons stated in our opening address. Ultimately this witness will give an opinion as to the reasonableness of the use of force in relation to shots two and three, based upon the accused's training. His understanding of the training. The training contains, what we might call, theoretical aspects, going through principles and policies. But it also involves practical aspects, including scenario-based training. This is an example of a scenario.

HIS HONOUR: Yes.

MR STRICKLAND: It won't be suggested, at any time, that this scenario, is not – it won't be suggested that this scenario is equivalent to the scenario at the time. But it's never the less an example, and we say it's a relevant example, of what kind of training did he receive, the accused receive, so that these principles are applied in a practical sense in his training. And because his training generally is relevant, we say this is relevant, as an important example of the practical scenario-based training he received. That's – on that basis, we say it's relevant.

HIS HONOUR: Well as long it's made clear to the jury that's it's not suggested by the Crown that the two incidents are equivalent.

MR STRICKLAND: Yes. I will do that.

HIS HONOUR: I think on that basis, it would be admissible.

MR STRICKLAND: If your Honour pleases.

MR EDWARDSON: I take it there is no scenario that's going to be presented by the prosecution, that's akin to the circumstances that confronted Zachary Rolfe, on 9 November?

MR STRICKLAND: Your Honour, this is the only – I think the short answer is, we don't – there is no other practical scenario training, other than this, as an example, given Mr Rolfe - your Honour will see from the document, that it's clear, he signed the document – the short answer is no, this is the practical scenario. And I will make it clear, when I address on it – when I address on this document, I will make clear that we're not saying it's equivalent.

HIS HONOUR: It does seem to me as well, Mr Edwardson, that there are some potential benefits to the accused.

MR EDWARDSON: Indeed, your Honour.

HIS HONOUR: All right, I'll adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Yes.

Can we bring the jury in, please.

JURY IN

ANDREW BARRAM:

MR STRICKLAND: Senior Sergeant, can I just clarify a couple of things, involves me rewinding a bit. What's your current position in the Northern Territory Police Force?---Right now, I'm Acting Superintendent in charge of the Drug and Organised Crime Division.

Just in relation to – you gave some evidence about the operational safety section. Are they – and they are responsible for training recruits?---Yes.

Are they responsible for training carried out by the tactical – Territory Response Group?---No.

Or the Immediate Response Team?---No.

I want to show you another document, please. I gave you some documents about exams that Mr Rolfe had conducted or completed in 2016?---Yes.

Is that another document that – is that another document that was conducted by Mr Rolfe on 10 November 2016?---Yes, it appears to be, yes.

So is part of the assessments that are done in relation to what is called Scenario Skill Techniques?---Yes.

And what are they? What are Scenario Skill Techniques?---That's where the student or the recruit participates in a planned scenario, where we're observing how they react to that scenario and, you know, correct them if they're not following policy, procedure, et cetera.

And you can indicate that the documents before you is an assessment in relation to one of those scenarios; is that correct?---Yes.

I tender that, your Honour.

HIS HONOUR: Exhibit 79.

MR STRICKLAND: Your Honour, could that be – would your Honour consider just making that part of exhibit 78? It would fit conveniently into the folder.

HIS HONOUR: Yes, I'm quite content to do that. That will be part of exhibit 78.

EXHIBIT 78 Documents in relation to assessment of a Scenario Skill Technique.

MR STRICKLAND: It will be tab 4, members of the jury. We have copies for the jury.

Now, Senior Sergeant. Can I get you to go back to exhibit 62 again? If you can go to page 27?---Tab 4, Defensive Tactics?

Tab 4, thank you?---Page 27.

Now, there's what's described there as a Tactical Options Model. Is that something that is taught to Northern Territory Police?---Yes.

And can you give – can you tell the court the essence of what is taught in relation to that model?---The – it's obviously the police officer in the middle and that safety should be the first consideration. Assess and re-assess the situation as it unfolds. Communication is also vitally important, as in communication to your partner or communication through the radio back to supervisors or police communications. And then all your tactical options are there and it's done in a circle to represent that the police officer can go straight to any one of those tactical options as they assess necessary, rather than having to go through any kind of a hierarchical model of use of force.

And you have "Communicate" touching each of those options; is that right?---Yes.

Why – what is taught about that?---That it's vital. You know, if it's – if you're doing tactical disengagement – for example, saying, "Get back, stay back," that kind of thing. Or if you've got a weapon presented, saying, "Drop the weapon." If a knife is produced for example, yelling, "Knife, knife, knife," so that your partner, who may not have seen it, realises that's what's in play in the situation. So communication is vital. It also alerts anyone else who's around that there's a knife, you know, if it's in a crowded area, people realise and move away. Communication is vital to police work.

In the innermost circle – it's not entirely clear – but I think there's the words, "Assess and re-assess"?---Yes.

Why is that in the inner circle?---Well, that's the continual process and constantly assessing the risk to you and other people in – and including the offender.

So if you draw a firearm, how does assess and re-assess operate?---Well, as soon as you've drawn the firearm, assessing whether or not the offender has seen it, what that – what affect that has to the offender. Does it change their behaviour, now that they can see that a firearm is drawn? And very, very often in my experience, it does. And then saying, you know, giving dynamic, verbal commands, such as, "drop the knife" or, "drop the weapon", or, "don't, police, don't move." They're all phrases that we – we teach and drill into the recruits.

I'm not going to go through each of these tactical options, but just a couple that are less self-evident. Tactical disengagement, if you just go to page 28. It refers to – on page 28 and 29 are elaborations on each of these options. Is that right?---Yes.

And are the police trained in relation to each- the details of each of these tactical options?---Yes, certainly are.

So tactical disengagement, what are police taught in relation to that?---That can be a controlled withdrawal. It can be running away, if someone's got a knife, and he's chasing you. Maintaining – trying to maintain a safe distance, and looking for cover. For example, there's been a number of scenario – well situations, real situations, where a knife's been produced, and the police are running around the car, to keep the car between them and the offender. Things like that. Looking for cover. There's that relationship between time, distance and cover. Distance gives you time, and cover also gives you time. And as I've said before, time is on our side. Time to react. Time to think. Time to do some planning and some decision making.

Under heading – the other – another option is, “empty hand tactics”, I just want to go into what's actually taught and the detail. “Escort hold”, what's that?---They're various holds when you're escorting an apparently compliant subject, which can be one handed or two handed escort hold.

But there are different types of holds taught, is that correct?---Yes.

Is a seatbelt hold taught?---Yes.

And what's a seatbelt hold?---One arm over the shoulder, one arm up under the opposite arm pit, with a gable grip, and then that leads into a take down.

And pain and compliance, what's a, “passive countermeasure and active countermeasure”?---Passive countermeasure is a firm grip, a control of the arm, for example, so that they know that you've got control of them. You – quite often you'll grab a person, and you'll feel them stiffen up or – and try your grip. And if you don't have that firm grip, then they'll try and break free.

And again, there – those things are taught to the police?---Yes.

What about, “active countermeasures”?---Active countermeasures can be distraction techniques. For example, a distraction strike, or different kind of things. You know, drawing – drawing the weapon can be an active countermeasure.

Go over to page 29, under the heading, “Firearm.” You've said earlier of all – of these options, what is taught is that the firearm is used as a last resort. Is that correct?---Yes.

Where there is immediate danger to life?---Correct.

And what are the – what's the essence of what's taught in relation to the matters described in that right hand column under, “Firearm”, beginning with “Verbal warning and continual assessment” – “continuous assessment”, et cetera?---Well I've already touched on it a bit, in that assessing, as soon you've drawn the firearm the – if there is a behavioural change in the offender, giving your verbal warnings, “stop, don't move, police don't move”, “drop the weapon” and that kind of thing, and – and continually assessing the behaviour. Because, you know, an aggressive person is going to try – perhaps you resolve, and you're continually assessing at what level

you need to be. Or – once you've drawn the firearm, pointing it down at the guard, at 45 – about 45 degrees, and assessing. Does that have an effect? It may not. You may then have to point the firearm at the person and give them some dynamic verbal commands. That may have an effect. You've got to assess that in an ongoing process.

Where are officers trained to shoot if they do fire the weapon?---At the centre of scene mass.

Which means what?---At the centre of – well if you can see the whole body, the centre of the torso. If you can see part of the person, because they're partially behind a wall, for example, and you shoot at the centre of what you can see of them, rather than – because we don't shoot at anything we can't see. So we're not trying to shoot them for the wall, for example. So we shoot at the centre of what you can see.

And is there training about how many times to shoot?---Yes.

What's the training about that?---Well the overarching training is that you must be accountable for every shot that you fire. But, we do train that one shot may be effective. It may not be effective. And that multiple shots may be required to achieve subject control through immediate incapacitation.

Now what do you understand by, "immediate incapacitation"?---The offender ceasing being able to do what they're trying to do, immediately.

Now the last bit of exhibit 62 I want to turn to is if you go to tab 5 please. You've mentioned a number of times in your evidence, or a couple of times, the notion of ICENCIRE?---Yeah.

Correct?---Yes.

I-C-E-N-C-I-R-E?---Yes, ICENCIRE, yes.

ICENCIRE. Is that something that is – that – well what is ICENCIRE?---That is the police plan.

So if you go to page 63 and 64, this is in the document, "Operational Safety Incident Management." So is the police plan, is that trained – are police trained in relation to that?---Yes.

If you go to page 72, about the application of the ICENCIRE principles, is this – are police taught that this – these principles are used for dealing with various different scenarios, is that right?---Yes.

One of them is siege or barricade situations?---Yes.

Another is serious high-risk situations?---Yes.



And I'm just fast forwarding it, but what happened in Yuendumu in House 511, or I should say the plan in relation to – I'll start again. Was the shooting incident that you were required to review, would that be described as a high risk situation?---Yes.

And do you say ICENCIRE is relevant for the training, in terms of training for that kind of situation?---Yes.

So how does – what is the – what is the essence of the training in relation to ICENCIRE? What are police taught about that?---Well it's taking a cordon and containment approach to pretty much every situation that we go to. And ICENCIRE is scalable to a minor traffic accident, right up to a large siege.

How does it – what are they trained to do in terms of cordon and control? What's the actual training that's delivered?---Well it varies. And we do practise it with traffic crashes, or mocked up traffic crashes. And we do other scenarios. So it's about setting up a cordon, a police cordon. And that can be – if – we take a basic traffic accident, and that can be just one police car, blocking off that lane. You've got a cordon. You've created a safe area in which to operate.

One of the letters in ICENCIRE, is "E", "Evacuate", what's the – what's taught about that?---It's to consider evacuating members of the public, and anyone that's non-essential to the task at hand, from within the cordon.

So if a house was being cordoned - - - ?---Yeah.

- - - for example, you'd evacuate people from the house who were not – who would you evacuate?---Well, anyone who's outside the house, immediately outside the house. You would want to get them out of the cordon. If there's people inside who are able to leave, as in they're not being held hostage, you would attempt to get them out. And again, out past the cordon. And then commence negotiations with the subject.

Can I ask you to look at exhibit 37 please?

If the witness can be shown exhibit 37, your Honour?

Now, you are familiar with this part of the defensive manual, is that correct?---Yes.

Weapon awareness?---Yes.

Could the witness please be shown exhibit 40?---Thank you.

Now, you've been shown those photographs, is that right?---Yes.

And you understand they are the photographs of the scissors that were - the Kumanjayi Walker had?---Yes.

And do you consider that those scissors are an edged weapon as defined?---Yes, they fall within that definition.

And can the witness please be shown exhibit 41? Thank you.

Can you open it up please - open up the scissors. Thank you, that's fine. Can I just ask you about exhibit 37? You're familiar with that?---Yes, I am.

And does that accurately reflect what is taught to police officers that is the content of that?---Yes, yes, it does.

Can I just ask you something about the heading, "Reactionary gap" if you go to page 67. Are police officers given - put through some drills in relation to responding to edged weapon attacks?---Yes.

And what drills are they put through?---They're put through several drills in defensive tactics, they are taught - well, they're presented with an offender who is close to them who produces a knife and they're taught to drive that offender away and make some distance and draw their firearm and commence dynamic verbal commands. We do an exercise often referred to as the Tueller Drill where we get the offender armed with a knife to run at them from various distances to show them that an offender that's - a determined offender who is sprinting at them can cover quite a distance in the time that it takes them to actually draw their firearm. We also do some drills down at the range when we're teaching firearms.

Can the witness please be shown exhibit 64. Now, in the witness box you gave a physical - Senior Sergeant, in the witness box you gave a physical demonstration of one of the drills?---Yes.

Now, do those photographs in exhibit 64 reflect more or less what is done in those drills?--Yes. Very similar.

Okay, and are you - is there a drill - you've hear of something called the, "Tueller" - T-U-E-L-L-E-R drill?---Yes.

What is the Tueller drill?---It was an exercised developed by a Sergeant Tueller in the United States to demonstrate what became known as the, "21 foot principle" which, as I've said earlier, is about how fast a determined offender can cover a reactionary gap and Sergeant Tueller employed a martial artist called Dan Inosanto to play the offender and had him run at him from various distances which ultimately showed that within that 21 feet, or 6.4 metres, most students were unable to draw their firearm and get an effective shot on the offender, so outside of 21 feet the majority of students were able to draw and get an effective shot on the offender. So it became a way of illustrating the importance of reactionary gap and maintaining it.

There were drills done in relation to pretend attackers walking or running towards the police with a knife or an edged weapon, is that right?---Yes.

And what the police should do in those kind of circumstances?---Yes.

Now, did you also teach the police in relation to the expression, "knife equals gun"?  
---It gets abbreviated to that, yes.

And what are the police taught about that?---When you see a knife maintain or create that reactionary gap of at least, you know six - six to seven metres and have your firearm out and begin your dynamic verbal commands.

And the tactical options described at page 29 of the Defensive Tactics, the escalating series of options?---Yes.

Is that taught as part of knife equals gun?---Well, what is taught is if they start running at you get off line and keep yelling, "Drop the knife". It's only once they get within that danger zone and that it's obvious that they're going to attack you with the knife that you should fire. But, having your gun out and yelling at them to drop the knife is essentially what is taught.

The scenarios that are taught involves the assailant standing up, is that right?  
---Generally, but scenarios vary.

You also trained police in relation to how to use the firearm, is that right?---Yes.

You went to shooting ranges, they are taught how to fire at shooting ranges?  
---Yes.

They were taught about the four firearm safety principles?---Yes.

I think there's been evidence of that, but there are those four safety rules. One of them is, "Keep your finger off the trigger and outside the trigger guard until your sights," is that right?---Your sights are on target and you've decided to fire.

And what's that rule? Can you just explain that rule, please?---That means, do not put your finger inside the trigger guard and on the trigger until you've got that sight picture and you've decided that it is necessary to fire, and then you put your finger in. That's to avoid unintended discharges of the firearm.

Another safety rule is, "Be sure of your target, know what it is, what it is in line with and what is behind it. Never shoot at anything you've not positively identified"?---Yes.

And again, can you explain what the essence of that safety rule is?---We have to be sure of what you're shooting at. That, you know, it's the offender. And you've also got to be aware of what's referred to as your background, as in, any people that are standing behind or near the offender. Particularly important when you're inside a house and there's other people in other rooms. Bullets could travel through walls and strike unintended people in other rooms, for example. So it's all about – and it's

also, as I touched on before, if you can only see part of the person, you shoot at the part of the person you can see because maybe they've got a hostage behind that wall. You don't know. So you only shoot at what you've positively identified as the offender.

And what are you taught about firing if a third party or a colleague is close by? Close by to the assailant?---Well, you do that risk assessment of whether or not you, potentially, going to be hitting them.

Now, the safety rules that you've just given evidence about, are they discussed at the shooting range?---They're discussed every day for the two-week package. And at the end of that two weeks, the student is required to pass an exam and those four firearm safety principles must be reproduced verbatim.

So they're drilled into the police, those principles?---Yes.

I take it in relation to safety rule 4 that, "Be sure of your target," training involves you need to look at the target; is that right?---I didn't catch that.

Sorry, I'm speaking too softly. In relation to safety rule 4, "Be sure of your target, know what it is, what it is in line with and what is behind it," are you trained to actually look at the target when you are firing the Glock?---Yes. And to take an aimed sight picture.

You wouldn't be pointing your Glock, firing it and looking away, would you?---No.

You're trained about that?---You don't do it.

One of the firearms that police are taught to use is the Glock; is that right?---Yes.

Is that the standard pistol that is- -?---Yes, it is.

And you've given evidence about the training at the police college in relation to the firearm. Is that training included in the annual re-quals?---Yes.

And do they have to maintain their qualifications in relation to – that is, police have to maintain their qualifications in relation to the firearm?---Yes.

And is that the same with Defensive Tactics?---Yes.

That they maintain their qualifications every year?---Yes.

Now, I want to ask you about – move on to a different topic – and ask you about reviewing the events – your review of events prior to the day of the shooting on 9 November 2019. You've given evidence of a number of documents and things you have read. Are you aware – were you aware that on 29 October 2019, Kumanjaya Walker had removed his electronic monitoring device at Central Australian Aboriginal Alcohol Programs Unit – CAAPU?---Yes.

And that on 5 November, a warrant was issued for breach of suspended sentence?---Yes.

And were you aware that various attempts were made to locate Kumanjayi Walker- - -?---Yes.

- - -from 29 October 2019 and you've made yourself familiar with what those attempts are?---Yes.

Are you familiar with what's described as the axe incident on 6 November 2019?---Yes.

Were you – and I'll come back to that in a moment. Were you – did you know that Kumanjayi Walker was recorded as a person in PROMIS? The PROMIS system?---Yes.

And very briefly, what is the PROMIS system?---It's the police system on which – hosts of our information and incidents are recorded.

And you were known – were you aware that Mr Walker was regarded – was recorded in the PROMIS system as having a history of violence?---Yes.

Okay. Did you, as part of your – the opinion you were asked to consider, did you review two body-worn videos of what's described as the axe incident?---Yes.

That is both for Mr Lanyon Smith and Mr Chris Hand's perspective?---Yes.

And having reviewed those body-worn videos, was it – is it your opinion, based upon their training, that either or both of those officers was entitled to draw their firearm in those circumstances?---Yes.

And why do you say that?---They were presented with a close range serious threat, an edged weapon.

Being an axe?---Being an axe.

And would you describe – was it your opinion that, at least from that date, Mr Walker was categorised as a high-risk arrest target?---Yes.

Were you familiar – did you become familiar with a search for Kumanjayi Walker after that axe incident at the Warlpiri camp?---Yes.

And you looked at some body-worn video in relation to that?---Yes, I did.

And Mr Rolfe's participation in that?---Yes.

And do you have an opinion about whether the search that was conducted at the Warlpiri camp on 7 November was done in accordance with proper Northern Territory training and operational safety principles?---Yes. I regarded it as a good application of ICENCIRE.

And ICENCIRE being the cordon contain plan we talked about earlier?---Yes.

And why do you say you regarded it as a good application of ICENCIRE?---It was done well. No one got injured and – yeah, it was well-led by the Sergeant and all those principles were followed.

And – okay. Now, you're familiar on the material, that an Immediate Response Team was deployed to Yuendumu on 9 November?---Yes.

And could I just ask the witness to look at exhibit 1, tabs 36 to 40.

Are you familiar with those documents?---Yes.

Are they records from the Adapt database?---Yes.

And what's the Adapt database?---That's what we record our training and qualifications on for each officer.

And when you say we, you mean the Operational Safety Section?---Well, the police in general.

I see. And those documents that I've just taken you to, exhibit 1, tabs 36 to 40, are the records containing the recruitment and training records for the IRT members who were deployed to Yuendumu on 9 November?---Yes.

Now as part of your –

Thank you, I've finished with that.

Now you're familiar that a briefing was conducted at Alice Springs Station, before the IRT members went to Yuendumu?---Yes.

And you're familiar with the fact that the accused, and other IRT members are said to have watched the body-worn video of the axe incident, before deploying to Yuendumu?---So I'm told.

And did you, at some stage, in preparing your reports, examine the accoutrement belt and pouch worn by Mr Rolfe on 9 November?---Yes.

Could the witness please be shown exhibit 1, tab 32.

And you've seen that photograph, is that right?---Yes.

And you've seen the actual duty belt itself, is that correct?---Yes.

Could the witness please be shown exhibit 46?---Thank you.

You've seen that, is that correct?---Yes.

Is it correct – thank you for that, I'll just wait for a moment. Is it correct that you inspected the various accoutrements that Constable Rolfe had when he – on 9 November?---Yes.

You inspected his baton?---Yes.

You found that to be in working order?---Yes.

His handcuffs?---Yes.

You found that to be in working order?---Yes.

You inspected his Taser?---Yes.

And what did you find out about – did you find out whether the Taser was ever in the – well before I go into that, can you just briefly tell the jury, briefly, how does the Taser work?---So a Taser is a conducted electrical weapon. And it discharges two barbs, which are connected to the Taser via wires. For it to affect a subject, both barbs must impact. And then there's the charge that runs between the two. So that creates an electrical circuit, through the entire system. If one barb misses, nothing happens to the offender. So both barbs must hit to get an effect from the Taser.

And can you see – can you see – if you go back to exhibit 1, tab 32, sorry I beg your pardon, I should have kept it there. Can you see the Taser - - - ?---Yes.

- - - with what – which part in the photograph can you see? The yellow part?---Yeah the yellow and black is the Taser.

And what did you - when you inspected Mr Rolfe's Taser, what did you find?---That the battery was flat.

Did you find any indication that it was on the on position at any stage?---Yeah, it appeared that the safety switch was in the on position, or had been left in the on position.

And at what times? At what times? If you need to look at your report, there's no objection, you can do so. Go to your third report?---Third report.

You prepared a number of reports, is that correct?---Sorry?

You've prepared a number of reports in relation to this matter?---Yes.

1 April 2020, at par 12?---Yep.

The – you found that the Taser was in the – Mr Rolfe's Taser was on the on position, is that right. "Was armed for two seconds at 3.04 pm"?---It - - -

Look, I'll come back to that. I'll come back to that, Senior Sergeant. Don't worry, I'll come back to that. Suffice to say, you inspected his Taser, is that correct?---Yes.

Did you find anything of particular note in the duty belt?---Nothing – or other than what he was holding the Taser in was a non-standard holster.

Now you're aware that Constable Rolfe and – arrived at the Yuendumu Police Station shortly after 6.30 pm?---Yes.

And that other IRT members arrives – he arrived with another IRT member?---Yes.

And that all the IRT members left Yuendumu Station at about 7.05 – 7.06 pm that evening, and they went to House 577?---Yes.

Now I want to ask you some questions about what happened in House 577. You have viewed a body-worn video of what happened - - - ?---Yes.

- - - House 577 was entered, is that correct?---Yes.

I'm just going to play you exhibit 21, which is the Kirstenfeldt body-worn video.

I'm just going to fast forward this a bit to that 9.40 – another minute or so. Okay, leave it there. I won't fast forward it, your Honour, it's too much problem.

#### DVD PLAYED

MR STRICKLAND: Can I ask you to go please to exhibit 78, tab 3. You have produced these - this page in one of your reports, is that correct?---Yes.

And let me just take you to the first page. The first two photographs, are they stills from the body-worn that we just watched?---Yes.

And the bottom two photographs, what are they?---They are photographs of me approximating those movements.

I see. When you've watched - you've watched this body-worn a number of times, is that correct?---Yes

What did you notice about Constable Rolfe and his holster?---That he disengaged the retention - two of the retention devices and the hood.



How could you tell that?---That top left photo that's got the red triangle around it – sorry, rectangle around it, you can see the sights of his gun and the back strap of the firearm, which is similar to the bottom right photograph of me.

And could you hear anything during the body-worn video?---There is a click if you watch it and listen carefully you can hear that mechanism being taken off.

Have you got a - you brought to court a holster matching?---Yes, I have.

And you've got a plastic - - -?---Yes.

Firearm - I am just going to - I am going to ask you please to demonstrate the - how it is that one releases what you say was the retention device?---So there's three - the first movement is push that down and then rock that forward.

And is that - thank you, and is that what you say Constable Rolfe did?---Yes.

On House 577? And is there another safety device?---There is a third one which is a mechanism that you push backward with your thumb that allows you to bring it out, you know.

So the first one - so the first one is the - right. So just go through the three again please?---One, two, three.

Your Honour, could that be MFI'd please?

HIS HONOUR: Marked for identification with the letter Z.

MFI Z Holster with plastic replica firearm, demonstrating release mechanisms.

MR STRICKLAND: Can you take it off please. Can you go to page - going to these photographs again, if you can go to page 2 of 4. Again, the - are the top two photographs, are they stills of the body-worn we've just seen?---Yes.

And the photographs below are photographs of you, is that right?---Of me, yes.

And what is the - what are the relevant parts of the stills that you are drawing attention to?---In that - that hood that it's forward.

And if you go to page 3 please? Again, the same thing, the top photographs, they are stills from the body-worn, is that correct?---Yes.

And the bottom two photographs are photographs of you?---Yes.

And what do you see? What are the features of the top two photographs you are drawing attention to?---Again that the rotating loop is forward, or disengaged.

I see. On page 4, are they photographs of you, is that right?---Yes.

What are you drawing - what features are you drawing attention to in those two photographs?---Well, in the first one the rotating hood closure is in position or engaged and in the second photograph it's down or disengaged.

Thank you. I have finished with that, thank you. So what are police taught about disengaging the safety features of the holster?---They are there - we are taught about firearms retention because sometimes there have been known situations where offenders have attempted to - and sometimes successfully - disarmed police of their own firearm and then used it on the police, so that's why we have - or we issue holsters that have retention features on them - inbuilt.

So what does that indicate to you if someone has disengaged that initial retention device - or safety device?---That they are - there's a readiness to use a firearm.

And in your opinion was it appropriate for Constable Rolfe to have disengaged a safety device in the circumstances you saw in House 577?---No. The only time we're taught to disengage them is when you are going to draw the firearm out.

Was it appropriate for him to draw the firearm out?---No.

And why is that?---Well, he'd been told there was no-one there other than a boy that looks about 10 years old and - yeah, I don't think it was appropriate that he would have the firearm out. Clearly he didn't either, because he didn't take it out.

Did you form an opinion as to whether the search of House 577 as conducted by Constable Rolfe was reasonable or necessary in the circumstances?---I don't think it was necessary. They were tasked to gather intel about where Mr Walker might spend the night. They'd pretty much gained that before they'd gone into the house - well they'd gained that before they'd gone into the house, from the child and if you're then going to do a search of the house like that, you would certainly consider getting the child out of the house. If they'd suspected that Walker was in there - or Mr Walker was in there and that they might have to use their firearm - I touched on this earlier, that bullets can go through walls - doors, et cetera. You've got to be aware of your background so before - you know, the ICENCIRE plan had been followed properly, that child should have been evacuated.

The ICENCIRE being one of the steps as E being evacuate, is that right?---Yes.

Now I want to now ask you about the arrival at house - I should say this. I want you to assume the evidence in this case - you've read the evidence of Constable Eberl and Hawkings, about the - the evidence they've given in this case?---Yes.

I want you to assume that their evidence was that there wasn't any discussion about a plan, if they were to encounter Kumanjayi Walker before entering House 577. What's your opinion if that were the case?---Well it goes back to how - if/then thinking, there should have been a discussion, at least, about what to do if he was there.

So I'll go to House 511. Again, you've read evidence that there was no discussion between Constable Eberl and Rolfe, regarding a plan, if they found Kumanjayi Walker in the house?---Yes.

And what is your opinion about that?---Again, there was no urgency for them to go into that house at all. They had all the time in the world to discuss, plan, make some decisions about what would happen, utilise their if/then thinking and training, about if he is in there, what do we do. So there was no rush for them to go in.

I think you used the expression, "If/when thinking"?---If/then.

If then. What is – what's that a reference to?---Well, if Walker is in the house, then we will – you know, they would choose what they're going to do then.

Okay, is that part of the training?---If/then thinking is an important part of incident management training.

And in the training that you are – that is delivered, what's the purpose of – what are police trained about the purpose of having a plan? Why have one?---So that you can turn an unplanned incident into a planned response, and allow that critical thinking, critical decision making about outcomes, rather than going into a situation and letting it dictate to you.

I'm just going to play part of exhibit 26, that's the body-worn of Constable Rolfe.

It's called Rolfe 2 of 4.

And would your Honour give a warning please?

HIS HONOUR: Yes.

The material which is about to be shown in the video is likely to be confronting for many people. If anybody in the public gallery believes that they may have a difficulty with that material, they should leave the court room now.

DVD PLAYED

MR STRICKLAND: Now you have considered Senior Sergeant, the – whether the circumstances of Constable Rolfe and Eberl entering a house, and what they did immediately after they entered, was consistent with police training, is that right?---I've considered it.

Yes, particularly police training, in particular, the application of those 10 operational safety principles that you've given evidence about?---Yes.

What – what is your opinion, first, about the circumstances of those two officers entering House 511?---It doesn't appear that they followed their training.

In what way not?---The first thing is immediately apparent when Mr Walker comes into view, is that he's got his hand in his pocket.

And what does that signify?---Well if you've got someone that you even suspect may be armed, first thing you're going to want to do is see their hands. So I don't know why they persisted with going in. They could have done that from the door and said show me your hands, immediately.

When you mean from the door, you mean the front door of the house?---Yes.

The standing what, at the door, or just outside the door?---Yes, either one. Rather than going into the room where there's potentially an armed offender.

And what's the advantage, or how's it consistent with training, to be just at the entrance, or just outside the entrance?---That provides you with time, distance and cover. Rather than being – putting yourself into the room with a potentially armed offender.

And do you have any other opinions about what you've seen?---Well again, that they shouldn't have gone in. They – if they're suspecting that it's Mr Walker, and he's clearly a high-risk offender, with a propensity to – well, a previous – previously he has armed himself.

Yes?---Why would you put yourself in such close proximity to him. You know, where's the six metre – 6.4 metre principle. There's no tactical – no distance between them. Limited time to be able to react. Completely goes against our training.

So what options – just assume that neither officer, in fact, knew that Kumanjayi Walker was Mr Kumanjayi Walker until the photograph was held up against the wall?---Again, they could've done that from the door. They could've said, "Sir, can you please come over here but show me your hands first." They could've done any number of things rather than going in there and putting themselves in proximity to him.

And what do you say was the – do you say they put themselves in any danger by doing what they did?---Yes, they did.

And what was that danger?---Well, they've put themselves in close proximity to someone that they suspect was armed.

MR EDWARDSON: Sorry, where's the evidence of that?

MR STRICKLAND: I'm not sure (inaudible).

MR EDWARDSON: They put themselves in close proximity to somebody that they suspected was armed. Where is the evidence of that?

HIS HONOUR: Well, you can ask him that in due course.

MR EDWARDSON: I will, your Honour.

MR STRICKLAND: Your Honour, is that a convenient time?

HIS HONOUR: Yes.

Members of the jury, you may now retire, please.

JURY OUT

HIS HONOUR: Are there any matters counsel want to raise before I adjourn?

MS CALLAN: Your Honour, for the record, the witness – toward the end of the evidence just then – a portion of exhibit 26 that was played from the start until 9:51:52 (inaudible).

HIS HONOUR: All right, thank you.

MR STRICKLAND: Your Honour, I just noticed – and this entirely – this is entirely as a result of what the Crown's done, but I just noticed that at least a couple of those jurors have some trouble lifting all those folders. We'll give some thought to that, as to- - -

HIS HONOUR: Provide each of them with a trolley.

MR EDWARDSON: The resources, your Honour- - -

MR STRICKLAND: I'm not sure each of them, your Honour, but perhaps we might offer if any of them wish to have a trolley.

HIS HONOUR: All right, thank you.

I'll adjourn.

WITNESS WITHDREW

ADJOURNED 1.13 PM TO TUESDAY 1 MARCH 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON TUESDAY 1 MARCH 2022 AT 9:37 AM

(Continued from 28/02/2022)

Transcribed by: EPIQ

HIS HONOUR: Before I ask for the jury to be brought in, there's a couple of housekeeping matters that I'd like to raise with counsel. As part of the agreed COVID arrangements that we made at the outset of the trial, seating in the public gallery has been spaced, so that not all seats are being occupied at any one time. Now questions have been raised about whether that is still necessary. And it appears there doesn't appear to be any direction from the Chief Health Officer in relation to spacing in environments such as the courtroom. So that it appears that there is no impediment to allowing full access to the gallery seating. Now as this was something that was discussed with counsel and agreed at the outset of the trial, I thought that I would raise it with you before making any decision.

MR STRICKLAND SC: Yes, thank you your Honour, I don't disagree with what your Honour has said. I agree with what your Honour has said, that there's no impediment.

HIS HONOUR: Right, thank you.

MR EDWARDSON QC: I agree with that too, your Honour.

HIS HONOUR: All right.

Well then, at the earliest opportunity, when we have a break, the – whatever notices have been put on the seats can be removed by the court staff, and the remainder of the seating can thereafter be utilised in the public gallery.

Now I've prepared a list of questions, which are mainly directed towards you, Mr Strickland, but I have no doubt that the defence will also want to make some submissions in relation to these matters in due course. So I'm going to hand them down. I don't expect you to look at them and provide responses now. Just when you have an opportunity.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: All right then we're ready to proceed then with the witness?

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: All right, thank you.

Can we bring the jury in please?

JURY IN



HIS HONOUR: I presume that the Crown is recalling Detective Sergeant Barram?

MR STRICKLAND: Yes, thank you, your Honour, I recall Detective Sergeant – Senior Sergeant Barram.

HIS HONOUR: Thank you.

ANDREW JAMES BARRAM, on former oath:

XN BY MR STRICKLAND:

MR STRICKLAND: Senior Sergeant, before we return to House 511, just a few things I'd like to return to. You've given evidence you prepared a number of reports, is that correct?---Yes.

I'll just show you a couple please. What was the date of your second report?---1 April 2020.

Yes, could that be marked please, your Honour. I think it's Z your Honour.

HIS HONOUR: In fact - - -

MR STRICKLAND: Maybe it's not.

HIS HONOUR: - - - Z was the - - -

MR STRICKLAND: Yes, the – holster, that's right, so - - -

HIS HONOUR: - - - and the document that I gave to you this morning, I've marked as well. So that'll be AA. So we will mark that for identification with the letters AB.

MFI AA Questions from his Honour to counsel.

MFI AB Dr Barram's report dated 1 April 2020.

MR STRICKLAND: Thank you.

And what's the date of your next report?---11 June 2020.

Thank you. And what's the date of your fourth report –

I'm sorry, could that be marked please, your Honour. Could that be marked that second – that third - - -

HIS HONOUR: That'll be marked for identification AC.

MFI AC Dr Barram's report dated 11 June 2020.

MR STRICKLAND: And your next report is dated 21 August 2020?---Yes.

Could that be marked please, your Honour.

HIS HONOUR: And AD.

MFI AD Dr Barram's report dated 21 August 2020.

MR STRICKLAND: And you prepared a report dated 13 March 2020 – I beg your pardon, I beg your pardon, a mistake. 22 June 2021? If you look on the third page?---Yes.

Yes, I'll ask that to be marked, your Honour.

HIS HONOUR: And you're asking for that to be marked as well?

MR STRICKLAND: Yes please, your Honour.

HIS HONOUR: Thank you. AE.

MFI AE Dr Barram's report dated 22 June 2021.

MR STRICKLAND: Thank you.

Now when you prepared your reports, what division of the Northern Territory Police were you attached to?---Proficient Standards Command.

And where was your office located?---The Mantra Building in town.

And were there other police investigators, in relation to this case, in that building?---No.

You gave evidence yesterday about your background, in your experience with the Northern Territory Police. You had various stints in Alice Springs, is that correct?---I was posted there for six years in total.

And did that include going to other communities?---Yes.

And which communities were you – did you go to, as part of your duties?---Santa Teresa, Finke, Amoonguna, I don't know, it's quite a regular occurrence to go out to communities from Alice.

As a police officer at Alice Springs, and other places, did you yourself have to face edged weapons?---Yes.

And you've been involved in use of force incidents?---Yes.

And when you are involved in a use of force incident, are you required to complete use of force forms?---A use of force report, yes.

And when faced with edged weapons, have you deployed non-lethal options?---Yes.

MR EDWARDSON: Well I object to that your Honour, it's all relative, and how can that assist the jury?

HIS HONOUR: Yes.

MR STRICKLAND: It's to do with the experience of this officer, your Honour. I understand that his experience, qualifications, training, may be in issue, and I'm not in any way seeking to equate what this officer faced with this situation, but I'm asking questions relative to his experience.

HIS HONOUR: All right, I'll allow that.

MR STRICKLAND: So you've used – when faced with edged weapons, you've deployed non-lethal options?---Yes.

And you've also drawn your firearm?---Yes.

Have you ever fired your firearm?---No, not at a person.

I'll ask you about exhibit 62?---Yes.

Can the witness please be shown exhibit 62?

If you can go to tab 5 please, the incident – Session Two, Incident Management. And if you go to part 3, Review of Policy Relating to the Use of Force?---Do you have a page number for that?

I beg your pardon?---Do you have a page number for that please?

Yes I do, sorry. Page 20 – 30 – 33. And if you go to page 34, there are some sections about criteria for the use of lethal force?---Yes.

And with some examples, do you see that, on page 35? If you go to page 35, you see, "Example"?---35, example.

Do you see that?---Yes.

The various questions of police in a position of defending life, or at risk of serious harm, "Does the threat presented have the intent to carry out the action. A threat made or implied. Ability to carry out their intent. Means to carry out their action. Opportunity to carry out their action. Is there no other option available to police to resolve the incident less forcibly?" Are those matters taught as part of the training at the college?---Yes they are. That's an expansion of the DIAMO plus P Model.

Could you please speak up please?---That's an expansion of the DIAMO plus P Model.

Okay, D-I-A-M-O plus P?---Yes.

Thank you. And why is that taught?---Well it's the example that explains justification for the use of lethal force.

I asked you yesterday about checking Constable Rolfe's accoutrements?---Yes.

And I asked you about the Taser?---Yes.

Was the Taser working at the time?---At the time of the incident in Yuendumu?

At the time of the incident?---Yes.

Let me return to the events. You can – I'm finished now with exhibit 62. So let me return to the incidents at House 511 on 9 November 2019. You've looked at the body-worn video, you said, from all of the different IRT members on that day?---Yes.

In your opinion, was there a proper cordon established around House 511 before the police entered?---No.

In your opinion, should Constable Rolfe have waited until the cordon was established before entering House 511?---Yes.

Why do you say that?---Because that's police practice.

Could a cordon have been established before him entering House 511?---Yes.

How many people do you need for a cordon?---Well, for a house that size, it's a small rectangular house, you'd need four police officers; one on each corner. And they've got line of sight to two other police officers. And you've got two sets of eyes on those walls all round; cordon's established.

I'm going to play to you –

And, your Honour, could your Honour give the usual warning about this video?

HIS HONOUR: I'm told that the video material which is about to be played contains material that may be distressing to individuals who are in the public gallery. If anybody believes that they may be affected by that material, they should now leave.

MR STRICKLAND: I'm playing exhibit 26, and the timeframe I'm playing from is Zulu 9:51:52, which in Central Standard Time is 9:21 – sorry, beg your pardon; 7:21 pm and 52 seconds.

DVD PLAYED

MR STRICKLAND: Now, you've seen that body-worn and others, is that correct?---Yes.

In your opinion, was Constable Rolfe justified when he fired the first shot?---Yes.

And why do you say that?---Because he was confronted at close range with an edged weapon, was actually stabbed with it in his shoulder, and it would have been reasonable to believe that his partner was also, at that point, in danger.

When you reached that conclusion, did you consider the body-worn video we've seen in real time; that is in the time just played now?---Yes.

After reaching that conclusion you've just told us about, you've also considered the body-worn video which was slowed down by Mr Sorell, is that correct?---Yes.

And you were shown that just before the committal hearing, is that right?---Yes.

Which was after your first report?---I believe so, yes.

Seeing that slow motion, enhanced version by Mr Sorell change your opinion about the – just the reasonableness of the first shot?---No, it confirmed my opinion.

Assuming that Constable Rolfe was aware of an edged weapon, in your opinion, should he have verbalised or said anything?---Yes.

What's the police training in relation to that?---To yell, "Knife. Knife. Knife."

Why do you train that?---So that – well, as part of the communication to let your partner know, in case they haven't seen it, and let other police in the vicinity know and let members of the public know.

Just continue playing exhibit 26.

DVD PLAYED

MR STRICKLAND: Thank you.

Your Honour, I paused it Zulu 9:52:55.

Senior Sergeant, in your opinion, was it reasonable or necessary for Constable Rolfe to have fired either shots 2 or 3?---No.

Why do you say that?---Because things had changed substantially from when the first shot was fired.

What had changed substantially?---They'd gone from a standing position in a fairly equal fight to being on the ground, with Constable Eberl on top and pinning Mr Walker down.

In reaching that conclusion, did you consider the body-worn video played in real time, just as we've - - -?---Yes.

- - - played it then. After you reached that – and you included that first opinion – sorry, I withdraw that. You included that opinion in your first report?---Yes.

After that first report, you were shown the Sorell slow motion video, is that correct; the body-worn?---I believe so, yes.

Did that alter your opinion?---No, it didn't alter my opinion.

I want to play to you that slow, times ten, that is slow by a factor of ten. It's exhibit 59.

#### DVD PLAYED

MR STRICKLAND: Now, I've stopped the video at Zulu time 9:52:02, which is frame 366. In your opinion, what is Constable Eberl doing at that time?---In my opinion, Constable Eberl is in a mount position on top of Mr Walker.

Thank you?---And using his hands to push Mr Walker's shoulders and, perhaps, his head down.

Thank you.

Can you continue, please?

MR EDWARDSON: I object, your Honour. It's probably too late now. Your Honour, it's very important that the witness confines his answer – in fairness, it's the question that I say is impermissible. He can certainly describe what you can actually see on the video. What he cannot do is express an opinion about what might have been happening, which is not visible on the video. He can give evidence consistent with rulings that – he can give evidence as to whether or not what he observed on the video or generally, the officers complied with the training.

HIS HONOUR: Yes.

MR EDWARDSON: That is as far as he can go.

HIS HONOUR: Yes, I agree.

#### DVD PLAYED

MR STRICKLAND: Pause there, please. Just go back a bit, please.

DVD PLAYED

MR STRICKLAND: Now, I've paused it at Zulu time 9:52:03, frame 417. What do you see in terms of Constable Eberl's position there?---That he's still on top of Mr Walker.

Okay. And is what he is doing there, in your opinion, consistent with Constable Eberl's training?---Yes. It appears he's transitioned into a side control position.

Can you speak up, please?---Sorry, bit of a frog in the throat this morning.

Do you need some water?---Perhaps. So I said, it appears to me that he's transitioned into a side control position.

And what is that?---It's a position taught in defensive tactics.

Okay. And what's the purpose of that?---To pin a person's shoulders – upper body down.

Can you just continue on, please.

DVD PLAYED

MR STRICKLAND: Thank you.

In your opinion, can you see Constable Eberl's right arm?---I think I can see his elbow and upper arm – part of his upper arm.

And his left arm? Constable Eberl's left arm?---Part of his arm again.

Thank you.

Continue on, please.

DVD PLAYED

MR STRICKLAND: In your opinion, can you see Constable Eberl's legs?---Yes.

And in training, what is done – what are police trained to do when they're – have you heard of the expression, "Ground stabilising"?---Yes.

What does that involve?---That involves stabilising a violent or potentially violent offender on the ground and getting them into a position from which they are least able to be a threat to anyone else.

And does that involve use of the legs?---Yes.

In what way?---Well, it's the whole body technique. You can splay out your legs to – to increase your base, allowing you to apply more force.

Is side control a form of ground stabilising?---Yes.

And we're at frame 434. Just keep going, please.

DVD PLAYED

MR STRICKLAND: Thank you.

Now, can you – in your opinion, can you see Constable – part of Constable Eberl's right arm?---Yes.

And where is that?---It's just below the red from the body-worn camera that's fallen off. So that's his sleeve.

And can you see, in your opinion, see his left – Constable Eberl's left arm?---Yes.

And is what you can see consistent with his training, in terms of side control?---Yes.

Just continue on, please.

DVD PLAYED

MR STRICKLAND: Now, pause at frame 677, Zulu time 9:52:12.

Can you see, in your opinion, Constable Rolfe's arm?---I think that's his left arm in the upper left of the screen.

And in your opinion, what's it doing?---I can't tell.

Okay.

If we could continue on, please.

DVD PLAYED

MR STRICKLAND: Pause there. Paused at frame 692.

Can you tell what he's doing with his arm now?---Yes. His left arm is on Mr Walker's upper arm, near the elbow.

And- - ?---And his right hand is gripping Mr Walker's left wrist.

When you say he's holding Mr Walker's arm, his left arm?---Yes.

And is what he's doing now in accordance with the training?---Yes.



And what is he doing, in your opinion?---Well, he's controlling the arm and we're trained to move the person flat on to their stomach and then handcuff them.

Okay.

Continue on, please.

DVD PLAYED

MR STRICKLAND: Pause, please. Pausing at 840.

And what can you see there?---So they've got – I can see Constable Rolfe's left arm coming up from the bottom left corner. He's holding Mr Walker's left wrist. And he's got Mr Walker's left arm up behind in the small of his back.

Is that in accordance with the training?---Yes.

In what way?---That's first step towards getting handcuffs on. Someone handcuffing them behind.

Thank you.

Continue on please.

DVD PLAYED

MR STRICKLAND: Now in your opinion, can you see Mr Walker's right arm?---Yes.

And where is that in relation to the body-worn?---Towards the upper right corner. That's his upper right arm.

Now I've paused at frame 960, Zulu time, 9.52.22.

Yes, if we could continue please.

DVD PLAYED

MR STRICKLAND: Pause there. Frame 1039, Zulu 9.52.24.

Can you see – in your opinion, can you see Mr Walker's right arm moving?---Yes.

And which – which part of the body-worn are you looking at there?---So again, the upper right corner of the – and the Axon yellow symbol is on Mr Walker's forearm.

Thank you. When you said – what, the Axon yellow symbol is the triangle, is that correct?---Yes.

Yes thank you.

If you continue.

DVD PLAYED

MR STRICKLAND: And pause there.

Can you see – in your opinion, can you see anyone holding any part of Mr Walker's right arm or wrist?---Not in that frame, no.

Continue on –

I should say, in any of the frames?---Well the bottom right frame, it appears - - -

Play it – we'll just play it again please, just from – perhaps from 1040.

DVD PLAYED

THE WITNESS: So in this bottom right frame we can see Constable Rolfe's right arm, or right hand holding Mr Walker's right arm.

MR STRICKLAND: Okay, and that's – I agree with that. And that's frame 1061. And do you also have regard to the bottom right hand – that's Hawkings body-worn. Have you seen that one?---Yes.

I'll play that in a moment.

Just continue on please.

DVD PLAYED

MR STRICKLAND: Pause. So I've paused at frame 1136.

But in the frames before that, can you see, in your opinion, Constable Rolfe grabbing the right wrist of Kumanjayi Walker?---Yes.

Is that in accordance with the training?---Yes.

How is that?---I beg your pardon?

What way is it in accordance with the training?---Well they're moving towards ground control and handcuffing position. Getting both hands into the small of the back.

Now I'll just play – thank you, I'll cease playing that exhibit. And the final part of the body-worn I wish to show is what's described as Hawkings 3 of 10.

I think this is exhibit 28, your Honour.

And I'll just play to about 9.52.20.

DVD PLAYED

MR STRICKLAND: I've stopped it at Zulu time 9.52.28.

That's viewing the – what, in your opinion, do you see in that few seconds before I paused it there?---Hawkings is looking through the door.

But what do you see Constable Rolfe doing?---What I described earlier. Moving Mr Walker's arms behind to handcuff him.

Thank you.

Yes, if that could be – finished playing that.

Senior Sergeant, in your opinion, you – sorry, you've given evidence that you believe that the firing the shots 2 and 3 were not reasonable?---Yes.

In your opinion, were there other non-lethal options available to Constable Rolfe - - - ?---Yes.

- - - from the time Constable Eberl and Kumanjayi Walker were on the mattress?---Yes there were.

And what other non-lethal options were there available to him?---Well he could have used his defensive tactics to help Mr Eberl control Mr Walker.

And do you mean by defensive tactics?---Well empty hand tactics, moving in and taking control of – or helping take control of Mr Walker on the ground.

And empty hand tactics are?---Tactics that don't involve a weapon.

In your opinion, if an officer did draw their firearm, in the circumstances you've seen there, at the time they were on the mattress, should verbal commands have been given?---Yes, that's what we're taught.

And what kind of verbal commands?---"Drop the knife. Police. Don't move."

What's the purpose of giving those verbal commands?---To give the person an opportunity to drop the knife, if there's time.

You've given evidence about the defensive tactics being to take control. Did you see – sorry, you've given evidence that the other option was the use of defensive tactics?---Yes.

And empty hands?---Empty hands, yes.

Did you see Constable Rolfe taking control at any time in the part of the video we've just played?---Yes.

Which part?---After he'd holstered the firearm and started to put his hands on Mr Walker to control him.

You've given evidence that in your opinion, the circumstances had changed between the firing of shots 1 and the firing of shots 2 and 3?---Yes.

One of the circumstances you gave evidence about was that the position of Kumanjaya Walker at the time; before the first shot, he was standing up?---Yes.

And the second, he was on the mattress?---Yes.

What other circumstances, if any, do you say were different between those two – between the firing of shots 1 and the firing of shots 2 and 3?---Very little different. I don't think the firing of the two shots, tactically, gave them any advantage.

What do you mean by that?---As far as the fight was concerned, or the arrest of Mr Walker, the firing of those two shots made no difference to the tactical situation.

Explain your reasoning in that answer?---So Mr Walker was pinned down by Mr Eberl, the scissors were a very low threat at that point, in my opinion - - -

MR EDWARDSON: Your Honour, how's he able to express that opinion?

HIS HONOUR: Yes.

MR EDWARDSON: He can't just simply gratuitously offer an opinion which he's not qualified to make, he's a biomechanics expert, there's nothing as we know on the video that in any way indicates, as is the evidence in this case, whether that right arm was constrained, pinned or unrestrained, as the case may be - - -

HIS HONOUR: He hasn't give any evidence of observation of the scissors in the hand of the deceased at the time that he was on the ground.

MR STRICKLAND: Well – I mean, sure that – I'll clarify the assumptions he's making.

HIS HONOUR: All right, if this is based upon assumptions.

MR STRICKLAND: What I'm doing, your Honour, is I'm just trying to expose the reasoning process.

HIS HONOUR: No, I understand.

MR STRICKLAND: Yes.

You've seen the – I've shown you the body-worn video?---Yes.

In your opinion, where was Kumanjayi Walker's right arm at the time of the firing of shots 2 and 3?

MR EDWARDSON: I object to that, your Honour.

HIS HONOUR: Yes.

MR EDWARDSON: Can't see it on that video. That's the evidence in his case.

HIS HONOUR: It should not be a question of what his opinion is; what did he observe about the position of Kumanjayi Walker's arm, right arm, at the time that shots 2 and 3 were fired.

MR STRICKLAND: Your Honour, can I indicate this: there's a legal issue that's arisen, and I think it's appropriate to be dealt with in the absence of the jury.

HIS HONOUR: All right.

Members of the jury, would you retire please?

JURY OUT

HIS HONOUR: Senior Sergeant, could you wait outside for a moment please?---Yes, your Honour.

WITNESS WITHDREW

HIS HONOUR: Yes, Mr Crown?

MR STRICKLAND: Your Honour, could I just indicate this: I'm indebted to your Honour for questions MFI AA.

HIS HONOUR: Yes.

MR STRICKLAND: I don't know whether any – I'm just – because I've just glanced at them, I'm not sure if any of these questions are relevant to the evidence I've adduced to this witness. They may - - -

HIS HONOUR: Well, there is some relevance to it, yes.

MR STRICKLAND: Could I actually have time to consider MFI AA?

HIS HONOUR: It does seem to me, Mr Crown, that, as I understand it, this witness's opinions have been based upon his observations that he has made of the body-worn video and stills and such as been taken from the body-worn video.

Now, he can say, it seems to me, what he has observed in terms of the positioning of the persons depicted in that video, and in particular, the right arm. And in particular, the right arm of the deceased.

Now, depending upon what his answers are in that regard, he may be able to then offer an opinion as to whether, if the right arm of the deceased was in a particular position, whether he was able to bring to bear the scissors as a weapon towards one or both of the police officers.

But it's not a question of opinion at that stage - - -

MR STRICKLAND: I understand, your Honour.

HIS HONOUR: At that stage, it's a question of what he observed.

MR STRICKLAND: I understand. I'll take what your Honour says onboard in framing the questions. Your Honour, just before I sit down, again I'm indebted to MFI AA. The questions, at first glance, do seem to be fairly important, and what I would ask for if we could have an early morning tea so I can consider them.

I don't wish to – obviously, I can't split my case; I don't intend to but I want to ensure, based upon these questions, that all relevant evidence is adduced from this witness.

HIS HONOUR: You'll understand that, at the end of the trial, it's my obligation to explain to the jury how the evidence which has been adduced may be used by them and how it may not be used by them.

MR STRICKLAND: I understand.

HIS HONOUR: And the questions which I framed are directed towards that, to my understanding of the way in which the Crown says - - -

MR STRICKLAND: I understand that, your Honour.

HIS HONOUR: - - - says that this evidence can be used. All right.

MR STRICKLAND: Excuse me, your Honour, Ms Callan's just drawn to my attention something. Would your Honour excuse me for a moment?

HIS HONOUR: Yes.

MR STRICKLAND: So, as I'm reminded, what – in terms of drawing out the witness's assumptions, we're looking at, a) his observations - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - and also what he can infer from those observations.

HIS HONOUR: Yes, well, an inference, I suppose in his behalf, is something, but it needs to be made clear that he is making an inference based upon what he sees, and it's then based upon what he has seen and the inference that he then - - -

MR STRICKLAND: Indeed.

HIS HONOUR: - - - draws an opinion.

MR STRICKLAND: Accept that entirely. We have to draw – has to be very clear what's direct observation and what's inference. I accept that, your Honour.

HIS HONOUR: Yes. All right.

Do you want to say anything further on that aspect at the present time?

MR EDWARDSON: I won't just yet, your Honour; I'll wait and see how the – how the evidence unfolds.

HIS HONOUR: Right.

MR EDWARDSON: What I am concerned about, and he's not been cross-examined at this stage, so it might be an opportune time for my learned friend

to speak to him and make sure that he understands that he can't just make gratuitous comments, which, for example, we heard a moment ago.

HIS HONOUR: All right.

MR STRICKLAND: Your Honour, I don't accept they're gratuitous, but I will ensure this witness confines his answer to the precise questions formulated.

HIS HONOUR: All right, thank you.

Then I'll adjourn. We will take the morning adjournment - - -

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: - - - early to give you an opportunity to read that.

ADJOURNED



## RESUMED

HIS HONOUR: Yes.

MR STRICKLAND: I have two things. The first is I'm instructed that the during the break, and I'm glad that your Honour provided that break, this – Senior Sergeant Barram was in the toilet. He was spoken to by the accused's father, who commented on his evidence. And started at him, in what was described as an intimidating manner. I'd simply ask your Honour to warn everyone in court, that they ought not to speak to any witness who's giving evidence in court.

And I'm concerned, as a general backdrop, which I won't go into, about various matters in relation to the attempt to intimidate this witness. So I'd like to – I'd ask your Honour simply – simply to give that warning, that - - -

HIS HONOUR: Yes, all right. Well without in any way commenting upon the rights or wrongs of the suggestion that's been made by the Crown about the particular incident, it is of course, important that all witnesses be able to give their evidence freely, and without any suggestion of interference or intimidation. So that all persons who are present in or around the court, should not attempt to speak to or in any other way, interact with witnesses, either before they give their evidence, or whilst they are giving their evidence, or even after they have given their evidence.

MR STRICKLAND: If your Honour pleases.

HIS HONOUR: Thank you.

MR STRICKLAND: Now the second matter, your Honour, considering our exchange before the break, and I accept entirely about the need to delineate assumptions, and the difference between direct observations and inferences. The objection of my learned friend about what opinions he was allowed to proffer in terms of the level of threat, in my submission, is inconsistent with the ruling made by Mildren AJ. I don't suggest what (inaudible) your Honour has in any way, but there was a very substantial debate about what opinions were permitted, and what were not permitted. This witness in his statement, has given the base of his opinions, and I'm seeking to elicit that, in accordance with the ruling. But I understand that I need to make clear, as your Honour will see, what those – what – having the assumptions upon which the opinions (inaudible).

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour, just my learned friend understands precisely the objection I want to be clear about. The evidence is – and we've now had the expert biomechanics – Dr McIntosh, give evidence. And the court now knows – and if anybody was in a position to express a view based on the body-worn video as to whether or not the actual right arm of Kumanjaya Walker was impeded, hindered in any way – from the video footage, he would've said so and he cannot.

And in my submission, this witness – and there's nothing about his qualifications that, in any way, would permit him to express an opinion as to whether or not Kumanjayi Walker had the capacity to inflict lethal force at any stage, as observed on the video footage.

HIS HONOUR: Mr Edwardson, the fact that another witness has given an opinion about the capacity of Kumanjayi Walker to be able to bring to bear the scissors whilst he was on the floor- - -

MR EDWARDSON: Doesn't bind another witness. I accept that.

HIS HONOUR: Yes.

MR EDWARDSON: The difference is- - -

HIS HONOUR: It doesn't stop another witness- - -

MR EDWARDSON: Of course not.

HIS HONOUR: - - -from saying that they see something different in the video.

MR EDWARDSON: Of course not. But plainly, your Honour, this witness is not qualified to express an opinion as to whether or not – because you simply can't see it on the video. And so he can't entertain – unless there's proper groundwork laid – for how he can possibly express that opinion. Which, I assume, he won't. He – having conceded, I think, at the committal in any event – that you simply can't see the right arm or the right hand, forearm, or even the upper arm. And so the difficulty is it's impossible, from his perception to just simply look in the video, for him to actually express an opinion as to whether Kumanjayi Walker was impeded in any way with that right arm.

HIS HONOUR: Yes, I don't think that we're at odds in terms of the principle. The question is, what is the evidence that this witness can give in terms of qualifying himself to be able to give any opinion in that regard. And I think that it now rests fairly and squarely in the lap of the Crown- - -

MR EDWARDSON: Yes.

HIS HONOUR: - - -to qualify the witness to be able to give an answer to a question which, I apprehend, will be asked of him about – based upon his observations and inferences or assumptions that makes. From those observations, what level of threat did Kumanjayi Walker present to either Constable Eberl or the accused whilst he was on the ground?

MR EDWARDSON: All right, your Honour. Yes, your Honour.

HIS HONOUR: So we'll just have to hear the evidence from the witness. Yes. Now, unless there's anything further, we'll bring the jury in and then we'll have the witness return.

JURY IN

ANDREW JAMES BARRAM:

HIS HONOUR: Yes, Mr Crown. When you're ready.

MR STRICKLAND: I'm asking you some questions about what you saw in the body-worn vide from the time Constable Eberl is on top of Kumanjayi Walker on the mattress. In your opinion, what did you see about the position of Kumanjayi Walker?---He was on his right side.

Were you able to see the position of his right arm? That is, Mr Walker's right arm?---No. I could see his right shoulder was on the mattress.

When was the first time you could see Mr Walker's right arm, from the body-worn?---On the body-worn? When they had control of his left arm and they've rolled him over to get the right out from underneath him.

That's toward the end of the body-worn we just watched; is that correct?---Yes.

Did you conclude, from what you observed from the body-worn, what position Mr Walker's right arm was in at the time shots 2 and 3 were fired?

MR EDWARDSON: I object to that question, your Honour. How is he qualified to make that – it's an assumption which is not visible, by his own admission.

MR STRICKLAND: I press it, your Honour. In my submission, he's entitled to give an opinion based upon what he's observed about what he's able to infer or conclude about the position of that right arm and indeed, that- - -

HIS HONOUR: He hasn't seen the right arm. How can he draw a conclusion about where the right arm is? I mean, we know it's attached to the shoulder.

MR STRICKLAND: Indeed, that's- - -

HIS HONOUR: But in terms of – in particular, the forearm from the- - -

MR STRICKLAND: I haven't got to the forearm yet. But in my submission, based – one can infer, based upon anatomy, the position of the right arm. He's done so in MFI Y. And it's obviously an assumption that I'm asking – I'm asking him what he can infer from the video. In my submission, I'm entitled to ask him that.

HIS HONOUR: All right.

MR EDWARDSON: Your Honour, I maintain my objection. In my submission, what he's really doing is asking this witness to speculate. The critical issue for the jury's consideration, in my submission, is the extent to which Kumanjayi Walker had the capacity to deploy the weapon which was, plainly, in his right hand. And this witness has acknowledged – as have the others – you simply cannot see that right arm on the body-worn video.

HIS HONOUR: Yes.

MR EDWARDSON: So anything beyond that is pure conjecture.

MR STRICKLAND: Your Honour, that is inconsistent with the ruling of Mildren AJ, in my submission.

HIS HONOUR: Well, I'm sorry, members of the jury. I'm going to have to ask you to retire.

JURY OUT

HIS HONOUR: I'm going to have to ask you to wait outside, please?---Yes, your Honour.

WITNESS WITHDREW

MR STRICKLAND: Does your Honour have Mildren AJ's judgment?

HIS HONOUR: I do.

MR STRICKLAND: So if your Honour goes to par 44. What there was an objection to - perhaps I'll go back. If your Honour has MFI Y there is an objection to – sorry, just excuse me your Honour. Does your Honour have MFI Y?

HIS HONOUR: Yes, I do.

MR STRICKLAND: So there were objections to the opinions expressed in relations to shots 2 and 3. And those opinions really commence in – at par 144. And they go from 144, really through to 161.

HIS HONOUR: One moment. Yes. Down to what paragraph, sorry?

MR STRICKLAND: 161, your Honour.

HIS HONOUR: Thank you. Yes, I've read that and now where is that dealt with in Mildren AJ's rulings?

MR STRICKLAND: Sorry your Honour, first, the background of Mildren AJ's report – sorry, I beg your pardon, judgement, was there was challenge to the admissibility on various grounds, including ss 79 and 80. If you go – your Honour, now unfortunately the numbering – the – I won't go to the paragraph numbering, because there were different paragraph numbers. I'll just go by way of page. The judgement I've got is 41 pages. Does your Honour have the same?

HIS HONOUR: Yes.

MR STRICKLAND: So if your Honour goes to – sorry, page 23, can I just ask your Honour to read – does your Honour have at par 18, it should say, "In relation to shot 1"?

HIS HONOUR: Yes.

MR STRICKLAND: Could I just ask your Honour to read that par 18.

HIS HONOUR: Yes.

MR STRICKLAND: So your Honour will note that in point one, the reasoning is expressed, part of one, that "When the shots were fired, Constable Eberl was not at immediate risk of serious harm or death." And the reasons given, including, "The

deceased right arm was pinned underneath of him.” So that’s part of the reasoning process. And your Honour can see that reflects the paragraphs that I’ve taken you to in MFI Y, particularly pars 145, 147, and, I think, it’s 151.

HIS HONOUR: The difficulty that I have is that on the face of it, the ruling made by Mildren AJ, was based upon this report - - -

MR STRICKLAND: Yes.

HIS HONOUR: - - - from the witness. And in that report, the witness says, at par 147, “In the position they were in, I do not believe Walker could have used the scissors to cause serious harm or death. As his right arm and hand were pinned between his torso and the mattress.” So that it appears that the basis upon which Mildren AJ approached the matter, was that this witness would give evidence that the arm, the right arm, and the hand, of the deceased, from his observation of the video, were pinned beneath the deceased’s body by Constable Eberl. Now that does not appear to be the evidence of this witness.

MR STRICKLAND: But your Honour, Mildren AJ doesn’t admit this evidence on the basis of that. What he says, at paragraph – at page 23 18.1 - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - is, “The deceased’s right arm was pinned underneath him.” That’s – so he – what Mildren AJ did, was there was a challenge to the – to the – both the relevance of the opinion, and whether it complied with s 79.

HIS HONOUR: Yes.

MR STRICKLAND: His Honour set out the reasoning process, which included the deceased’s right arm was pinned underneath him. And his Honour held, at page 33, that – I beg your pardon. His Honour held that the opinions were both relevant, and he was qualified to express those opinions. In my submission, there has been no foreshadowing, before this witness gave evidence, no foreshadowing at all, that this – Mildren AJ’s ruling would be revised, or I should say, challenged. And yet that’s what’s happening now. That is, this witness – clear, one of the bases of his opinion, is this witness’ opinion about the level of threat to Mr Eberl and Mr Rolfe. That’s clearly expressed in his report. And is the basis of his opinion about the reasonableness of shots 2 and 3. There was a challenge to that opinion. That challenge was rejected. And there was no foreshadowing that that would be revisited.

In my submission, provided that it’s made clear what his assumptions were, this witness is entitled under s 79, to give his opinion, his ultimate opinion, about whether the shots were reasonable, and whether they were in accordance with training.

HIS HONOUR: I would have no difficulty with the proposition, if you approached the witness in this way. What did you see in terms of the positioning of the arm of – the right arm of the deceased - - -

MR STRICKLAND: Yes.

HIS HONOUR: - - - at the time that he was on the mattress - - -

MR STRICKLAND: Yes.

HIS HONOUR: - - - with Constable Eberl above him.

MR STRICKLAND: Yes.

HIS HONOUR: Secondly, to what extent were you able to see the arm of the deceased at that time. So what – to what extent were you able to observe the arm, the right arm of the deceased.

MR STRICKLAND: Yes.

HIS HONOUR: Thirdly, if you assume that the right arm, to some extent, and you'd have frame the question appropriately, whether it's the right arm down to the elbow, or the right arm down to the hand, was pinned underneath the deceased or pinned between the deceased and the mattress at that time, do you have an opinion about the ability of the deceased to bring to bear the scissors as an effective weapon against Constable Eberl or the accused.

Now I think if you approached it that way that there would be no problem but it has to be made clear, you keep asking the witness and I say this without any intention to be critical, but you ask him to keep giving his opinion about where people's arms were.

MR STRICKLAND: What it infers. But your Honour I'm happy – my submission that is an improved approach to what I am doing. I am seeking to ask him to do an inference but I'm happy to do it the way your Honour has done it which is assume X. But that's all opinions are based upon those assumptions.

HIS HONOUR: All right. Now if it's approached in that way do you have any difficulty with that?

MR EDWARDSON: I slightly – I do, your Honour. Can I just, firstly - - -

HIS HONOUR: Yes.

MR EDWARDSON: - - - just put my position in relation to the way in which Mildren AJ approached his task. And he plainly approached his task on the basis that the underlying criteria for the ultimate expression of an opinion, both in relation to shots



1 and then ultimately, 2 and 3 was really a question of, in combination, "was that consistent with his training? And that's the ultimate opinion - - -

HIS HONOUR: Yes.

MR EDWARDSON: - - - that this witness is going to express, and has expressed. The difficulty is that he's proceeded; that is, with the greatest of respect, Mildren AJ has proceeded on the basis that this witness was able to give and could give victim of the extent to which the right arm was constrained.

Now, we now know that contrary to the way in which he framed his report, which is the basis upon which Mildren AJ made his decision, it's completely erroneous, and it's erroneous in a number of material respects. Your Honour's already identified pars 145 and 147.

HIS HONOUR: Yes.

MR EDWARDSON: At 145, he expressed it this way: "Walker was already on the ground, where police are taught to take people who are resisting arrest." So far, so good. "Walker's right arm was no longer free and unrestrained. It was underneath him, and his right hand with the scissors also appeared to be underneath him and not in a position where he could use the scissors."

Well, there is absolutely no basis upon which he can express that opinion, bearing in mind that he's only as good as what he can see on that video. He's conceded now that you can't actually see any part of the right arm, apart from a small part of the shoulder. He has no idea, other than speculation, where the right arm was, the forearm was, the scissors where, which we know you cannot see until right after, well after the second and third shots are fired.

So, effectively, it doesn't matter which way you approach it; once the witness makes that concession, in my submission, ultimately, it must follow as a matter of logic and law that he cannot be asked to either make assumptions, which are not based on evidence.

Let's say the biomechanics expert had come along and said, "Look, I" – with that expertise, in combination with the body-worn video, can say that his arm must have been constrained, for whatever reason. Let's assume he was able to express that expert opinion.

Even if this witness couldn't, but was asked to assume, based on the expertise of somebody else, that that was the position of the arm, it might be different. But that's not what's happened here; quite the opposite. When we go to paragraph 147, it appears to me that Walker may have been attempting to roll onto his back, which had he managed, may have allowed him an opportunity to continue fighting and use the scissors, but Eberl maintains control.

HIS HONOUR: Yes.

MR EDWARDSON: "In the position they were in, I do not believe Walker could have used the scissors to cause serious harm or death, as his right arm and hand were pinned between his torso and the mattress." He cannot express that opinion. That is absolute rank speculation.

So I maintain, your Honour, that the premise upon which his Honour, Mildren AJ made his decision and ruling, proceeded on a false premise, and in any event, it doesn't matter what he's put into his report; it's the evidence before this jury. And this witness has unequivocally said, "You cannot see on the video the right arm." If he can't see on the right arm, he cannot express an opinion, inferentially or otherwise.

HIS HONOUR: He can't express an opinion based upon his observations from the video.

MR EDWARDSON: No, he can't - - -

HIS HONOUR: I accept that proposition. What the Crown, I think, now is embracing is a different proposition; that this man is qualified as an expert in terms of defensive training, and in particular, in relation to defensive tactics against attacks made with weapons.

Now, as I understand it, the Crown will say, "Well, if you make these assumptions about the position - - -

MR EDWARDSON: It's the assumptions that I'm concerned about. If it was put - - -

HIS HONOUR: I know what you're concerned about the assumptions. Your point is that there is simply no evidence upon which he could make that assumption.

MR EDWARDSON: Exactly. And so it seems to me, with respect, that we're really coming back – we're trying to get, as it were, approach it from a slightly different way.

HIS HONOUR: Yes.

MR EDWARDSON: But you can only approach it in that alternative way if there's a proper basis for the assumption being put. And there is none; certainly not with this witness. So I say they're stuck with the answers that they've got in-chief.

Whatever he might have said in his report, that's not the evidence here. He's accepted that he can't see the right arm, and therefore the Crown should not be permitted in any circumstance to ask this witness to speculate as to the extent to which that right arm may or may not have been inhibited or constrained or the capacity of Kumanjayi Walker to deploy the scissors against Mr Eberl. As your Honour pleases.

HIS HONOUR: All right, thank you.

MR STRICKLAND: Your Honour, there is evidence upon which the assumption can be made. The first is the evidence of Adam Eberl. Adam Eberl is asked, at 7:03, "Can you see where his right arm was?---I believe it was sort of underneath his body."

McIntosh, who my learned friend doesn't – whose expertise is not challenged, gives, in his report, which is tendered, at par 133, says, "Walker's right arm was likely pinned under his body by Walker's posture and the weight of Eberl."

I mean, it is evidence upon which the assumption can be made. Now, obviously, whether the assumption is made good is, ultimately, a matter for the jury.

HIS HONOUR: That's a matter for the jury.

MR STRICKLAND: Absolutely. But my learned friend says there's no evidence upon which the assumption can be made. Eberl, who was there, gives that evidence. McIntosh, his expertise is not challenged, as – gives something similar to the assumption.

Now, where it falls ultimately will be for the jury to determine. But this witness, in my submission, is entitled to make the assumption, or entitled to give an opinion based upon that assumption.

MR EDWARDSON: Your Honour, sorry, just to finish. The assumption is again the problem I've got, as it presupposes that that fact is made good, and it's not. If the question's going to, at best, put: "If Kumanjaya Walker's arm was constrained or restrained in a way that limited his capacity to inflict a wound or harm by the deployment of those scissors, what does that say about your opinion?"

That's one thing. And then the Crown would then have to make good the proposition on the evidence that there is evidence capable of establishing that he was not so limited or constrained.

The difficulty, again, your Honour, is I come back to what the Crown have to prove. At the end of the day, it doesn't really matter one jot what these other people think; it's the perception of my client, Zachary Rolfe, and what he could see with his eyes, what his senses told him in the split second that he had to make that ultimate decision, not the frame-by-frame approach that's been taken by learned friends.

And so we say, with respect, your Honour, again, it's artificial; this witness will have to concede in due course that there are a whole lot of problems with body-worn video, what you see on – all of the stuff that's been done before, but I'll deal with that when we get to it.

So I do maintain that he can't put the proposition that he's to assume that that – that his arm was constrained in a way that he wasn't able to deploy the scissors, because that's just not made out on the evidence.

HIS HONOUR: I think that there is a sufficient evidentiary basis for the Crown to be able to ask that question of the witness.

MR STRICKLAND: Your Honour pleases.

MR EDWARDSON: Court pleases.

HIS HONOUR: Now, we will have the jury returned.

JURY IN

HIS HONOUR: And we will have the witness returned, thank you.

ANDREW JAMES BARRAM:

HIS HONOUR: Yes.

MR STRICKLAND: Based upon the body-worn video that you've seen, from the time that Kumanjayi Walker and Constable Eberl were on the mattress, what did you see in terms of the positioning of Kumanjayi Walker's right arm?---I couldn't see it on the video.

At what point in time could you see it?---Once they'd commenced trying to handcuff him, and had his left hand behind his back. They then rolled him on to his left side to get his right arm out from under him.

Now, if you assume that Kumanjayi Walker's right arm was to some extent, and I'm now -- I'll now give you two different scenarios. That is, first his lower right arm, so from his shoulders to his elbow, do you understand what I'm talking about?

HIS HONOUR: That's the upper right arm.

MR STRICKLAND: The upper arm, I'm sorry. If you assume the upper right arm was pinned between Kumanjayi Walker's own body and the mattress, do you understand that assumption?---Yes.

Do you have an opinion about the ability of Kumanjayi Walker to deploy the scissors against Constable Eberl?

MR EDWARDSON: Well I object to that, your Honour. Again, how is he qualified? He's not been qualified at all to be able to express that opinion, even based on that assumption. A biomechanics expert can certainly talk about the extent to which you might have flexion and those sorts of things. That's why Dr McIntosh was called by the Crown.

HIS HONOUR: Yes.

MR EDWARDSON: And he's been and gone. This witness can't give that evidence.

HIS HONOUR: Well I disagree. I think that he has been sufficiently qualified as an expert, in terms of defence against attack. And particularly attack relating to the use of a weapon, to be able to give this answer.

MR STRICKLAND: Do you want me to repeat the question?---No, I'm happy to answer the question. If his upper right arm was pinned against his body, and against the mattress, there would be very limited ability to deploy the scissors as a weapon.

If you assume that the whole of the right arm, that's from the shoulder to the hand, was pinned between Kumanjaya Walker's own body and the mattress, do you have an opinion about the ability of Kumanjaya Walker to deploy the scissors against Constable Eberl?---If the entire arm and hand was under his body, he wouldn't be able to deploy the scissors.

Now you've given evidence about a change of circumstances, between the firing of the first shot, and the firing of the second and third shot. Do you believe there was a change of circumstances?---Yes.

What was that change of circumstance?---Well they've changed from being in a standing position, in a fairly equal fight, to Mr Walker being shot in the back. Which would affect a person in some way. And -- and being pinned on the ground with his right arm under him. So the -- his ability to deploy the knife being limited by his lack of mobility of that arm.

And you said the knife, do you mean the scissors?---Sorry, the scissors.

Okay. Now I want to ask you about the training you have -- you're aware that Northern Territory Police are given in relation to assessing a threat?---Yep.

If an officer cannot see what threat they are facing, for whatever reason, what are they trained to do?---To move to a point where they can assess the threat.

Now you, in the course of preparing your reports, you have considered the opinion of another officer, Ben McDevitt, who has provided some reports, is that correct?---Yes.

And you've read those reports?---Yes.

I just want to ask you about just some of the opinions Mr McDevitt has expressed?---Okay.

Mr McDevitt has expressed that in his opinion, separating the incident into two separate phases, standing up and laying on the mattress is artificial. Do you recall that part of his opinion?---Yes I recall.

And it's really a single event, in terms of the ability of the officers to gain subject control, throughout that period. Do you recall that opinion?---I recall.

What's your -- what is your opinion about that?---I disagree.

Why is that?---Because two distinct phases, going from standing, to being prone on the mattress.

Mr McDevitt gave an opinion that he thought Mr Eberl was in more danger on the mattress than when he was standing up. Do you recall that opinion?---I recall that.

One of the basis of his opinion was that Constable Eberl lost the use of his legs when he was laying down?---I recall that.

What's your opinion about that?---I disagree. He was using his legs as part of the – the holds that he was performing.

Do you agree that Constable Eberl was in more danger on the mattress, than compared to when he was standing up?---I disagree with that.

Why do you disagree?---We've just explored that there's limited ability to deploy the scissors when he was in the prone position.

Mr McDevitt expressed the opinion that the first shot fired at the accused did not incapacitate – I'm sorry, the first shot did not incapacitate the deceased?---Well I agree. It didn't fully incapacitate him.

Do you have an opinion about – I withdraw that. Do you have an opinion about the effect of that first shot?

MR EDWARDSON: Well your Honour, he'll have to be careful with question.

MR STRICKLAND: I withdraw that question.

HIS HONOUR: Yes.

MR STRICKLAND: Do you have an opinion about the effect of that first shot in terms of the ability to – of the officers to gain control of Mr Walker whilst on the mattress?

MR EDWARDSON: I object to that question again, your Honour. Again, it presupposes that this witness is able or is qualified, to give any evidence about the extent to the – the passing of the bullet through the body of the now deceased, in some way limited his capacity thereafter. What he can say is if – his observations, and certainly his own observations within his own area of expertise, and having looked at the body-worn video, if he discerns some noticeable difference.

HIS HONOUR: Yes.

MR EDWARDSON: That he can give. But his evidence so far is he agrees that it did not incapacitate him.

HIS HONOUR: Did not totally incapacitate him.

MR EDWARDSON: Totally incapacitate him, yes.

HIS HONOUR: Yes. I think there's some merit in that.

MR STRICKLAND: I understand. I accept there is some merit in that.

Now Mr McDevitt – excuse me for one moment. Mr McDevitt gave evidence – I'm sorry, expressed an opinion, that the police officers are trained to fire as many shots as possible to achieve the goal of stopping the offender?---That's possible.

Are trained to fire as many shots as necessary - - - ?---As necessary.

- - - to stop the offender?---Yes, that's a different proposition, and I agree with that.

In your opinion does that general proposition apply to the firing of shots 2 and 3?  
---We are taught that we are accountable for every shot that we fire and that we need to assess and reassess after every shot.

Yes. And how does that apply to shots 2 and 3?---That - well they, in my opinion, were unnecessary and it doesn't appear a correct assessment of the situation was made.

By whom?---By Mr Rolfe.

Mr McDevitt says in his opinion that the application of lethal force was the only real option available in relation to firing shots 2 and 3?---I disagree with that.

And why is that?---I believe that there were other options available.

When you said in relation to a previous answer that you said the assessment was incorrect - the assessment of what?---The effect that the shot had had and the situation - the tactical situation.

By that do you mean the threat?---Yes.

The threat of what?---Well, we're authorised to fire if there's a threat of serious harm or death to someone or ourselves and I don't think with that limited ability for the arm to move that that threat was present.

Excuse me, your Honour. If I can excuse myself for 30 seconds, your Honour.

HER HONOUR: Certainly.

MR STRICKLAND: Yes, they are my questions, thank you, your Honour.

MR EDWARDSON: Your Honour, regrettably there is a matter I need to raise in the absence of the jury. It requires your Honour to give a preliminary ruling and I need to do that before I start my cross-examination - and I am sorry. It shouldn't take long.

HIS HONOUR: Would you retire please.

JURY OUT



HIS HONOUR: Would you wait outside again please?---Yes, your Honour.

WITNESS WITHDREW

MR EDWARDSON: Your Honour, at some stage - and subject of course to your Honour ruling that I am permitted to do so, I will be seeking to cross-examine Senior Sergeant Andrew Barram about two postings on Facebook - that's his Facebook page and including posting a particular video tape of a shooting - a police shooting and making comments about it - the heading being, and under his hand, "Brings a little bit of reality into the argument." I will post - sorry - I will play that video to your Honour so you can see it and understand its context. In addition to that there is another posting - a reposting by Mr Barram in which there is a police officer who has clearly been hurt and the posting reads as follows:

"I am so sick of hearing people ask why a copper shot someone rather than using a Taser or pepper spray. Sure, some people have mental illnesses but that doesn't make them less dangerous. Sure, some people are drug affected, that doesn't make them less dangerous. If I was a copper faced with a choice of definitely making it home today or possibly making it home today I'd shoot the perpetrator every time. There are no winners in these scenarios, just brave men and women who are expected to put themselves in harm's way. You're a bunch of legends and I hope you know how much you are appreciated by the vast majority of Australians."

They are the two postings that are on Facebook. They clearly bear on the issue. Interestingly, your Honour, they were posted in advance of him providing his opinion. Somebody must have brought it to his attention after he published these reports and provided them to the defence because they have since been taken down by Sergeant Barram but, by that stage, we already had copies of them.

I will just briefly play, if I may, the video?

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, will your Honour be making a non-publication order in relation to those?

MR EDWARDSON: Of course.

HIS HONOUR: Yes, of course. I make that order in relation to this - at least until I have made my ruling of course.

MR EDWARDSON: Yes.

DVD PLAYED

MR EDWARDSON: We say, this is directly relevant for a number of reasons. Firstly, it is a posting by Senior Sergeant Barram in which he puts up the heading, "Brings a little bit of reality into the argument."

One of the issues this jury is going to have to consider and determine of course is the immediate or the potential threat, given the proximity of the participants to this exchange which took place. This is a real live situation which he obviously thought was appropriate to show that even though this guy was shot five times, nonetheless he managed to get up, still with a knife and then actually take on another police officer before ultimately being shot and, we say, it also bears on his credibility and impartiality as a relevant witness having been called by the Northern Territory Police to express the opinions which he has.

We say, that his expertise and his impartiality is very much in dispute - for obvious reasons - and we say, there is little or no difference between shot 1 and shots 2 and 3 and that, in effect, what this witness has done is provided an opinion for executive who had to justify a charge that was laid before there was any meaningful investigation made by the Northern Territory Police. We say both of these matters go to his credibility and reliability and we should be permitted to put them before the jury.

HIS HONOUR: Mr Crown?

MR STRICKLAND: Well, your Honour, my learned friend needs to establish the factual basis upon the assertion that Mr Barram made the postings. Now - - -

HIS HONOUR: Assuming that's the case.

MR STRICKLAND: Well, on my - (a) there ought to be a voir dire on that - - -

MR EDWARDSON: I agree with that.

MR STRICKLAND: In my submission, on the material that I have, Mr Barram did not make the posting, "I am so sick of hearing people ask" - - -

MR EDWARDSON: No, he reposted it.

MR STRICKLAND: Well, what was put to your Honour was that he, himself posted or - was - - -

HIS HONOUR: No, I think there was a suggestion that he had reposted at least one of the - - -

MR EDWARDSON: (Inaudible), that's right.

MR STRICKLAND: Yes. So, in my submission, a factual basis of that material ought to be established. The issue is what relevance does a reposting have of that

material. If it were the case that he expressed the opinions about this video that might be one matter but, in my submission, on the voir dire it is unlikely - well, I withdraw that.

Your Honour will need to be satisfied to determine in its relevance and whether it has a capacity to substantially effect its credibility whether the underlying premise which is "he has expressed that opinion" has a foundation and in my submission on the material I have in relation to whether he posted this material - that is "I am so sick of hearing people" - that needs to be established and the second point is that the date of the - the date of the first posting, "I am so sick of hearing people" - which is by another person was in 2016.

HIS HONOUR: Yes, but what was the date of the reposting?

MR STRICKLAND: That was also in 2016.

HIS HONOUR: All right.

MR STRICKLAND: So, suffice to say, the factual premise needs to be established before there can be - your Honour can make a determination about relevance and whether it's relevant to attack this witness on the basis of credibility.

HIS HONOUR: Well, certainly, I think it's been accepted by Mr Edwardson that we need to have a voir dire in order to determine those - - -

MR EDWARDSON: I need to know the foundation for this being admitted.

HIS HONOUR: Yes.

MR EDWARDSON: If your Honour takes the view that it doesn't matter what he says. It can't have any bearing on the issues, then we'll put that to one side and move on.

HIS HONOUR: Well, I don't take that view.

MR EDWARDSON: Thank you. So, I will certainly want to ask him some questions in the absence of the jury.

HIS HONOUR: Yes.

MR EDWARDSON: To lay the foundation for it being admitted; and then, subject to your Honour's ruling on that matter, then we'll deal with it. But we need to it in the absence of jury.

HIS HONOUR: Yes.



MR EDWARDSON: So, I'd ask that he be returned to the witness box for a voir dire on this topic.

HIS HONOUR: All right, thank you.

ANDREW JAMES BARRAM:

HIS HONOUR: Now, be seated there again. We are going to have some questions directed towards you in the absence of the jury. I want you to understand that you are still subject to the oath that you took in this trial to tell the truth. You understand that?---Yes, your Honour.

Thank you.

Yes?

XN BY MR EDWARDSON:

MR EDWARDSON: Mr Barram - Senior Sergeant Barram, I'm sorry - I'm going to ask you some questions, if I can, about your Facebook postings. You had a Facebook account, did you not?---Yes.

In your name?---Yes.

And that was taken down, I think, in February 2021?---No, it's still there.

I beg your pardon?---It's still there.

It's still there. But a number of postings that previously existed had been taken down by you?---No.

You deny that?---I've just changed the security settings.

So, you've changed the security settings, such that other people may not have had access to postings that you had previously made?---Yes.

You made a posting specifically, did you not, which included a video footage of a shooting incident?---Yes.

With a heading, "Brings a little bit of reality into the argument."?---Yes.

I'm going to play that video for you and I just want you to confirm this is the posting that you made on Facebook.

DVD PLAYED

MR EDWARDSON: That is the footage that you posted?---Yes.

Can you have a look at the document - - -?---Well, that's the video that I shared.

Can you have a look at the copy and just confirm, can you, that specifically that's the video that you shared with those who were interested, with the heading, "Brings a little bit of reality into the argument."?---There's something else on the back page, yes, on the second page.

Sorry, I'll come to that one in a minute. "Graphic – why officers shoot until threat has stopped?"?---Yes.

And that's the posting that you made?---That is something that I shared.

All right, thank you. Now, I want to turn to another posting. Could you turn to the last page of the document that I presented to?---Yep.

MR STRICKLAND: I object to this. I object. I object on the basis that this document that is being shown to the witness is misleading and - - -

HIS HONOUR: I'm going to have to ask you to wait outside again?---Yes, your Honour.

#### WITNESS WITHDREW

MR STRICKLAND: If I hand up, on this application, this document, your Honour.

MR EDWARDSON: I take my learned friend's point. We used this document, which is the point anyway. It's a shared document, a shared posting.

MR STRICKLAND: Sorry, your Honour. I think these things should be done formally.

HIS HONOUR: Yes.

MR STRICKLAND: First, could this – could the document you were given - - -

HIS HONOUR: The document which was placed in front of the witness?

MR STRICKLAND: That's right - could that be marked, please?

HIS HONOUR: That will be marked for identification, AF.

MFI AF Document placed in front of witness.

MR STRICKLAND: And could this document that I've handed up be marked as well?

HIS HONOUR: And that will be MFI AG.

MFI AG Document placed in front of his Honour by Mr Strickland.

MR STRICKLAND: And, your Honour, I'm not in any way suggesting my learned friend or his solicitor was responsible. It is clear that the document that was shown, MFI F, had a critical part omitted, which is MFI G, which is that the author of the posting is, in fact, Dave Wilson. That was the basis of the objection.

HIS HONOUR: Well - - -

MR EDWARDSON: I'm grateful to my learned friend. We'll rely on his document. That way, there can be no argument.

HIS HONOUR: Right. I'll have those returned. We will mark them and remain here.

And we'll have the witness brought back in, thank you.

ANDREW JAMES BARRAM:

MR EDWARDSON: Senior Sergeant, could you have a look at the single document which is presented to you which you haven't seen yet? Firstly, is it you that we see named at the top of that page?---That's my name, yes.

The 13th of June 2016, which a photograph of police officers, an injured police officer?---Yes.

Do you know Dave Wilson?---I don't know. I don't recall.

But we can see, can't we, that, nonetheless, from that image that is presented to you that you have shared his posting?---Yes.

And how does Facebook work? If something comes up on a feedline and, if you like it, you incorporate it into your friendship group, is that how it works?---You can either like something or share something, or both.

So, what happens when you share something? That means you share it with others, doesn't it?---With you group of friends, yeah.

And so therefore, you were embracing and sharing the notion or the sentiments expressed by Dave Wilson, on 10 June 2016?---I shared it, it doesn't necessarily mean I embrace every single word of it.

Well you certainly were inept with it, sufficiently enough to share it?

MR STRICKLAND: I object.

MR EDWARDSON: Why?

MR STRICKLAND: I object to, "You certainly were inept of it".

MR EDWARDSON: It's cross-examination. It's leading - - -

HIS HONOUR: I agree.

MR EDWARDSON: You certainly were inept with it, weren't you?---No.

You shared it?---Yes.

You didn't express anything – any doubt about the sentiments that were expressed in Dave Wilson's posting?---I didn't express anything about it.

No. You shared it with others?---Yes.

And the others that you are friends with, many of them would know that you're a police officer?---Some do, yes.

And that – would they know that you're attached to Professional Standards?---I wasn't at that time.

But – was this one of those postings, or share it postings, call it what you will, that you changed the security on, once it was brought to your attention, after you'd published these reports against Mr Rolfe?---I changed the security to my account.

And did you do that because you became aware that these were in the public domain?---No.

Why did you change your security?---Because my Facebook account was being trolled by someone, and a number of negative posts about me, incorporating photos of me when I was like 17, were being posted.

Just taking up Dave Wilson's shared – or the post that you shared. He's there dealing with the day to day problems that police officers have to face?---Is he?

Well, in specifically in the context of, "Being sick of hearing people ask why a copper shot someone rather than using a Taser or a pepper spray". Well that's what he said isn't it?---Yes.

You shared it to the world, who's - - - ?---Not to the world.

Well to whoever's party to your Facebook?---Yeah, and Facebook was very different back in 2016 to what it is today.

The posting – the previous video that we observed, that was on 2 October 2019, so that was one month before the Yuendumu shooting?---Yes.



Was the world of Facebook very different one month before that shooting?---To what it is today? Yes.

Well what about at that time, were you part of Professional Standards at that time?---No.

But did that change afterwards?---I beg your pardon?

That changed, did it?---Did what change?

When did you become party to Professional Standards?---I can't remember the exact date. A bit over two years ago.

If your Honour pleases, that's sufficient for my purposes.

HIS HONOUR: Do you want to ask any questions?

MR STRICKLAND: Yes, thank you, your Honour.

XXN BY MR STRICKLAND:

MR STRICKLAND: You didn't post Mr Wilson's remark, yourself, did you?---I didn't write any of that.

On 2 October, did you write, "Brings a little bit of reality into the argument"?---Yes, I wrote that.

And what did you mean by writing those words?---I think, at the time, there was a movement around defund the police and disarm the police. And why don't police just shoot people in the arm or the leg. That's what I was referring to. And that is why we train to shoot at the centre of scene mass.

Did you regard this video as having any relevance to the report you had been asked to write about the shooting at Yuendumu?---I was posted a month or more before the incident happened, obviously, had I had a crystal ball, I wouldn't have posted it. But yes, I posted it. Not realising that I would then become involved in a police shooting.

If the court pleases.

MR EDWARDSON: Can I just ask one question with your Honour's leave, rather than - - -

HIS HONOUR: Yes.

REXN BY MR EDWARDSON:

MR EDWARDSON: When you were asked to provide the reports which you have, by the executive, in – I think it's called Operation Charwell, did you disclose the fact that you had made these postings on Facebook?---No.

Thank you.

HIS HONOUR: All right, thank you, would you stand down please and wait outside again whilst I have some discussions with counsel?---Yes, your Honour.

WITNESS WITHDREW

MR EDWARDSON: Your Honour, on reflection, the second item, which given the time that it's removed, and it's a shared posting, as opposed to his words, I don't press for that admission. I do press though for the one that's proximate to the events in question. And in particular, the video.

HIS HONOUR: All right.

MR EDWARDSON: And I've put the submissions already as to how and why we say it's relevant. He's now having acknowledged that he did do the posting, and he did post and source that particular video.

HIS HONOUR: Yes.

MR STRICKLAND: In terms of – sorry, I'll just make submissions on that.

HIS HONOUR: Yes.

MR STRICKLAND: 2 October 19, it is accepted that he made the post - - -

HIS HONOUR: He reposted it.

MR STRICKLAND: - - - I'm talking about the two – he reposted it, exactly.

HIS HONOUR: Yes.

MR STRICKLAND: It's accepted that he did that. And your Honour's heard why he did that. In my submission, it is not relevant to the issues in this case. The circumstances of – as I understand it, the relevance will be to say that it somehow damages his credibility in some way. In my submission, the circumstances of that video are entirely removed from the circumstances of the Yuendumu shooting. His opinion as to a particular shooting, far removed from the shooting on 2 October '19, on the basis that it quote, "Brings a bit of reality into the argument." Question is, what is the argument? His evidence is that the argument refers to the defunding of the police, or whether police should be entitled to shoot to kill in certain circumstances, or sorry, to shoot in certain circumstances, where those - - -

HIS HONOUR: Well the question, as I understand it, what he says he was directing his comment to was an argument that police should not be taught to shoot at the centre of scene body-mass. Rather than shooting at - - -

MR STRICKLAND: That's exactly right.

HIS HONOUR: - - - a hand or a leg or something.

MR STRICKLAND: Exactly right, thank you, your Honour.

HIS HONOUR: Yes.

MR STRICKLAND: So we say that that doesn't bear on any of the – that in my submission, is not relevant – there's another issue, your Honour, which is that this – to show this video, and as my learned friend says, to attack the credibility of this witness on the basis of those particular comments, "Brings a little bit of reality into the argument", is likely to distract the jury from what in my submission, is an entirely different scenario.

What his opinion was about defunding the police, or shooting, or the controversy about where police can be shot to shoot, and in these circumstances, that is in the circumstances of a man running at police with a knife, and to say, well because he's made his – he's reposted that, and that somehow effects his credibility in relation to this report, in my submission, doesn't bear on the facts of the issue in this case. And in my submission, it's – there is an unfairness to this witness, or the Crown case, in terms of really leading the jury into a side issue as to comparing this issue – I'm sorry, the scenario of this case, with the facts of the Yuendumu shooting. They're my submissions, your Honour.

HIS HONOUR: All right, thank you.

Counsel for the accused proposes cross-examining the present witness as to his reposting of a video, which shows, or depicts a police shooting, as I understand it, in America. The basis upon which this cross-examination is proposed is that it will affect the credibility of the witness, or it may affect the credibility of the witness, in terms of the reports that he has provided, and the evidence which he has given in this trial.

The application is subject to s 103 of the *Evidence (National Uniform Legislation) Act 2011* which provides that;

"The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness."

Taking a step further back, the credibility rule is set out in s 102 of that Act which provides that credibility of that evidence about a witness is not admissible.

So the general proposition is that cross-examination of the witness about credibility is not admissible but there is an exception to that if the evidence could substantially affect the assessment of the credibility of the witness.

In my opinion, it will be open to the jury to conclude that the witness embraced the contents of the video in reposting it. He says that he did so for a particular purpose but I see no reason why he should not be cross-examined on that issue before the jury.

I also see no reason why, in the absence of any qualifications on the reposting to the effect that the police involved in the incident which is depicted had not acted in accordance with proper police training, that the showing of the video and the cross-examination of the witness could substantially affect the assessment of the credibility of this witness to the extent that the video may depict actions on the part of the police involved in that incident which are inconsistent with the evidence which has been given by the witness in the present trial or in his reports in relation to proper police procedure and approaches when dealing with the use of lethal force against people who are armed with weapons.

In my opinion the evidence could substantially affect the assessment of the credibility of this witness and I propose to allow cross-examination in front of the jury.

MR STRICKLAND: If your Honour pleases.

MR EDWARDSON: If your Honour pleases.

Your Honour, I have one further application. I would need the witness – I want to - first of all, can I produce to your Honour a photograph of what I am told is a T-shirt designed by Senior Sergeant Barram in 2018 which depicts the gun equals knife - or knife equals gun, and I want to ask him - and I want to do it obviously absent the jury first - if he agrees with the notion that he was responsible for its design – sorry. It was designed with him as the instructor on the course. So I want to ask him about the parameters of that and what he can say about it.

HIS HONOUR: Do you want to ask him on the voir dire on that?

MR EDWARDSON: I do, your Honour, I think it is important we know what he is going to say about it before we go down that path in front of the jury.

HIS HONOUR: All right, well this is really a separate application.

MR EDWARDSON: Yes, it is, thank you.

HIS HONOUR: All right, then the witness can be recalled, we will have some evidence taken on the voir dire on that issue.

ANDREW JAMES BARRAM, recalled:

XN BY MR EDWARDSON:

HIS HONOUR: Just take a seat there. There is a further and separate issue on which counsel wish to ask you some questions in the absence of the jury?---Yes.

MR EDWARDSON: Senior Sergeant Barram, I want you go have a look at the photograph which is now produced to you. You are familiar with that design on that particular shirt that we see in that photograph?---Yes.

And you were aware of it being done in relation to the 2018 Defence Tactics Course?---Actually I wasn't aware. I know that they make T-shirts. I didn't have any involvement in the making of the T-shirts.

It wasn't done with your authorisation?---No.

You deny that?---I don't think I authorised that, no.

You don't think you authorised it? Did you authorise it or didn't you?---I don't think so - I don't - I'm pretty sure this is the first time I've seen that design.

Have you seen anything of a similar nature?---Yes.

In what way?---Every - well, it's a police tradition. Most courses produce their own T-shirts or polo shirts and quite often they invent the design themselves but it's not a police uniform thing or anything.

Of course not, of course not. But you obviously can see from the emblem that it's self-evident from the face on the photograph it depicts an important part of the teaching of these cadets - isn't it - that, "knife equals gun"?---All right. "DTIC" stands for Defence Tactics Instructor Course" - it's nothing to do with cadets.

Sorry, that's my poor word, yes. So - but nonetheless, it embraces the sentiment, does it not, of, "knife equals gun" as we have discussed?---It would appear to do, yes.

And have you got one of those?---No.

I am not going to press it. Not going to press it.

HIS HONOUR: You're not going to press it?

MR EDWARDSON: No, your Honour.

HIS HONOUR: All right. I don't need to hear from you. All right then, we will have the jury return.

I will have that marked for identification, that photograph, it will be marked for identification AH.

MFI AH Photograph of T-shirt.

JURY IN

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Your Honour, could the members of the jury have in front of them largely exhibit 62, that is the exhibit that I will be going to mostly in the course of my questioning of Senior Sergeant Barram. I know they have got a lot of folders so I am going to try and confine it to that.

Before I do I want to ask you some questions, if I can, about whether you have a Facebook account, Senior Sergeant, do you?---Yes.

And about one month before the shooting at Yuendumu on 9 November 2019 did you post a video on Facebook?---I shared a video.

And was that particular video, under your name, did it have a heading, "Brings a little bit of reality into the argument"?---Yes.

And the video footage itself also had a sentiment graphic, "Why officer shoot until threat has stopped"?---Yes.

I am going to ask that this video be played in the presence of the jury and then I will ask you some questions about it briefly and I will come back to it later.

DVD PLAYED

MR EDWARDSON: That is the video that you posted on Facebook about a month before the Yuendumu shooting?---Yes.

I'll come back to it again, but I just want to ask you a few quick questions about that video. Obviously, it's a scenario which is entirely different from the scenario that confronted Zachary Rolfe on 9 November?---Yes.

In that case, it's plain is it not, that we can see the police officers – the first police officer who shoots the offender, constantly trying to distance himself from the offender?---Yes.

And issuing commands?---Yes.

The offenders armed with a knife?---Yes.

And then as he gets closer and closer, and we get to that critical distance, he then discharges his firearm?---Yes.

Multiple times?---Yes.

I think, maybe five times?---Yes.

Something like that anyway. And we know that despite – and it would appear, that the police officer was aiming for the central body mass of that offender?---Yes.

And he hits the ground, that is the offender hits the ground, but plainly as we saw thereafter, he was not incapacitated?---Yes.

Despite the fact that he'd been shot five times or thereabouts?---Well I've got no evidence of how many of those shots hit.

No, no I get that, but was multiple – multiple shots?---Yes.

In addition to that, he always maintains, doesn't he, the knife, or the edged weapon in his hand, in his control, after that initial shooting?---I'm not sure that he did, when he got back up.

Well the bottom line is, he got up, and he then moves, and another police officer seeks to intervene, doesn't he?---Yes.

Or she. It would appear at least, that that particular offender was still armed?---Possibly, yes.

Most likely, because it's unlikely he would have been shot again would he, if he didn't have a weapon in his hand?---Well he's going for the officer's gun.

Going for the officer's gun?---Yes.

So he was still a threat. He hadn't been incapacitated, despite having been shot on multiple occasions?---Yes.

And we see that then the officer discharges his firearm again, and eventually does incapacitate him?---Yes.

Again by shooting to the centre body mass?---Centre of scene mass.

Centre of scene mass. And it's the shooting at the centre of scene mass which is the instruction that was given to Zach Rolfe, and indeed all other police officers when they start?---Yes.

All right. When you were asked by the executive to – and when I say the executive, I mean the senior police officers who'd been nominated as being part of what they call Operation Charwell, is that what it's called?---Yes.

You were asked to provide an independent opinion, or opinions, about whether the actions of Zachary Rolfe, amongst other things, were consistent with his training, the starting point was of course, viewing what I'll call the body-worn video?---Yes.



Because it's the body-worn video that potentially encapsulates or shows the images of the exchanges that took place at the time that he discharged his firearm three times?---Yes.

You would have been briefed, and quickly established, that the time difference between the first shot and the third shot was about 2.06 seconds – sorry, first and second shot, my apologies. Was 2.06 seconds?---I think it's 2.6.

2.6 seconds, thank you. And then the difference between the second and third shot is 0.53 seconds, point five three, I should say, so less than a second?---Yes.

It's what you call, I think you refer to in your report, as a double-tap?---Yes.

All shots are aimed at, and penetrate the centre scene body mass, as it presented itself, from the body-worn video at least, to Zachary Rolfe?---Yes.

Again, consistent with his training, as to where he should shoot, having made the decision to pull the trigger?---Yes.

You accept do you not, unequivocally, that scissors are an edged weapon?---Yes.

Scissors are potentially a lethal weapon?---Can be, yes.

Scissors have the capacity, if deployed to the right location, on the body of a police officer, to be fatal?---Yes.

And to give you just a few examples, which I'm sure you'd agree with, and again consistent with your training, if Zachary Rolfe had been stabbed to the carotid artery on the neck, it could have killed him?---Possibly, yes.

We know, don't we, and you know from what you've seen and what you've read, that Zachary Rolfe was stabbed in the shoulder by those scissors, which were secreted and deployed by Kumanjaya Walker?---Yes.

We also know, don't we, that the first time you can actually see the scissors, on whichever body-worn video you wish to look at, is after the third shot had been discharged?---No, you can see when he takes them out.

You say you can see that do you?---I think there's some frames that show that.

Is it the case that you assume that that's where the scissors are, as opposed to actually being able to see it with the naked eye?---I'd have to review the footage again.

All right, let's assume from your interpretation of the body-worn video, you were able to see the scissors when they're raised in a stabbing motion, that's before the first shot's discharged isn't it?---Yes.

And it's after Zachary Rolfe is stabbed in the shoulder that he fires the first shot, which you have explained, and I'll come to the detail in – shortly?---Yes.

After that, you don't see the scissors again, yourself, on the body-worn video, do you, until sometime after the third shot had been discharged?---Yes.

It's true, is it not, that when you look at the body-worn video, at no stage, after Constable Eberl and Kumanjayi Walker hit the mattress on the floor, it's true that you're not able to see the right arm of Kumanjayi Walker?---Yes.

In other words, you can't see the upper arm, the forearm, or his right hand?---Correct.

And the reason for that is that Constable Eberl is between you – sorry, is between the camera, the way it presents, the direction it's pointing, and where Kumanjayi Walker was positioned?---No, that's not right.

Why do you say?---Because you can see Kumanjayi Walker's right shoulder - - -

I didn't ask you about the shoulder. I'm asking you about the arm, the upper arm, and the forearm and the hand?---Eberl is blocking the right arm from view.

Plainly. He's between the lens and the position of Kumanjayi Walker. So you can't see, correct?---No, I don't think that's correct, so.

Well what else is standing in the way?---Kumanjayi Walker's body.

All right. I want to ask you a little bit about your training. You have no expertise in body-worn video cameras do you?---No.

But none the less, are you, and do you agree, that there are quite a number of limitations that have been expressed to you, about the utility of looking at a body-worn video, and making an analysis just from that video?---Expressed to me by who?

Well, let me give you an example. Did the prosecution, or the investigators, provide you with a declaration from a person by the name of Brian Chiles, or Chiles, that's C-H-I-L-E-S, dealing specifically with issues about the limitations of body-worn video?---Yes, I think so.

And they did that, no doubt, to inform you about issues such as what's called parallax error and shutter speed?---Yes.

Which can give rise to artefacts, and or the potential to misrepresent movements and actions?---Yes.

“An objection can appear elongated or distorted, for example, as a result of movement of the camera, or object while the shutter remains open”?---Yes.

"The object will typically be blurred as well"?---Yes.

And you also know that there's a wide-angle lens on the body-worn video that you viewed?---Yes.

And a wide-angle lens also creates an image to the person who's viewing the body-worn video, of the two being much closer together than they really are?---In some circumstances.

You'd accept would you not, that there is an element of artificiality in slowing down frame by frame, to try and determine what happened, as you did, as opposed to looking at it in real time?---Yes.

And the reason for that, is that Zachary Rolfe, didn't have the luxury of pushing the pause button did he?---Of course not.

He had to respond instinctively and intuitively, consistent with his training, to a very dangerous and dynamic situation?---Yes.

I want to come back to Kumanjaya Walker. Did you know Kumanjaya Walker before he was – before he passed away?---No.

Did you know anything about him?---No.

So, anything you knew about him is, in effect, post-shooting?---Yes.

Part of the process in your analysing, from a police perspective, whether Zachary Rolfe did or did not perform in a way that was consistent with his training, you needed to put into context the shooting itself, didn't you?---I suppose so, yes.

Let me give you an example, sorry, it's a badly worded question. We know and you know, before you wrote your report, that on 6 November 2019, Kumanjaya Walker had deployed an axe against two police officers by the name of Hand and Smith?---Yes.

You viewed that body-worn video, didn't you?---Yes.

And it is, can I suggest to you, even for somebody like yourself, who is experienced in this area, a very confronting piece of footage?---Yes.

Would you agree that it appears that the two officers who were presented with a potentially lethal weapon appear to have frozen?---Well, their evidence is that they did momentarily, yes.

Were you, or have you ever expressed an opinion as to the way in which they responded and whether that was consistent with their training?---I've expressed the opinion that they would have been entitled, in drawing their firearm.

And they would have been entitled to pull the trigger if they thought that Kumanjayi Walker was going to use the weapon?---If they thought that, yes.

All right. So, it's all a matter of perception, isn't it?---Yes.

It's about instinctive, intuitive decision-making as the situation presents to the officer who is under threat?---Yes.

As it happens, they didn't pull the trigger, or pull their firearm out; and, fortunately, no one was hurt. But, what it did inform anybody thereafter, and, can I suggest, you included, was that that, of itself, clearly demonstrated to police that Kumanjayi Walker had to become a high-risk target?---Yes.

Because he had the capacity to be violent if confronted by police?---Yes.

And, if given the opportunity, would access a weapon and have the potential to use it?---If given the opportunity, he may access a weapon.

Exactly, of course. In addition to that, you would have known, or you would know now, that he had a very extensive criminal history; in particular, of violent offending?---Yes, he had some convictions of violent offending, yes.

And the combination of that criminal history, in conjunction with the video footage, would inform any police officer who was tasked with the responsibility of arresting him that there was a real potential for him being extremely dangerous?---Yes.

So, you try and keep your eyes open to see if he's ever armed or equipped himself with a weapon?---Yes.

For example, in the case of the axe incident, anybody could see what he was doing because he had, in plain sight, this axe?---Yes.

We know, of course, that the situation was quite different on 9 November because the other officers; that is, Officers Eberl and Zachary - and Zachary Rolfe, were confronted with a pair of scissors that we now know were secreted in his pocket?---Yes.

And they were not visible until he deployed that weapon?---Yes.

That potentially lethal weapon?---Yes.

All right. I want you to turn now, if you can – and by all means, have, if it assists you, in front of you your – first of all, I want exhibit 62 – it will be at annexure B in your report – exhibit 62, tab 4; and, insofar as you need to refresh your memory, from your first report, which is dated, I think, 13 March 2020. If you could have that in front of you.

That's been marked, I think, for identification, your Honour.

For the jury's benefit, I will be largely going – asking them to follow what is annexure B to your affidavit, but it's tab 4 in exhibit 62, which is the defensive tactics.

Just – can I ask you a little bit about the document itself? The document itself is not a handout that's given to police officers in training?---Well, this document is the facilitator guide.

Yes?---But it's also a participant guide that is handed out to - - -

With the facilitator guide, is that the guide that, in effect, the instructors use, to make sure that they convey all the information that needs to be conveyed to a police officer in training?---Yes.

And when the training occurs – I mean, I suppose it's possible, you tell me – but different instructors might have a different approach depending on who they are? ---We try and maintain a uniform approach by running an instructor course.

Is the instruction course, obviously, a combination of practical and theory?---Yes.

And does it include, for example, slides?---Yes.

PowerPoints, things like that?---Yes.

And is the idea that the model, the teaching instruction encompasses all of the topics that we've discussed and you've set out in your report and you've given evidence about?---Yes.

All right. You were asked originally, were you not, by Detective Acting Superintendent Kirk Pennuto, who is the lead investigator of Operation Charwell, to review the police tactics and provide an opinion on the force used in an incident that occurred at Yuendumu community, Northern Territory, on Saturday, 9 November 2019?---Yes.

Which resulted in Constable Zachary Rolfe shooting Kumanjayi Walker and his subsequent death due to injuries received?---Yes.

And part of the process, as I understand it, included your consideration of the body-worn video that we've discussed, all of the relevant body-worn videos?---Yes.

You've acknowledged that you had been provided with a declaration that set out the potential limitations of the body-worn video and you have embraced all of the concepts that I've put to you and understand that there are limitations of that body-worn video?---Yes.

And one of the difficulties, of course, is that your interpretation, your perception might be quite different from the person who is under attack?---Yes.

We know that the body-worn video might not – is positioned, generally speaking, around the chest region?---Yes.

And so, again, depending upon where that person who has got that body-worn video attached to them, where they're looking. They might be looking in the same direction as the body-worn video or in a completely different direction?---Yes.

So, whatever is captured on the body-worn video may not represent what the individual sees?---Yes.

There is also the question of lighting and we know that this particular incident occurred in poor lighting?---Yes.

It required torches, in large measure?---Yes.

And, of course, you have got the additional feature of a camera having the capacity to enhance the images which the eyes can't see?---Yes.

One of the reasons that officers are taught, again and again and again, about the way in which they should approach their task, depending upon the level of threat, is so that they are trained in a way which does become somewhat instinctive because, if, under huge pressure or threat, it may be that they can't think as logically as they would, for example, sitting in a court room or looking at videos, frame by frame? ---Yes.

Now, you've embraced and accepted the notion that Zachary Rolfe never had the luxury of pushing the pause button. So, everything that he saw from his perspective, from where he was standing, is in real time?---Yes.

And it's an absolute luxury, at one level, if you want to analyse the position of people and so on, to look at it frame by frame, but that's just not the way it happened? ---Okay.

Do you agree?---Yes.

Although we can see and there are different sections in the video – we can see that, after the first shot, Eberl and Kumanjayi Walker end up on the mattress, as you've told us?---Yes.

And you've described from your perspective - and again, the prosecution want to close this down and look at it frame by frame, so we can look at every single millisecond movement - - -

MR STRICKLAND: I object, your Honour. This witness shouldn't be commenting on what the prosecution is seeking to do.

HIS HONOUR: Yes.

MR EDWARDSON: I'll rephrase the question, your Honour. I'll withdraw the question actually. I shouldn't have asked it.

You were asked to give evidence, in part, by reference to this frame by frame notion, yes? We did it today?---Yes.

Do you accept, from your tactical experience and training, that dynamic situations such as the one that we see on the various video footages, can change in a split second?---Yes.

A person who might be on the bottom of – underneath a police officer, those roles can reverse again, in matter of seconds?---Yes.

If you do not have complete control of the individual, your position can change in an instant?---Yes.

You've conceded, and you accept, that nowhere on the body-worn video, are you able to see the right arm of Kumanjaya Walker?---Yes.

That is, his upper arm, his forearm, his hand, or the scissors?---Until they're attempting to handcuff him, yes.

Yes, exactly. You therefore – and you also accept that you're giving your evidence about the extent to which you think there's been compliance with training, by reference to that video footage, from the perspective of the image projected in the video footage?---Yes.

And because you can't see everything, together with all of the difficulties we've discussed about body-worn video, you also accept, do you not, that whatever it is that you could see, by reference to that body-worn video, may not represent what Zachary Rolfe could see?---There could be differences in angle of view, yes.

Well there could be a whole lot of things. There could be differences in angle. He could see things that aren't captured by the body-worn video. He might hear things that aren't picked up, and so on?---Yes.

The threat, as he perceived it to be, you cannot comment on, and you quite properly can I suggest, say as much in your report?---Yes.

Indeed, can I direct your attention to par 19 of your report. You say this, do you not, Senior Sergeant, "Rolfe has not provided what his apprehensions and beliefs were at the time of firing the shots, and has exercised his right to silence. Therefore I am unable to consider these mental elements in coming to an opinion about the necessity and proportionality of the force used in this situation"?---Yes.

You then go on to deal with the training. Explain what that training involves. The training that he would have received, as all police officers do receive. And then by

reference to that training, ultimately express the opinions which you've now expressed in this court, that is, shot 1 versus shots 2 and 3?---Yes.

You start in large measure with the proposition that really reflects no more than the law, can I suggest, "Members should only use force that is reasonable, necessary, proportionate and appropriate to the circumstances. Members should use the minimum amount of force required for the safe and effective performance of their duties"?---Yes.

In other words, if somebody's not a threat at all, or if they've got some harmless item in their hand, that would not warrant lethal force, obviously?---Yes.

But again, everything is case specific?---Yes.

That video footage that you posted, that rather graphic, can I suggest, footage, is a good indication, is it not, firstly, on why you try and keep the distance from an individual who's armed with an edged weapon, if you can?---Yes.

As that police officer appeared to be doing, reversing?---Yes.

And giving verbal commands?---Yes.

Because in that case, the police officer had distance, time and a visual perspective on his or her side?---Yes.

That is not the scenario that confronted Zachary Rolfe at all?---Yes.

Because what we do know is that the weapon, the potentially lethal weapon, namely the scissors, were presented in a split second after he had asked Zachary Rolfe, sorry, asked Kumanjaya Walker to put his hands behind his back?---Yes.

Do you accept, Senior Sergeant, that at all times in the lead up to the verbal exchange that took place before the deployment of those scissors, he expressed himself in an extremely calm and polite fashion?---Who?

Zachary Rolfe?---Yes.

He was courteous to the people he was asking outside, that is the men and women in the community about where Arnold Walker might be?---Yes.

There was an element of de-escalation in a sense that he said to him, I can't remember the exact words, but words to the effect, stay calm, and words of assurance if you like, but in a – a fairly polite way?

MR STRICKLAND: Your Honour, I object, I'm just not sure of what point in time that question is directed to - - -

HIS HONOUR: Yes.



MR EDWARDSON: No, no, I agree with that, that's all right.

He was moved, when he first – when they first approached him, they moved him to the wall, didn't they?---Yes.

And it's at that point in time that we see the exchange that takes place between both officers and Kumanjaya Walker, where plainly, and it's self-evident on the video, they were seeking to establish his identity?---To confirm it, yes.

Well, the person that presented to the two officers had used the name Vernon Dixon?---Yes.

They even call him Vernon Dixon until the formal identification takes place, we hear that on the video, don't we?---Yes.

And it's only after Zachary Rolfe puts his phone, with a photograph of Kumanjaya Walker on it, next to the face of the man who was then calling himself Vernon Dixon, that the identification is complete?---Yes.

And immediately after that, he asks Kumanjaya Walker to put his hands behind his back?---Yes.

And although I say we can't see it, you say you think you can see the scissors in part, but what we do know, is essentially, it's at that point in time, Kumanjaya Walker deploys this potentially fatal weapon by stabbing Zachary Rolfe in the shoulder?---Yes.

In considering whether there has or has not been compliance with training, you start with referencing what's called the Ten Operational Safety Principles, which are central to everything an officer does operationally?---Yes.

And it's those Ten Safety Principles that are taught to all police officers before they graduate?---Yes.

If you like, it's the model by which police officers conduct their affairs?---Yes.

As you say, can I suggest, and I'm now referring to par 25 of your report, "The operational safety principles were developed to be observed when developing a plan for an operation, and as far as possible, when reacting to an incident. The effect of these measures will be to achieve the objectives of the task with minimum harm to persons involved"?---Yes.

"Not all of the principles can or should be applied on every occasion"?---Yes.

And that's because, everything has to be case specific, doesn't it?---Yes.

Take the film that we put – you posted on Facebook. That's a very different scenario, different considerations apply, distance and all those matters that we've discussed before?---Yes.

Chain of command is an important part of policing, is it not?---Yes.

You know that Zachary Rolfe is a member of the IRT, or the Immediate Response Team?---Yes.

And as it happens, with the exception of Officer Donaldson, who was a dog handler, the other members, who were present at the time of this incident on 9 November 2019, were all members of the IRT?---Yes.

You would have been told, or you would know, I assume, that they were deployed for general duties, as opposed to a high-risk tasking?---Yes.

But they were nonetheless, deployed for the purposes of arresting a high-risk target?---That was – I'm not sure exactly what they were told.

All right. The IRT – do you know much about the IRT?---A bit, yes.

Well the IRT were – their traditional function, was to cordon and contain?---Yes.

Until the TRG could arrive?---Yes.

Now all of that requires, does it not, a command structure to be put in place?---Yes.

And there needs to be sufficient resourcing for that to happen?---Yes.

You don't know precisely what they were told?---Yes.

What you do know, this much though, you do know that they were told that the mission was to arrest Kumanjayi Walker?---I think they were told to go to Yuendumu to provide relief to the Yuendumu members.

Right. But as it happens, there were no Yuendumu members that assisted them, when they went into the community?---No they were replacing the Yuendumu members.

I see. So they had no - they weren't assisting the Yuendumu members on the ground?---Not directly. They were assisting them by relieving them so that they could get some sleep, from what my understanding is.

Right, they were relieving them so they could get some sleep?---Yes.

But they certainly, as part of that relief task, they certainly were to gather intelligence and then ultimately arrest Kumanjayi Walker?---Yes.

Who you have accepted was a high-risk target?---Yes.

You have made reference what you call ICENCIRE?---Yes.

And that is - that model we find, do we not, in the Operational Safety Incident Management Facilitator guide, part 5, which is page 63, tab 5, for members of the jury - 62 I am sorry - exhibit 62, tab 5 and if you could turn to page 63 you will see, "Siege and barricade situations". Do you see that?---Yes.

So this particular module that you have referenced, is encompassed - or encompassed inside the facilitator guide, so that's for instructors, is it?---Yes.

Was the ICENCIRE model actually taught to Zachary Rolfe?---Yes, it should've been.

And if it was presumably it would reflect what we find in the facilitator's module? ---Yes.

And the heading is, "Siege and barricade situations"?---Yes.

"Types of situations, hostage taking, kidnapping or abduction, barricade or siege situation, armed resistance to lawful arrest, aircraft hijacking". Do you see that? ---Yes.

On the first - - ?---Yes.

So they're all - they're pretty self-evident, even if you're not a police officer. We're talking about a particular type of situation aptly described as a "Siege and barricade situation"?---Yes.

Which is a high-risk deployment?---Yes.

And inevitably, if it is a high-risk deployment that would necessarily involve the involvement of the TRG?---Yes.

Because that's what they do?---Yes.

That requires resourcing from the executive?---Yes.

We know that the executive provided no such resourcing in the context of this issue?---Yes.

For example, it was a general duties deployment as oppose to a high-risk deployment even though they were IRT members?---Yes.

Without any support?

MR STRICKLAND: I object. I object.

HIS HONOUR: Yes?

MR STRICKLAND: I just am not sure that can be put as a proposition, given evidence about Mr Donaldson, but - - -

MR EDWARDSON: Sorry, I forgot the dog handler - my apologies. With the exception of the dog handler - sorry.

With the exception of the dog handler that's the only support they had?---Yes.

So it's command or the executive that make the decision about how these men are to be deployed and they put in train the appropriate resourcing ?---Yes.

And that's what happened on this occasion?---That's my understanding, yes.

So the buck stops at the top and it works down, doesn't it?---I suppose so, yes.

Your Honour, is that a convenient time? I know it's a little bit early but I have got a bit to get through and I do need to move on to another topic now.

HIS HONOUR: All right.

MR EDWARDSON: Thank you.

HIS HONOUR: Well clearly, we are not going to finish the cross-examination of this witness today, so this is a convenient point to break that cross-examination, so members of the jury, would you now retire for the day and we will resume at 9:30 tomorrow. Thank you

JURY OUT

HIS HONOUR: Now, Senior Sergeant, as you are in cross-examination, you will be aware that you are not to have any contact with the prosecutor or the prosecution team or to discuss your evidence with anybody else before you return tomorrow?  
---Yes, your Honour.

You can stand down now.

WITNESS WITHDREW

HIS HONOUR: Now, are there any matters that counsel want to raise at this point?

MR STRICKLAND: Yes, I would, your Honour. Your Honour, in the course of the questions there was a reference to par 19 of MFI Y to the accused's right to silence.

HIS HONOUR: Yes.

MR STRICKLAND: May I ask, is it your Honour's practice to give a direction to the jury about the right to silence after that evidence has been given - as distinct from - I know your Honour will give it at the - - -

HIS HONOUR: I will give one at the end of the trial, of course.

MR STRICKLAND: Yes, your Honour. Your Honour, could I ask your Honour to consider whether to give that direction tomorrow morning? It may be that some members of the jury don't understand that concept and it is fundamental.

MR EDWARDSON: And I agree, and I am grateful to my learned friend.

HIS HONOUR: I will do so.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: That was the only matter?

MR STRICKLAND: That was the only matter, your Honour.

HIS HONOUR: Thank you.

I will adjourn.

ADJOURNED 12.56 PM TO WEDNESDAY 2 MARCH 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON WEDNESDAY 2 MARCH 2022 AT 9:30 AM

(Continued from 01/03/2022)

Transcribed by: EPIQ

MR EDWARDSON QC: Your Honour, just a reminder about the matter that we've ended with yesterday, that is the right to silence. Thank you.

MR STRICKLAND SC: Your Honour, after the cross-examination of – after the cross-examination of this witness, I'd like to have a look at the video that's just been – about to be tendered.

HIS HONOUR: Yes.

MR STRICKLAND: I may wish – I may wish to speak to the witness about that after cross.

HIS HONOUR: Yes, I understand.

All right then, bring the jury in please.

JURY IN

HIS HONOUR: Now members of the jury, before we proceed any further, yesterday one of the witnesses referred to the accused as having exercised his right to silence. Now some of you may not be aware what this means. So I'm going to very briefly tell you something about that.

Every person in our community has the right, if questioned by a police officer, to decline to make any statements, or to speak to that police officer. Now there are some limited exceptions to that general principle, which are not relevant at the present time. So that generally speaking, if a person is questioned by a police officer, they have the right to decline to make any statements to the police officer. That is a right which is given to everybody in our community, including police officers. Now you must draw any inference against the accused because he has exercised his right to silence in that regard. It is a right which he possesses as a member of the community. And certainly, you cannot draw any inference relating to his guilt from the fact that he chose not to speak to police about these events.

Yes.

MR EDWARDSON: If your Honour pleases. Before I proceed further, your Honour, I seek to tender the Facebook with the caption "Brings a little bit of reality into the argument." That's the Andrew Barram Facebook posting. And also the associated video that's been played to the jury.

HIS HONOUR: Now do you want those separately marked, or marked together?

MR EDWARDSON: I don't mind, your Honour, whatever – as the court pleases.

HIS HONOUR: Might be easier to mark them separately then.

The Facebook entry will be 70 – exhibit 79.

EXHIBIT D79 Facebook entry of Andrew Barram with caption "Brings a little bit of reality into the argument."

HIS HONOUR: And the video will be exhibit 80.

EXHIBIT D80 Facebook video posted by Andrew Barram.

MR EDWARDSON: And I've supplied copies for the jury, your Honour, at least of the hard copy.

HIS HONOUR: Yes, thank you.

Now, Mr Edwardson, you're ready to continue the cross-examination?

MR EDWARDSON: I am indeed, your Honour, thank you.



HIS HONOUR: The witness can be recalled, thank you.

ANDREW BARRAM:

HIS HONOUR: Again, Detective Senior Sergeant, you are still subject to the oath that you have taken in this matter?---I understand, your Honour.

Thank you.

Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Can the witness have in front of him please, your Honour, exhibit 62, tab 4, which is the annexure B to his opinion, namely "Defensive Tactics."

And in particular, Detective Senior Sergeant, could you turn to page 22 of that document?---Sorry page?

Page 22. You should have a heading "Force philosophy"?---Yes.

"The success of an operation will primarily be judged by the extent to which the use of force is avoided or minimised"?---Yes.

That is a philosophy that's taught to all police officers?---Yes.

And of course it's consistent with the law that applies to everybody, including police officers?---Yes.

If you look at the bottom of that page, you'll see "Any force used by a member of the Northern Territory Police must be justified in terms of the *Criminal Code Act*" and it refers to three specific sections. Do you see that?---Yes.

Of course that's been superseded has it not now?---Yeah there – well there's 43BD and 2IE, yes.

Right, so just for the benefit of the jury, and for the relevance of this case, s 43BD Criminal Code, is the provision that deals with self-defence?---Yes.

Section 208E Criminal Code, is the provision that deals with the reasonable performance of duties defence?---Yes.

And s 148B Police Administration Act, is what's been described as the good faith defence?---Yes.

All three of those defences are available to police officers, as you would understand?---Yes.

And it's in that context that one must understand the notion of the Force Philosophy?---Yes.

In the context of lethal force, if you turn over the page at page 24, we can see that "Any use of force that is likely to cause death or serious harm" is within the definition of lethal force?---Sorry that was page 24?

Yes, page 24, with the heading "Lethal Force" in the centre of the page?---Yep.

And you'll see in quotes "Any use of force that is likely to cause death or serious harm"?---Yes.

That's if you like, a descriptive of what will amount to lethal force?---Yes.

And the points that the – in training, that officers are taught, the points to consider, is that it must be the option of last resort?---Yes.

Could be the subject – sorry, could the subject cause death or serious harm?---Yes.

Is there the opportunity for the subject to cause death or serious harm?---Yes.

Is an officer or third party in jeopardy?---Yes.

Is there any – sorry, is there any less than lethal alternative available and is it likely to be effective?---Yes.

When you came to express your opinion, either in evidence of in writing, you must have had regard to the definition of lethal force in that respect?---Yes.

Can you turn now to the Tactics Options Model, which is on page 27. Sorry, I said tactics. It's Tactical Options Model. That's a model that's, as we can see, that's developed to assist officers in understanding the appropriate level of force in operational situations?---Yes.

And importantly, can I suggest, police officers are taught – and you've expressed these sentiments already, I think, yesterday – as we can see at the bottom of page 27: "Physical confrontations are not static but are dynamic by nature"?---Yes.

Clearly, the confrontation between Zachary Rolfe, Kumanjayi Walker and, in turn, Constable Eberl was a physical confrontation?---Yes.

It was not static, it was dynamic by nature?---Yes.

"The Tactical Options Wheel turns in either direction, moment by moment, to the appropriate option depending on all the circumstances. These circumstances may include factors such as size, special skills, age or sex of the subject and police offender" – officer, sorry. Last paragraph?---Yes.

Now, that – it's expressed in a circle because it's meant to represent the dynamic nature of a situation that might confront a police officer?---Yes.

And the circumstances that confront a police officer – that is, the given circumstances in every case – will be different?---Yes.

And hence, the response will be different?---Yes.

And indeed, as the dynamic situation unfolds – depending upon how it unfolds – that will depend on if you're applying the wheel – or the circle, if I can put it that way – will depend on the response?---Yes.

And no doubt, you had very careful regard to this Tactical Options Model when you came to consider the expression of your opinion in respect of each of the shots that were fired by Zachary Rolfe?---Yes.

I want you to turn now to page 64, which is part 4. And the heading, "Edged and Blunt Weapon Awareness." This is a very important aspect of training for all police officers, is it not?---Yes.

Because in a sense, without tactical and proper instruction, a police officer may not realise the extreme danger that an edged or blunt weapon may pose to that officer?---Yes.

And that's why it's expressed – that is, the training is expressed – in the way it is?---Yes.

And I want to take you to some material aspects of it, if I may. On page 64, it's expressed in this way:

"Members should not assume they will be given warning of an impending edged weapon attack, allowing for time and room to prepare. A person carrying a small, easily concealed weapon with a very limited range is unlikely to reveal it until they are within range. Members facing edged weapons can have fractions of a second to respond if the weapons are employed at a very short range. People who are attacked with edged weapons often don't see it coming until it is too late"

?---Yes.

The sentiments of that paragraph, can I suggest, resonate very much to the circumstances that confronted Zachary Rolfe and Constable Eberl as we saw on 9 November 2019?---Yes.

Kumanjaya Walker was carrying a small, easily concealed weapon in the form of scissors?---Yes.

As you've said, it had the potential to inflict a lethal wound?---Yes.

It was deployed from his pocket in a matter of – a split second?---Yes.

And the whole episode occurs over a very short space of time?---Yes.

An edged weapon is carefully defined in broad terms, can I suggest, as we can see on page 65. That is,

“Any weapon purpose-designed or improvised that has potential to cause injury by cutting, slashing or penetrating. Any object capable of penetrating the skin or of cutting, slashing or drawing blood, it does not have to be sharp.”

And plainly, as you’ve said, scissors fall within that definition?---Yes.

And indeed, in terms of a description of the types of weapon that might be properly described as an edged weapon we can see, can’t we, on page 66 of a list of different types of weapons of that nature? Top of page 66?---Yes, yep.

Which includes stationery scissors?---Yes.

And it’s all part of the training that police officers have an understanding of how to identify not only what is an edged weapon, so that they can deal with it and the response is directly relevant to the type of weapon that’s presented?---I’m sorry- - -

It’s a poorly worded question. I’ll start again. The police officer has to identify whether a person is in possession of an edged weapon by definition?---Yes.

And it’s the fact of an edged weapon that gives rise to this notion that we’ve talked about, knife equals gun or edged weapon equals gun, however you want to express it?---Yes.

And that’s a descriptive that was instilled in all persons who were trained as a police officer and specifically, Zachary Rolfe, when he was going through as a cadet? ---Yes.

And the edged weapon – again, to re-emphasise how potentially dangerous they are. As we can see on page 65:

“Edged weapons don’t jam, stop working or run out of ammunition, they don’t need the user to be highly trained, are easily concealed and are easily accessible, can be easily made from any materials or objects, don’t need to be big, sharp,”

Et cetera, et cetera. In other words, a clear description is given why a person might have a significant advantage and, potentially, dangerous advantage by holding an edged weapon?---Yes.

If we turn to page 67, we can see that the module deals with what's been described in this court as the reactionary gap?---Yes.

And that's something that cadets are taught?---Recruits.

Recruits, I'm sorry. Recruits are taught?---Yes.

And so obviously, Zachary Rolfe must've been taught that because all police officers are?---Yes.

In your own words – and by reference to the module – can you tell the jury what the reactionary gap is and why it's so important?---So – well, there's a relationship between distance and time. The more distance there is between you and the offender, the more time you have to react. There was a number of experiments done – or what became to be known as the Tueller drill, which demonstrates distances at which a person running at you with a knife and time, how fast that they can close that gap. So we're taught to maintain a reactionary gap of the minimums that are quoted in the manual here. So someone that you believe is armed, you should try and maintain a minimum of 6 metres reactionary gap.

And in a sense, an example of that was seen in the video that we played yesterday, isn't it? The video that you posted on Facebook?---The American police?

Yes?---Yes.

I mean, it's an example of how the police officer, because of distance between him and the offender, was able to try and maintain a safe distance?---Yes.

Having regard to, no doubt, what we've called the reactionary gap?---Yes.

And because the offender was visible and at some distance between the two of them, the officer was made – was able to think about commands, which he did? ---Yes.

Like, "Drop the weapon," whatever he said. Words to that effect?---Yes.

He had his weapon – his gun exposed so the offender could see it?---Yes.

Which of course, as I think we discussed yesterday and you accepted, is an entirely different scenario from that which confronted Zachary Rolfe?---Yes.

Can you turn to page 68, please? And you'll see there is what is described in this module as a Timetable of Death?---Yes.

Is that something that police officers are taught as part of their training?---Yes.

And the reason for that, can I suggest, is that it had – it must be brought home to them that if an edged weapon is deployed to a particular region of the body, as

described in that timetable, the potential for death is inevitable and quick?---Yes, well the top padding is arteries.

Of course?---So if an artery is nicked in those areas then that's the timeframe in which you approximately will bleed out.

And as we've discussed, the carotid artery is an area that's exposed?---Yes.

And an area that could be deployed or the use of a weapon such as scissors could be deployed in that region?---Yes.

And fatally?---Sorry, I missed that last bit?

And fatally - with fatal consequences?---Yes.

Thank you. Yesterday Mr Strickland - this is page 907, your Honour, of the transcript - Mr Strickland asked you this question;

"Now, what do you understand by 'immediate incapacitation?---The offender ceasing being able to do what they are trying to do immediately."

?---Yes.

And what you are talking about there is the notion that police officers are taught if they fire their weapon they fire it at the seen body - was it "seen body mass"?  
---Centre of mass.

Central seen body mass, I'm sorry - central seen body mass. And in addition to that the objective is to discharge the firearm to incapacitate as you described in that passage?---Yes.

And that might require one shot. It might require multiple shots?---Yes.

Again, it is case specific - it depends on the individual?---Yes.

And no doubt it depends on where the bullet actually finds its way into the centre seen body mass?---Yes.

Excuse me. A number of reports have been provided to the defence and the court and indeed, evidence has been given since prepared your opinion and I just want to ask you whether those reports - or parts of the evidence - have been brought to your attention before you commenced to give evidence in court today. Are you aware that two eminent medical practitioners by the name of Botterill and Towsey gave evidence in these proceedings?---Yes.

And were you provided with their reports or their transcript?---No.

Has it ever been brought to your attention, for example, the extent to which any one of the three shots that Zachary Rolfe fired had the capacity to in some way impede the movement of the right arm of Kumanjaya Walker?---I have seen that medical report, yes, I correct myself I'm sorry.

In simple terms - and I don't expect you to remember the exact passages, but would you accept that the information that must have been conveyed to you is that none of the three bullets had the potential or capacity to somehow inhibit his movement - that is just the shot itself?---The movement of the right arm - - -

MR STRICKLAND: I object, your Honour.

HIS HONOUR: The movement of his right arm?

MR EDWARDSON: The movement of his right arm, yes.

MR STRICKLAND: And also the word "potential" your Honour. I'm not sure that was the opinion proffered - that it had the potential.

MR EDWARDSON: All right. Nothing was indicted to you to suggest that the shots that were fired - the three shots - inhibited the movement of the right arm?  
---Correct.

Thank you. I want to turn now if I can, to a concept that you referred to, I think yesterday and certainly you do, I think, in your report which is known - excuse me a moment - as the DIAMO plus P model?---Yes.

Now, is the DIAMO plus P model - that expression or that descriptive, if I am using it correctly - is that how it is taught to police officers?---The acronym?

Yes?---It's been removed from the training.

Do you know whether it was specifically used - that is that acronym - at the time that Zachary Rolfe was being trained?---I believe that may have already been removed when Rolfe was trained.

So insofar as you refer to DIAMO plus P model - that acronym - it's not something that would have been conveyed to - in those terms - to Zachary Rolfe?---As the acronym, no.

No. But the acronym itself stands for this, does it not, "D" is "defence of life, serious harm, are police in a position of defending life or at risk of serious harm"?---Yes.

"I" "intent to carry out their action, a threat made or implied"?---Yes.

That's the intent?---Yes.

Of the individual?---Yes.

Who is armed. "A" "ability to carry out their intent"?---Yes.

Again, that's the ability of the offender to actually carry out or to use the weapon in the way that it presents itself. "M" means to "carry out their actions or threat"?---Yes.

And "O", "opportunity to carry out the action or threat"?---Yes.

And "P" is the "preclusion of all other options"?---Yes.

You considered the elements of that model, did you not, in determining how you arrived at the conclusions that you had expressed in this court as to the appropriateness of each of the shots that were fired by Zachary Rolfe?---Yes.

I want to deal now if I can, with shot 1. Your opinion is expressed in these terms, is it not;

"It appears to me that Rolfe fired shot 1 in defence of Eberl, in line with training to have drawn and fired his firearm Rolfe must have formed the belief that death or serious harm would result to Eberl and that he had no other option than to shoot to protect Eberl from being stabbed. In my opinion that would be a reasonable belief at that moment in time, given the following circumstances".

They are your words?---Yes.

That's the way in which you described the way in which he responded from your perspective, having looked at the body-worn video in respect of shot 1?---Yes.

And you identified, did you not, a total of six circumstances which gave rise to the expression of that opinion? I will list them for you, I don't expect you to remember off by heart. "1, prior knowledge that Walker had armed himself two days prior to resist arrest"?---Yes.

You are there referring, of course, to the axe incident?---Yes.

"2. Rolfe had seen a bladed weapon in Walker's hand"?---Yes.

That must've happened of course after he produced it from its concealed right hand pocket - or most likely from there. "Rolfe had actually been stabbed by Walker with that improvised weapon, the logical extension of which is that if Walker was prepared to stab Rolfe, he was also prepared to stab Eberl"?---Yes.

"4. Eberl was in close physical contact with Walker, who was still armed"?---Yes.

"5. Police training around the potential lethality of edged weapons, particularly when in close proximity"?---Yes.



"6. Such close proximity means there is not time or distance in which to consider and deploy other tactical options"?---Yes.

So it's the combination of all of those circumstances that gives rise to the expression of your opinion that shot 1 would be a reasonable - sorry - shot 1 was reasonable and proportionate in the circumstances?---Yes.

Do you accept, Senior Sergeant, that shot 1 did not incapacitate Kumanjaya Walker? ---Yes.

You've told us that the training is that you can continue to fire until incapacitation is affected?---Or the threat is eliminated.

Or the threat is eliminated. After the firing of shot 1, by that stage Rolfe must have known - or you have said as much - that (a) he'd been stabbed?---Yes.

We know that Kumanjaya Walker maintained control at all relevant times in his right hand of the scissors which are a potentially fatal weapon?---Yes.

The firing of that shot did not remove the scissors from his right hand?---Yes.

Eberl, after the first shot, remained in close physical contact with Walker, who was still armed?---Yes.

Police training around the potentially - potential lethality of edged weapons, particularly in close proximity, applied equally, did it not, after the first shot had been fired?---I don't know about equally. It depends on what moment and time you're talking about.

Come on, they're in combat together, they're on the ground - they're fighting. We know that Kumanjaya Walker has got this pair of scissors in his right hand - they are in close proximity to each other are they not?---Yes.

Because of their proximity there is not time or distance in which to consider and deploy other tactical options?---Yes.

So it would seem, that even in respects of shots 2 and 3, each one of the circumstances that gave rise to your opinion in respect of shot 1 apply?---No.

Kumanjaya Walker, or the threat of the scissors, was not removed until the handcuffs were placed on his wrists?---Yes.

After the first shot, and indeed after the second and third shots, he was still not incapacitated, was he?---Not fully, no.

Well, there's no - in so far as training is concerned, and the way in which you've described what is incapacitation, you don't talk in terms of whether you're fully

incapacitated, or partially incapacitated, or maybe incapacitated. You either are you're not?---Well it talks about the ability to carry out your intent. And once they're on the ground, it's my contention, he did not have that ability.

Well first of all, you've already acknowledged yesterday, and I don't want to go back over all this again, that we have no way of seeing whether his right arm had the capacity to deploy those scissors, on the body-worn video?---Yes.

We know that they remained in his hand throughout?---Yes.

We know, having looked at the video, and I can replay it if need be, but despite directions being given by multiple police officers to let go of the scissors, or drop the scissors, he did not comply?---That wasn't prior to shots 2 and 3.

I beg your pardon?---That was after - - -

No, I'm talking about even after 2 and 3 - - - ?---Yep.

- - - that's what I'm talking about?---Well, was he able to comply?

He was – when you say was he able to, you don't know do you?---No.

Because you weren't there?---No I wasn't.

All you can say, at best, is try and interpret what you can see on that video?---Yes.

Without knowing what was going through Zachary Rolfe's mind, what he could see, and what he was thinking?---Yes.

As you acknowledge in your report?---Yes.

And you accept, do you not, that at no stage, until the handcuffs were finally placed on his wrists, was Kumanjaji Walker ever compliant?---Yes.

He consistently continued to resist?---Yes.

After the first shot?---Yes.

And after the second and third?---Yes.

Are you familiar with a memorandum from the Acting Commander Crime Command to the Deputy Commissioner of Investigations and Capability, dated 25 November 2019, dealing with Operation Charwell, its structure and resourcing?---No.

I want you to look at the document which is now produced to you.

A copy for your Honour, too.

Just familiarise yourself with the document briefly if you could please. Have you had enough time to look at it yet?---Oh how much of it do you want me to read, or would you - - -

Well first of all, you've never seen that document before?---No.

But you're aware of this much, are you not -

I'll have it marked for identification, your Honour, if I may.

HIS HONOUR: That'll be marked for identification with the letters AI.

MFI AI Memorandum from Acting Commander Crime Command to Deputy Commissioner of Investigations and Capability, dated 25 November 2019.

MR EDWARDSON: Thank you.

You were part of the Criminal Investigation Team of Operation Charwell?---No.

You were not?---No.

Were you not identified as Senior Sergeant Andrew Barram, subject matter "Expert, Northern Territory Police of the Criminal Investigation Team"?---Yes, but I wasn't part of the investigative team.

All right. You were the expert that was engaged by the Investigation Team, in particular, Detective Acting Superintendent Kirk Pennuto, and Detective Acting Senior Sergeant Wayne Newell?---Yes.

For the purposes of providing the expert opinion?---Yes.

And the first opinion that you provided was the very first statement that you've given, which I think was dated 13 March 2020?---Yes.

We know that Zachary Rolfe was arrested on 13 November 2019?---Yes.

And you'd know, from what you've been told and what you've read, that for all intents and purposes, on 13 November, there was no real investigation at all. There had been no investigation?---I wasn't involved in it - - -

No?---So I don't know.

What happened was this. He was arrested on 13 November 2019, without any meaningful investigation at all - - -

MR STRICKLAND: I object.

HIS HONOUR: On the grounds?

MR STRICKLAND: On the grounds that it's put as a proposition, as distinct from something this witness knows, or might have known.

HIS HONOUR: Well the witness I'm sure, is - - -

MR EDWARDSON: Your Honour, it's probably put to - - -

HIS HONOUR: - - - perfectly capable of saying if he doesn't know.

MR EDWARDSON: That's true.

To your knowledge, was there any meaningful investigation conducted by anybody, before Zachary Rolfe was arrested on 13 November 2019?---Yes, this document says - - -

Sorry?---This document even says that it was.

What investigation occurred?---Well it was after it was referred to the Director of Public Prosecutions.

It might have been. But I'm talking about what investigation had occurred. There was no investigation?

MR STRICKLAND: I object.

THE WITNESS: I don't know.

MR STRICKLAND: I object.

MR EDWARDSON: Beyond the body-worn - - -

HIS HONOUR: Well the answer is he doesn't know.

MR EDWARDSON: I understand.

Beyond the body-worn video, it's a question that's better directed to Detective Pennuto, who'll be coming in due course. There's a question I overlooked before, in terms of alternative options or one option, in the context of the exchange that took place, in respect of shots 1, 2 and 3?---Yep.

He had, as you know, that is Zachary Rolfe, had a Taser on him, a spray or baton?---Yes.

It's police training, however, is it not, that these other weapons are generally not the best option where an edged weapon is involved, due to the potential lethality of an edged weapon?---Well the training is to try and have a lethal cover, and then the second person can go to other options.

Well on – reading from your report, have a look at page 136 of your report – paragraph, sorry, 136, on page 35. Did you express yourself in these terms. I'll perhaps start at 135, "The next question to ask is did Walker have the opportunity to stab Eberl." And your response, "Given that Eberl was in close physical contact with Walker, and that Walker's right arm was not restrained, there was opportunity for Walker to stab Eberl"?---That was while- - -

MR STRICKLAND: Your Honour, I object. I think the context of par 135- - -

HIS HONOUR: Yes.

MR STRICKLAND: - - -needs to be- - -

MR EDWARDSON: Yeah all right. I'll put - - -

HIS HONOUR: Yes.

MR EDWARDSON: I'll go back to when we were discussing before, the DIAMO plus P model. And if you go to the preceding page, you'll see that applying that model, you deal firstly with what I'll call shot 1. Do you see that?---Yes.

And starting at par 131, "In applying DIAMO plus P model to shot 1, the first question to be asked is, 'Are police in a position of defending life or at risk of serious harm.'" And you said, "It is my opinion that Eberl was at risk of serious harm or death from being stabbed with the scissors"?---Yes.

132, the next question to ask is: "Did Walker have the intent to stab Eberl?" You expressed your opinion in this way: "It is my opinion that, given he had already stabbed Rolfe, Walker had the intent to stab Eberl and anyone else who might attempt to arrest him"?---Yes.

133. The next question to ask is: "Did Walker have the ability to carry out the act of stabbing Eberl?" "Walker had" – and your response –

"Walker had already demonstrated this ability by stabbing Rolfe. Walker was a reasonably fit 19-year-old male, approximately 172 centimetres tall and of thin build. Walker had no physical injury, illness or impairment as confirmed in the autopsy report. Walker's right hand, that contained the scissors, and his whole right arm were unrestrained"

?---Yes.

134. The next question to ask is: "Did Walker have the means to carry out a stabbing against Eberl?" And you said,

"It is my opinion that, yes, Walker had the means, which were the scissors, which is the identical means used by Walker to stab Rolfe. Walker was armed

with a pair of scissors that were 12.5 centimetres long from end to end. Walker held them in an ice pick or stabbing grip, as opposed to a thrusting grip, in his right hand. Rolfe's body-worn video indicates at the point where handcuffs were being applied to Walker, that Walker was holding the scissors with his index finger inserted through one of the rings and holding the shanks as a handle, with the blades projecting from the bottom, or little finger, side of his hand. Body-worn video shows Walker use the scissors in a downward stabbing motion to stab Rolfe. The way that Walker held the scissors indicates some experience with using scissors as an improvised weapon, or at least some careful consideration as to how a pair of scissors may best be deployed as a weapon."

Is that what you said?---Yes.

That was the opinion you expressed?---Yes.

135. The next question to ask is: "Did Walker have the opportunity to stab Eberl?" Your response: "Given that Eberl was in close physical contact with Walker and that Walker's right hand was not restrained, there was opportunity for Walker to stab Eberl"?---Yes.

136. The next question to ask is: "Had Rolfe precluded all other options?"

"As discussed above, Rolfe had the options to draw his Taser, spray or baton instead of his firearm. However, police training is that these weapons are generally not the best option where an edged weapon is involved, due to the potential lethality of an edged weapon. Once the firearm was drawn, Rolfe had the option to direct Walker to drop the knife at gunpoint, using dynamic verbal commands such as, 'Police, drop the weapon,' before firing. However, the time this would've taken could have given Walker sufficient time to break out of Eberl's headlock, placing him at greater risk of being stabbed by Walker. It appears it may have been impracticable to call on Walker to drop the weapon"

?---Yes.

137. "Therefore, with regards to shot 1, all elements in the DIAMO plus P model had been met and therefore, Rolfe's action in firing shot 1 when he did was a reasonable action in that moment and was in accordance with his training"?---Yes.

And I suggest to you, Senior Sergeant, that apart from the fact that Eberl was on the mattress engaging in combat with Kumanjayi Walker, nothing had changed. He was not incapacitated by shot 1. You've told us that?---Yes.

You can't see the scissors and you couldn't see the scissors at any stage or where they were on the video. You've told us that?---Yes.

You've accepted that you can't see on the video whether his right arm was restrained or precluded from deploying those scissors against Eberl. You've told us that?---Can't see it, yes.

No, you can't see that. And you've told us that it really is about the perception of the individuals who are actually concerned, because only they can say what they saw, what they sensed and why they reacted in the way that they did?---Yes.

In other words, the training is that it's the individual that has to make the actual decision?---Yes.

And the individual makes that decision by reference to the threat as he or she perceives it to be at the relevant time?---Yes.

In a matter of seconds, in this case?---Yes.

And you've accepted – as you must I suggest, because it's self-evident on the body-worn video – that at no stage from the time that Kumanjayi Walker produced those scissors right through until after the third shot had been fired – and indeed, well after that – did he ever show any sign of being incapacitated?---Yes.

He was non-compliant throughout?---Yes.

He did nothing that he was directed to do by either one of those police officers or indeed, by – I think it's Constable Hawkings, from outside?---Yes.

And the only time he becomes restrained and the scissors are physically removed from his hand is at the time of handcuffing?---Well, you're asking me about two different concepts there, sir.

Well it's true, isn't it? The only time – the scissors weren't removed until he was physically restrained by means of handcuffs?---Yes.

And even after he'd been shot three times, he even said, "I'm going to kill you"?---Yes.

Which is a further indication of his state of mind, is it not – that is, what he intended to do or might have done to either one of these police officers, given the opportunity?

MR STRICKLAND: I object.

HIS HONOUR: Yes. This witness can't speculate about what was in his mind.

MR EDWARDSON: No, you're quite right, your Honour. I withdraw the question. Well, it's upheld anyway. Sorry, your Honour.

HIS HONOUR: Yes.

MR EDWARDSON: Excuse me. Nothing further, thank your Honour.

HIS HONOUR: You wanted to – short break at this point?

MR STRICKLAND: Yes, thank your Honour.

HIS HONOUR: Members of the jury, will you retire please. Just for a few moments.

JURY OUT



HIS HONOUR: Yes, could you wait outside for a moment, please?---Yes, your Honour.

WITNESS WITHDREW

HIS HONOUR: Just before I adjourn. I note that this witness gave evidence yesterday to the effect that it was an option available to the accused whilst the accused was struggling with – sorry, whilst the deceased was struggling with Constable Eberl – for him to use empty-hand tactics. The jury do have a copy of all of these documents that have been tendered. If I can take you to page 68.

MR STRICKLAND: Page 68 of which document, your Honour?

HIS HONOUR: Sorry. Of the Defensive Tactics document. At the very top of that page – and this is in relation to, as I understand it- - -

MR STRICKLAND: Would your Honour just excuse me for one moment while I get that document?

HIS HONOUR: Certainly.

MR STRICKLAND: I won't be long. Excuse me, your Honour.

HIS HONOUR: This is in relation to Edged and Blunt Weapons Awareness.

MR STRICKLAND: That's exhibit 37 as well, I think. Is that correct, your Honour?

HIS HONOUR: All right, and- - -

MR EDWARDSON: 52, tab 4.

HIS HONOUR: There's – at the top of page 68. It's, "Points that May Save Your Life." And I note that it says, "Do not use empty hand techniques unless it is not possible to use a firearm." Now, I don't know whether either of the parties intended to address that issue.

MR EDWARDSON: Your Honour, I should've. I overlooked it and I'm grateful to your Honour. I'd seek your Honour's – it doesn't – I don't have any difficulty with M Strickland's – now that the jury's adjourned. Rather than bring them back and then put them back out again, he can speak with him as he sees fit. But I would like your Honour's leave just to put that topic before I finally complete my cross-examination.

HIS HONOUR: Yes, because I think it may be important. The jury is going to have that document.

MR EDWARDSON: Of course.

HIS HONOUR: All right. I'm quite content to give you that leave. And- - -

MR EDWARDSON: Thank you.

MR STRICKLAND: I have no objection to it, your Honour. Your Honour, would it be convenient just to take the short – an early morning tea?

HIS HONOUR: All right.

MR STRICKLAND: Thank you.

HIS HONOUR: And I'd ask that that be then communicated to the jury as well, that we'll take the morning tea adjournment at this point. Thank you.

ADJOURNED

RESUMED

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HIS HONOUR: Bring the jury in please.

JURY IN

MR EDWARDSON: Your Honour, there's one matter that I overlooked, and with your Honour's leave, I'd just seek to complete a couple more questions with Senior Sergeant Barram.

HIS HONOUR: Thank you, well I'll grant you that leave.

The witness can be recalled.

ANDREW BARRAM:

HIS HONOUR: Yes.

XXN BY MR EDWARDSON:

MR EDWARDSON: Senior Sergeant, sorry I overlooked one matter that I just want to address.

At page 934 of the transcript, your Honour.

I'll just repeat what you said in answer to questions put by Mr Strickland. He said this,

"Senior Sergeant, in your opinion, you – sorry, you've given evidence that you believe that the firing the shots two and three were not reasonable." And you said "Yes."

Question, "In your opinion, were there other lethal options available to Constable Rolfe?---Yes."

"From the time Constable Eberl and Kumanjayi Walker were on the mattress?---Yes there were." "And what other non-lethal options were there available to him?---Well he could have used his defensive tactics to help Eberl control Mr Walker."

"And do you mean – and do you mean by defensive tactics?---Well empty hand tactics, moving in, and taking control of, or helping take control of Walker on the ground."

"And empty hand tactics are?---Tactics that don't involve a weapon"

?---Yes.

That's the evidence that you gave?---Yes.

Can I direct your attention please to exhibit 62, tab 4, and in particular part 4, which is the Edged and Blunt Weapon Awareness Model? And in particular page 68. You've given evidence that this is the model, this is the training, this is what police

officers are taught, specifically in the context of edged and blunt weapon awareness?---Yes.

And the training specifically and unequivocally says, does it not, under the heading "Points that may save your life." "Do not use empty hand techniques, unless it is not possible to use a firearm, e.g. attack is spontaneous and retreat is not possible"?  
---Yes.

In this particular case, Zachary Rolfe chose to deploy his firearm, in terms of firing shots 2 and 3?---Yes.

In other words, he did not use empty hand techniques?---No.

Which is consistent with the very training that he was given?---Well it says here, "Retreat not possible." Retreat was possible in that circumstance - - -

But not in the context - - - ?---Officers could have disengaged.

- - - not in the context of Constable Eberl, as you well know, Senior Sergeant?

MR STRICKLAND: I object to "As you well know", your Honour.

HIS HONOUR: Well - - -

MR EDWARDSON: Not in the context of Constable Eberl though?---Yes. He could have disengaged.

He could have?---Yes.

And if he disengaged, Constable Eberl could be dead?---No he couldn't, no.

What if he got stabbed in the carotid artery?---How was that going to happen in that position?

Oh Senior Sergeant, we've been through that before.

Nothing further, thank you, your Honour.

HIS HONOUR: Yes, re-examination.

REXN BY MR STRICKLAND:

MR STRICKLAND: I just want to ask you some questions about exhibit 80. The video of the shooting from the United States?---Yes.

Now you've watched that video in court?---Yes.

And you watched it at the time you shared the Facebook post. You saw the assailant with the knife being shot, is that correct?---Yes.

In two separate phases?---Yes.

One right at the end?---Yes.

When he'd had the officer – when he'd grabbed the officer?---Yes.

And an earlier time, when he'd been shot running towards the officers?---Yes.

Are you able – in relation to that first phase, can you tell from the video how many of those shots had hit the target?---No.

Can you tell if any shots had hit the target, whereabouts on the target he was hit?---No.

Now you were asked some questions, this is at 978, about the training in – of police officers in dynamic situations which can – where things can change in a matter of split seconds?---Yes.

Are police officers trained to – how to react in dynamic situations, where things can change in split seconds?---Yes.

And what is that training?---Try and maintain your distance, and constantly reassess the situation.

You were asked, this is at 974, you were – you agreed with Mr Edwardson, that Mr Rolfe did not have the luxury of pushing the pause button?---Yes.

And you were asked this question. “He had to respond instinctively and intuitively, consistent with his training, to evade dynamic and” – sorry, I'll start again.

“He had to respond instinctively and intuitively, consistent with his training, to a very dangerous and dynamic situation?---Yes”

?---Yes.

Was – were Northern Territory Police Officers trained to respond instinctively and intuitively to dangerous and dynamic situations?---Well the firearms training program's two weeks long, and we train until the skills are embedded of drawing a firearm and we're also trained that with other less lethal options as well.

And at the time that Constable Eberl and Mr Walker were on the mattress in the two or three seconds before shots 2 and 3 were fired, what instinctive and intuitive responses would you expect Mr Rolfe to have followed, based on his training?---Well, he was at some distance and to reassess.

So when Mr Rolfe fired shots 2 and 3, in your opinion did Mr Rolfe in fact act consistently with that training in responding instinctively and intuitively to that dangerous situation?---No. No he didn't.

Why do you say that?---Well, there's no time limit. He could've reassessed for as long as he needed to.

You said that DIAMO plus P, the acronym was not taught to police officers at the time Mr Rolfe was trained?---Yes.

But was the content of that notion, DIAMO plus P taught?---Yes.

At that time? Could the witness please be given MFI Y. That's your - have you got your statement in front of you?---Yes.

Now, you were taken to par 128?---Yes.

Which related to the basis or the reasons why you were of the opinion that the first shot was reasonable - the first shot fired by Mr Rolfe was reasonable?---Yes.

And you were taken through the six factors?---Yes.

In that paragraph?---Yes.

And then you were read through - it was read to you the various paragraphs which elaborated those reasons?--\_Yes.

And you were asked whether those six factors applied to shots 2 and 3?---Yes.

And you said that they did not?---Yes, correct.

Why do you say that?---Because prior to shot 1 they were still on their feet. It was a very, very dynamic situation. After shot 1 the video shows that Mr Walker had some kind of reaction to the shot, sufficient for Mr Eberl to be able to take him down to the ground and it was very much a static situation once they were on the ground.

What do you mean by that?---He was restrained by Mr Eberl.

Now, you were asked this question - this is today - you were asked this question today. This is - "He did nothing" that's Mr Walker - "did nothing that he was directed to do by either one of those physical officers?" And you agreed?---Yes.

You said, "The only time" - this is the question - "The only time that he becomes restrained and the scissors are physically removed is at the time of handcuffing?" And your answer was, "You are asking about two different concepts"?---Yes.

Do you recall that answer?---Yes.

What two concepts - what two different concepts were you referring to?---Well, restraint and being handcuffed.

Well, in your opinion was he restrained at any time before he was handcuffed?  
---Yes.

When, in your opinion?---He was restrained using taught holds by Constable Eberl.

At what point in time?---Almost immediately after he hit the ground and Constable Eberl went into a mount position and then he went into a side control position.

So do you mean before shot 2?---Yes.

You were asked this question today. "You've accepted that at no stage from the time that Kumanjayi Walker produced those scissors right through until well after the third shot had been fired did he ever show any sign of being incapacitated"?---Yes.

Do you recall that question? You said, "Yes". What do you understand by the term "incapacitated"?---Loss of the physical ability to carry out an intent.

And what does that mean?---Well, one example is brain death. You can't carry out any intent - your brain can't send any signals. Another is severing the spinal column or - you know, if your brain can still send a signal, if you're restrained you can't then carry out that but if you weren't restrained you could.

So it's in those senses you've described you refer to the words - - -?---Yes, well the term that we use in police training is "immediate incapacitation".

And what does that mean?---Essentially that means brain death or the severing of the spinal column with a bullet. The best way to achieve that is a round through the nasal cavity which will destroy the brain immediately.

Is that the sense in which you said he showed no signs of being incapacitated?  
---Yes.

Finally, you were asked some questions about exhibit 62 at page 68. Can you go to that please?---Of my statement?

I am sorry, my mistake. Can the witness be shown exhibit - have you got exhibit 62? That's the Defensive Tactics Manual?---Yes.

If you go to tab 4, page 68. Now, you were asked about that first point, "Points that may save your life"?---Yes.

And you were asked about the application of that point, "Do not use empty hand tactics unless it is not possible to use a firearm" - sorry, I'll start again. "Do not use empty hand techniques unless it is not possible to use a firearm, e.g., attack is



spontaneous and retreat is not possible". And you were asked about the application of that point to the facts of this case. In your opinion does that point or training - does that apply to the circumstances in which Constable Rolfe was in at the time of the - at the time Constable Eberl and Mr Walker were on the mattress?---No.

And why is that?---It wasn't a spontaneous attack.

When you say "It wasn't" I'm asking about what do you mean by that?---By that point - well, the spontaneous attack occurred prior to shot 1. After that everyone knew that the weapon was in play. Mr Rolfe had made some distance and he had an opportunity to reassess.

Is it your opinion that empty hand techniques were appropriate or were an option when Constable Eberl and Mr Walker were on the mattress?---Yes, and Constable Eberl was using empty hand tactics.

They are my questions, your Honour.

HIS HONOUR: Thank you. You can stand down.

WITNESS WITHDREW

HIS HONOUR: Yes.

MR EDWARDSON: Yes, your Honour. I am sorry, there is a matter that my learned friend has brought to my attention before. I need to raise it very briefly in the absence of the jury. I do apologise.

HIS HONOUR: All right. Sorry, members of the jury. I'm going to have to ask you to retire again.

JURY OUT

MR EDWARDSON: Thank you.

HIS HONOUR: Yes?

MR EDWARDSON: Your Honour, I think it was last night – but either way, last night or this morning – my learned friend has put us on notice that they propose, through Detective Pennuto, to seek to tender what is said to be the service or training record of my client when he was with the army. Your Honour, I'll ask that a copy be presented to you, if it could. It had been disclosed a long time ago I hasten to add, your Honour.

HIS HONOUR: Yes.

MR EDWARDSON: But we were reminded this morning that they propose to tender it. Your Honour, we object to the tender of this document. Your Honour, the prosecution – whilst they opened on the fact that my client was previously a serving member of the Australian Army, no evidence has been adduced at all of any connection or correlation between his service in the army and the events which took place on 9 November 2019. Or how his service record in any way impacts on him as a police officer in the Northern Territory.

In other words, apart from the fact that he'd previously been in the army – which gives some background to who he is and where he comes from before he went into service as a Northern Territory Police Officer, we submit that there is no relevance at all and no basis upon which the jury, properly instructed, could use this information to inform them about the events on 9 November or the charges before the court.

HIS HONOUR: Right, thank you.

MR STRICKLAND: Your Honour, we opened – and I'm just using that as a starting base – we opened – and this is at page 11 of our opening – of the fact that the accused had received training both in the Northern Territory Police and the Australian Defence Force in firearms – firearms training and basic combat training. His training in relation to weapons – the use of weapons, in my submission, is directly relevant to the issues in this case. One of the matters that the Crown have to prove is the intent when he fired the weapon.

HIS HONOUR: Yes.

MR STRICKLAND: And we say there was an intent to kill or, at least, an attempt to-  
- -

HIS HONOUR: Cause serious harm.

MR STRICKLAND: Cause serious harm. And his training in relation to what he knew about what he was supposed to do when he fired the weapon, where he was supposed to look, the effect on – of firing at close range. We say that's relevant to

his state of mind. And whether he received that training in the Northern Territory Police or whether he received it in the Australian Defence Force, in my submission, is relevant to that. Your Honour, Mr Edwardson has repeatedly and appropriately drawn attention to the limitations of the body-worn.

HIS HONOUR: Yes.

MR STRICKLAND: And a repeated and effective point he has made is that what one can see in the body-worn may not be what the accused saw. And that's clearly a critical issue.

HIS HONOUR: Yes.

MR STRICKLAND: But what is really important is what did the accused see at or immediately before firing the shots 2 and 3.

HIS HONOUR: Yes.

MR STRICKLAND: And so what he was trained to see – what he was trained to look at, in my submission, is of real relevance. And therefore, his training in relation to the use of firearms, including before he joined the Northern Territory Police, is relevant to that issue.

HIS HONOUR: Do I understand that you intend to go no further than to tender this document?

MR STRICKLAND: In relation to this witness, that's correct.

HIS HONOUR: Are you calling any other witnesses to give evidence about it?

MR STRICKLAND: No, I'm not.

HIS HONOUR: Then how does this document inform the jury about the content of any training that he was given as a member of Armed Forces?

MR STRICKLAND: Well, your Honour, I am required – I understand there will be a defence case. I'm required to tender all the material in the Crown case and there is - -

HIS HONOUR: But it's still – you're required to tender the material in the Crown case, but you must be able to demonstrate that it's relevant.

MR STRICKLAND: That's right. Well, can I just – I can take your Honour to the document itself.

HIS HONOUR: Yes.

MR EDWARDSON: Grenade launcher.

MR STRICKLAND: I beg your pardon?

MR EDWARDSON: Grenade launcher

MR STRICKLAND: My learned friend says, I think possibly facetiously, "Grenade launcher." There are – if your Honour goes to page 3.

HIS HONOUR: Yes.

MR STRICKLAND: Under the heading, "Course History."

HIS HONOUR: Yes.

MR STRICKLAND: There is Special Forces Entry Test.

HIS HONOUR: Yes.

MR STRICKLAND: Basic Combat Comms, Force Preparation.

HIS HONOUR: Yes. Well, there are a number of courses that are set out in the document.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: There are dates which one could interpret the document as indicating that the course was taken between certain dates or at a certain date. And there's an indication as to whether the accused passed the course or dropped the course.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: But at the end of the day, it doesn't tell us anything about the content of those courses.

MR STRICKLAND: Well, your Honour, can I indicate this? If the – and I've discussed with my learned friend – if the accused is called to give evidence, I intend to ask him about that training. There may be an objection, but I intend to. And I intend to show him this document if required. And I don't want to be – I don't want it to be said, "Well, you're splitting your case."

HIS HONOUR: I understand your concern, but you have to take these things one step at a time.

MR STRICKLAND: I understand, your Honour.

HIS HONOUR: And the first step in trying to tender a document in the Crown case is to demonstrate that it's relevant. And at the present time, you haven't

demonstrated as relevant. It may become relevant if the accused goes into the evidence and you cross-examine him on this issue.

MR STRICKLAND: I understand. But your Honour, in light of what your Honour has said, I will not tender this document before the witness. I'll simply have it – but I will ask him to inquire whether he's obtained the service record and then I'll have it marked. I'll do it that way.

HIS HONOUR: All right, that's fine.

MR EDWARDSON: There will be an objection to that. We'll deal with it when it happens.

HIS HONOUR: I'm sorry?

MR EDWARDSON: There will be an objection to that course, but we'll deal with it when it happens, after the close of the Crown case.

MR STRICKLAND: I think what my learned friend is saying is there will be an objection, not to the marking- - -

HIS HONOUR: There will be an objection to cross-examination of the- - -

MR STRICKLAND: Absolutely, yes. No, I understand.

HIS HONOUR: I understand that, yes.

MR STRICKLAND: I think both parties know their position and are forewarned.

HIS HONOUR: All right, thank you. Yes, then. Can we bring the jury back in.

JURY IN

MR STRICKLAND: Yes, your Honour. I call Superintendent Kirk Pennuto. Your Honour, excuse me for a moment.

KIRK PENNUTO, sworn:

HIS HONOUR: Yes, Mr Strickland.

XN BY MR STRICKLAND:

MR STRICKLAND: I'll ask you to speak slowly and clearly. Everything you say will be recorded. If you'd like me to repeat the question, or you don't understand my question, please say so?---Yes.

And speak up please?---Yes.

What's your full name?---Kirk Joseph Pennuto.

What's your rank?---Substantive Superintendent. I'm currently acting as a Commander.

How long have you been a member of the Northern Territory Police Force?---Since 2011.

Now in November 2019, what was your rank then?---I was a Substantive Senior Sergeant, acting as a Superintendent.

When you say "substantive", what does that mean?---That's my rank. But I was performing higher duties.

What was your -- where were you stationed at that time in November 2019?---The Crime Command.

And what function does the Crime Command perform?---It has oversight across the Territory for investigation of crime.

Now is it the case that you became the officer in charge of having responsibility and oversight of investigative matters relating to the criminal investigation into the death of Mr Kumanjayi Walker?---Yes.

When did you cease your involvement as the officer in charge?---Approximately 12 months after the event. November 2020, I think, the start of then.

And why did you cease your involvement in November 2020?---I was given a different role, and transferred to Katherine.

Did you have a number of police officers in your team assisting you with that criminal investigation?---Yes that is the case.

Detective Sergeant Wayne Newell?---Yes, Mr Newell was part of the team.

Mr Greg Kean?---Yes Mr Kean was too.

And Mr Brett Wilson?---Yes.

Did you investigate – did your involvement in that investigation, into the shooting death of Mr Walker, commence in the evening of 9 November 2019, when you received a call?---Yes I was contacted that evening, yes.

And that's when you began your role as – or sorry, did you begin your role then as officer in charge?---No.

When did you begin your role as officer in charge?---10 November, the following day.

Now you've made – you've brought to court two diaries, is that correct?---Yes.

And are they your contemporaneous notes of your involvement as the officer in charge?---Yes.

Your Honour, could those two diaries be perhaps marked, either separately or to connote the two separate – the fact that there's two separate documents.

HIS HONOUR: Are they for different years?---They go across years, your Honour. So they start in late 2019, and then - - -

I'm just trying to work out some way in which to differentiate them?---Okay. Yeah, so the first one finishes in December 2019, so you could call that - - -

That one will be marked for identification the letter - - -

MR EDWARDSON: Your Honour, I didn't see it but apparently the officer removed some papers from his diary and put them on the floor, I'd like to know what they are.

HIS HONOUR: Well - - -

MR STRICKLAND: Well perhaps the officer can say what they are?

HIS HONOUR: Yes, I don't want to look at them for the moment, thank you?---I was handed those moments before I walked in. And I asked the gentleman here whether I should put them on the table, and he said bring them with me. So I brought them with me.

MR EDWARDSON: What is the document though is what I'm trying to understand?

THE WITNESS: It's a – it's a memorandum, your Honour, that I was – a police memorandum.

MR STRICKLAND: Your Honour - - -

MR EDWARDSON: I'll deal with it in cross-examination.

MR STRICKLAND: No, I'll deal with it now.

Can I have a look – can I have - - -

HIS HONOUR: Well before we do that, I'm going to mark that diary as AJ, and then the other diary as AK.

MFI AJ Diary one of Kirk Pennuto.

MFI AK Diary two of Kirk Pennuto.

HIS HONOUR: Right, now - - -

MR STRICKLAND: Could I have access to that? This mysterious document.

And the document that has excited Mr Edwardson is described as MFI AI, is that right?---I believe so.

Right, if that could be marked as well.

So it's – it's already been marked.

HIS HONOUR: It's already been marked.

MR STRICKLAND: Your Honour, can I then - - -

HIS HONOUR: It's a copy of MFI AI.

MR STRICKLAND: Yes.

HIS HONOUR: You want to still mark it?

MR STRICKLAND: No thank you, your Honour. I'm sorry, it has already been marked.

HIS HONOUR: All right. Then I'll return it to the witness, unless somebody has any objection my doing so.

MR EDWARDSON: Your Honour.

HIS HONOUR: All right.



MR STRICKLAND: When were you given MFI AI?---About two minutes before I entered the room.

Now you say your role as officer in charge began on 10 November?---Yes.

And were you advised on that date that the accused was offered a chance to speak to the investigators and declined on the basis of legal advice?---Yes.

And you understand that on 12 November 2019, the accused again declined on legal advice, to participate in a record of interview?---Yes.

On 13 November 2019, did you attend Mr Rolfe's home, or residence, at the VOQ in Darwin?---Yes.

What does VOQ stand for?---Visiting Officers Quarters.

And you informed him on that date that he was under arrest, is that right, for the offence of murder?---Yes.

And you gave him a caution?---Yes.

Which is to say he didn't need to say anything. Anything he said could be recorded and used against him?---That's right.

And he confirmed to you he didn't wish to be interviewed?---Yes.

Thank you. I'll show you a document please.

MR EDWARDSON: I object to that, your Honour.

HIS HONOUR: Yes.

MR EDWARDSON: I object to the production of this document to this witness.

MR STRICKLAND: I'm not going to have it tendered, your Honour.

MR EDWARDSON: I don't care. I object to it being produced to this witness.

HIS HONOUR: On what grounds?

MR EDWARDSON: Your Honour, it's a document that we debated a moment ago -  
- -

HIS HONOUR: I know.

MR EDWARDSON: - - - how can this witness possibly discuss, or comment on, or even identify its existence? It has nothing to do with the Northern Territory Police.

HIS HONOUR: I think what you can do is to simply ask the witness at the present time, whether that's a document which he came into possession of, as part of his investigation.

MR STRICKLAND: That's all I was intending to do, your Honour.

HIS HONOUR: Without describing the contents of it.

MR STRICKLAND: That's precisely what I was intending to do.

HIS HONOUR: Yes, well we'll do that.

MR STRICKLAND: Now, in the course of your investigation, you obtained some information, is that correct?---Yes.

And this document was part of the information that you obtained, is that right?---Yes.

I ask it be marked, your Honour.

HIS HONOUR: Yes. That'll be marked for identification, AL.

MFI AL Document provided by Kirk Pennuto.

MR STRICKLAND: Can I show you another document please? Do you recognise that document?---Yes.

And what is it?---It's an internal record from our Adapt system, which is a HR style database.

I tender that.

HIS HONOUR: Exhibit 81.

EXHIBIT 81 Internal record from Adapt system.

MR STRICKLAND: I have copies for the jury, your Honour.

HIS HONOUR: Thank you.

MR STRICKLAND: Could the witness please have a copy that exhibit, your Honour?

Can I ask you to look at the first four entries? The first entry indicates that he attended - Constable Rolfe attended the Constable Recruit Course on 30 May 2016 to 7 August 2016?---Yes.

Then there's another entry he attended that course on 8 August 2016 to 7 December 2016? Do you see that?---Yes.

Do you know why they are separated in two different entries?---No, I don't know.

Then the next entry is that - this is Alice Springs Police Station - can you decipher the next word?---Are you referring to the column headed "Structure"?

The column headed "structure" that's right?---So the reference you are talking about there it says, "Alice Springs Police Station and Wat" - I think it's referring to the watchhouse, which is the custody environment.

I see, and what does that refer to?---It's the same thing as the Alice Springs Police Station, it's just part of that complex.

And then it's got "Alice" - the next entry is "Alice Springs from 1 January 2019"?  
---Yes.

Thank you. Are you aware whether Constable Rolfe completed training admission to the Tactical Response Group?---Yes.

And to your knowledge did he join the Tactical Response Group?---No.

In the course of your investigation into the shooting at Yuendumu did you become of an allegation that Kumanjayi Walker had been involved in break-ins in Yuendumu on or around 9 November 2019 or before?---Yes.

And was it determined by those investigations that there was no substance to the allegation of Mr Walkers' involvement?---There was no evidence.

Let me just ask you just a few brief questions about your ongoing involvement in the investigation. Did you, during the course of your period as officer-in-charge of the investigation did you have overall responsibility for an oversight of briefing any expert witnesses who provided reports as part of the criminal investigation?---Yes.

And was there a particular officer in your team who was tasked with making enquiries of potentially suitable experts?---yes, Detective Senior Sergeant Newell.

And did the briefing of those experts require your approval?---Yes.

Now, can I ask you just to turn please, to your diary, that is the second diary chronologically - I am sorry, your Honour, I have just forgotten what marking that is - AK - MFI AK. And can I ask you to go please, to page 47 on 12 March 2020? And I should say I ask that the witness have leave to have access to his diary. I should have asked that before?

MR EDWARDSON: No objection.

HIS HONOUR: Yes, he may have access to the diary.

MR STRICKLAND: Thank you.

On page 47 do you see an entry on 12 March 2020?---Yes.

At 8:15 in the morning?---Yes.

And does that record a discussion with Wayne Newell ahead of a scheduled meeting he was to have with Northern Territory forensic experts?---Yes.

And in particular a discussion about obtaining an expert opinion about any injuries sustained by Constable Eberl and Constable Rolfe during the shooting incident?  
---Yes.

And is it the case that you were advised that - well, I am going to ask you please to read the entry you made - excuse me for one moment, your Honour?

Now, can you go over the page, to page 48 and on the same day, on 12 March at - I can't read the time - you see there's an entry at 13:11?---Yes, I can see that.

What is the next time please - 15-something or other?---I think it's 15:02 - 3:02 in the afternoon.

3:02 pm. You've recorded having a meeting with Ray Newell, is that correct?---Yes.

To receive an update of - in relation to forensic - meeting with forensics, is that correct?---Yes.

And in particular in relation to the edged weapons that had been recovered, including a pair of scissors, is that right?---Yes.

And also a discussion about wounds or injuries sustained by Constables Eberl and Rolfe, is that correct?---Yes.

Under the heading "wounds" and you were advised that - were you advised that at that meeting everyone agreed that a pathologist was the most appropriate person to provide comment on the injuries to Constables Rolfe and Eberl?---Yes.

And you tasked Mr Newell to approach Marianne Tiemensma at the first instance, is that correct?---Yes.

Thank you. And your understanding was that Wayne Newell did approach Marianne Tiemensma?---Yes.

You understood her to be the Northern Territory pathologist, is that correct?  
---That's right.

Now, can the witness please be shown exhibit 58? Have you got that exhibit?  
---Yes.

And you were aware – if you go please to the second page of that exhibit, four days after the meeting I've just asked you about, you're aware that Wayne Newell sent an email to Dr Tiemensma?---Yes that's right.

It's the bottom of page two, 16 March 3.25 pm?---Yes.

And asking her in that email that she had some questions about the injuries to Constables Rolfe and Eberl, and asking if she's the appropriate person to make comment about those injuries, is that correct?---Yes that's right.

And then you're aware that Dr Tiemensma replied to that email, very shortly after 16 March, at 16.06 pm?---Yes.

And you're aware that she'd told Wayne that she did not think she was the appropriate person to give that opinion, because she – sorry, I'll withdraw that. I'll start again. Sorry, I've made a mistake. 16 March at 3.46 pm she wrote an email to Wayne Newell, saying she didn't think she was the appropriate to give the only formal opinion in relation to this matter?---That's the advice she provided.

Right. Now can I then ask you to turn to your diary, the same diary I was asked about, at page 55?---I'm sorry, page number?

55. Now on 30 March at 7.30 am, were you advised from Detective Sergeant Wayne Newell, that the injuries to Constable Rolfe and Eberl cannot be interpreted by the local forensic pathologist, Marianne Tiemensma?---Yes.

And also that trauma expert, Dr Keith Towsey's unable to provide a suitable interpretation?---Yes.

And the recommendation of Dr Tiemensma was that, and then it's got "V", what's the next word please, or the letters?---V-I-F-M.

VIFM are worth exploring as an option. Do you see that?---Yes I can.

And what does VIFM stand for?---That is a – that's the Victorian Institute of Forensic Medicine.

Right, and under your supervision, were enquiries made of potential experts at the Victoria Institute of Forensic Medicine to provide that opinion about the injuries to Constable Rolfe and Eberl?---Yes.

And were you advised that they – VIFM were unable to identify a suitably qualified expert, or that they – that VIFM itself, was unable to provide a suitably qualified expert?---VIFM, were not in a position to assist.

And you were then advised to obtain an opinion from Dr Paul Botterill, is that right?---Dr Botterill was engaged subsequently, yes.

That is, after 30 March 2020?---Yes.

And you were advised – you then tasked Wayne Newell to obtain an expert report from Dr Botterill, is that correct?---Yes.

Can the witness please be shown exhibit 72.

And you were aware of the report obtained from Dr Paul Botterill on 2 June 2020?---Yes.

Now you were aware that there was a – a preliminary – there was a committal hearing, scheduled to be heard at Alice Springs in – in September 2020?---Yes.

And you were made aware that lawyers for the accused sought to ask questions of certain Crown witnesses, at that preliminary hearing?---Yes.

Expert – that is, sought to ask expert medical witnesses of certain questions?---Yes sir.

Could the witness please be provided exhibit 73.

And if you go to page three of that email chain. Can you see there's an email from Wayne Newell to Dr Botterill, dated 15 July 2020 at 2.52 pm?---Yes I can see that.

And that email, from Detective Sergeant Wayne Newell, sets out various questions for Dr Botterill, in a little box, A, B, and C?---Yes.

And as far as you were aware, they're the questions the lawyers for the accused requested by asked of medical experts?---Yes.

And then there was a follow up email on 28 July by Detective Wayne Newell, was that right? Bottom of page two, 28 July, 10.20 am?---So I can see that email. Just for your information, it's not on page two of mine, but yes it's there, at the top of page three.

Okay, right?---10.20 am.

That's it. Now can you please go back to exhibit 58 I'm sorry. And can you see on – if you go to page three, on the same date, on 15 July 2000 – sorry, on 15 July 2020, there's an email from Paul Morrissey, who's he?---Mr Morrissey was a detective sergeant, who was involved in the investigation team.

And he sent an email to Dr Tiemensma setting out the same questions?---Yes.

Were asked of Dr Botterill?---Yes.

And this was all under your supervision?---Yes.

And they were the questions that the lawyers for the accused wanted to ask Dr Tiemensma?---Yes.

Now I just want to show you another bundle of documents. If I can take you – do you recognise that as a bundle of emails in relation to doctor – communications between – involving Dr Towsey?---Yes.

Yes, I tender that bundle, your Honour.

HIS HONOUR: Exhibit 82.

EXHIBIT P82: Bundle of emails communications involving Dr Towsey.

MR STRICKLAND: And we have copies for the jury, your Honour.

Now, if I can take you to the first page. On 15 July 2020, at 2.47 pm, Detective Newell sent an email to a Dr Keith Towsey?---15 July at 2:47, you said?

That's right?---Yes, I can see that.

And asking the same questions that were asked in relation to Dr Botterill and Dr Tiemensma?---Yes.

And as you understood it, they were the questions the lawyers from the accused wanted to ask Dr Towsey?---Yes.

Then at the top of that email chain on 28 July 2020 at 9:49 am, there was a follow-up email? Request seeking the same information?---Yes.

To your knowledge, did Dr Towsey respond to those – either of those emails?---I don't believe he did respond to that email.

Okay. Or to either of them, I'm talking about?---(No audible response).

I can't hear your answer, sir?---I don't believe so, sir, no.

Thank you. You have made a search of records in relation to Wayne Newell's communications with Dr Towsey; is that correct?---Yes.

Are you aware whether Detective Newell sent photographs of the scissors used by Mr Walker to Dr Towsey?---No, he did not.

Has there been, to your knowledge, any attempt by you or investigating officers under your supervision to ignore any opinions offered by Dr Towsey, relevant to this investigation?---Absolutely not.

Are you aware that your – duties of your officers – sorry, I'll start again. Are you aware that your duty as the officer in charge as to present any relevant medical expert opinion to the court?---Yes, I understand.

And is that what you've done?---Absolutely.

If you go to the next page of exhibit 82, you can see an email from Collette Dickson. You understand she's an officer of the Director of Public Prosecutions?---I can see that email and yes, I'm aware she works for the Director of Public Prosecutions.

And you can see that it was Collette Dickson sent an email to Dr Towsey, attaching four photographs of the scissors?---Yes, that appears to be the case.

And you're aware of an email from Detective Newell to a number of experts, including Dr Towsey, on 24 August 2020?---Yes.

Which includes sending a Dropbox link to various body-worn footage?---Yes.

They're my questions, your Honour.

MR EDWARDSON: Could you just excuse me? No questions, your Honour.

HIS HONOUR: Thank you. You may stand down.

#### WITNESS WITHDREW

HIS HONOUR: Just one moment. Before this witness leaves the court – Superintendent, can you just wait a moment? He does have his diaries with him, which have been marked for identification. So do you want to- - -

MR STRICKLAND: Could I – could someone just confer with him about that your Honour, now?

MR EDWARDSON: Look, your Honour, I can honestly say given that I had no questions, I have no difficulty with those diaries being returned to- - -

HIS HONOUR: All right.

MR EDWARDSON: - - -that officer. He can have them as long he gives an undertaking that if, at any stage for some reason they need to be produced, they will be preserved.

HIS HONOUR: Superintendent, you understand that, do you?

MR PENNUTO: Yes, I do.

HIS HONOUR: All right, thank you. Then you may go, thank you.



MR STRICKLAND: Yes, your Honour. That is the Crown case.

HIS HONOUR: Thank you.

Now?

MR EDWARDSON: Your Honour, my client does propose to give evidence in his defence and we're in a position to start now, if that's convenient to the court?

HIS HONOUR: Yes, it is.

MR EDWARDSON: I call Zachary Rolfe.

ZACHARY ROLFE, affirmed:

XN BY MR EDWARDSON:

MR EDWARDSON: Mr Rolfe, how old are you?---I'm 30 years old.

When were you born?

HIS HONOUR: Just one moment. Can we go through the preliminaries first?

MR EDWARDSON: My apologies.

HIS HONOUR: Now, in terms of identifying the witness for the record.

MR EDWARDSON: Yes. Yes, certainly, your Honour.

Could you please state your name for the record?---Zachary Brian Rolfe.

And how old are you?---30 years old.

And when were you born?---18 August 1991.

And where were you born?---Canberra.

And were you educated in Canberra?---Correct. I finished year 12 in Canberra.

Having completed school, what did you do?---I joined the Australian Army.

And do you know what year that was?---2010 until 2015.

And having joined the Australian Army, did you serve anywhere specifically?---Correct. I was deployed to Afghanistan in 2014, returning in 2015.

And when did you complete your term with the Australian Army?---Mid-2015.

After completing your term in the Australian Army, what did you then do?---I returned to Canberra for approximately 10 months. Did some odd jobs and then joined the Northern Territory Police Force.

And in order to join the Northern Territory Police Force, did that require you to submit an application?---Correct. I had to do an application process, fill out paperwork, give them my CV. I had to a fitness test, a psych test, an aptitude test and then complete an interview with the Board.

And was there a process of induction or training?---Correct. After I was accepted, I moved to Darwin in May 2016 and started my training.

Can you just – I'll come to the specifics in a minute, but can you please tell the members of the jury and the court, please, the process that you undertake for training?---Training is about seven months. It's mainly theory-based training. We would start the day, each day, with either physical training or practical hands-on Defensive Tactics training. That may have changed now, but that's what I was doing for my seven month period. Most our days after that would then be in a classroom doing PowerPoint presentations. We did have three two-week practical blocks, one of which was two weeks of firearms training specifically. Another was two weeks specifically driver training. And the third block was two weeks of investigative-based training.

Could the witness – could Zachary Rolfe have in front of him, please, exhibit 62.

And I want you to turn to tab 4, please?---Yes.

Which is the module dealing with Defensive Tactics?---Yes.

Now, you've been present in court throughout this trial?---Yes.

And you've heard various people refer to this particular document?---Yes, I have.

Does the document – you've seen this document before?---Yes, I have.

Does the document itself represent, in general terms, the training that you received to become a police officer with the Northern Territory Police Force?---Yes, correct.

What I want to do is ask you a little bit about some essential parts of the training. Can you turn to page 22 of the document. And you'll see in that document, there's a heading, "Force Philosophy"?---Yes.

Which reads, "The success of an operation will be primarily judged by the extent to which the use of force is avoided or minimised"?---Yes.

Is that a philosophy that you were trained in?---Yes, correct.

And were you also trained as to the different types of force that might be applied by you as a police officer in the course of your duties?---Yes, correct.

If you turn to page 23 through to 25, you'll see that there are different definitions that deal with minimum force, the unnecessary use of force, lethal force and non-lethal force and, finally, excessive force?---Yes.

The different types of force that are identified in that module, was that part of the training that you received?---Yes it was.

And accordingly, did you have an understanding of what each of those different types of force meant?---Yes, I did.

I'll focus if I can, for present purposes, on the more relevant if I can, and that's at page 24. You'll see that there's a reference there to, "Lethal Force", and it's described as, "Any use of force that is likely to cause death or serious harm"?---Correct.

"Must be the option of last resort. Could the subject cause death or serious harm? Is there the opportunity for the subject to cause death or serious harm? Is an officer or third party in jeopardy"?---Yes.

Is that the training that you received in respect of lethal force?---Yes it was.

So in other words, you were trained that lethal force must be the option of last resort?---Correct.

And if there are any less than lethal alternatives available, and it is likely to be effective, that it should then be applied accordingly?---Correct.

Can you turn to page 26 please. You'll see there that the module deals with Ten Operational Safety Principles?---Yes.

You're familiar with that concept are you?---Yes I am.

Were you trained, or were you taught, in the terms expressed in that module on page 26? That is Operational Safety Principles?---Yes I was.

And is that consistent with your training?---Correct.

I'll turn now to the Tactical Options module – model, I'm sorry. You'll see that's on page 27?---Yes.

Again, does that – is that a model that was taught to you?---Yes, it was.

And specifically, that diagram that we see on page 27, is that something that you recognise?---Yes.

In other words, was it produced to you, as part of your training?---Yes, that was given to us.

“Physical confrontations are not static but are dynamic by nature”?---Yes.

And again, it describes the tactical options, and how the wheel can move or turn, in either direction, depending upon the dynamic situation that might confront a police officer?---Correct.

Is that how you understood the position?---Yes, the way it was described to us was that any one of these options could be your first option, depending on the situation.

Thank you. I want to turn now if I can to – more relevantly, to part 4, which is – commences at page – I think it was 63 from memory, just bear with me. 64, thank you. I want to spend a little bit of time on this if I may. Part 4, “Edged and blunt weapon awareness.” Was that part of your training?---Yes, it was.

Again, you’re familiar with this particular document?---Yes, I am.

And you’ve heard lots of evidence obviously from various witnesses who’ve been taken to this document?---Correct.

Does the document itself represent the training that you received?---Yes.

I want to focus if I can on the last paragraph on page 16 – sorry, on page 64, which says as follows. “Members should not assume they will be given warning of an impending edged weapon attack, allowing for time and room to prepare. A person carrying a small easily concealed weapon with a very limited range, is unlikely to reveal it until they are within range. Members facing edged weapons can have fractions of a second to respond, if the weapons are employed at very short range. People who are attacked with edged weapons often don’t see it coming until it is too late.” Is that an instruction that you received in the context of this part of your training?---Yes, it was.

I’m not going to go through the entire document, but I do want to ask you a little bit about a concept that the jury have heard from time to time, through various witnesses. And they’re described either as edged weapon equals gun, or knife equals gun, as the case may be, depending upon who’s giving that description. First of all, you’ve heard the evidence that’s been given in this trial on that topic?---Yes, I have.

Are you familiar with that expression?---Yes, I am.

What does that expression mean to you, in terms of your training?---The way I was trained was if we were presented – if someone was threatening us with an edged weapon, our first response was to go for our firearm, unless that was impossible.

Were you given any instruction as to if you do draw your firearm, as to pulling the trigger?---If you pull your firearm, if you draw your firearm, you only draw your firearm if you're prepared to pull the trigger. Initially you would present what we call lethal cover.

Yes?---And then assessing the situation, go from there.

And when you say, "Assessing the situation", insofar as you're training is concerned, I'm focussing on now, did it depend, when you talk about lethal cover, did it depend upon the situation that confronted the individual, as you understood it, within your training?---Yes, definitely.

Can you just explain, I want you to use your words, can you explain to the jury the difference?---So if you had distance, and you pull your weapon and you had lethal cover, you then have time to assess to see if there is a difference – if the offender reacts differently. If you don't have that distance or time, then you aren't – you don't have the ability to – you don't have the ability to cause that change and effect. If the offender's on top of you, you can't assess a situation, or you can assess a situation, but you can't so much utilise that distance, is what I'm saying.

All right?---And I always give them that benefit of the distance, in that situation.

If you turn to page 67 of this module, you'll see that there's a heading, "Reactionary Gap"?---Yes.

Is that a concept that you were taught?---Yes, it was.

Without just simply repeating what's contained in the document, can you explain your understanding what a reactionary gap is?---The way we were taught with a reactionary gap was it's a physical exercise to show you about your reaction time. Your reaction time being the time it takes for you to observe a threat, decide how to react, and to actually enact that action. The reactionary gap, put it into a distance. Showing us that if someone was approximately 6.4 metres away, they could decide to attack you, and could attack you and touch you before you were able to effectively react. Potentially by pulling your firearm.

Did you receive any training as to where you should fire at an offender, who's armed with an edged weapon – a specific location is what I'm trying to say?---Correct, we're always taught centre of scene mass.

Centre of scene mass?---Correct.

And what does that mean?---Whatever your target is, generally it is a full human, centre of mass would then be the torso. Yeah that's a - - -

You've told the members of the jury that your training to become a police officer involved both physical and – training, and theory?---Correct.

I want to ask you a little bit about the physical training, and particularly in the context of a potential offender, who's armed with an edged weapon?---Yes.

Are you able to give us a description, in your own words, of what sort of training you received, in that respect?---We received, in regard to edged weapon assailants – we were put in different scenarios where offenders had edged weapons and would attack us. And we were instructed to do a number of drilled responses, such as the shove and shoot drill, which has been talked about before.

The shove and?---Shove and shoot drill.

I wonder if the witness could have in front of him exhibit 64 please. Perhaps if that could be put up on the screen, your Honour?

HIS HONOUR: Yes.

MR EDWARDSON: I think there are two photographs.

Now do you recognise those photographs as being evidence that was adduced in the course of this trial?---Yes, I do.

Do those photographs reflect an image of the type of training that you received in a particular scenario?---Yes, it does.

What training did you receive, in a scenario similar to the one that we see in that photograph?---The scenario we were put through was very similar. The instructor, or our other recruit playing offender, would have the edged weapon, standing close to us. They would attempt to strike us. We were drilled to defend ourselves with our non-dominant arm. That dominant arm, draw our Glock and simulate firing rounds into the centre of mass of the assailant.

In so far as the discharge of a firearm's concerned, when presented with an edged weapon, was there any training as to how many times you should pull the trigger?---The training was always you shoot until the threat is incapacitated. No matter how many rounds that takes.

To shoot until the offender is incapacitated, no matter how many rounds that takes?---Correct.

Into the scene centre body mass?---Correct.

And what do you understand by the term, "incapacitated"?---The way I was taught was that that person no longer has the ability to what they were doing before.

Thank you. The next thing I want you to turn to if you could please, is the - again exhibit 62 but this time tab 5 and in particular page 63. Now this is a document that has been disclosed by the prosecuting authorities as part of their brief and you have seen this document?---Yes, I have.

You will see that part 5 is added, "Siege and Barricade situations" and then you will see that it refers specifically to what has been described in this as the "ICENCIRE plan"?---Yes.

Are you familiar - or were you taught or trained in respect of the so-called acronym ICENCIRE?---Yes, I was.

And as you can recall it, what was the training that you received in that respect?  
---ICENCIRE we were taught is a model for a planned police response under a siege management situation. It talks about how to manage a high-risk event like a siege - a barricade - a hostage - situation like that.

If you have a look at page 63 you will see that it lists in this module the types of situations that are relevant to a siege and barricade situation, namely hostage-taking, kidnapping or abduction, barricade or siege situation, armed resistance for lawful arrest and aircraft hijacking?---Yes.

Are they the situations that you were taught about in the context of this siege and barricade situation?---Yes, they were.

And specifically the ICENCIRE?---Yes, correct.

Thank you. Having completed your - or you graduated?---I graduated, correct, in December.

In December?---2016.

And having completed - or having graduated in December 2016 where were you deployed?---I was posted to Alice Springs Police Station in the general duties unit.

And between December 2016 and November 2019 did you remain at that location?  
---Yes.

So the entire time that you were a police officer you were effectively working out of Alice Springs Police Station?---Yes.

We've heard about the so-called IRT - or the Immediate Response Team in the course of evidence in this trial?---Yes.

Were you a member of the IRT?---Yes, I was.

How did that happen?---In or just before May 2017 in the Gazette that gets emailed out to every police officer every two weeks there was vacancies listed for IRT. You had to respond with an expression of interest. I responded. I was accepted to try out to do the two-week training course, which I did do and I passed and I was accepted in.

Can you tell the members of the jury please a little bit about that two week training course that you have indicated. What was it about?---Well, IRT is - it's been said before but IRT is a semi-tactical unit that generally the purpose of it - the main purpose is to deal with high-risk events and cordon and contain that event if possible until TRG arrives. IRT - - -

Just pause there for a minute. We've heard a lot about cordon and contain. What does, "cordon and contain" mean?---Cordoning and containing means you isolate an area - you isolate that area of interest or that target area, you create a perimeter around that area and you control entry and exit into that location.

The extent to which you are able to cordon and contain a particular location of interest, is that dependent upon the resources that have been deployed?---Yes, definitely, a proper cordon requires lots of resources.

When you say, "A proper cordon" what do you mean by that?---For example, if we talk about the evidence that has been given, you have a house and you have four people on each corner, you have visual sight around the house but you cannot control entry and exit into that location if someone leaves through a door in the middle of that wall, for example.

Mm mm?---If that person - if that person runs you can't control that entry and exit.

All right. Now, apart from cordon and contain and the example I think that you gave was cordon and contain until the TRG could arrive?---Yes.

Who are the TRG?---TRG are the Tactical Response Group who are based in Darwin.

So they are based in Darwin. You at all relevant times were working in Alice Springs?---Correct.

What else did you learn as a member of the IRT?---We learned specialist skills in close quarter combat, which is just weapons tactics in urban environments, inside houses and streets, a bit of reconnaissance, which is gathering intel on offenders, generally covertly, but it was generally upskilling the skills that were already there in a GD sense but in a more tactical manner.

When you say, "GD" you mean, "general duties"?---General duties, sorry.

In a more tactical manner?---Correct.

Once you graduated and you became a member of the Immediate Response Team, what additional equipment were you entitled to use, as a member of the IRT beyond a normal standard police officer conducting general duties?---Our non-lethal accoutrements that we're allowed to use that were qualified at the time was the bean bag shotgun.



What is that?---It's a converted shotgun that shoots non-lethal rounds, a bean bag rather than an actual shotgun round.

When you say, "non-lethal rounds" does that depend, of course, upon the proximity of that individual to the gun when it is discharged?---Yeah, I should imagine that a - with that bean bag shotgun we have a minimum distance of - it's been a while since I've been on the tools - but I believe it was five metres. Anything within five metres was considered potentially lethal. In saying that, further than that could be potentially lethal but within that five-metre zone you were taught not to shoot.

Apart from the bean bag shotgun, what other pieces of equipment are standard for an IRT member?---Standard weapons would be - on the lethal side - would be the AR15 which is a - - -

What is that?---That is the patrol rifle, it's a semi-automatic rifle that Tony Hawkings - Anthony Hawkings is seen carrying on the day of the 9th.

Yes?---We were trained in Flashbangs, which is a - - -

What, sorry?---Flashbangs - or stun grenades.

Stun grenades, what do they do?---They are a grenade that you throw that generally just create light and sound to disorientate someone, but we were trained at that but, at the point that we were at, we hadn't been utilising them, you know, operationally.

Yes, what else?---As far as new accoutrements - body armour - we were allowed to - we are signed off to use a tactical body armour carrier rather than the blue police vest that most police- - -

What is the body armour worn - what is it?---So the tactical vest you can see as in the exhibits - mine has been exhibited - I utilised the body armour plate that we are issued, that all police have but I was able to use it through IRT in a covert carrier, so it was sitting close to my chest, which has allowed me more speed of movement. It was just lighter, more practical.

Thank you. Now, leaving aside the events which I will come to in due course, on 9 November 2019, before that time had you ever been deployed in your capacity as a member of the IRT?---Yes, I had been.

In what circumstance?---I'd been deployed multiple times, I believe up to ten deployments I've been on. Generally they were all classified as general support jobs but they were to arrest high-risk offenders.

All right, can we take that slowly? They were all general duties jobs?---General support.

General support?---Yes.

But to arrest high-risk offenders?---Correct.

Well, what is, "General duties support"?---General support jobs are just any jobs that aren't classified strategically by the bosses, as high-risk.

And what about a high-risk offender - what does that mean?---A high-risk offender is - that's more fluid in the description as there is not a check-list for that but it's just offender is of high-risk of being volatile or dangerous. Any offender is a risk but it's just one who has a propensity for violence I'd say.

It's one who has a propensity for violence?---Yes, correct.

And on the other occasions, was it - when you say, "support" were there other police officers who are not members of the IRT that participated in whatever arrest it was that you were deployed to do?---Correct. Generally if we were in Alice Springs we would utilise available members of general duties. If we were in a community outside of Alice Springs, the general - the local police in that community would assist us.

I want to turn now, if I can, to Thursday 7 November 2019. Were you on duty on that day?---Yes, I was on an evening shift from 3pm until 1 am.

And performing what sort of duties?---General duties.

Were you wearing normal police uniform on that day?---Yes.

What time did you get to the station?---I believe just before 3 pm.

And once you got to the station just before 3 pm, do you have any recollection now of what it was that you did?---Yes. On Thursday, I logged on to the - my muster room computer. I checked my emails and checked the daily intel sheet, which- - -

If we can just that slowly. What's a daily intel sheet?---So we have an intelligence unit that creates a daily intelligence sheet for the past 24 hours, including active arrest targets and any significant jobs that have occurred in the last 24 hours.

And was there something that captured your attention on that intelligence sheet?---Yes. I saw an active arrest target for Kumanjayi Walker, previously known as Arnold Charles Walker. And he was an active arrest target for breach of parole and assault police.

And having identified him in that context what, if anything, did you do?---I looked up the - generally when someone has assaulted a police officer, it's signalled throughout the station in a specific email. This wasn't. So I looked up the PROMIS job, the police reference number that was attached to that assault.

Just take that slowly. The PROMIS job or the PROMIS reference number - what's PROMIS?---So PROMIS is the police system that we use to log - it's a database that we log all jobs, all people that we've come in touch with.

Right. And so you looked into PROMIS and specifically, in the context of Kumanjayi Walker?---Correct. So every incident has its own job number, or PROMIS number, which was referenced in his – in the intel sheet. So I logged into PROMIS and accessed that job number to investigate what had happened.

And what did it reveal?---I read the job summary which didn't reveal much. I couldn't tell how – what – how the situation had occurred or to what extent the officers involved had been assaulted.

Now, when you say you couldn't tell the situation concerned or the extent or how it was that the officers were assaulted. At that point in time, were the specific officers who had apparently been assaulted – were they identified?---They were identified as Chris Hand and Lanyon Smith.

Yes. Did you know either of those officers at that point in time?---Chris Hand, vaguely. I believe on my annual Defensive Tactics re-qualification, I believe we must have mirrored up, because I think I had seen him there a couple – a couple of times.

But you weren't close to him?---No, not at all.

And you hadn't worked with him directly?---No, never.

All right. In any event, at this stage, you'd identified that they were the two officers who had been assaulted by Kumanjayi Walker?---Yes.

What did you do next?---Attached – you can go – you can delve deeper into PROMIS. I went to the case log, which is where you upload your evidence. In – still on the computer. And I saw that there was no police statements uploaded to the job yet. So I couldn't see their, I guess, in-detail version of what had occurred but I was able to see that their body-worn videos had been activated at the time of the assault or the incident.

And once you identified that both their body-worn videos had been activated, what did you then do?---I then logged on to the Axon website, which is the company of our body-worn videos, and found the relevant body-worn videos.

And when you say you found the relevant body-worn videos, what videos were they?---So I looked up the users, being Chris Hand and Lanyon Smith, and the date time of the incident, which was the day previous and found their body-worn videos of the axe incident.

When you say, "Of the axe incident," that's what it's been described as in the context of this case?---Yes.

And without going back over the videos again, are they the videos that have been played in the course of this trial on numerous occasions?---Yes.

That is, the individual or separate body-worn videos of Officers Smith and Hand?---Yes.

How did you view the body-worn video?---I viewed them one at a time. I can't recall which officer I viewed first. That's how I initially viewed them.

And then, having viewed them one at a time, did you do anything after that?---Then I moved them to split screen, so I could watch both videos at the same time.

And how did it present to you when you first saw these videos?---It showed to me an extremely, potentially deadly situation. From my observations, I saw it was a perfect example of a human fear-based reaction that we have all – not – sorry – that I am aware of of fight, flight, freeze posture and I saw a perfect example of, "freeze and flight".

Right. Was there anybody else in the police station at the time that you were observing or watching these videos?---My patrol group was around and my shift sergeant that day, Evan Kelly, was close by in his office.

So your shift sergeant was Evan Kelly?---Correct.

Was he physically present when you first looked at these body-worn videos?---Not when I first took them but as – watched them. But as soon as I watched them, I made him aware and he came and watched them.

Now, why did you make him aware of these body-worn videos?---From my reading of the job – initial job write-up, it seemed to me that this incident had – was being swept under the rug. I - - -

What do you mean by that?---It seemed that this is the kind of incident that should be made – that we should all be alerted to, because – especially because Yuendumu is – it's three hours, but it's known that people from Yuendumu and Alice Springs generally go between fairly often. So this offender was, potentially, a risk to Alice Springs members.

Right. So you brought it to the attention of your shift sergeant, Evan Kelly?---Correct.

And how did you bring it to his attention?---I asked him to come watch the videos and we had a discussion about it and he agreed that the incident should've been relayed up the chain of command and a higher response should've been already organised.

Do you know a police officer by the name of Sergeant Lee Bauwens?---Yes, I do.

How do you know him?---Lee Bauwens is the OIC of IRT. I called him that day.

I believe I called him on my mobile and in – I don't think he was on duty at that time. And I informed him of the incident, because I was in the mind that it was a potential job that IRT should have already been called out for.

Yes?---I relayed to him what had happened. He agreed with me and said that he'd look into it.

Thank you. Later in your shift, did your patrol group attempt to locate Kumanjayi Walker?---Yes, we did.

How did that come about?---I looked into his identity on PROMIS to find out more about him. I had – and established he had an old link to Warlpiri camp, to House 6 at Warlpiri camp.

I should've asked you this earlier. We've heard some evidence about officers, at different times, looking at PROMIS to identify the criminal history of Kumanjayi Walker. After you – or when you were looking at the body-worn video and you were trying to identify and know more about him, did you access his criminal record?---Yes, I did.

And did that present as an extensive criminal history?---It was a very extensive criminal history.

What type of offending are we talking about?---Seemed that – as he was younger, it was more property offending. The older he was getting, he was moving towards violent crimes, including violence against women and violence against police.

And the combination of all the information that you had on this day, 7 November 2019, did that inform you as to how you would characterise him as a potential risk to police officers?---Yes.

And how did you characterise him in your mind, at least?---I characterised him as a high-risk offender, extremely violent, who was using – was willing to use potentially lethal weapons against police.

Now, I want to come back to the attempts to locate Kumanjayi Walker later in that shift on 7 November. You said that you identified on PROMIS a potential location that he might be found?---Yes.

Who authorised the finding of him on that day?---Shift Sergeant Evan Kelly.

And at that stage, was there – you knew that there was a warrant for his arrest?---Correct.

And the warrant was for what?---For a breach of parole.

Did the warrant identify a specific house?---I believe it did, but I only became aware of that later.

And when you became aware of it later, what was the specific house?---House 511 in Yuendumu.

And 511 at Yuendumu is where, ultimately, Kumanjayi Walker was shot?---Correct.

By you?---Correct.

All right. On 7 November, you said that it was – your shift sergeant, Evan Kelly, who authorised the attempt to locate and arrest Kumanjayi Walker on that afternoon – was there somewhere that you went to?---Yes. On the way to Warlpiri camp, there's a large Bunnings with a large car park. We decided as a patrol group to meet up there, because it just happened that no – no one was attached to any jobs. So it's a good time to all of us go together. So we all met in the Bunnings car park.

When you say, "We," who is we?---So my patrol group, which would've been three vehicles, generally with two police in each vehicle. And the shift sergeant.

And who – what's the identity of the police officers that were in your company for this purpose?---The officers that I can recall, myself, James Kirstenfeldt, Mitchell Hansen, Bree Bonney, and I believe Luke Crotty, and Shane King, I believe, were there.

And what about Evan Kelly?---Evan Kelly was there as well, yes.

All right. How far is the Warlpiri Camp from the Alice Springs Police Station?---From Alice Springs Police Station, I believe it's a seven minute drive.

Seven minute drive?---Believe so.

You said that you met at Bunnings?---Correct.

At Bunnings, was there a briefing?---Yes.

Who conducted that briefing?---I conducted that briefing.

And when you say you conducted that briefing, what did that entail?---That was just a small set of SMEAC orders, which is what we're taught. Which is another acronym  
- - -

A small set of?---SMEAC orders.

What is that?---It's an acronym that stands for Situation Mission Execution, Admin and Logistics and Command Signals.

Mm mm?---This was just a very brief one. Generally, I just utilised my phone and Google Maps, to identify the house in question.

Yes?---And informed the patrol group that we would arrive, we would set up a cordon, because we had numbers for the cordon.

And how many numbers was that? About five or six or - - - ?---Yeah, so I – potentially seven.

Right?---Three police vans, generally with two constables in each van, and a shift sergeant, so I believe seven.

And were you kitted up in IRT uniform?---No, general duties uniform.

So what did that mean? What sort of – what did you have on you, person?---So our bare minimum accoutrements that when we're in general duties consist of your Glock pistol, a spare magazine for your Glock, a – your pepper spray, a baton, and handcuffs. Additionally you can take, if they're available, a Taser, or some people can take a party pack, which is – not what it's officially called, but a party pack is a large crowd control pepper spray that you saw Evan Kelly carry that day.

Evan Kelly, the officer who gave evidence in this trial?---Correct.

And that's that large - - - ?---It's a large canister, and it sprays outwards really.

Incidentally, at the time that the briefing was conducted by you, with the other members of your patrol, did you, or to your knowledge, any of the other officers, have any intelligence to suggest that Kumanjayi Walker had in fact returned to Alice Springs?---No we didn't.

Now you said there was a link to House 6 was it?---House 6, correct.

In Warlpiri Camp. So having given the briefing, you all moved from that location?---Correct.

And went where?---We drove to Warlpiri Camp and each of us parked in pre-determined locations to begin enacting that cordon.

When you say each of us parked in pre-determined locations, who parked where?---I believe myself and my partner, I think was Mitch Hansen in the car with me, parked at the front of the house. The house is on a bend. So we parked towards the front door of the house. Another vehicle, I believe Bree Bonney and James Kirstenfeldt, parked towards the rear of the house. And a third vehicle parked on the other side of the house. It's not very – it's not very – not – in the parkland really. I'm not sure where Evan parked.

Now did you have a drone?---No, we didn't.

So you didn't have access to a drone on this occasion?---No, we didn't.

Having parked at the various locations that you've just described, what was the plan from there?---The plan – it was very, very simple. We were going to cordon the house, as best we could, and then knock on the door. Because that – we didn't have any specific intelligence.

And is that what happened?---Correct.

At that time, did you see anybody around the place that might have been Kumanjayi Walker, or you might have thought was Kumanjayi Walker?---I believe James Kirstenfeldt alerted me to the fact that two young males had decamped the camp from a – that vicinity, just prior to us - - -

When you say decamp the camp, you mean Warlpiri - - - ?---Sorry.

- - - Camp location?---Yeah, they left Warlpiri Camp on foot from that vicinity, just before we arrived.

And when you were – when that information was conveyed to you, did you do something thereafter?---Yes, we left half the PG in location, watching that house.

You left half the PG, what's that?---Patrol group, sorry. So half our members - - -

Thank you, patrol group?---We left in the – surrounding that house. Myself and James Kirstenfeldt pursued the two men on foot. And I believe Mitch Hansen drove on a dirt track, to try to get there in his vehicle.

And ultimately did you identify the two men?---Yes, and neither of them were Walker.

Right. Having excluded both of those men as Kumanjayi Walker, did you then return back to House 6?---Correct.

And when you returned, what happened next?---We knocked on the door for a little bit longer, but no one answered the door.

Was there any sign of anybody being inside that house, for the entire time that you were present?---Nothing really.

And so as a consequence, what happened?---As a consequence, we – we just left, and went on about our regular duties.

Thank you. And what time did you finish your shift, can you recall?---That was an evening shift, so if I didn't do any – if I didn't get caught up, I'd have finished at 1 am.

Before you completed your shift, did you receive a notification via Police Communications from a person by the name of Senior Sergeant Alistair Gall(?)?---Correct, he was my watch commander that night.



What's a watch commander?---So he is – so we have the patrol group, then you have your shift sergeant, and then you have your watch commander. So he's like – he's just the big boss of the shift.

Right, and this big boss, did he convey some – or give you some notification?---Correct. Senior Sergeant Gall informed me that – or informed the patrol group, that he had been contact with Julie Frost from Yuendumu, and she still believed that Kumanjayi was in Yuendumu.

Excuse me a minute, your Honour.

I should have asked you this question before. Did you have a belief as to whether you had any legal power to force entry at House 6 in Warlpiri Camp before you left?---No, I didn't.

What - - - ?---Do you want to explain to the jury?

Yes please?---So as police officers we have legislated powers. One of those powers is a power of entry. If we believe, on reasonable grounds, that someone is within a house, who either has a warrant, or has committed an indictable offence, which is an offence where the potential imprisonment is over two years, then we can enter that location without permission. And using the minimum force required. If we don't have that belief, on reasonable grounds, then we will ask for permission, and require being given permission to enter that location.

So in simple terms, you didn't enter the house?---Correct.

And is that because you didn't believe that you had the lawful power of entry?---Correct.

All right. Now back to Senior Sergeant Alistair Gall. You said that he said that he'd spoken to Sergeant Julie Frost at the Yuendumu Police Station?---Yes.

And the information conveyed to you, and your patrol, was that she, that is, Sergeant Julie Frost, believed that Kumanjayi Walker was still in Yuendumu?---Yes.

So that was the extent of the intelligence that you had, at least by the time you finished your shift, on 7 November 2019?---Correct.

Do you know what time you finished your shift?---I believe 1 am.

All right. Now were you on duty on Friday, 8 November 2019?---Yes I was. I was on duty for another general duties shift, in the evening, from 3 pm to 1 am.

And did anything of note, and specifically in respect of Kumanjayi Walker, occur on that shift?---Not that I'm aware of, but I did disseminate information about him during that shift.

And what information did you disseminate?---So I made – because there was still no major alert given to the police station, about the incident on Wednesday night. I showed a number of members, in the station, on other patrol groups, the body-worn video of the axe incident.

And why did you do that?---To make them aware of the incident that had occurred, and to – to disseminate the information that there is an extremely violent individual that they may come in contact with, in Alice Springs. And just to be aware of his propensity for violence.

And why was that important from your perspective?---For a safety position for those officers that – who hadn't been made aware of this. For example, if they were to be sent to arrest someone for a breach of parole, that's fairly standard, and they might not be expecting such violent resistance.

All right, so that's the extent of Friday 8 November 2019?---Yes.

All right, I'll turn to the significant day, that is, Saturday 9 November 2019. Were you on duty?---I was rostered on for duty for another evening shift.

And how did that come about?---Well I didn't get into shift that day before – at approximately 2.30 pm, before I'd started shift I received a phone call on my mobile from Sergeant Shane McCormack.

Who's Sergeant Shane McCormack?---On that day he was – he's an IRT member. On that day, he was the OIC of IRT, because Lee Bawens was not on duty, or not in town.

So he was the officer in charge of the Immediate Response Team?---Correct.

And he contacted you on your mobile telephone?---Yes.

What did he say to you?---He informed me that I was to - that I was being, I guess, called up for a call-out - for an IRT call-out.

An IRT call-out?---Correct. To travel to Yuendumu to arrest Arnold Walker.

Thank you. Did he give you some directions as to how that should happen?---On the mobile phone at the time he just told me to get into the - come to the station and dress in my blue police uniform but to bring my camouflage kit.

Now, there's two different types of uniform is there?---Correct.

What is the difference?---One of our uniforms is blue general duties uniform that every other police officer wears. One is a camouflage uniform that identifies us as a tactical unit.

And so you were told to wear your blue police uniform but nonetheless, pack your camouflage uniform as well?---Correct.

And did you do that?---Yes.

So did you organise your kit?---Yes, I organised my kit and I drove in to the station.

What time did you get to the station?---Probably quarter to 3:00.

This is the Alice Springs Police Station?---Correct.

And at the Alice Springs Police Station did you speak to Sergeant Shane McCormack?---Yes, I spoke to Shane McCormack and asked him to confirm what the tasking was - what the mission was and he informed me it was to arrest Kumanjayi.

Can you try and remember as best you can the words that you used? You've interchanged, "task" and, "mission"?---Sorry, I - yes, correct. I asked him specifically what our mission was. I asked him twice and he confirmed it was to arrest Kumanjayi Walker

Thank you. But he would've said, "Arnold Walker" not "Kumanjayi Walker" then? ---Correct. At the time he would've said, "Arnold".

Thank you. Were you also informed as to who would be assisting you or working with you on this mission, namely to arrest Kumanjayi Walker?---Yes, I was. Sergeant McCormack informed me that the IRT team would consist of myself, James Kirstenfeldt, Tony Hawkings and Adam Eberl. He also informed me that a canine handler, Adam Donaldson, would be in support of us but he'd already left and was on his way to Yuendumu.

And did he say that those other officers would be attending Yuendumu with you? ---Correct.

Was there any discussion with Sergeant Shane McCormack as to what, if any, intelligence existed at that point in time about Kumanjayi Walker's whereabouts? ---Yes. McCormack informed me that there was really no new intelligence since Wednesday night in regard to Kumanjayi's location or anything in regard to the incident. He informed me that we would be expected to drive to Yuendumu and hopefully get more intelligence from Julie Frost at the time.

Did he say anything to you specifically about some break-ins at the nurses quarters in Yuendumu?---Yeah, he informed me that on the Saturday morning - that morning - the nurses had evacuated Yuendumu due to a number of break-ins or attempted break-ins at their sleeping quarters.

So in other words the medical staff had left?---Correct.

Did you then prepare yourself for the tasking?---Yes.

Were the other members of the IRT team present or did they arrive at the Alice Springs Police Station?---They were arriving throughout this time, yes.

And so when you say, "they" is that the persons that you've identified, that's James Kirstenfeldt, Adam Eberl, Tony Hawkings?---Correct.

So they've all arrived at the Alice Springs Police Station?---Yes.

Before departing the Alice Springs Police Station did you and the others do anything?---Yes, I spoke to all the members about what our tasking was - what our mission was.

Now, I want you to take this carefully because it's important. Can you try, as best you can, to tell the members of the jury what you said to the other members?---Yes, I informed the members that we were travelling - or our task was to travel to Yuendumu to arrest Kumanjayi Walker for the reasons of the axe incident on Wednesday night. Tony - sorry, Anthony Hawkings and Eberl hadn't seen the footage and were not aware of the axe incident so I logged on to a computer and showed them the footage of the axe incident for - which is the reason we were going out to arrest Kumanjayi, and - - -

What about the Warrant of Apprehension that was in existence?---Correct, that was for a - that was a reason. Administratively we were taught to - if there was a situation where someone has a warrant and aggravated assault, for example like this, we'd arrest for the aggravated assault and then we could deal with them concurrently.

Right?---If we arrest just on the warrant then we have to deal with the warrant first before we can start, it's just an admin thing.

All right, thank you. Sorry, I missed that, who did you play the axe incident video to?---For Anthony Hawkings and Adam Eberl.

Does the body-worn video record each time it's played?---Yes, and sometimes - if you go back to the start it will record another - that will have you having watched it again - or accessed it again.

So if you are going backwards and forwards it will register?---Multiple - - -

Multiple times?---Multiple times that you've accessed it, yes.

Now, you said before that back at the Alice Springs Police Station - sorry, on the 7th when you first viewed this axe incident video?---Yes.

Your process was to look at each body-worn video separately - that is Hand and Smith one or the other first and then followed by the other?---Correct.

And then you said you had a split screen?---Yes.

And you viewed it in that format?---Yes.

So you could watch both at the same time?---Correct.

Are you now able to remember the way in which you played this body-worn video to the other members of the IRT team at the Alice Springs Police Station before you left?---I believe I played it split screen, so it would've registered me accessing both videos.

Was there any conversation between you - or did you convey to them the information that you had about his previous criminal record?---I conveyed information about his previous criminal history and the fact that the nurses had been evacuated.

Thank you. How long were you at the Alice Springs Police Station in the company of the other members of the IRT before you left?---I believe - I believe we stepped off around about 3:30 pm - so about half an hour.

You say you stepped - sorry, you were there for about half an hour?---Yes.

And you left at about 3:30?---Correct.

And how did you - where did you go?---I drove in a vehicle with James Kirstenfeldt. We drove straight to Yuendumu. I believe Tony and Eberl may have stopped of for fuel or food so they were 15 minutes or 20 minutes behind us.

And when you say, "15 or 20 minutes behind us" you mean that is you got to the Yuendumu Police Station first?---Correct.

And at the time that you left, what equipment did you take with you?---On my person I had Glock, spare magazine, pepper spray, baton, handcuffs and Taser and I was wearing my covert body armour. James Kirstenfeldt was carrying a bean bag shotgun and I know Tony Hawkings was taking an AR15 and I don't know if Adam Eberl took one or if he didn't.

I should have asked you this before. You told the members of the jury that when you spoke to Sergeant Shane McCormack he informed you that you would have support in the form of a dog handler, Mr Donaldson?---Correct.

And you've told us already that Mr Donaldson had already gone?---Yes.

Did you convey to the other members of the IRT before you left the Alice Springs Police Station that you would have - that is the team - would have his support?---Yes, I did.

In his capacity as a dog handler?---Yes.

Now, sorry, you had your Glock, spare Glock magazine, what else?---Taser - I took my Taser - or a Taser - because we shared Tasers at that stage and pepper spray, baton and handcuffs and I was wearing my tactical body armour.

And did you take your camouflage gear with you?---Yes, in a bag - in a bag.

Incidentally, do you have a particular type of holster that houses your Glock?  
---I have a particular type that houses my Glock and I had it on my accoutrement belt a different holster for rifle magazines, in my role as IRT, I wasn't taking my rifle out for this incident so that was empty. I used that to put my Taser in. In Alice Springs we share Taser holsters and there was not enough Taser holsters, so you might rock up to shift, there might be spare Tasers but there would be no spare Taser holsters. This magazine pouch fit a Taser with a loop over the top of it to - so it doesn't fall out without me pulling it out, so that's what I utilised to carry my Taser in.

Thank you. What time do you think - or do you remember what time it was that you got to the Yuendumu Police Station?---I believe James and I arrived at about 6:30 pm.

Did you have a torch with you?---Yes, I had a torch that I connect to the lapel on my shoulder.

And what type of torch is that?---The brand is called, "Guardian Angel".

And why do you have it attached to your lapel?---I attach it to my shoulder so that I can turn the torch on and use both hands, so I don't have to utilise - lose one hand using a torch, I can use it hands free.

And you had one in that position when you got to the police station?---Yes.

Now, I want to ask you a little bit about your hand. In particular, your right hand. Was there something you needed to do to your right hand or that you did do before you departed the Alice Springs Police Station?---Yes. At the Alice Springs Police Station, I strapped my hand with strapping tape. A few days prior, when I was training in the gym, I jarred my thumb and my wrist – my right thumb and wrist a little bit. So I strapped that up to give it more support.

And you did that at the Alice Springs Police Station before departing?---Correct.

You arrive at about 3:30 pm?

Sorry- - -

MR STRICKLAND: At 3:30.

MR EDWARDSON: I think you're right, I'm sorry.

What time did you arrive?---In Yuendumu? Approximately 6:30 pm.

Sorry, thank you. It's a drive of what, about three hours?---Yeah. Yeah.

In the course of your drive from Alice Springs to Yuendumu, was there any conversation that you can recall about the mission as you understood it to be?---I believe there was a brief conversation that we were, obviously, aware that the mission was to arrest Walker. The only comment that I can recall myself making is that we should've been sent out earlier. As in, days earlier, not hours earlier on that day.

Your Honour, I'm going to ask for the court's indulgence. I had hoped I'd get further than I have, but that's not possible. It's obviously preferable that he give his evidence in one sitting when we now get to the Yuendumu Police Station.

HIS HONOUR: Yes.

MR EDWARDSON: So I'd ask that we rise today and I'll finish it tomorrow morning.

HIS HONOUR: So members of the jury, would you now retire, please? And we'll start again tomorrow morning at 9:30.

JURY OUT

HIS HONOUR: You can stand down, thank you?---Thank your Honour.

WITNESS WITHDREW

HIS HONOUR: Are there any matters before I adjourn?

MR EDWARDSON: No, your Honour.

MR STRICKLAND: No, your Honour.

HIS HONOUR: I'll adjourn.

ADJOURNED 12.52 PM TO THURSDAY 3 MARCH 2022



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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY BRIAN ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 3 MARCH 2022 AT 9:36 AM

(Continued from 02/03/2022)

Transcribed by: EPIQ

MR EDWARDSON QC: Your Honour, before the jury come in, there's a matter I'd like to raise with you. And what I'm about to say, in my respectful submission, should be the subject of a suppression or non-publication order. Your Honour, over my objection, the Crown were permitted to at least put in front of Detective Pennuto, MFI AL, which is the service record of my client. And in particular, the courses that he completed in that context.

HIS HONOUR: Yes.

MR EDWARDSON: I foreshadowed that there would be an objection taken by me, if Mr Strickland persists in seeking to cross-examine my client on that topic. I need a ruling, in advance of completing my examination-in-chief, on the appropriateness of that course of action. And can I just put that – this into context. At no stage have the prosecution disclosed, nor sought to lead any evidence at all, about any of the courses or training that my client received in the course of his service with the Australian Army. At best, they've simply produced a printout of a document, which of itself, is meaningless. It was not put into evidence in the course – well before they closed their case. It's simply been marked for identification.

But there are additional reasons why I say it's grossly unfair on my client, if he is cross-examined on those topics, having regard to the fact that there has been no disclosure that could put into issue, his training, as being somehow relevant to the events on 9 November 2019.

Your Honour, this morning, I sought legal advice myself, from a very senior member of the Army who happens to be a silk, but is also a general. And he, in turn, made some enquiries with the Australian Army about the extent to which Zachary Rolfe might be permitted to disclose issues that arose in the course of his term, particularly Afghanistan, and things of that nature. In short, as I understand the position, and this is not my area of expertise, but in short, as I understand it, he would not be permitted to disclose the detail of the training that he received. Nor where he was – anything to do with anything he did while he was in Afghanistan. I can tell your Honour, that if the Crown are going to be permitted in some way to ask a question, I know my client would say that his training, that is his training in the Australian Army, in no way, is inconsistent, indeed in many respects is the same as, the sentiments that we've heard so much about in the – in the context of the Northern Territory Police Force.

I can also say, that if asked, he did not fire a single shot in combat during the term that he was deployed. So I say, your Honour, that the Crown should not be permitted to cross-examine him. I want to raise it now, so I'm not embarrassed in front of the jury - - -

HIS HONOUR: I can understand why you want to raise it.

MR EDWARDSON: - - - and if they are – if they are in some way to be permitted, and I'd need to know what sort of questions he proposes to ask, then I'll deal with it

before I complete my examination-in-chief, insofar as I can. Your Honour, as I say, the difficulty is, it would have to be a cross-examination blind. Because – I mean I assume that if they've got something in their brief, it's not been disclosed to me.

HIS HONOUR: Yes.

MR EDWARDSON: So if they've got some intelligence, or some information, that suggests that his training in the Australian Army, somehow impacted on the way he performed on 9 November, that should have been disclosed, and it hasn't. And in my submission, it is really, if you like, a disguise to attempt to split their case.

HIS HONOUR: Mr Strickland?

MR STRICKLAND SC: Your Honour, cross-examination is not splitting your case. I don't propose to outline now, in the middle of examination-in-chief what I might or might not cross-examine on. I don't intend to do that. However, when my learned friend has completed examination-in-chief, I will then confer as to what areas I propose to cross-examine on, in relation to that topic.

HIS HONOUR: I don't think that that's really going to be acceptable, Mr Strickland. The reason I say that is because one would expect that, if the topic is to be raised by the Crown in cross-examination, and counsel appearing for an accused person knows that, that they may well wish to deal with some aspect of that topic in examination-in-chief.

MR STRICKLAND: Your Honour, I've opened the case. We have provided full disclosure of all the documents that we have that are relevant to the case. I've disclosed, by way of the MFI, the document that I propose – the document that is relevant on that topic. There were no other documents of that nature that I propose to put to this witness.

I don't know what the accused is going to say in chief on the critical matters, and I do not intend to disclose what areas I propose to cross-examine on on that topic until I know what the evidence-in-chief is. However – because I don't know, ultimately, what the accused is going to say on the critical issues. There has been no record of interview, obviously - - -

HIS HONOUR: What critical issues are you referring to?

MR STRICKLAND: The critical issues that we need to establish to negate the justifications. But, your Honour, in my submission - - -

HIS HONOUR: But how – you say that, but how does cross-examination about his military training bear upon those issues?

MR STRICKLAND: It is - cross-examination into his military training may well bear on his state of mind at the time he fired shots 2 and 3, because his state of mind and

his state of training can't be bifurcated into training in relation to the police and training in relation to the military.

At the end – what I propose is this, your Honour. At the end of the chief, proposed chief, I will consider what the evidence is, if we could have a short break. I will confer with my team and then make a decision as to what areas we propose to cross-examine, and then I will flag it with your Honour and, of course, my learned friend, if he wishes to ask further questions, can do so. But I don't intend at this stage. I don't know what the accused's evidence is going to be in relation to the critical issues of 9 November 2019.

HIS HONOUR: The Crown also has an obligation of fairness, which would mean that, in my view, the Crown has to be very careful not to put the accused in a position in the witness box where he, effectively, has to say, "I can't answer these questions."

MR STRICKLAND: I understand. That I entirely understand.

HIS HONOUR: I propose to adopt the course suggested by Mr Strickland, Mr Edwardson.

MR EDWARDSON: Could I just be heard on one aspect of that, your Honour, if I may?

HIS HONOUR: Yes.

MR EDWARDSON: I'm sorry to cut you off.

Your Honour, if my learned friend, as he has, unreservedly accepts the difficulty my client has in the context of not being able to speak to what the specifics of his training were, and given that my learned friend has acknowledged that a document which is not in evidence and was not tendered as part of his case, albeit having been disclosed, tells us nothing, because, of itself, it doesn't speak to what the training was.

And, more importantly, given the Crown had unequivocally and unreservedly accepted that the first shot was lawful, appropriate, reasonable and so on, it is impossible, in my submission, to see how there can be any relevance at all beyond conjecture, to the fact that he served in the armed forces and may have received training. If my client isn't allowed to identify what that training is and the specifics of it, then it is impossible for the jury to make any assessment at all as to whether or not there is any relevance to that fact.

I am simply saying, your Honour, it is not good enough for the Crown to come along and say, "I'm not going to tell you what I'm going to ask." I'm entitled to know, and so is my client entitled to know, how do they say his military training, which has not been identified at all, bears, in any shape or form, on the issue that this jury has to resolve? Yet again, my learned friend has simply ducked the issue that your Honour raised with him and has effectively declined to disclose what he

proposes to ask. I pass the rhetorical, but I need to know before I finish my examination-in-chief.

HIS HONOUR: Well, I think that's exactly what's been suggested at the present time; that, if you come to what would be absent any suggestion of cross-examination about his military history at the end of his evidence-in-chief, Mr Strickland asks that I adjourn - - -

MR EDWARDSON: It's not that basis - - -

HIS HONOUR: - - - to give him an opportunity to consider whether he then proposes to ask any questions.

Now, we can then hold that debate and, at that point, I think Mr Strickland is going to have to show his cards.

MR EDWARDSON: Yes.

HIS HONOUR: All right.

MR EDWARDSON: Thank you.

HIS HONOUR: So, we will have the jury in, please.

JURY IN

HIS HONOUR: And Mr Rolfe may return to the witness box, and you are still subject to the oath you took yesterday.

ZACHARY BRIAN ROLFE on former oath:

XN BY MR EDWARDSON:

MR EDWARDSON: Mr Rolfe, before I turn to where we left yesterday, and we were about to commence on your arrival at the Yuendumu Police Station, there are a couple of matters I just want to deal with, which I overlooked yesterday. I want to ask you some questions firstly about the approach that you took, together with Officer Kirstenfeldt, when you entered House 577.

I wonder if exhibit 21 can be played, and what I want to do is I'm going to ask you some questions – I'll ask you to pause it at a particular spot and you will see.

DVD PLAYED

MR EDWARDSON: It's not a perfect shot, but I want to ask you a couple of questions if I may about your hand position in relation to your Glock?---Yes.

Can you explain what we can see there?---What you can see there is me placing my hand on my Glock in its holster and using my thumb to release the first retention device on that holster.

How many retention devices are on that particular holster; that is, your holster?---Technically, there are three, but there are only two devices that require any action by us to release the Glock. There is one static device, so there was a bit of confusion by Detective Senior Sergeant Barram and his description of it. There is one static device that we don't interact with at all. It is a guard at the front of the holster which can be seen.

So, what did you actually do?---So, the retention device that I released requires downwards motion and forwards motion; so, two actions in one fluid movement to release. So, I placed my hand on the Glock and pushed down. A device pushed it forward to release that first retention device from covering the rear of my Glock.

Now, most importantly, for the jury's consideration, can you please explain, in your own words, why you did that at that point in time and as you move, effectively, through House 577?---We are trained – in training, we trained to prepare for a potential threat or a potential situation, which was described as "if-then" thinking. So, at that time, clearing that house or searching through that house, I was wearing for a violent offender who had, just days previously, in that same house attacked two police officers with a potentially lethal weapon. So, all I was doing was preparing for, if I was presented with a case where I had to follow my training and utilise drawing my firearm, depending on the situation I was presented with.

In other words, it was a state of readiness?---Correct.

I now want to – thank you. I now want to turn to another matter that I overlooked yesterday and that was your IRT training. You told us about the training you received to graduate and, effectively, become a member of that team?---Yes.

Subsequent to completion of that training, was there any additional training that was required of all members?---Yes, we work in a roster period of five weeks down in Alice Springs - or everywhere in the NT and one training day per roster we would have additional IRT training where we would go to the range or upskill on the skills already taught to us in that two week course.

Thank you. I am now going to turn to the position we left yesterday, which is the arrival at the Yuendumu Police Station. You arrived at the Yuendumu Police Station with officer Kirstenfeldt?---Correct.

The two of you having travelled from Alice Springs to that township?---Correct.

And specifically to that police station?---Yes.

At approximately what time did you arrive?---Just after 6:30 pm.

And when you arrived did you meet someone there?---I met Julie Frost for the first time, who let us into the station.

That's the first time you'd met her?---Correct.

And you were with Kirstenfeldt when you met her?---Yes.

And who let you into the police station?---Julie Frost herself let us into the station.

Did you yourself have some sort of keycard that permitted access?---We have a keycard that allows us into, for example, Alice Springs Station, into different rooms in the Alice Springs Station but we discovered that our keycard - myself and Kirstenfeldt's didn't - weren't coded to have access to Yuendumu Police Station, so we weren't able to get in.

So accordingly, it was Officer Frost who let you in?---Correct.

Was there anybody else present at the police station once you entered it?---Once we entered the muster room there was Chris Hand and Felix Alefaio.

Did you know those officers before?---Yeah, not well. I hadn't worked with either of them specifically but I knew who they were.

Do you know, or can you recall, what they were doing when you arrived at the police station?---Chris Hand was sitting at a desk on the - as we walked into that door in the muster room, on the opposite side of the muster room. He was sitting at a desk,

I assumed it was his desk, on a computer, writing up his statement from the axe incident.

And what about Felix?---Felix was sitting near him. I didn't notice if he was doing anything in particular.

And having arrived - I am sorry - at this stage the other two members of the IRT team had not arrived?---Not yet, no.

How long after was it that they arrived?---Approximately 20 minutes, I think.

What I want to do now is deal with the 20 minutes before they arrived?---Yes.

Did you converse with Officer Frost about your mission?---Yes, I did.

Are you now able to tell the members of the jury about that exchange?---Correct. One of the first things we started speaking about after introductions was our mission for being there was - in our mind - was to arrest Kumanjayi Walker. She mentioned to me specifically that she'd prefer us to arrest Kumanjayi in the morning at about 5 am because she was tired and she wanted to have a night off to sleep, but she did tell me that if we were to arrest him during the night she would - we were to call her, and her and the other local police, would attend the station and handle the custody processing of Kumanjayi.

Just pausing there, who was present during that conversation?---All the members that I mentioned before, Kirstenfeldt, Alefaio and Hand.

Thank you, and where did the conversation take place?---In the muster room.

Now you mentioned that there are procedures and requirements that need to take place in the event that somebody is arrested and briefly, can you tell us what that entails?---Okay, well there's physical procedures that need to take place but there's also administrative procedures which are on the computer - it's programs on the computer, there's multiple programs that you need to log certain information on and each station has different log in codes and - different log in codes and ways to get into those programs which we weren't aware of for Yuendumu. There's also physical requirements such as even where the cell keys are or where the food is for the prisoner that we didn't know either, that's why Julie Frost said she would come in to handle that side.

In the event that Kumanjayi Walker was arrested overnight?---Correct.

Now, beyond this preliminary conversation that you had with her, at that stage, that is before the other two members of the IRT team arrived at the police station, did Julie Frost produce any documentation to you?---She produced a number of small maps on A4 paper



Yes? Can you just describe what they were?---Just a map of the community on an A4 printout so you couldn't see very well around - but there was also an A3 map that was laminated. I can't recall if she gave it to me or I utilised that from someone else's desk.

Were those documents identified by her again before the other IT members had arrived?---Correct.

And at this stage the dog handler, Mr Donaldson, he was not there?---He was out and about in the community. We hadn't seen him yet.

Thank you. Did Officer Frost say why she was producing the maps? In other words did she talk to the maps?---Yes, the conversation where I asked her, when she mentioned arresting him at 5 am, I asked them where he would be at 5 am and she told me she had no idea. We then moved on to houses of interest - locations of interest that he may be and that's what we were doing with the maps, she was showing us houses of interest of where he had been linked to, where his friends had been linked to.

And, again, this conversation that we are now talking about happened before the other two had arrived?---Correct.

Was there anything further said before the other two arrived, about the mission? ---I asked her if she had any update since Wednesday and she told me that she had no further intelligence from the Wednesday night.

Intelligence as to Kumanjaya Walker's whereabouts?---Correct. She informed me that she had attempted to negotiate with the family and the timings for that negotiation had changed. She said that the final negotiation time was after the funeral and she'd informed the family that if he hadn't handed himself in after the funeral she would get a specialist team from Alice Springs in to affect the arrest.

Thank you. Was that really the substance of the conversation that you had? ---Yeah, that was really it.

Excuse me a minute, your Honour.

Could you have a look at exhibit 1, tab 14 please? Now firstly you can see that this is an email to a number of people including yourself?---Yes.

And you can see that it's dated Saturday 9 November 2019 from Julie Frost to the identified persons at the top of that email?---Yes.

And this, in evidence in this court, has been generally described as the, "Frost arrest plan" or words to that effect?---Yes, correct.

Firstly, we can see the time is 16:59. Where were you on Saturday 9 November 2019 at about that time?---At that time I was about halfway between Alice and Yuendumu, so I'd been out of reception for approximately an hour and-a-half.

At any stage whilst travelling from Alice Springs to Yuendumu did you sight that email?---No, I didn't. I wouldn't be - wouldn't have been able to.

When you arrived and throughout the time that you were actually at the Yuendumu Police Station did Officer Frost ever hand to you that document?---No, she didn't.

Did she ever identify that document to you or anybody else in your presence?---No, not that I saw.

You've mentioned already that there was a map or maps which she did talk to, that is identifying possible locations?---Yes.

Where Kumanjayi Walker might be connected to or might be found. Did you take any photographs in her presence whilst you were at the police station?---Yes, I took a photo of the map, and I can't recall if it was the A4 or the A3 and then she did direct me to a piece of paper with some house numbers of relevance on it. I took a photo of that. She then told me extra house numbers of interest and I don't recall if I wrote them down in my police notebook or on one of the maps.

Now, can I just ask you about that last photographs where she directed you to a piece of paper. In the sequence of events do you know whether - or can you now remember - whether that happened before the other officers arrived or after?---I believe that was before.

And when you took a photograph of that piece of paper, did she herself either verbally or directly, identify it as being part of the so-called arrest plan?---No, the only part of that piece of paper that was brought to my attention was that small section with relevant house numbers.

Thank you. After the other two members arrived was there further discussion in the presence of Officer Frost?---There was. There was - because previously before the officers arrived a I discussed with Julie Frost how, if she wanted us to arrest Kumanjayi at 5 am that we had no intelligence as to where he was, we couldn't create a plan. I informed her that generally when IRT would attend a community we would introduce ourselves to the community - because we are guests in the community, we would introduce ourselves to the community while attempting to gather intelligence about the person that we are generally trying to locate and, at the same time, try to gain community assistance for our task. I said perhaps that's the best course forward seeing as we had no intelligence. And she agreed with me at that point. That was before the other officers arrived at the station.

And did she say anything to you, at any stage, about what would happen if you did come across him?---Correct, she said, "Obviously arrest him."

If you come across him?---Correct.

And when did that happen? When did she say that?---I think she said that multiple times. She said that to me prior to Hawkings and Eberl's arrival. And she then said – she said that again in all of our presence.

Was there any conversation between you and Officer Frost, about the possibility of other members of the Yuendumu Police Station, assisting you in your task?---Correct. All we had was a – all I had was an old mug shot of Kumanjayi. And I am aware that mug shots often don't resemble the person that we're looking for. And I requested that a local member come out with us, who was aware of him, could identify him from a distance, and could also know his family friends which would assist us in looking for him. Frost told me that herself and Chris Hand would not be coming out with us, because there was a conflict of interest. Because Hand had been involved in the axe incident, and Frost was his partner. She said that Felix Alefaio couldn't come out with us. But she didn't give a reason. And Felix didn't give a reason. He just looked at me blankly in regard to that.

What I want to do is I want to ask you now whether anything else was said in the presence of the others, that you can now recall, before you were deployed from the Yuendumu Police Station into the township?---There was two further bits of information that I can recall. One was just in the presence of myself and Kirstenfeldt, where she mentioned briefly that when Kumanjayi was in town, he often would encourage young kids to conduct break and enters for him. And the reason for that was the younger you are, the less likely there are to be consequences if you do get caught. His fingerprints wouldn't be on the buildings, et cetera. The only other thing that was mentioned that I can recall is in – in everyone's presence, I asked Julie Frost if they had any working radios out on the station. And the reason for this is the radios that we use in Alice Springs are, without getting technical, they work on a different network. You can change that network by going into the modes and stuff, but it is a bit difficult. So in Alice Springs they work on like a cell phone network. Out bush they work on more of a walkie-talkie line of site network.

And when you made that request, of her, did she respond?---She did. She said she does have radios, but she doesn't – they don't really use them out there. And she was unaware if they were in working order.

Were they none the less identified?---Yeah she took me to the storeroom where they were on charge. I grabbed the ones that were there. We tested them, and they were in completely good working order.

Now you mentioned before that the photo – I thought you said we had, or did you say you had, was it an old mug shot of Kumanjayi Walker?---Correct.

Where did that photograph come from?---I took that at Alice Springs off one of the computers that I was working on from PROMIS.

When you say you took that, was that a screenshot?---So it was on the computer screen. I then took a photo of it on my phone. When I was at Yuendumu, because I'd taken previous photos since then, I'd gone through my photo album, and I screenshotted the – just the photo. So then it would come at – show at the bottom of my photo album, when I opened my photo album.

That is before you were deployed?---Correct.

All right. Was there any – a particular – did – sorry, I'll start again. Did Julie Frost, whilst you were there at any stage identify on the map, specifically House 577?---Yeah she identified 577, and then she identified the men's business area, where Kumanjayi had previously run towards. Believing that she – if he was going to be there, then he would run towards the men's business area again.

Did Donaldson return to the police station?---Yes. Donaldson returned just after 7 pm.

And what about the other two?---They got there just before Donaldson.

And what time roughly was it, as you can recall, that you left the police station, all of you?---I believe 7.05 pm thereabouts.

And when you left the police station, where did you go?---Our plan was to go to House 577. Park surrounding the house as best we could with the numbers that we had to set in a sort of soft cordon. Because that was the last house – the last known address, or the last known location that Kumanjayi had been at.

Sorry, I overlooked one last thing. At the time that you were setting up the radios that Frost had identified, did she say anything to you, at that time, about what you could or couldn't do?---Yeah, so – yeah, this is – I remember this because it was a strange comment. She said to me while I was setting up the radios, that if I wanted to, I could conduct an RBT, which is a random roadside breath test. And I was confused about that. Because, at that point, my belief was still that my task was only to arrest Kumanjayi Walker. And I didn't see how setting up an RBT could assist that task.

Thank you. All right, I'll move now to the departure from the Yuendumu Police Station into the community. So at about 7.06 you all leave?---Yes.

And how are you – how do you move and where do you go to?---We move in the same vehicles that we drove to Yuendumu in. So myself and James Kirstenfeldt were in one vehicle. Hawkings and Eberl were in another. And Donaldson and his canine were in his vehicle.

And where did you go?---We drove directly to House 577.

Just pause there for a minute. Why specifically did you drive directly to House 577?---We decided that was the best place to start our intelligence gathering - - -

And why was that?---Our task was still to arrest Kumanjayi. And that was the last known location that we had of his. So it was the best place to start.

And once you got there, how did you position yourselves?---In a sort of triangle around the house with the vehicles. Again, a soft cordon. We didn't have the numbers to create a full cordon. Myself and Kirstenfeldt parked on the corner near the – near the front door. If this is the house, this is the front door. Kirstenfeldt and I parked here. Donaldson, I believe, parked at the rear of the house. And the other two, Hawkings and Eberl, parked on the side of the house.

And was there some sort of strategic logic to the positioning of each of those vehicles?---Correct. We wanted to have eyes on every approach to the house. And Donaldson parked on the side of the house closest to the men's business area, in Kumanjayi ran. He could utilise his canine to chase him.

And what happened when you got to House 577, after you'd positioned your vehicles, as you've described?---I exited my vehicle. And I noticed a man towards the front of the house, that I now know to be Ethan Robertson.

And did you speak to that man?---I spoke to him and asked him – I determined who he was. And he informed me that he was Rakeisha's father. Who is Kumanjayi's – or was Kumanjayi's partner, at the time. I asked him if Kumanjayi was here at the house. He said he wasn't. And then James Kirstenfeldt came around from the side of the house and spoke to him.

I'll come to what he might have said to you after that. First of all, can I just ask you this. You've – were you wearing body-worn video at the time?---Yes.

And what's the protocol as far as is it on all the time, or do you switch it on or off or what?---Anytime where you're – when I was in, it was changing. There was – the General Orders were changing fairly consistently. But whenever you were potentially going to use a police power you had to have that body-worn on, activated. It was safest when you jump out of the car to turn it on.

All right. When you were speaking to Ethan Robertson, was it on?---Yes.

All right, you said that – after you had that conversation with Ethan Robertson, Mr Kirstenfeldt then came around from the side of the house?---Yes.

And did he say something to you?---He said that he'd spoken to a child through the window, who had informed him, that Kumanjayi might be sleeping there that night.

Did he say anything about the last time that Kumanjayi Walker might have been at the house?---Yes. I think he said that he'd just left minutes prior.

What did you then do, armed with that information?---I still believed it was required of us to search that house, because I don't trust the word of a 10-year old child as actionable intelligence. And I asked permission of Ethan to enter his property.

And did he give you that permission?---Yes, he did.

And then as we saw, at least in part on that video, and I don't need to play it now again, you then enter the house?---Yes.

What does – have you heard the expression, “Clearing a house”?---Yes, I have.

What's that mean?---I think there's again been some confusion in this case, as it depends on the context. There is a tactical clearance of the house, where you as a team, believe that there is a – you have actual intelligence that there may be a lethal offender inside. At which point you might enter that house with your weapons drawn. You move in a tactical fashion, which is taught. You clear the corners. You clear the dead space, and move forward. In the context that we were talking, it is interchangeable with the word, “check”, we were checking that house.

Right. So you were checking the house to see if, contrary to whatever you might have been told, whether Kumanjayi Walker might have been inside?---Correct.

Now you've already told the members of the jury about the information that had already – or you'd already come by. The axe incident. His previous criminal record. The fact that you regarded him as a high-risk offender. That he might resist police in terms of being confronted for the purposes of arrest. And you've told us how you had your gun, or at least actionable, already, if I can put it that way. What did you do, as you went through the house?---I walked through the house and just searched – searched the house and opened closed doors. I located the young child that Kirstenfeldt had spoken to; and then, locating him and seeing that that room was clear, I went into another bedroom and checked under the bed, and then just – the doors, the rest of the house, I just went through, saw that no one was home, no one else was there, and that was that.

You've told the members of the jury, I think, yesterday, that you had strapped your right hand before you attended at Yuendumu?---Yes.

And that was because of a thumb injury?---Correct. So, in regard to this incident – obviously, anywhere within that house, I am within that reactionary gap that we talked about before, which went more towards my thought process of, if I'm confronted with a potentially lethal incident, I am prepared. In our training, we are taught that it is – in the use of force process, to put your hand on your Glock. Nowhere have I been trained and nowhere have I read in any training manual when you put your hand on your Glock, not to release that retention device. And the injury to my thumb caused – there was pain and it made it harder to release that device, pushing it down and forward. So, I did that. That's how that contributed to my thought process.

In other words, it was a factor that you took into account to ensure that, if you did have to use your firearm, you were able to remove it from its holster?---Correct.

And you went through the house, as we see on the video; that is, you and Kirstenfeldt?---Yes.

And you check all aspects of the house?---Yes.

And you were ultimately satisfied that Kumanjaya Walker was not in the house?---Yes.

That having been done, what did you then do?---We left the house then, at which point, we both, but mainly I, spoke to Ethan again. Ethan confirmed or he told us that Kumanjaya had recently left the house, at which point I brought the photo of the map up on my phone that I had taken previously. I then talked with Ethan about the map and he picked out a group of approximately – I think it was a group of three houses, a bit separate than other houses, two of those houses being 511 and 518, which he believed Kumanjaya was going towards. At the time, I believe he was a bit more focused on 511, but he said it could have been either of those houses that he believed he was walking towards.

Just before we move and progress to those two houses, we know from what you have told us, and indeed what Officer Kirstenfeldt told the jury, that this young boy, effectively, indicated that Kumanjaya Walker had left about three minutes before?---Correct.

And also, more importantly, that he was going to come back with Rakeisha and sleep at the house that night?---Yes.

Given that you had that information, at least from a young boy inside the house, why not wait until he comes home?---In my experience, policing often – often, people will lie to us. That is why you wouldn't take the word of someone – if you did have permission to enter a house, at face value. I was also aware that I believe that, due to my experience in policing, the fact that we had gone to that house - shortly after that house – shortly after we'd left, a lot of the community, including Kumanjaya, would know that we have been to that house and that we were – the Alice Springs specialist team was in Yuendumu actively looking for Kumanjaya, and I believe, from that point onwards, Kumanjaya would not return to House 577 because he would have been made known of us attending.

So, bearing in mind the extent of the information that you had; namely, that he had left only minutes before with Rakeisha, you then went where?---We then drove to House 511 and 518.

And when you got to that house location what did you do?---We decided again to park in a way that could attempt to surround the properties in a way that we could, but we didn't have the numbers to, so we parked in a way that we could exfil the

vehicle, or get out of the vehicle, sorry, and have spotters, more so than a cordon, so we could see if anyone ran away from those locations.

What is a cordon?---A cordon, again, is a perimeter around a target location. You can use barricades. In this situation, we only had people, but it is a perimeter around a target location that isolates and contains that location, and controls entry and exit into that location.

Insofar as the concept of a cordon is concerned, were you, to some extent, limited by the resources that had been given to you by the executive?---Correct. Like, cordon and containing is taught in our ten operational safety principles, if it is practical, and I would say, not only is it impractical but impossible to cordon two houses with five members.

And so, given the limited resources that you had; that is, the four members of the IRT team and the dog-handler, what did you do?---So, we utilised members as spotters, more so than a cordon. So, where my vehicle parked was near House 518. From that location, Kirstenfeldt put himself in a position where he could see one side of 511. He could also see the rear of 511, if someone decamped that way, or ran away that way, and he could do the same with 518. Kirstenfeldt – sorry, not Kirstenfeldt, Hawkings went to the rear of 511, again, like a triangle that we did previously, but a larger one, because now we have a larger area. So, like a triangle, we had Donaldson on one point, Hawkings on one point, Kirstenfeldt on one point.

All right. And then, each of you, having taken up those positions, as it were, you moved where?---I moved from the car, the vehicle, around 518 and I moved towards House 511, approaching it from the side.

And, in the course of that movement, did you come across anybody?---Yes, I jumped a fence on the side of 511, because I didn't want to lose sight of that side of the house.

Sorry, just to interrupt to, your body-worn video was on at that time?---Correct.

Thank you. Sorry, you jumped the fence?---I jumped the fence.

Why did you jump the fence?---I didn't see a gate on my side of the fence and I didn't want to lose sight of my side of the house.

Yes?---That I was approaching. I jumped the fence and then I realised that there was a woman in the back yard of 518. So, I walked to the rear of – I walked to the property line between the two houses.

And did you speak to that woman?---Yes, I did.

Do you know who that is?---I believe that is Rachel Lewis.



Thank you. And what did you say?---I asked her to come and speak to me and, generally, just asked her if she knew who Kumanjayi or Rakeisha was and if she knew of their whereabouts.

Now, again, obviously, we're doing this out of respect, but you didn't refer to him as Kumanjayi when you actually spoke to her at that stage?---No, at the time I was referring to him as Arnold Walker.

Thank you?---Sorry.

That's all right. So, from there, and she didn't know?---She said she didn't know.

So, you moved from that position?---Yes, I moved from that – while I was speaking to her, towards the end of our conversation, Adam Eberl approached me. He asked me to confirm Kumanjayi's first name and, at the time, I said it was Arnold, and he informed me that there had been someone that he had seen moving in the back of that house. So, I started following him. I walked past the young child. I said something – I said hello to her. And then, I spoke to two women in the front yard of House 511.

Do you know who those women are?---I believe Leanne Oldfield and Elizabeth Snape, I believe.

All right. And do you remember now – I mean, it's on video, of course, but do you remember, as best you can recall, the exchange that took place between you and them?---Yes, I asked them whose property it was and they said – one of them said it was Margaret's. I believe that – referring to Margaret Brown. I asked them again if they knew who Kumanjayi Walker was, or where he was, and they both denied that. And then, I, believing that they were lawful occupiers of that house, asked permission for us to enter that property.

And did they give you that permission?---Yes, they did.

And so, as a consequence, what did you do?---Then I started approaching again, Eberl, who had gone and spoken to a man near the front door. I walked towards him. I'd come to the conclusion that we were going to check this house again, using the term "Clear" and I radioed to the rest of the team that we were going to check – sorry, I said we were going to clear this red house, at which point Eberl entered the front door of the property and I followed him.

Right. I'm going to pause there. I'm going to ask that exhibit 24, which is Mr Eberl's body-worn video, be played, because he's the one that enters the property first?---Yes. And I will take it to a particular point and then stop it.

DVD PLAYED

MR EDWARDSON: Just pause there for a minute.

Now, I appreciate that this is Mr Eberl's body-worn video. We will look at your video in a minute. At that point in time, were you able to see the male that we now see on video?---Yes, I was.

Did you recognise him at that time?---No, I didn't.

Did you know that it was, in fact, Kumanjayi Walker?---No, I didn't.

At that point in time, regardless of the lack of identification, were you aware that that person was, in fact, armed?---No, I wasn't.

Did you notice - or do you now have any recollection, of seeing his right hand around the right pocket and possibly in it?---No, I didn't recall. I don't recall at the time noticing that.

MR STRICKLAND: Could the Zulu time be identified when - - -

HIS HONOUR: Yes.

MR EDWARDSON: Certainly, were do I find that?

MR STRICKLAND: Top right-hand side.

MR EDWARDSON: 9:51 Zulu 9:51:01 Zulu. Sorry?---Sorry, no I didn't - I didn't - I don't recall noticing that his hand was in his pocket.

Can I ask you this? When you entered that house at that point in time, did you have your hand on your Glock in the same way you had previously at house 577?---No, I didn't.

Why? What's the difference between the two houses?---I don't think 511 was actually mentioned to me by Julie Frost as a house of interest and basically, walking into that house and seeing this man who I didn't know was Kumanjayi - I didn't perceive a threat, I just believed we were going to just have a conversation.

All right.

Can you push "play" please?

DVD PLAYED

MR EDWARDSON: Now, that's your right hand, is it?---Yes.

Removing the cap from the person who had called himself Vernon Dixon?  
---Correct.

Why were you removing the cap?---Just to attempt to have a better idea of being able to positively identify him - recognise him from the mug shot.

Now, if we look carefully in the frame - sorry, I should say it's 9:51:24 Zulu. If you look carefully in the frame and specifically your right hand, which is holding the cap that we see, you can see that your hand is strapped?--Correct.

Thank you. Can you push "Play"?

DVD PLAYED

MR EDWARDSON: Just pause that for a minute.

At this point in time, and again we might have to look carefully at both videos, did it appear to you that both his hands were free?---During this interaction I noticed that his hands at that point were free and were empty.

At that time did you have any idea at all that he had secreted a potential lethal weapon, namely the scissors that we now know existed?---No, I didn't.

Okay.

DVD PLAYED

MR STRICKLAND: Sorry to interrupt, I think - I'm not sure if it was identified, the last one was 9:51.38?

MR EDWARDSON: No, I read it into the transcript. I am stopping now at 9:51:51 Zulu. Do you want me to repeat that?

Can you stop there.

And I am now going to go to your body-worn video because of course it is your perception what you saw and what you heard that is so important. So that is exhibit 26. Now, before we push "play," I just want to ask you some preliminary questions. Where was your body-worn video positioned on your body?---My body-worn video was positioned in my - it's magnetised so I put the back magnet in my top left pocket, it's a bit off to the left of my chest then I put it on the front and then due to the body armour that I was wearing it was - so, left of my chest pointing inwards a little bit.

Right, and at all times throughout this whole incident, the body-worn video was playing?---Yes.

Okay, can you push "play" now please. So we're starting at 9:50:17 Zulu time.

DVD PLAYED

MR EDWARDSON: When he - sorry, it's 9:51:18 Zulu time, stopped. He said there, "My name's Vernon Dixon and she my aunty" and he gestures off camera?---Yes.

Was he gesturing to anybody in particular?---I believe he was gesturing to just one of the women outside. I didn't turn my head to look.

Right?---But I did notice at that point his hand was empty.

Right, thank you. And that's his right hand?---Yes.

Thank you.

Can you push "play"?

DVD PLAYED

MR EDWARDSON: Stop it there.

I can't work out whether that's you or Constable Eberl but who says the words, "Just chill out"?---I think that was Eberl.

It was, right, and sorry, the time is 9:51:27 Zulu time.

Press "play".

DVD PLAYED

MR EDWARDSON: Okay. At that point in time what photograph is displayed on the camera?---The mug shot that I'd re-screenshot from the computer that I'd taken at Alice Springs.

Now, before you actually looked at his physical features, as we can see on the video, and compared - by that I mean his facial features - and compared that to the mug shot, did you know that it was Kumanjayi Walker?---No, I didn't.

When was the first time that you were - you positively identified him?---It still took some time after looking at the photo next to his face, the - - -

There is something significant about the photograph that permitted you to identify him as being Kumanjayi Walker?---Yes, significant in a small way. He had - the only way I positively ID'd him was, I believe, he had in his left ear, a sharp skin fold. If it wasn't for that I wouldn't have been able to ID him.

And did that appear to be consistent with what was presenting - or his facial features and that skin fold replicated on the photo?---Yes.

And accordingly, you were satisfied in your mind that it was Kumanjayi Walker, not Vernon Dixon as he told you both?---Correct.

The time is 9:51:43 Zulu time.

## DVD PLAYED

MR EDWARDSON: It's now 9:51:59 Zulu time. By this stage had you discharged your Glock?---No.

What are you doing with your Glock, if anything?---By - at this stage my right hand would be on my Glock now.

Right, can you just - I know it's very difficult - I just want you to describe if you can, the first - as you recall it - events not by doing frame by frame but what you remember seeing, hearing and perceiving before you - up to the point where you discharge the shot for the first time?---Yes. So when I said, "Put your hands behind your back" as soon as I said that Kumanjayi started resisting. He raised his arms and started striking me around my head and neck area and I immediately raised my left arm and left shoulder to protect my neck. Kumanjayi struck me twice on the top of the head in a hammer fist motion, which is using the writers palm coming downwards on the top of my head. I thought this was strange because he wasn't using his knuckles so I - at that point, I looked at his hands. That was the first time I ID'd that he had a metal blade protruding - - -

Pause there. That's the first time you ID'd the fact that he had a metal blade? Did you know any more than that?---No, I just knew it was a metal blade.

We now know, as it turns out, that they were scissors?---Correct.

When was the first time you realised that what, in fact, he had deployed throughout this exchange, were scissors?---Not until I had him on his stomach, I was in mount and I was pulling his hands - right hand, behind his back.

All right, thank you. So anyway, you saw what appeared to be a blade?---So I saw him holding a blade in a dagger-like grip and then I had my shoulder up and my arm out to protect myself and then he stabbed me in my left shoulder.

Right. And what did you then do?---Instinctively from then – from then, I jabbed him just with my left hand, and - - -

Jabbed him where?---In the face with my left fist.

Thank you. And then what – what were you doing with your right arm or hand?---Instinctively at the same time, I put my hand on my Glock. At which point I realised his left hand was already on my Glock.

Can I ask you this? Were you aware, in these split seconds, were you aware of where Eberl was, and what he was doing, and his proximity to this blade, which had just stabbed you?---I was aware he was in a close proximity, yes.

So you then did what with your Glock?---So as soon as saw him with the blade, I immediately feared for my life. And instinctively I went for my Glock.

Yes?---His hand was on my Glock, and I twisted my hips back, which were trained to do with speed, to knock that hand off my Glock, and step back. As soon as I stepped back, Kumanjaya's focus turned to Eberl, and I immediately feared for Eberl's life. Kumanjaya started stabbing Eberl in the chest and neck area.

When you say, "He started stabbing him", were you able to see whether the blade physically came into contact with him, or is that just the impression that you got?---That's the impression I got.

MR STRICKLAND: I object to leading your Honour.

MR EDWARDSON: Hardly leading.

MR STRICKLAND: I object to leading.

HIS HONOUR: Yes, I don't think it was leading.

MR EDWARDSON: What could you actually see?---I – my perception was that Eberl was being stabbed.

All right. That's the perception you had?---Yes.

And given your training about edged weapons and the like, at that point in time, did you consider that he, that is Kumanjaya Walker, was potentially armed with a lethal weapon?---Yes, definitely.

And where are the areas on your body that are particularly vulnerable in these circumstances, to a weapon such as this?---Definitely neck – neck, underarm, groin, thigh.

All of which are part and parcel of your training as being potential lethal zones, if deployed - - -

MR STRICKLAND: I object to leading, your Honour.

MR EDWARDSON: He's given evidence of all of this already, your Honour, directly from part four.

MR STRICKLAND: I object to leading.

MR EDWARDSON: All right.

I'll ask the question this way. In your training, were you identified by reference to part four of the Tactics Manual, to specific areas of the body that are potentially lethal?---Yes.

What are those zones?---Neck, underarm, chest, groin, for some is the stomach. The chest wall you can penetrate that just a few centimetres.

Now you were wearing body-worn – body-worn – you were wearing your body, what do you call it?---Body armour, I was, yes.

Body armour. What about your partner, Constable Eberl?---Eberl was not.

What was he wearing?---He was wearing just his general duties shirt, just his uniform shirt.

Thank you. So you fired a shot?---So I drew my Glock, and when it was safe to fire, still fearing for Eberl's life, I fired one round into centre of seen mass of Kumanjayi.

And were you able to see whether the direction in which you pointed the gun, at the time you pulled the trigger, where it – where it might have hit?---Correct. I – I was aiming at the centre of mass. Pulled the trigger, and was able to confirm that it hit the target.

Why was it that you aimed for the centre of seen mass?---I was following my training, which is really ideal for this situation where you have such a dynamic moving target in a high stress situation, your fine motor skills might diminish, and you need to aim at the biggest target you have.

From your perception, having discharged that first shot, was Kumanjayi Walker incapacitated?---No, not at all.

What does your training tell you about incapacitation and the discharge of a firearm?---We are taught to continue firing until we achieve incapacitation.

We know on the evidence in this case, that there's a time lapse of 2.6 seconds between the first shot and the second shot?---Yes.

And .53 seconds between the second shot and the third shot?---Yes.

What happened in those 2.06 seconds – 2.6 seconds I'm sorry, that is between one, two and so on, and three, that you were able to see, as you perceived it, from your position?---So after I fired the first shot, Kumanjayi and Eberl fell to the ground. That's what my perception, they fell to the ground, and they began fighting on the ground. Most of - - -

Sorry to cut you off. Were you able to – sorry, I withdraw that. You keep going?---So they continued to fight on the ground. Kumanjayi's – most of Kumanjayi's body was behind Eberl's body, but they were facing the same direction. I saw – I could see Kumanjayi's right – Kumanjayi's right arm, with the blade in it, still moving and stabbing Constable Eberl on the ground.

And that is the perception that you had?---Yes.

That's what you could see?---Yes.

So given what you perceived, and what you could see, did you have any perception as to whether or not the shot had incapacitated him in any way?---I believe it hadn't incapacitated him at all.

And specifically, whether there was any impediment to him deploying that weapon against your partner, Constable Eberl?---No, I was still in fear for Eberl's life.

And you knew that your body-worn video was being run at that time?---Yes.

I can't recall in the sequence, we'll have to look at the video, but we do know that Constable Eberl's body-worn video comes off his person at some stage?---Some point, yes.

Do you know when that was?---I believe it was when they falling to the ground, amongst that scuffle.

Were you aware that that had happened at the time?---No, I wasn't.

Is that something you know from looking at the video since?---Yes.

All right. So your perception was his – he was not incapacitated. He was – the - that is, Kumanjayi Walker, was still in possession of the scissors, well what you thought was a blade at that time?---Yes.

That the blade was being deployed against your partner, Constable Eberl?---Yes.

Did you regard that blade as being a potential lethal weapon?---Yes.

Did you regard it as having the capacity to inflict a lethal wound on - - -

MR STRICKLAND: I object to the leading.

HIS HONOUR: It's not leading.

MR STRICKLAND: In my suggestion, he's suggesting an answer, your Honour.

HIS HONOUR: It is not suggesting an answer.

MR STRICKLAND: That's my objection, your Honour.

HIS HONOUR: Well I'm overruling it.

MR EDWARDSON: Given the position of the two men, in conflict, as you've described, what was your perception of the weapon, the blade, that was in



Kumanjayi Walker's right hand?---I believed he still had a lethal weapon, and was utilising it against Eberl.

In which direction?---He would have been stabbing, again, in this area here, neck, chest, shoulder.

As a consequence of what you saw, felt and perceived, and indeed having regard to your training, what did you then do?---I then, still fearing for Eberl's life, I moved towards the two on the ground.

Why did you do that?---Because I'd made a – I was in fear for my partner's life, and I was – needed to incapacitate the threat immediately by the use of my firearm, and I needed to make that use of the firearm as safe as possible for Constable Eberl.

And how did you do that? Did you achieve that?---I did. I moved towards the two, and I placed my left hand on Eberl's back. I did this because they were still fighting and they were still moving. I didn't want him to be thrown, or to move back into my line of fire. I then fired two more rounds into Kumanjayi's centre of mass. At which point, I observed his right arm stopped trying to stab my partner. At which time I holstered my Glock.

And even though, by this stage, he'd been shot three times, did you regard him as having been completely incapacitated?---No, definitely not. I believed he was still a threat, and he still held a lethal weapon. I just believed I could handle that situation moving forward, with lessor force than a – than utilising my firearm.

Criticism has been made of you by Senior Sergeant Barram, and specifically the deployment of shots two and three, rather than using your hands. Why did you take the course of shooting Kumanjayi Walker again, rather than intervening physically?---Well I believed there was still an immediate threat to Eberl's life. And my training states that I should not go hands-on, with someone with an edged weapon, unless I cannot use my firearm. That's how I was trained.

As so from your perspective, did you react in accordance with your training?---Yes, definitely.

Having fired the three shots, what happened next, from your point of view?---So after firing the third shot, I observed that Kumanjayi's right arm had stopped moving to an extent. I pushed Eberl out of the way. I still believed Kumanjayi was a threat, and that right arm specifically with that weapon was a threat. I rolled Kumanjayi onto his stomach and put him – I got in mount position, which is straddling him. And I used my weight on top of him to trap his right arm under him, to control that threat for the moment. I then asked – I believe at that point I asked Eberl if he was okay. I said – I think I said, "Are you good? Are you good?" because I believed he could have been seriously wounded, or potentially suffered a fatal stab wound in that fight. Once he responded and said that he was okay, at that point, I started working Kumanjayi's right arm out from under him to place him in handcuffs and finish the arrest process.

And when was the arrest process completed?---I'm not sure on the time, but I believe it was – took another minute nearly to put those handcuffs on.

And until the handcuffs were finally put on Kumanjaya Walker, was he still resisting police?---Yes, he was.

How was he resisting police?---He was tensed up, and he was pulling against us and his fists were clenched and he wasn't allowing us to get the scissors out of his hand.

We hear on various body-worn videos, officers saying, "Let go of the scissors, or "Drop the scissors", or something like that?---Mm mm.

Did you utter those words, or words to that effect at any stage?---Yes, I did.

When?---When I – so I pulled his hands out from under him. At that point I ID'd that he had a pair of scissors in his hands. And around the same point in time, Eberl said words to the effect of, I think he said, "Fuck, did you?" And I took that to mean, "Did you shoot him?"

Yes?---At this point, I believed that Eberl and myself had just been involved in a potentially lethal fight and he was at a heightened state. And the symptoms of that include tunnel vision and auditory exclusion where you – you focus on the specific thing in front of you, and you don't hear everything that's going on. I believed he was just suffering from auditory exclusion, so I needed to tell him, I needed to give him all the facts, so he could come down from that heightened state. And I told him that it was all good, Kumanjaya had a – he had scissors in his hand and he was stabbing me, and he was stabbing Eberl. Just to explain to him the situation.

Could you put the tape back on and play right through to that point.

DVD PLAYED

MR EDWARDSON: The time is 9.52.55 Zulu Time.

We can see now, that at that point in time, the handcuffs are finally placed on Kumanjaya Walker's wrists, and he's then effectively restrained?---Yes.

Given that he'd been shot three times, why was it necessary nonetheless, for you to put the handcuffs on him?---I still believe he had enough strength left in him to fight. And his intention – he said, "I'm going to kill you mob." He still – I believed his intention was still to fight us. He had that much strength, in fact, it wasn't until much later in the police vehicle, we – when we – when it was time to start medical treatment of him, I still didn't feel comfortable uncuffing him until I'd searched his whole body. Taken his pants off – left his undies on, but I took his pants off to ensure that he didn't have another weapon on him. Because he still had enough strength, that if he wanted to, he could utilise that weapon.

Thank you. And is that again consistent with your training?---Yes.

What steps did you, if any, take, to try and save his life?---We moved back – we took him to the police vehicle - - -

Sorry, I should have asked you this before. Why was it necessary to move him from that location?---We'd been informed, and I could hear it, that the community was approaching our location in a dangerous manner. And it wasn't safe for us to keep him there, for our safety, but also we needed to provide first aid. And we couldn't provide medical treatment while dealing with a security threat.

So he was taken back to the police station?---We took him back to the police station because the clinic had been evacuated, so there was no point going there.

And what happened when you got back to the police station?---On the drive to the police station, I had – I'd searched him. I'd uncuffed him, I'd taken his shirt off and assessed his wounds, and assessed that he'd had three gunshot wounds to his centre of mass, to his torso. I believed, at that point, that two of the gunshot wounds, the second and third, may have penetrated his lungs. I didn't believe that of the first wound. So once we got back to the station, we got a medical kit that we had, which is only basic first aid kits, and I did my best to create what's called a three sided bandage, which is a bandage – it is what it says, you put a bandage on which has three sides pinned down, which allow, so when you breathe in, no air will enter your lung cavity or chest cavity from externally. And when you breathe out, it will still allow that air to release. To try and slow that – that lung collapse, caused by a tension pneumothorax. So that's all we could do. So I tried to do a do-it-yourself job of that, because we didn't have the correct medical gear. That was the first thing I did. The back wound, I just put pressure on it and sealed it. I wasn't worried about a – any side effects of a tension pneumothorax from that wound. Once that was done, we moved him from – that was done ASAP, as quick as we could in the car park, because that was a priority. We then moved him from the car park into the watchhouse area of the police station, which is – it's attached. It's just next to the muster room. But it is the cleanest part of the cells. It's cleaned all the time. There's no office work done in there. It's just – it's cleaned every day. So that was the cleanest place that we could continue treatment. There was also – I believe there was CCTV cameras as well. So there was a couple of reasons we put him in the watchhouse area.

And was there any other equipment that might have been used to try and save his life?---I believed at that point that due to the lack of equipment we had, and the lack of ability to do anything further, surgically, you're not qualified, and didn't have the gear to do that. All we could do was observe him. Make him as comfortable as possible. And at some point his heart would stop, and his breathing would stop. And to assist that further, I was looking for a defibrillator. I asked Julie Frost if she had one. And she stated that the station didn't have one. I then got the boys to start looking for one. Because I believed that all stations had a defib by this point. And we located one in a vehicle parked in the – in one of the police vehicles outside.

And was that piece of equipment deployed?---We utilised that. Obviously it wasn't effective, but we did our best.

I need to ask – go back again, and just ask you a few more questions about alternatives to discharging your firearm. You've told us that when you entered 511, you were wearing your kit?---Yes.

And that included, did it not, as you've told us I think, the Taser?---Yes.

What else?---Taser, pepper spray, baton. As far as accoutrements like that go.

And is there any reason why none of those pieces of equipment were deployed from the time that you tell Kumanjaya Walker to put his hands behind his back, right through to the time that ultimately he's arrested – or formally restrained?---Yeah – yes, there was. So I was following my training, when confronted with an edged weapon, and being in fear for my life, my partner's life. And instinctively I went for my firearm. In saying that, the Taser has been described before has two prongs, that separate on discharge. The effective distance for a Taser that – the prongs need to separate. The further away – away you are, the more they separate. If they're too close together, they will not cause neuromuscular control, which is what you're looking for. So the effective distance for that is 2.5 metres to four metres. So I was entirely too close to use my Taser at all points. Also, in training, I've only ever been taught to use a Taser against a standing offender. If they're wearing specific clothes, that'll prevent them from – from it being effective. But I've never even been trained to Taser someone on the ground. So I was in immediate fear for my partner's life. My training says, unless there is no immediate fear for my partner's life, I stay on my firearm. I didn't believe a Taser would be effective in that – at no point in that instance did I believe a Taser would be effective.

Now, at some point in time, as we can see on the video footage, at least from the perspective of the body-worn video that you were wearing, Constable Eberl is – my words, but for want of a better description, on top of Kumanjaya Walker?---Yes.

In other words, Kumanjaya Walker is underneath Constable Eberl?---Yes.

Do you have any specific training of that sort of scenario and how quickly that can change?---Yes. From what I saw they were fighting on the ground. They were not in a – neither of them were in a specific position of dominance, even still, they were fighting on the ground and it can take half a second for whoever is on the bottom to swing their hips and be on top, now, in a dominant position, so it can take split seconds for that whole dynamic to change and they were moving the whole time.

Mm mm. I want to remind you of some evidence that you gave yesterday at transcript page 1032 and I will just read this to you. I asked you this question:

"Can you just explain, I want you to use your words. Can you explain to the jury the difference?---So if you had distance and you pull your weapon and

you had lethal cover, you then have time to assess to see if there is a difference, if the offender reacts differently."

?---Yes.

"If you don't have that distance or time then you aren't - you don't have the ability to - you don't have the ability to cause the change and effect. If the offender is on top of you you can't assess a situation - or you can assess the situation but you can't so much utilise that distance is what I'm saying."

?---Yes.

I want to break that down if I can?---Yeah.

Can you just explain what you mean - what it was that you were trying to explain to the jury in that scenario?---Yeah, I didn't explain that very well yesterday. What I meant was when faced with an edged weapon we are trained to draw our Glock and present a lethal cover - which doesn't necessarily mean we need to fire our Glock. So say someone is running at me with a - from a distance with an axe - my training is to draw my Glock and present a lethal cover. The mere act of me doing that might cause the offender to see the Glock and drop the axe - or he may not, and if I still have time, I may verbalise and say, "Please drop the weapon - drop the weapon or I'll shoot." Now, the verbalisation with the presentation of my Glock might cause the offender to drop the weapon again, or it may not - and if it doesn't and if you are put in a position where your life is at risk then you are taught to fire. So I guess I was saying that there are some instances where presenting your Glock can cause the necessary change. This was not one of them, and there are others - - -

Why was this not one of them?---I was in immediate fear for my partner's life. I did not have time to verbalise.

You are now talking about shots 2 and 3?---Even shot 1.

Thank you?---Even shot 1. So shot 1 - I was in immediate fear for my - for Eberl's life and I did not have time to waste verbalising. That might take even a second - second and-a-half - two seconds within which time Eberl could've been stabbed multiple times. We are taught not to verbalise if it's impractical to do so.

Excuse me, your Honour. Your Honour, I think I have completed my examination-in-chief. I may - - -

HIS HONOUR: We are going to take an early adjournment this morning, members of the jury, so would you retire please? We will take the morning adjournment at this point.

JURY OUT

HIS HONOUR: If you could stand down now?---Thank you, your Honour.

WITNESS WITHDREW

HIS HONOUR: I will take the morning adjournment and then we will hear what you want to say, Mr Crown.

MR STRICKLAND: The court pleases.

HIS HONOUR: Yes.

ADJOURNED

## RESUMED

HIS HONOUR: Yes?

MR STRICKLAND: Your Honour, I do propose to ask this witness about the fact that he received training in the Australian Defence Force in relation to the firing of weapons and whether he received training when he was in the Australian Defence Force in relation to the use of force generally. I don't intend to go into the details of the content of that training other than to ask in general terms whether he received that training.

In my submission it is relevant for the reasons I have already stated, that is this case is - a central issue in this case is his state of mind at the time of firing shots 2 and 3. There has been a lot of evidence about what he knew was his knowledge about use of force, training in relation to weapons et cetera. In my submission whether that training has been reinforced or whether it has been assisted by training before he went into the Northern Territory Police is relevant to his state of mind.

HIS HONOUR: Right.

MR STRICKLAND: In my submission, it's not splitting the case. I have some authorities, very well-known authorities - - -

HIS HONOUR: I am not concerned about the splitting the case argument.

MR STRICKLAND: I understand. But in my submission, when one looks at cross-examination - and I am citing what the High Court has said in *Wakeley v R*, there is no - it is difficult for a court - in my submission the court should be very cautious to cut off a line of enquiry, and that is to forbid particular lines of enquiry before they even commence unless it is clear that that line of enquiry has no relevance to the issues in the case.

They are my submissions, your Honour.

HIS HONOUR: I don't think I need to hear from you, Mr Edwardson.

MR EDWARDSON: No.

HIS HONOUR: The Crown proposes questioning the accused in cross-examination about his service in the armed forces before he became a member of the Northern Territory Police Force. He proposes to do so, however, in a very restricted way, simply to ask whether he had received particular types of training - that his training in relation to the use of force and in relation to the use of firearms in the armed forces.

It is not suggested that the accused will be cross-examined about the content of that training. In those circumstances it does not appear to me that this material could be used rationally by the jury to assess the probability of the existence of any fact in issue in the proceedings. It is simply not relevant in the absence of any

evidence or material relating to the content of his training. For that reason, I rule that that proposed area of cross-examination, limited as it was, is not admissible.

MR STRICKLAND: If the court pleases.

MR EDWARDSON: The court pleases.

MR STRICKLAND: Your Honour, in that case, if I was to elicit evidence about the content of his training, through my questions of him, then I propose to do so, subject to your Honour's ruling. Now, - - -

HIS HONOUR: Now you've changed your position.

MR STRICKLAND: But your Honour, I've changed my position based upon your Honour's ruling.

HIS HONOUR: Well, my ruling was based upon your position.

MR STRICKLAND: I understand. But - I understand that, your Honour, but what I am - what I have sought to do - my learned friend has said that there are some restrictions.

HIS HONOUR: Yes.

MR STRICKLAND: As to - - -

HIS HONOUR: And this may require some taking of evidence. If it is case as a question of fact, that he is restricted in terms of what he is able to say about his training, it may be entirely unfair of the Crown to put him in the position, in front of the jury, of presenting as someone who is uncooperative.

MR STRICKLAND: Your Honour, can I say, I respectfully agree with that entirely. However, your Honour doesn't have - I accept my learned friend had the conversation he says he - I accept that unreservedly but, in my submission, your Honour would need some material before your Honour could accept that as a fact.

HIS HONOUR: Well it has only just been raised - - -

MR STRICKLAND: I understand - - -

HIS HONOUR: And I accept what you say. But that means that the trial will be delayed - undoubtedly - whilst evidence is put before me in relation to these matters.

MR STRICKLAND: Well, your Honour, what I can - I understand that and I don't - I can continue without mentioning that at all, for most of the rest of the day. I don't think it needs to be - or I understand - I'm just - what I - the proposal would be this; if it were the case, having - if your Honour received the material and accepted the



material that he could not answer those questions because of whatever, I would not then seek to ask those questions because I agree with your Honour, that it would not be fair to ask those questions and the jury take a view as to his level of cooperation.

HIS HONOUR: Yes.

MR STRICKLAND: So, if material was presented before your Honour and satisfies your Honour, then that would be the end of it. I don't think it does need to prevent the commencement of the cross-examination because, if it were the case that your Honour did permit that, I would have no objection to my learned friend asking questions of that. I mean, the fact is, we don't have and I accept it's been raised for the first time this morning, as to the - - -

HIS HONOUR: Except we're in the position where we're at the close of what would otherwise be the evidence-in-chief of this witness, and I have got no doubt that Mr Edwardson would prefer, if it to be an area which is opened up at all, that he has the opportunity to deal with it before cross-examination commences.

Am I correct in that regard?

MR EDWARDSON: That's exactly what I said before, your Honour, and that was my understanding of the position that was accepted by my learned friend. It seems there has been a moving of the goal posts.

HIS HONOUR: I'm going to take a short adjournment. I think you should consider your position, Mr Crown, because if you persist in what appears to me, frankly, to be a fishing expedition, in circumstances where you apparently don't have anything which you can directly put to this witness to suggest that his training in the military is different to his training in the Northern Territory Police. If you persist in that, then I must, I think, give the defence an opportunity to bring the appropriate evidence before me to establish that that line of cross-examination would not be fair.

MR STRICKLAND: I understand, and I will consider my position. But, your Honour, in terms of a fishing expedition, cross-examination of a witness who hasn't given a statement because of his right, in my submission, can't be really categorised as a fishing expedition. That is the purpose of cross-examination, is to test things, some of which we don't know and couldn't know, including, for example, his state of mind.

HIS HONOUR: If there was something that you had, some information that you had that would make that relevant, then I would agree with you.

MR STRICKLAND: I understand.

Your Honour, there is a second matter before your Honour goes off the Bench.

HIS HONOUR: Yes.

MR STRICKLAND: Something has arisen in the course of this evidence which will require me to – or I'm going to seek your Honour's leave, in relation to a particular application, but I ask that the court be closed while I make that application, for the reasons that will become obvious when I make it.

HIS HONOUR: All right. Do you want me to deal with that now?

MR STRICKLAND: Yes, please, your Honour.

HIS HONOUR: Then I will order that the court be closed for the purposes of this limited application. So, will all those present in the courtroom please leave, except for the lawyers.

**CLOSED COURT**

## COURT REOPENS

HIS HONOUR: Come back into the witness box please.

ZACHARY BRIAN ROLFE:

HIS HONOUR: Before the jury is brought back in, this morning before evidence recommenced, there was an application by Mr Edwardson for a ruling in relation to proposed cross-examination by the Crown. Of course, that legal debate and discussion occurred in the absence of the jury. I just want to make it clear that there – any reporting on that discussion is prohibited, and there will a suppression order made in relation to that, until further order of the court.

Now we'll bring the jury back in please.

JURY IN

HIS HONOUR: Mr Edwardson.

XN BY MR EDWARDSON:

MR EDWARDSON: There's one final matter that I overlooked. And I just want to ask you about please, Mr Rolfe. Yesterday you gave evidence about the events that occurred on 7 November 2019, and in particular, your attendance, along with other members, at the Warlpiri Camp?---Yes.

And specifically, you gave evidence about two males who had departed that vicinity at around that time?---Yes.

And that you, and I think it was Officer Kirstenfeldt, went to track them down and identify who they were?---Correct.

To ensure that they were not, in fact, Kumanjayi Walker?---Correct.

How did you go about that identification process?---I believe they had ID cards on them when we caught up with them.

So you were able to identify them by them producing a valid identification of some sort?---Correct.

Do you know what that identification was?---I don't recall what version of an identification card it was, for now.

Nothing further, thank you, your Honour.

HIS HONOUR: All right, thank you.

Mr Strickland.

XXN BY MR STRICKLAND:

MR STRICKLAND: Your Honour, I intend to play exhibit 26. Would your Honour give the usual warning? I understand one of the body-worn was played without the warning earlier, and someone was upset – or the mother was upset. So could your Honour give that warning please?

HIS HONOUR: Yes.

I'm told that the Crown is about to play one of the body-worn videos, which will contain distressing material. If there is anybody present in the courtroom, who believes that they may be affected by that material, they should now leave.

Constable, I'm about to play some body-worn, which I assume you have seen many, many times, is that correct?---Correct.

Thank you.

I'm playing from Zulu time, 9:51:42.

DVD PLAYED

MR STRICKLAND: Pausing at Zulu time, 9:52:52.

Now, do you agree that you shot Kumanjayi Walker twice in quick succession whilst he was on the mattress?---Yes.

Whilst Constable Eberl was on top of him?---No, partially on top of him.

All right. Whilst he was on top of the upper part of his body?---No, I don't agree with that either.

Okay. The shooting twice in quick succession is known as a double tap, isn't it?  
---Not then, actually. Do you want me to explain the difference between a double tap and a controlled pair, for the jury?

No, thank you. Have you heard the expression double tap?---Yes.

Does that mean shots in quick succession, one after the other?---Generally, it would mean you take one sight picture and you fire as quick as possible, meaning that the shots would actually be, on average, about .2 of a second apart.

So, that, in your opinion, was not a double tap?---No, it wasn't.

But it was two shots in very quick succession?---Yes.

At point-blank range?---Close to point-blank.

Five centimetres away?---I can't give you a centimetre distance.

You understand that there is an agreed fact about the distance between the Glock and the body of Mr Walker?---I believe as an agreed fact, it was approximately that distance, but I can't say exactly how close or far it was.

Do you accept it was point-blank range?---I believe – I accept that it was extremely close.

But you don't accept the expression, "point-blank."?---My understanding of point-blank is nearly touching - is actually touching the target.

It was very close to touching the target, wasn't it?---Correct, it was very close, but that's not touching.

You knew at the time you pulled the trigger of your Glock on two successive occasions that you were pointing the Glock at Mr Walker's vital organs?---I was pointing the Glock at his centre of mass, centre of seen mass.

And you knew that the centre of seen mass contained his vital organs, didn't you?  
---Some of them, yes.

Which ones?---I knew they contained his lungs, heart.

And you knew that those two shots fired in quick succession, at point-blank range, in an area that contained his lung and his heart, would probably kill him?---I've been trained that shooting centre of mass is likely to cause death or serious harm.

What I'm asking you about is this occasion?---I knew it was a potential outcome.

You knew that firing those two shots, 5 centimetres away, in an area that contained his heart and his lungs, would probably kill him, didn't you?---No.

But you think it would probably cause him serious harm?---I wasn't thinking that at the time.

Did you think it would cause him any harm?---I wasn't thinking that at the time.

Well, if you weren't intending to cause – and you weren't thinking about causing him any harm, what was the purpose of firing the two shots?---To incapacitate the threat that he was posing to Eberl.

Incapacitate means to stop him moving at all, correct?---Incapacitate, as I was trained, is to prevent him from being able to do what he was doing before.

By stopping him moving?---By stopping him from stabbing Eberl.

By stopping him using his right hand and right arm, correct?---In that instance, yes.

And you knew that if you fired two shots in quick succession, at point-blank range, or 5 centimetres away, at an area containing his heart and his lungs, that that would cause – would likely cause his death, didn't you?---I knew it would likely cause death or serious harm.

Okay. Now, you've given evidence that after you fired those two shots whilst he was on the mattress, that you thought that Mr Walker was still resisting arrest?---Correct.

You, at the time, you heard Mr Walker crying out, didn't you?---Afterwards.

Between the time you fired the two shots and the time you finally got the handcuffs on him and secured the handcuffs, did you hear him crying out?---Yes, I believe he did, at some point.

He cried out a name, didn't he? Leanne, Leanne?---I believe so, yes.

Well, did it appear to you at that time that Mr Walker was in agony after those two shots were fired?---Yes, he seemed to be in pain.

In extreme pain, didn't he?---He seemed to be, potentially.

Potentially?---Correct.

Are you saying he seemed to be potentially in pain after being shot three times?---I'm saying I can't say what he was feeling.

I'm asking you what he appeared to be?---Yes, he appeared to be in pain.

I want to suggest that he seemed to be in extreme pain to you?---He appeared to be in pain.

Let me ask you about your aspirations in relation to your career, in around about at the time you joined the Northern Territory Police Force. You joined the police force after completing a five or six-month training period?---Six or seven.

Six or seven months, and you joined on 21 December – sorry, you became a police officer after that training in December 2016?---Correct.

And you joined, you voluntarily joined the Immediate Response Team five or six months later?---I believe it was four months.

And you joined May 2017?---Correct.

And you have heard evidence from Sergeant Lee Bauwens that you, in fact, helped train him; you, in fact, assisted him at some point in time in training other people who joined the IRT?---Correct.

Is that the case?---Yes. So, they'd already joined and in our regular training days, sometimes I would assist the training.

And how would you assist in that training?---With however Burner (sic) would ask me to – Bauwens, sorry, Bauwens would ask me to assist.

And what way was that?---I can't recall specifics. It would be explaining some training aspects that I was already aware of.

You have given evidence that you were involved in a number of deployments before the 9 November deployment?---Correct.

And can you say approximately how many?---I believed it was approximately ten.

And is that during the period between May 2017 and 9 November 2019?---Correct.



And did those deployments involve arresting people?---Correct.

All of them?---No.

How many of the ten involved arresting people?---Most. There was some for riots, we were there just as a presence to prevent any further rioting.

And you heard evidence from Sergeant Bauwens that a person's military training was regarded favourably in people who applied to join the IRT?---Yes.

And you had previously served in the Australian Defence Force?---Correct.

Did you regard your military training as assisting you in the deployments you've given evidence about?---Yes, I have.

Sorry, yes you did?---Yes.

And in what way?---I believed my training throughout my life and life experiences have made me a better police officer overall.

How was that?---Just gave me more - I guess the more you learn - actively learn - you become a better learner and a lot of those courses required me to pick up skills fast , so I became a - I learned how to learn, I became a better learner. Well, for example, when in the police force learning to use an AR15 - a patrol rifle. I'd already had hands on that similar rifle before, I knew how to use it. Stuff like that.

So I want you to pause in case there is an objection to this question, do you understand? But you say that you've picked up skills from your time in the military. That was your evidence?---Yes.

And that included, for example, using an AR15?---Yes.

And did you receive training in using an AR15?---Not in the military.

Did you receive training in firing weapons?---Yes.

One of the things you were taught both in the military and the Northern Territory Police is when you fired your Glock to look in the direction you were firing, is that right?---When I fire my firearm.

Yes. You had to look in the direction?---Yes.

That you're firing. And when you fired the three shots in House 511 you were looking at the target, weren't you?---Correct.

You weren't looking away?---Correct.

Did you enjoy when you went out on the deployments in the IRT, did you enjoy the adrenaline and the excitement of those deployments?---No, it was work.

Yes?---I enjoy my work in general.

Did you enjoy in particular that aspect of your work - that is being deployed to arrest targets?---Sometimes I did, sometimes I didn't.

Were the targets you sought to - were the targets of those previous IRT deployments, were they regarded as high-risk targets?---I can't recall all the targets.

Were any of them high-risk targets?---I believe so, but I can't recall.

Did you find that exciting or adrenalin-filled, to go on those kind of deployments, arresting high-risk targets?---Not particularly.

Did you apply to join the TRG when you were in the NT Police Force?---Yes, I did.

And when was that?---I believe 2018.

But you didn't, in fact, end up joining them, is that correct?---Correct.

Why did you apply to join the TRG?---Just to enhance my career and - - -

Beg your pardon?---To enhance my career.

How would it enhance your career?---You would receive extra qualifications, you would build your resume, you'd get extra training, for example.

In what?---In tactical areas.

What do, "tactical areas" mean?---Well, the Territory Response Group is a tactical unit that is higher trained in weapons and tactical operations, they conduct CPP, which is Close Personal Protection, search and rescues and they have a bomb disposal unit, for example, and they conduct high-risk jobs or they are prepared to.

And did you want to be involved more in high-risk jobs if you joined the TRG?  
---I wanted to improve myself and improve my resume, that was part of it, so yes, I guess.

Isn't it the case that you obtained some excitement - some enjoyment - in being deployed to high-risk situations?---I wouldn't call that excitement.

Did you apply in 2018 or did you undertake the ADF Special Forces entry test?  
---Yes.

Is that because you sought - you hoped to join the ADF Special Forces?  
---Yes.

And what are the ADF Special Forces?---The unit that I was trying out for was the SAS.

And why did you want to join the SAS?---To be honest, at that point in time I was in a bit of a rut in the police force and I was looking at other career paths.

You didn't succeed in joining the SAS, is that correct?---Correct. I got injured after - just before the select - the actual selection started.

Is it - and why did you choose the SAS as a potential career path?---Because all I had done previously really, career-wise was the Army and I didn't have any desire to join the general Army again and that was the - that was a pathway that was potentially open to me.

Is it the case that you wanted to become involved in more hands-on situations? ---So the SAS was specifically a long range reconnaissance - specialist reconnaissance unit and historically weren't really involved in as really direct action jobs like what you are talking about.

But your aspiration was to become involved in what you described as "direction action jobs" wasn't it?---No, because then I would've more likely joined the - tried to join the commandos who are specifically into that role.

Isn't that one of the reasons you sought to join the TRG, to become more involved in direct action jobs?---No.

You don't accept that?---I don't accept that.

Now, I just want to ask you some questions about your training in the Northern Territory Police Force.

Can the witness please be shown exhibit 1, tab 40?

THE WITNESS: Thank you.

MR STRICKLAND: Now, have you seen this document before?---Not that I can recall, to be honest.

Well, take as much time as you like to look at it, because I just want to ask you some questions about it?---Yes, I can - I get the gist of it completely already.

Do you want to have some time to look at it?---Feel free to ask away.

Can you see that there are a number - that lists a number of courses, qualifications you've taken since you joined the Northern Territory Police Force?---Yes.

If you go to page 2 it talks about the various trainings you've received in - when you did the course in the second half of 2016. Do you see that?---Yes.

So you've done Taser courses, Taser operation courses. You've done a risk - this is about the fifth-last line, a risk assessment and management online training course?---Yes.

The course on Glock - in relation to the Glock?---Yes.

Is this an accurate record of the training you've actually received?---Yes.

And if you go to page 1 it refers to - this is the third-last line, "Defensive tactics training" again in that period in - between July and December 2016, did you in fact receive that training?---Yes.

And it refers to - and I won't go through them all. Please have a look at them. Do you accept that all of the courses there you've actually received the training that is recorded?---Yes, I do.

Thank you. Now, you have - you would accept, do you, that you were trained only to use lethal force when either yourself or someone else was faced with an immediate life-threatening circumstance?---Yes.

You were trained to assess the threat continuously?---Yes.

And to reassess the threat, as circumstances changed?---Correct.

You're trained to consider whether there are any other options available to resolve a particular incident less forcefully?---Yes, when there's no longer an immediate threat to life.

And you've given evidence that you were trained to only use lethal force as an option of last resort?---Correct.

Now can I ask you to go to exhibit 62, tab 4. Just go to page 24 please?---Yes.

Now you were asked about the training you received in relation to lethal force, and what is lethal force, is that right?---Correct.

And you say - I'm looking at the - under the heading, "Lethal force." What is contained there, in that part, is accurately reflects what you were actually trained in, is that correct?---Yes.

In particular, the points to consider when using lethal force is whether an officer or third party was in jeopardy?---Correct.

Is there any less than lethal alternatives available, and is it likely be effective. That's something that was central to your training, is that right?---Yes.

“Where there is no immediate threat to life, a member should assess the incident in order to determine what non-lethal techniques will best de-escalate and bring the incident under control in a safe manner.” That’s something that was central to your training?---Correct.

“De-escalation techniques”, you’ve heard of that expression?---Yes, I have.

What does that mean to you?---De-escalation techniques is anything that you can do to calm down a situation. To bring a level down - the level of the situation down from where it is, to a lower level. So the way I was taught was – obviously there’s communication. But any use of force that is used justifiably, and is effective is a de-escalation technique.

Do you agree that communication is one of the critical de-escalation techniques?---Correct.

Tactic – what is described as tactical withdrawal is another de-escalation technique?---Yes.

And what do you understand by the meaning, or the phrase, “Tactical withdrawal”?---Generally it’s creating space, putting cover between yourself and the offender, if you’re – if you’re able to do that.

And you know, and again, I’m looking at the page 24, you know that you are trained, but you’re authorised to use non-lethal force techniques, and – which is OST equipment. Do you know what OST stands for?---Correct.

What does OST stand for?---Operational Safety and Tactics.

So you’re authorised to use non-lethal force and operational safety tactics equipment for the resolution of incidents, in order to either protect themselves, or another individuals, et cetera, is that right? That’s part of your training?---Correct.

Could the witness please be shown exhibit 78.

Now as part of your training, you did a number of exams, is that correct?

I’m sorry, exhibit 78 tab – well I’m just asking generally for the moment.

You did a number of exams as part of your training, is that right?---Yes.

And you scored very highly in those exams, didn’t you?---Correct.

If I can just take you to the first one, tab 2, that’s described as “Exam One” on 20 June 2016. Have you seen this document?---Yeah, when I was in training.

Yes. And is it your handwriting that's contained in that document?---Yeah, I've signed the – the front page.

Yes?---And that is, yes. I believe it is.

And your signature is under the heading, in the box, "Participants signature" is that correct?---Correct.

Was this a closed book exam?---I can't recall.

Okay. If you go to page nine - - - ?---Of that exam?

Of that exam, yes. You have successfully completed the Operational Safety Principles, is that correct?---Correct.

And do you – I take it you weren't just copying something that you were – in front of you, you'd remembered them, is that right?---Yeah, I believe this would have been a recall, but some of our exams at some points became open books. I just can't remember which ones.

Right. If you go over the page, page 10. Again you see there's, "Tactical Options" model?---Correct.

And you were asked to – look at question 11B, you were asked to provide an example of a – of de-escalating response to a situation. Can you just read that response please?---11B?

Yes please?---"From a police officer using the hard cover of his firearm to attempt to control an apparent violent, knife-wielding man, who is yet to move to attack the public or police, the police officer may tactically disengage to a safe distance. And further de-escalate the situation by beginning to negotiate with the man."

And apart from the training you received, which you evidenced by way of the exams, you also received – you also received scenario-based training. Is that correct?---Correct.

Can I ask you to have a look at tab – same exhibit, tab 4. Have you seen this document before?---Yes I have.

And if you go to page nine, that indicates that you and another training officer called Lannigan(?) did a scenario based training on 10 November 2016 at a bus exchange at Palmerston?---Correct.

Do you recall doing that?---Yeah, so I was in the Peter McAulay Centre in the basketball area, but that's what we were told the scenario was.

And so the scenario was that - - -

HIS HONOUR: Could those who are present in the public gallery please ensure that their phones are turned off.

MR STRICKLAND: So do you recall this scenario, that you and another member – Lannigan was a female, is that right?---Correct, Maddie Lannigan.

Maddie Lannigan, when you arrived at the bus station, there was a person named as John Smith, that's a – that's part of the scenario, is that right?---Correct.

And he was abusing a bus driver who would not allow him on the bus. And he's being disorderly and violent, and not compliant when speaking with police, is that right?---Well that's a scenario. There was no bus or bus driver.

I understand that - - - ?---Or bus stop.

- - - so that's the – I should have said, that's the scenario you were presented with?---Correct.

And in the scenario, when asked to explain the situation, Smith pulled a knife and began threatening you and Maddie Lannigan, is that right?---Correct.

In the scenario?---Yep.

And you, in the scenario, you and Maddie Lannigan both pulled their Glocks and created distance, is that right?---Correct.

Ordering Smith to drop the knife?---Correct.

You're using your verbal commands?---Correct.

Part of the de-escalation techniques?---Yeah, part of our operational tactics.

And in the scenario then, Lannigan re-holstered her Glock and pulled her Taser?---Correct.

And then, in the scenario, Smith dropped the knife, and then you holstered your weapons to conduct a hands-on arrest, is that right?---Correct.

And then in the scenario, Smith took up a fighting stance, you know, what fists ready?---Correct.

And then in the scenario, you pulled your ASR, that's your OC spray, is that right?---Correct.

And you sprayed Smith?---Yes.

And you sprayed him a couple of times?---Correct.

Continued to fight, and then a Taser was deployed by Maddie Lannigan?---Correct.

And that was effective, and then you actually placed handcuffs on Smith?---Yes.

So that's – that scenario was the Tactical Options model, in operation, in effect. Is that right?---Yes, part of it.

Various – you were trained in various circumstances which involve using something other than lethal force?---Correct.

Now, you were asked yesterday by Mr Edwardson about your training in relation to knife equals gun. Do you remember some questions about that?---Yes.

I'll just remind you of some of the questions you were asked. This is at 1031. You were asked at the bottom of the page, "Are you familiar with that expression, either edged weapon equals gun or knife equals gun?"---Yes.

"Are you familiar with that expression?---Yes, I am." You said – sorry, I'll go back. I'll go back to – you were then asked, "What does that expression mean to you, in terms of your training?" And you answered, "The way I was trained was, if we were presented - if someone was threatening us with an edged weapon, our first response was to go for our firearm, unless that was impossible." Do you recall that?---Yes.

I want to suggest that's not a reflection of what you were trained to do?---That's how I was trained.

You've been present in court when a number of officers in the Northern Territory Police gave evidence about knife equals gun?---Yes.

For example, Sergeant Kent, you recall his evidence, as a police officer, some 14 years - - -?---I remember him giving evidence. I don't remember what he said.

I want to suggest his evidence was, "If presented with an edged weapon, you draw your firearm, dependent on the circumstances, in particular, the level of threat you faced"?---Well, correct, that's a different situation than what I was headed to.

He said, "If they're actively threatening me with an edged weapon, then potentially I'd escalate to drawing my firearm or giving them some verbal directions first." Do you recall that evidence?---Yes, I recall him saying something similar.

And that's the training you were given, wasn't it?---No, that's not how I was trained.

He said, "It's an escalation, so verbal commands would be first." Do you remember him saying that?---I don't remember him saying that.

Okay - - -?---But I trust the transcript.



See, you say that's not how you were trained. Can I ask you go back to exhibit 62 again, please? And going back to this tactical options model at page 27 - - -?---What tab?

Tab 4.

MR EDWARDSON: Sorry, what page was that?

MR STRICKLAND: It is exhibit 62, tab 4, page 27.

So, you've given evidence – yesterday, about your knowledge of this wheel, this tactical options model wheel?---Yes.

And if you go over the page, you see that each of those tactical options – presence, other weapons, ASR, tactical disengagement, there are – there is an elaboration on each of those options, isn't there?---Yes.

And you've given evidence that what's contained in this manual is consistent with your training?---Correct.

So, if you go to the tactical options model involving firearm – you see that, page 29?---Yes.

You can see that there is a series of escalating steps, isn't there?---Yes.

Verbal warnings, the first step?---Yes.

Then continuous assessment?---Yes.

Hand on firearm?---Yes.

Drawing on firearm?---Yes.

Aiming firearm?---Correct.

And reassessing the situation?---Correct.

Then verbal warning?---Correct.

Then discharging firearm?---Correct.

And assessing the situation after that?---Correct.

So, if presented with an edged weapon and your training, you only draw your firearm, I suggest, according to your training, depending upon the circumstances; and, in particular, whether you were facing the threat of immediate danger to life? ---I was trained, if you were faced with an edged weapon, as a threat, to pull my firearm.

As a first option?---Correct. I believe it goes into it if you go onto the edged weapon section, it'll merely confirm that.

You were trained, weren't you, that if an edged weapon was presented, you were to shout something along the lines of "Knife, knife, knife."?---If practical, yes.

Yes. And you were trained to do that to warn anyone else that there was an edged weapon?---Yes.

And you were trained that, if you gave a commanding people to do things, issuing verbal commands, such as, "Drop your weapon", was something that is part of your de-escalation techniques, is that right?---Yes, we're trained to that, if practical.

Because what you're trying to do when you issue commands is to change the behaviour of the assailant, correct?---Yeah, yeah, you are.

Is that right? Now, I want to ask you about the events leading up to 9 November 2019. I will ask, in particular, about 7 November 2019?---Yes.

Now, you gave this evidence. This is at page 1038. You said, "You logged into" – this is on 7 November – "You logged into PROMIS."?---Yes.

And you read a job summary, which didn't reveal much?---Yes.

Could the witness please be given exhibit 8?

Have you seen that document before?---No, I haven't.

I'll give you an opportunity to read it, then?---Yes, thank you.

Thank you. Just take whatever time you need?---Thank you. I've read through that.

So, when you – do you recall if you read this document on 7 November?---So, this is a PROMIS case entry that can be edited by anyone at any point in time, who accesses the same job report. For example, I could have edited it when I looked at it. I can't be sure that this was the same writer that I read on that night or on that afternoon.

Are you saying, in short, that you can't recall if you read this exact document on 7 November?---Yes.

Did you read a case note on 7 November?---Correct, and some of these things I recall, for example - - -

Which ones? Which ones?---The statement where it says, "He was at the back of the house" or - - -

Can I just ask you to just - just to assist the court, can you just identify which paragraph number you're referring to?---So if we go - it's "Arnold Walker" and they both go, "under the circumstances" you go two paragraphs down.

Yes?---So the second paragraph and the third paragraph.

Can you just begin reading the two paragraphs, which particular - are you saying "At around 6:25 pm"?---I can - yes, would you like me to read them out?

No, no, I'm just - the paragraph you recall reading, in essence, began, "At around 6:25 members Smith and Hand attended House 577"?---Correct. This is mainly the paragraph after that, so the - the story - the write-up I read generally stated that he was at the rear of the house, he picked up an axe and ran at members and then ran out a rear door of the house. So I didn't understand how he was - if he was already at the rear of the house why he would have to run at members to run out then the rear door of the house. Which we know is not what happened.

I am just asking you what you read on 7 November, do you understand that?  
---Yes, it was something about what I just said.

Okay, so you read an account of the axe incident, is that correct?---Correct.

Go over the page. It states, "Extensive negotiation has since taken place with family of Walker in order for him to present himself to the Yuendumu Police Station. Further resources will be considered if Walker fails to present himself to the police station." Do you recall reading something like that?---No, I don't think I ever read anything like that.

On 7 November?---No.

So before you went to Yuendumu on 9 November did you know that there had been extensive negotiations between the police and the family of Kumanjayi Walker?  
---No.

Before you went to Yuendumu on 9 November did you know that there was a funeral that was taking place on that day?---I believe I was aware that there was a funeral on the Saturday.

And when did you know that?---I believe on the Saturday I was informed.

By whom?---I believe now, McCormack.

What did Mr McCormack say on that topic?---I think he may have just mentioned that there was a funeral.

Did he explain to you - what was the context in which you talked about a funeral?  
---I believe from what I can recall, "There's a funeral in Yuendumu."

And what did that have to do with what you were going to do?---I was going to Yuendumu.

Did he mention that Kumanjayi Walker was expected to attend the funeral?  
---No.

Did he mention that you were not to carry out your mission of arresting Mr Walker until after the funeral had taken place?---No.

Did you ever understand that to be the case - that is before the shooting incident?  
---Julie Frost informed me when I was in Yuendumu that she had negotiated for Walker to hand himself after - in after the funeral and she told me that the funeral should be over at that time, before we left the station.

So as I understand it, at the time you left Yuendumu station at about 7:05 pm, you knew there was a funeral taking place?---I knew at that time that the funeral had been - it was over. I believed that.

We'll just go step by step. You knew - you'd been informed by Sergeant McCormack that there was a funeral on that Saturday?---Correct.

And you had been told by Julie Frost that Mr Walker should not be arrested until that funeral had completed?---No. She told me that she had negotiated for him to hand himself in after the funeral.

After the funeral?---Correct.

Did you understand that you - the arrangement was he was not to be arrested until after the funeral?---No.

Did you ask anyone when you were at Yuendumu station whether the funeral had finished?---Julie Frost told me - without me needing to ask her.

What did she say?---"The funeral should be over."

She said that did she?---Yes.

And what did you say in response?---"Okay" probably - I can't recall exactly.

Did she tell you anything about the significance of the fact that the funeral should be over?---It was in regard to the fact that she had - was just speaking about her negotiations with Walker included the funeral.

And what did she say about that?---She said she had negotiated with family, the timings had changed, she'd now negotiated with the family for Walker to hand himself in after the funeral and then she said the funeral should be over now.

When you say she'd told you the times had changed?---Yes.

What did you learn about the times being changed?---I've learned about that in this case.

Well I'm talking about then, back on 9 November?---I don't think I had learned anything about that.

But did she say the times had changed what - from when 'til when?---No, I don't think she had.

I thought you said she told you the times - that is the time of the funeral had changed?---No, the times of her negotiations to get - to have Arnold or Kumanjaya hand himself in.

I thought what you were intending to convey was that she told you the times of the funeral had changed?---No, sorry, negotiation times for Kumanjaya to hand himself in.

Could the witness please be shown exhibit 1, tab 8?

THE WITNESS: Thank you.

MR STRICKLAND: Do you recognise - have you seen this document before?  
---No, I don't believe I have.

Just go to page 3?---Yes.

Have you seen that page?---No, I don't believe I have.

I will just get you to have a chance to read that please?---Yeah. Yes.

So was that a document you read on 7 November?---No, I don't believe so.

Now, you say on 7 November you watched the body-worn video of the axe incident?  
---Yes.

You watched both Smith and Lanyon's body-worn video?---Yes.

And you watched it several times, is that right?---Yes.

And is it accurate to say that after watching those body-worn videos several times you took an active interest in that matter?---Correct.

You gave evidence yesterday that you believe that the incident was being - to use your words - "swept under the rug"?---Yes.

And by, "swept under the rug" did you mean that the incident was being deliberately hidden?---In a way, yes - or downplayed.

Who in your opinion - or who did you believe was sweeping the incident under the rug?---My initial impression was the attending members.

I beg your pardon?---The attending members.

As in Smith, Hand, Lanyon?---Correct.

Sorry, it is, sorry, Lanyon Smith and Chris Hand?---Correct.

And what have they done that led you to believe that they were deliberately hiding the incident?---Just from reading the job write up.

Yes?---That we've read before that I'm not sure if that's the one I read on that day or not. Just from their job write-up on the day, I got the impression they greatly downplayed the actual incident.

I see. What gave you that impression - that they were greatly downplaying the incident?---However it was written on that day.

But they had attended the incident - not you, correct?---Correct.

And you thought that their description of it was - in writing their description of the axe incident they were deliberately hiding what - some aspect of it, is that right?---I believe that they were downplaying the incident.

And you have said that - well you have accepted that that involves deliberately hiding it?---Well, I believe they were downplaying it.

And do you mean that they weren't including important bits of information in their description?---I just don't think they were describing the incident accurately.

But how were you able to assess that if you weren't there?---After watching the body-worn footage.

Did you feel angry that it was being swept under the rug?---No, not at all.

Did you watch the body-worn video with anyone else on 7 November?---Yes.

You watched it on two different occasions didn't you? Before the search of House 6 at Warlpiri and after, is that correct?---I believe so. I can't remember specific timings or - - -

So, when you watched it before the search who did you watch it with?---My patrol group or some members of my patrol group and my shift sergeant.

And can you say who they were ?---I would just be guessing.

What did you say to them whilst you were watching it or after you watched it?  
---I said to Evan Kelly, there seemed to be an incident that should have been reported up the chain of command. And higher response should have been organised.

I see. And by higher response, you meant IRT, or TRG?---Any form of organisational response.

Now, you then went to Bunnings, is that correct?---Correct.

That was about 6.30 at night, approximately?---I believe so.

And you said you gave the briefing at Bunnings, is that right?---Correct.

And was Sergeant Evan Kelly present when you gave the briefing?---He came partway through.

Why was it that you gave the briefing?---I believe at the time, I was just the most comfortable with the SMEAC acronym.

And just remind the court what SMEAC means?---Situation, Mission, Execution, Admin and Logistics, and Command and Seek.

What's the purpose of SMEAC?---It's just a model for a quick set of planned orders.

And you were most comfortable of all the people at the station, at that time, is that correct? You believed?---In my patrol group.

Your patrol group?---Correct.

Okay. And I just want to play you part of exhibit 6 please.

DVD PLAYED

MR STRICKLAND: Keep going.

DVD PLAYED

MR STRICKLAND: Just pause it there.

Pausing it at 9.07.56 Zulu Time.

Do you recognise – did you recognise your voice?---Yes.

You were driving to the Warlpiri Camp on 7 November?---Correct. I was in the passenger seat.

All right. And did you hear yourself say “They’ve already fucked it up”?---That was Mitch Hansen.

And do you know what he was referring to?---I imagine he’s referring to the positions of cars being parked around the house.

Now were you the person in charge of that particular, what you’ve described as – well sorry, would you describe that as a cordon?---Yes, but I wasn’t in charge.

Okay. Did you organise that cordon though?---I organised the plan for that, yes.

At Bunnings?---Correct.

Thank you.

Excuse me for one moment, your Honour.

Now when you went back to – after this search at Warlpiri Camp, you went back to the Alice Springs Police Station, is that right?---I would have at some point. I can’t recall.

Do you remember watching the body-worn video again?---I don’t remember watching it again.

Your Honour, could the witness please be given exhibit 1, tab 1?---I’m already there (inaudible).

One moment please. Now if you – if you can go please to start at page 11?---Yes.

Do you understand that every time you look at the body-worn video, there is a report generated of when you look at it, and who looks at it?---Yes.

What I’m showing you now is part of the agreed facts in this case, do you understand that?---Yes.

So if you go to par 69, this is the audit report for the Smith body-worn video of the axe incident. And – if you go to 7 November, can you see that – now on page 12, 19.55.08, there are several entries of you accessing the body-worn video?---Yes.

And several instances of Mitchell Hansen doing the same?---Correct.

And a person called Luke Crotty, is that right, also a member of your patrol group?---Yes.

And Evan Kelly?---Yes.



I withdraw that. I withdraw that. And if you go to par 70, on 7 November, this is the audio report for the body-worn video of Chris Hand, can you see that again at about 7.55 pm, and at 8.02 pm, it's recorded you have accessed the body-worn video of Chris Hand?---Yes.

Do you accept, having them in mind, and of this audit report, and that – well the agreed facts that you did in fact look at the body-worn?---No I accept it, I just can't remember it.

That's fine. And do you accept that you watched it with Mitchell Hansen?---I'm not sure.

This is in the muster room you watch it, is that right?---Correct. I am – I imagine I was in the muster room. I don't know if Mitch was watching with me or near me, or in the muster room on a different computer.

Do you recall his evidence at this trial, that he watched the body-worn video with you?---Yes. But that doesn't mean we watched it every time together.

I understand. Why did you then – why, after the search, at House 6 at Warlpiri Camp, did you again watch the body-worn video?---I can't remember why.

You were very critical – you were very critical, at that stage, having watched the body-worn video several times, of the actions of Hand and Lanyon Smith, weren't you?---I never said anything critical to anyone about their actions.

I'm asking you, at the time, you were critical of their conduct, is that right?---Not in the axe incident.

You thought they'd frozen in fear didn't you?---Correct. Which is a human response.

You thought they got too close to Mr Walker, didn't you?---No.

See, is it the case that – you gave evidence yesterday, that you called Lee Bauwens?---Correct.

And what was his relationship to you?---He was in my chain of command in regard to IRT.

Okay?---So he was my – the OIC of IRT.

And you called him on that day, is that right?---I believe so.

And you called him on your mobile?---Yes.

And how long did you speak to him for?---Not long.

About four minutes?---Potentially.

This is what you said yesterday. "I believe I called him on my mobile. I don't think he was on duty at that time. And I informed him of the incident." You're referring to the body-worn of the axe incident?---Correct.

And you informed him you'd actually seen the axe incident on body-worn, is that right?---I informed him that I had seen it?

Is that right?---Yes, yes.

"Because I was in the mind that it was a potential job that IRT should have already been called out for"?---Correct.

And that was your view on 7 November?---Correct.

And you expressed that view to Lee Bauwens, is that right?---Correct.

And what did he say in response?---He seemed to agree.

What did he say?---He said he would look into it.

Right. And did you say to Lee Bauwens that you would volunteer, if the IRT was called out to Yuendumu to arrest Walker?---No, I don't recall saying that.

You didn't do that?---I don't recall it.

But were you keen at that stage to be deployed to Yuendumu to arrest Kumanjayi Walker?---If I was called up, and requested to attend, I would have attended.

But were you keen to do so?---No more or less than any other part of my job.

And did you decide – you decided at that point, didn't you, that's on 7 November, that you wanted to be part of a mission to track down Kumanjayi Walker?---No, incorrect.

Well why did you call Lee Bauwens?---I had intelligence of a incident, and I was just passing it up the chain of command. Same as what I did with Evan Kelly. So I have two chain of commands. I had my general duties chain of command, which was Evan Kelly, passed it up to him. And I had my IRT chain of command, Lee Bauwens. Passed it up to both my chain of commands. Just part of my job.

But your specific request of Lee Bauwens, was that the IRT should be called out to Yuendumu?---I didn't make a request off Lee Bauwens.

Well, you told him that that's what should happen?---I told him that's what I thought should happen.

Yes. And you wanted to be part of that deployment, didn't you?---I was indifferent.

You were indifferent?---If I got called up, I would have accepted. I wouldn't have been upset in the slightest, if I didn't get called up.

You certainly were not indifferent to what happened at House 577 on 6 November, were you?---I had thoughts about it, correct.

Well you weren't indifferent to it, were you?---No.

In fact, you were highly motivated to watch the body-worn video many times, correct?---I watched the body-worn multiples times, yes.

And you were highly motivated to tell your commanders, or the people in – superior to you in the command structure, that they should do something about Kumanjayi Walker?---I never told anyone that they should do anything about it.

Well that someone – that the IRT should be deployed to track him down?---I just told my – I just passed it up the chain of command.

HIS HONOUR: Is that a convenient time?

MR STRICKLAND: That's a convenient time, your Honour.

HIS HONOUR: All right, members of the jury, we'll now break for the day, and resume again tomorrow morning at 9.30.

JURY OUT

HIS HONOUR: Now you can stand down, Mr Rolfe. But as you are in cross-examination, you can't speak with your legal team. You understand that?---Yes, your Honour.

All right, thank you, you can stand down.

WITNESS WITHDREW

MR STRICKLAND: Your Honour, may I just ask, in my submission, the warning to extend beyond his legal team.

HIS HONOUR: Well, or discuss your evidence with any person, thank you.

I received, this morning, before I adjourned, I received this morning an email relating to suppression orders. I don't expect you to do anything about this now. But I'll have my Associate provide you with copies of those – of that email, so that we can discuss it at the appropriate time. Now is not that time.

MR STRICKLAND: Thank you.

HIS HONOUR: Are there any other matters before I adjourn?

MR STRICKLAND: No, your Honour.

HIS HONOUR: All right.

ADJOURNED 1.13 PM TO FRIDAY 4 MARCH 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY BRIAN ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 4 MARCH 2022 AT 9:36 AM

(Continued from 03/03/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes. Now, there was a housekeeping matter I understand that - - -

MR STRICKLAND SC: That's right, your Honour. Your Honour, my learned friend and I were wondering whether if on Monday, if the health requirements allowed, if we would be able to sit normal court hours from 10 am until 4 pm.

HIS HONOUR: Well I haven't yet been able to read the latest directions from the Chief Health Officer. I'll try and do that at the morning break. But all things being equal, I'm perfectly content to move back to normal hours.

Now that then raises another issue, which is a note I have got from an individual juror. Which indicates that this juror has a funeral this coming Monday at 10.30 am. And is there any chance of attending. I don't know the relationship between the juror and the deceased. But I'll try to have the Sheriff's Officers make some enquiries about that during the morning.

MR STRICKLAND: Certainly. So your Honour in terms of we don't wish to be heard at all on – it's entirely a matter for your Honour. So we don't wish to be heard on Monday. In terms of scheduling, putting that issue aside, I've spoken to my learned friend. We expect the evidence to conclude probably Monday morning. And we were hoping that addresses could occur the following day. I can indicate to your Honour that I don't expect to be more than one and a half to two hours. That's what I'm certainly planning towards. And our intention was it would be – not our intention, our hope was that the addresses could be heard in a – sorry, in a single day, if that's convenient?

HIS HONOUR: All right.

MR STRICKLAND: But I don't think – on Monday there are some legal issues we'll need to raise with your Honour. So I don't think we'll be in a position to do our final addresses on Monday.

HIS HONOUR: No, well I understand that. But of course, if we don't get started until late on Monday - - -

MR STRICKLAND: Understand.

HIS HONOUR: - - - that is going to affect that.

MR STRICKLAND: I accept that. And your Honour, irrespective of the health regulations, on Tuesday, on this side of the Bar table, we have some court commitments which won't finish until about 9.30 on Tuesday morning.

HIS HONOUR: Yes.

MR STRICKLAND: So, in any event, we'd ask to start at 10 am on the Tuesday, thank you.

HIS HONOUR: All right, thank you.

MR EDWARDSON QC: Your Honour, as far as the time (inaudible) is concerned, our preference is that, if there are to be legal issues, there's no reason why they can't be resolved, or could be resolved perhaps this afternoon before the weekend. Which is the email I sent to my learned friend. I don't – I'm not pressing it one way or the other. That's just a preference. And we would prefer that if at all possible, that the one address, at least be sorted on Monday, if possible.

Now again, I don't force the issue, because we'll have two days over the weekend. We had – both of us wanted to have at least one day to prepare our addresses. So that's an alternative option which, of course, would mean that we can keep the trial moving, which we are anxious to do if we can.

HIS HONOUR: All right.

Look I'll try and, as I said, make some enquiries of the – this particular juror, so that we can work out whether we're going to be able to sit Monday morning or not.

MR EDWARDSON: If your Honour pleases.

HIS HONOUR: Thank you.

MS CALLAN SC: Your Honour, one housekeeping matter. In relation to transcript corrections, can I hand up a schedule which deals with all of week 3 and what has occurred so far in week 4.

HIS HONOUR: These are agreed?

MS CALLAN: Yes, they are. Your Honour, can I draw your attention on page 2, your Honour might notice there are some proposed or agreed corrections in relation to some specific aspects of the evidence of the witness who's currently in the box. I've discussed with my friend the proposed correction in respect of page 1072. We're fairly confident that that is what the witness said. But if it's convenient to the court, we might just ask the witness himself.

HIS HONOUR: All right. Just one moment.

MR EDWARDSON: 1072, your Honour, it's the third paragraph, third to last line in that paragraph. I think it's meant to be "right palm", but I don't know. Let him answer it, I suppose.

HIS HONOUR: It would seem to make more sense, but - all right, that can be clarified.

Can we bring the jury in, please, and then we will have Mr Rolfe brought in.

JURY IN

ZACHARY BRIAN ROLFE, on former oath:

XXN BY MR STRICKLAND:

MR STRICKLAND: Mr Rolfe, yesterday I asked you if you had received training in using an AR15, and you said, "Not in the military." Do you recall that question and answer?---Yes.

Where did you receive that training?---In America.

In what setting?---After I left the military, in between the military and police, I travelled to America for some private training that I paid for out of my own pocket.

Where did you receive that private training?---In Arkansas.

And with whom?---A company called Trojan Securities International.

How long was that course?---I did a number of courses there over about four or five weeks.

What were the courses?---I can't recall the exact names of them. There was a hostage rescue component, there was a defensive driving counter-ambush driving course, there was a weapons familiarisation course. There was more specifics, but I can't remember the specific names.

Was it in the weapon familiarisation course you learned about the AR15?---Correct. I believe so.

You were trained in it?---Yes, I was given a familiarisation.

And were you trained in semi-automatic pistols as well?---There were some there, yes.

How much of the training involved familiarisation with weapons?---That was a two-day component.

Why did you attend that course?---I wasn't working any job that required me to stay there at the time. I wanted to upskill myself and continue to improve myself on the path that I knew that I would eventually join the police, and I believed that upskilling could be of assistance.

You were asked yesterday about the Special Air Services, SAS?---Yes.

And you said this, this is at 1101, you were asked the question:

"But your aspiration was to become involved in what you described as direct action jobs, wasn't it?"



?---I thought you described that as direct action jobs.

Beg your pardon?---I think you described it as, "direct action jobs".

What I'm doing is I'm reminding you of my question?---Okay, yeah.

Sorry, I will start again:

"But your aspiration was to become involved in what you described as direct action jobs, wasn't it?" And you said, "No, because then I would have more likely tried to join the Commandos, who are specifically into that role."

Do you remember that answer?---Yes.

Isn't it the case you did apply to join the Commandos?---No.

Are you sure about that?---Yes.

Didn't you try and join the Commandos in April 2010?---Way back in the direct entry scheme, that was one of the options in how to get into the Army, correct.

So you did apply to join the Commandos?---Yes. Yeah, I guess I did in join the Army initially, but never again after that.

Why did you apply to join the Commandos?---It's just another way to get into the Army.

But why the Commandos in particular?---There was the option - there was not the option of applying directly to the SAS from not being in the Army at the time. It was just another entry avenue, I guess, on a higher level than the general Army.

What did you understand the role of the Commandos to be?---Not much at that time. I wasn't in the Army at that time.

Didn't you seek to join the Commandos because you wanted to be involved in direct action jobs?---At the time I just wanted to get into the Army at the time, and if I could get into the Army at a higher level, then I was happy to.

What you said yesterday was - your question was:

"Your aspiration was to become involved in what you described as direct action jobs, wasn't it?" Then you said, "No, because then I would have more likely tried to join the Commandos, who are specifically into that role."

Do you remember giving that answer?---Yes.

So weren't you saying that if you in fact wanted to be involved in direct action jobs, you would have tried to join the Commandos?---Yes.

And that's what you did in fact try and do?---In 2010. To be honest, I completely forgot about my application process to the Army.

I see. So when you gave that answer, you had forgotten about that application process?---Yes.

You weren't trying to conceal the fact that you had applied to join the Commandos?---No. It was a tick on a box in an application process 13 years ago.

Didn't you say that you were only interested in joining the Commandos when you gave your application - made your application?---Hang on, say again?

You said it was just a tick in the box?---Correct.

You, in fact, made a written application, didn't you?---Again, 13 years ago, can't recall.

Do you remember saying in your application that all you were really interested in was to join the Commandos?---No, I cannot.

I show you this document. Do you remember you did an interview? Is that correct?---I cannot recall the specific application process 13 years ago.

I will show you this document?---Thank you.

MR EDWARDSON: I object to this, your Honour. This is a document that has not been tendered in the course of the prosecution case. It is now being produced and I am struggling to understand how 15 years ago, to tick a box in an application to become a Commando - or doing the Commandos in the Army has any relevance at all to what this jury have to consider in the context of these charges. Now, if we have to debate it in the absence of the jury, so be it.

HIS HONOUR: Well, if you are asking me to ask the jury to retire so that you may develop your argument while - - -

MR EDWARDSON: I do, your Honour, I am sorry.

HIS HONOUR: Right, thank you.

JURY OUT

HIS HONOUR: Would you wait outside please Mr Rolfe?---Yes, your Honour.

WITNESS WITHDREW

MR EDWARDSON: Firstly, I wonder if my learned friends could provide a copy to your Honour. This is the document that has been produced, without warning, to my client. My learned friend says, "This is a document that we've disclosed." Well, he might have disclosed thousands of documents to us in the disclosure process, but there is a fundamental difference between disclosure and actually identifying a document as being relevant to - and admissible - against the accused in the case against him. It is not a document that found its way into the prosecution brief at all, nor is it a document that was tendered in the course of their evidence.

Your Honour, we had some debate at the commencement of the evidence given by the accused about the extent to which his Army training or record could in any way inform the jury as to the events that occurred on 9 November 2019.

In my respectful submission, whether he did or did not apply on a tick-a-box or subsequently was interviewed in relation to his service and in relation to him being a member of the Army has absolutely nothing whatsoever to do with the issues that the jury here have to consider. In my submission, to pull documents out like this in the way that my learned friend has, is grossly unfair on the accused. It is misleading in the sense that the focus is now very much on this man wanting to become a Commander - or Commando I am sorry - so what? How can that possibly bear on any issue that this jury have to consider in terms of what was going through Zach Rolfe's mind at the time that he discharged shots 2 and 3? How can any nexus possibly be demonstrated between that background - that material - indeed, this document, and the questions that have been asked - recurring dot theme back to his Army training - and that is all the more so, can I suggest, your Honour, in the context of the concession by the Crown that shot 1 was reasonable, proportionate and on the Crown's own case lawful.

The theme that seems to be being developed in the course of cross-examination is the notion that my client had some pre-planned intent to pull the trigger fatally - which I imagine that's what we are building up to - as against - at the time that he discharges shots 2 and 3. That theory is ludicrous in the context of this evidence and particularly given that shot 1 is lawful and proportionate and obviously visited ad debate - and we will deal with it in due course, about whether you can separate shot 1 from shots 2 and 3 or is it really, in truth, one holistic incident that he had to deal with in the 2.6 seconds between that first shot and the second shot.

So I object to this line of questioning, your Honour.

HIS HONOUR: Yes, thank you.

Mr Crown?

MR STRICKLAND: Yes, your Honour. Just in terms of some factual premises or factual assumptions. This document was disclosed as part of the prosecution brief.

HIS HONOUR: Well, that is not challenged.

MR STRICKLAND: Yes. So, *R v Chin*, basic proposition, what we can't do is to cross-examine on a document that hasn't been disclosed. And it has been disclosed. We are not confined to cross-examining a witness on the basis of documents that are then tendered in the case.

HIS HONOUR: Yes, I understand that.

MR STRICKLAND: Secondly, the debate that we had before that was in relation to military training. This is not confined to military training.

HIS HONOUR: No - - -

MR STRICKLAND: I'm just - I will get - look - - -

HIS HONOUR: The real objection is how do you suggest that this is relevant?

MR STRICKLAND: Well, we say it's relevant in two ways. The first is that this witness' interest in what we described as - what we described as - excuse me for one moment - "direct action jobs". We say that is a relevant - - -

HIS HONOUR: What is a, "direct action job"?

MR STRICKLAND: Well, I intend to explore that. That is it's a job that involves hands-on, use of force, arrest - it includes those components and this witness has been cross-examined about his interest in that kind of deployment from 9 November and it has been - and being a continuous theme this witness' aspirations and interests.

HIS HONOUR: But how does that ultimately - what intellectual process will you ask the jury to engage in in order to use that evidence to reason that he is guilty of one or more of these offences?

MR STRICKLAND: Well, your Honour, first, questions can be asked on one of two bases. Is it relevant to a fact in issue?

HIS HONOUR: Mm mm.

MR STRICKLAND: Directly or indirectly or is it relevant to an issue of credibility? So one doesn't have - not every question needs to be linked directly to the ultimate fact in issue.

HIS HONOUR: But it has to have been a chain of reasoning.

MR STRICKLAND: Well, your Honour, credibility questions - - -

HIS HONOUR: How can questions about his willingness to join the Army as a Commando be relevant to his credibility?

MR STRICKLAND: Your Honour, it's not his willingness to join - the questions that have been - - -

HIS HONOUR: Of his desire - - -

MR STRICKLAND: The questions that have been asked relate to an answer given at 1101 when he was asked about his aspiration to become involved in direct - sorry, I will let your Honour go to that.

HIS HONOUR: Just one moment whilst I - - -

STRICKLAND: Copy.

HIS HONOUR: Find my copy of the *Evidence Legislation* because we are now in the terms of credibility. There is of course the Credibility Rule which needs to be considered.

MR STRICKLAND: Indeed, 103, your Honour. So can I go to 1101.

HIS HONOUR: Of the transcript?

MR STRICKLAND: Of the transcript. So it really begins about - from 1101.2, "You didn't succeed in joining the SAS, is that correct?" And then he was asked some questions why he chose the SAS. "Is it the case you wanted to become involved in a more hands-on situations?" He gives the answer. "What, your aspiration was to become involved in what you've described as 'direct action' jobs, wasn't it?---No." He refutes that answer, "Because then I would've more likely tried to join the Commandos who were specifically into that role." And he now - - -

HIS HONOUR: But this was an application which was made when?

MR STRICKLAND: 2010.

MR EDWARDSON: No, '15.

HIS HONOUR: No, no, we're talking about a much later application when he was a member of the police.

MR STRICKLAND: I am sorry, I'm - - -

MR EDWARDSON: It's 2018.

MR STRICKLAND: I - just a second, your Honour. Which application - - -

HIS HONOUR: The answers that he is giving at page 1101, from my recollection, were in relation to an application that he made at a later date. Yes, that's right - if you go back to page 1100 you asked, "Did you apply in 2018 or did you undertake the ADS Special Forces entry test?" So that the questions - - -

MR STRICKLAND: I understand.

HIS HONOUR: The answers that he is giving are as to his state of mind in 2018.

MR STRICKLAND: Yes, I accept that, your Honour. I accept that.

HIS HONOUR: So you are really not comparing apples with apples here.

MR STRICKLAND: Yes, I understand that. Would your Honour excuse me for one moment please?

HIS HONOUR: Mm mm.

MR STRICKLAND: I won't pursue that, I withdraw the question, your Honour.

HIS HONOUR: All right, thank you.

MR EDWARDSON: Your Honour, I would ask in the circumstances that your Honour, not counsel, give the jury some indication as to why you've not permitted that to – that line of cross-examination to be pursued, specifically that the answers he gave in relation to that Commando matter, related to the 2018 timeframe, not 2010.

HIS HONOUR: All right, I will say that to the jury, yes.

MR EDWARDSON: Thank you, your Honour.

HIS HONOUR: Thank you.

Can we bring the jury in, and then Mr Rolfe can be bought back, thank you.

MR STRICKLAND: Your Honour, can that document be marked as it's been (inaudible).

HIS HONOUR: Yes, certainly I'll have that marked for identification, if I can just find my list. As AM.

MFI AM: Document

JURY IN

HIS HONOUR: And Mr Rolfe can return.

ZACHARY BRIAN ROLFE:

MR STRICKLAND: Your Honour, I withdraw that question.

HIS HONOUR: Members of the jury, I'll just make it clear that the Crown has withdrawn that question on the basis that there was apparently some confusion by the Crown. The answer that was given by the accused yesterday about if he had been interested in more hands-on work in the Army, he would have applied to join the Commando instead of the SAS, related to an application that he made in 2018, or thereabouts to – to join the Australian Armed Forces. Not in relation to his application that he made in or around 2009. So for that reason, the Crown accepts that it is not – sorry, 2000?

MR STRICKLAND: 2009, your Honour.

HIS HONOUR: And what - - -

MR EDWARDSON: It's 2010, your Honour.

HIS HONOUR: 2007, I'm sorry. So the Crown accepts that it would not be fair to ask him that question in relation to that answer.

MR STRICKLAND: Your Honour said 2007, it's 2010.

HIS HONOUR: 2010. I must get my hearing aids fixed. 2010, but you understand what I'm saying. That they're talking about two different times.

All right, thank you.

MR STRICKLAND: I'll continue.

XXN BY MR STRICKLAND:

MR STRICKLAND: I just want to ask you some questions about your previous deployments with the IRT?---Yes.

Were you ever deployed before 9 November 2019 with Adam Eberl?---I can't recall if I had.

Did you know him well before 9 November 2010 (sic)?---I knew him well within the working environment.

Were you in the same patrol group?---No we'd worked close to each other.

Yes?---I wouldn't say we were – we didn't catch up outside of work too much, but I knew him at work.

All right. So you knew him as a professional, well-trained officer?---I did.

And you knew him to be a fit and strong man?---I didn't know how fit or strong he was.

You didn't?---I've never trained with him physically.

Do you agree in your work as an NT Police Officer, that NT Police regularly take people into custody who have a violent disposition or past?---Correct.

And do you know that it's an unfortunate, fairly regular occurrence, that NT Police are faced with persons with edged weapons?---Correct.

Have you ever faced an edged weapon before November 9, 2019?---Correct.

But that – on how many occasions?---At least five.

You gave evidence yesterday about your training to shoot in relation – sorry. You gave some evidence about your training in relation to shooting until the person's incapacitated?---Correct.

You said yesterday, or possibly the day before, I'll just try and get your exact answer, it's at 103.3, "The training was always you shoot until the threat is incapacitated, no matter how many rounds that takes." Remember - - - ?---Correct.

- - - giving that evidence?---Yes.

And by incapacitated, you understand that means the loss of any physical ability to carry out the threat?---Just to stop them from doing what they were doing before.

Yes, but – I understand. But that's – the notion of it – did you understand the notion of incapacitated means that the assailant, the suspect, lost the physical ability to carry out the threat?---Depends on the context, I believe.

But I'm asking about, not a particular situation, but the – but your understanding of that word?---Of incapacitation?

Yes?---To stop them from doing what they were doing before.

Yes. But stopping them from doing what they were doing before by ensuring that that person had lost the physical ability to carry out the threat, correct?---Not always.

Isn't that what incapacitation means?---To – the way I was taught it was to stop them from doing what they were doing before.

I know you're repeating that as a mantra, but I'm trying to get you to understand what that – trying to get you to ask what that actually means, do you understand



that?---Well it means different things. For example, if someone was posturing or potentially being violent, fighting people outside of a nightclub, you pepper spray them. They could still do what they are wanting to do, but most often they will stop. Because they no longer have that desire. And as we are trained, that would incapacitate them. So despite being have the physical ability to still do what they were doing beforehand, they have stopped. Because they mentally may no longer have the desire to do it.

What I'm suggesting is this. Your training was to continue firing until you achieved either incapacitation, or the threat had been eliminated?---My training is to stop until the threat had been incapacitated.

Until the threat had been incapacitated? What do you mean by "the threat" being incapacitated?---Well until the threat's no longer there.

Your – there are two different concepts aren't there, in relation to this. There is the incapacitation of the person, or the elimination – or the elimination of the threat, do you agree with that?---In my training, and in the training manual, I don't think you will find anywhere where it says we are taught to shoot until one or one. We are taught to shoot until the threat is incapacitated, or to incapacitate the threat.

If the threat has been eliminated - - - ?---Yes.

- - - but still the person has a capacity to do things, you don't – you're not trained to shoot however many rounds it takes are you?---If the threat had been eliminated - - -

Yes?---I would stop shooting.

So doesn't it then follow that your training is that you're trained to continue firing until either the threat has been eliminated, or you've achieved incapacitation?---I am not keeping up with the - - -

Okay, I will ask it again?--- - - - description. I was trained to shoot until the threat was incapacitated.

I know you repeat that, but I'm trying to delve into that. I will try again. You've just said - you've accepted that if the threat is eliminated, you are not trained to shoot however many rounds it takes. You've accepted that?---Yeah, I didn't say that, though. I didn't say that I would shoot as many rounds as it takes despite the threat having stopped.

Just listen to the question, please?---I'm trying to keep up with you. It's extremely confusing, the way you're asking it for me.

We will go back to your original answer. The training was always you shoot until the threat is incapacitated, no matter how many rounds it takes. Do you accept that's the evidence you gave?---Yes.

If the threat was eliminated, you would not shoot however many rounds it takes even if the person was still capacitated, would you?---I agree. If the threat had stopped, I would stop shooting.

And therefore it follows that your training was you would shoot - you would continue to fire until either you had achieved incapacitation or the threat had been eliminated?---I understand what you're saying, and I do agree to an extent, but we can't change the training manual because we believe the definition means this and this. The training manual says to shoot to incapacitate the threat; it doesn't say to shoot to do this or that. There's one thing that it says.

You've heard the evidence of Detective Senior Sergeant Barram, haven't you? And he said that Northern Territory Police are trained to continue firing until either they've achieved incapacitation or the threat has been eliminated. You recall hearing that evidence?---I believe that he said that, if you're saying that he did.

And that is the case as far as you were concerned, wasn't it? That was the training you received?---Correct. In my head it's the same thing.

I just want to ask you to go back to the events of 7 November 2019?---Yes.

What time did you come on duty that day?---I believe my shift started at 3 pm.

When you came on duty you were on duty as part of your patrol group. Is that right?---Correct.

Patrol group 5?---Yes.

And you weren't on duty then as part of the IRT, were you?---Correct.

So on that day on 7 November you only had one chain of command, didn't you?---I was on duty with general duties. I still believe I have two chains of command.

So you're saying on 7 November you had a chain of command to your shift sergeant, that's one?---Yes.

But also the IRT?---Yes, that's what I believe.

But aren't IRT part-time?---Correct.

You're not constantly on duty in the IRT, are you?---No, we're not.

So if that's the case, how could you have a second chain of command on 7 November when you weren't on duty at the IRT?---I don't believe that chain of command disappears when I'm not on duty or am on duty. That's my - that's the way I was thinking at the time.

I want to suggest on 7 November there was only one chain of command, not two?---Okay. In my head I disagree.

It wasn't any part of your duty on 7 November to report to a second chain of command when you weren't deployed with the IRT?---I disagree.

So you told Lee Bauwens on 7 November that you believed that a higher response, being the IRT, was warranted at that stage?---I told - I believe I discussed that with Evan Kelly; and I believe with Lee Bauwens I said it's potentially a job for IRT.

But nevertheless you went to Warlpiri with a patrol group on that day?---Correct.

As part of your duty in patrol group 5?---Correct.

You gave evidence about what you did on 8 November?---Yes.

The following day. You said this, this is at 1045, you said that on that day you were on duty for another general duties shift from 3 pm to 1 am?---Correct.

And you disseminated information about Kumanjayi Walker during that shift?---Correct.

Were you asked to do that by anyone?---I don't believe so.

You were asked:

"What information did you disseminate?" And you said, "Because there was still no major alert given to the police station about the incident on Wednesday night" -

Now, which police station were you referring to?---Alice Springs Police Station.

"I showed a number of members in the station on other patrol groups the body-worn video of the axe incident."

?---Correct.

And can you go to exhibit 1, tab 1, par 69?---Yes.

On 8 November you accessed Lanyon Smith's body-worn video at 11:48 pm?---Yes.

And you accessed Chris Hand's body-worn video at 11:48 and 11:49 pm?---Yes.

And you showed those body-worn videos to members of your patrol group?---Probably other patrol group members.

Other patrol group members?---Correct. A new shift would have started at approximately 11 pm.

And what did you say to them when you played the body-worn video?---I can't recall. Probably just to be aware of - - -

What was the discussion?---I can't recall the discussion.

Nothing at all?---No, I can't.

Your shift finished at 11 pm, didn't it?---1 am.

1 am?---Yes.

You agree that by this stage, 11:48 pm on 8 November, you had become obsessed with drawing everyone's attention to this body-worn video?---No.

You don't agree with the word, "obsessed"?---No.

You were fixated?---No.

You were certainly preoccupied with that, weren't you?---No.

You weren't preoccupied?---No.

You had seen it by then on multiple occasions, hadn't you?---Correct.

On 8 November no one asked you to do that?---No.

You don't accept you had become preoccupied - - - ?---No, not at all - - -

- - - that idea?---No.

You hadn't become preoccupied with the idea of you tracking down Kumanjayi Walker?---No.

You thought, at that stage, didn't you, that Chris Hand and Lanyon Smith had pushed the incident under the rug. Is that right?---That they were downplaying the incident. I don't know if that had changed between when I accessed the job and afterwards. I don't believe I had accessed the job again that I can recall. They may have updated the job.

Did you make enquiries of Smith and Hand themselves about what happened with the body-worn - of the axe incident?---No, I don't think I did.

Did you consider that they might actually have some personal knowledge of Kumanjayi Walker?---That's likely the case, but I don't know if I thought about that.

You had no knowledge of Kumanjayi Walker, did you?---Not before - not that I was aware of before the 7th.

Had you ever been to Yuendumu before?---No, I had not.

You had no knowledge at all of that community?---Correct.

Your evidence that they pushed the matter under the rug, or put it under the rug, or downplayed the incident, that was made solely on your assessment of watching the body-worn video. Is that correct?---Watching the body-worn video and reading the initial job write-up.

But you thought the initial job write-up was the thing that was downplaying the incident?---Correct. So my thought process was a combination of the two.

Yes, but you – your opinion that they had pushed the matter under the rug was not based upon the written document you'd seen was it?---Well it had to be based on both.

Yes, but your assessment about the – the true nature of that axe incident, was based upon you looking at the body-worn video, correct?---A more realistic nature, yes.

Because you believed that – you judged this event by reference to the body-worn video, rather than what the officers had written about the event, is that right?---By that point they had not made police statements.

Well you had – you judged the event by reference to the body-worn video, rather than the written document you'd read, is that right?---I came to my judgement on the base of both of those bits of information.

No, about the downplaying of the incident, that was based solely on the body-worn video wasn't it?---No if I'd seen solely the body-worn video, and I hadn't seen anything else, then there's no bar for me to judge if it had been downplayed or spoken about realistically.

You believed the true nature of the incident was captured on the body-worn video, is that right?---Correct, more realistic and more true.

Now I want to ask you about 9 November 2019. Do you still have the exhibit 1, tab 1 in front of you?---Yes.

And if you go to – again to par 69?---69, yes.

You again watched the body-worn video at 3.17 pm?---Correct.

That's the one of – by Lanyon Smith, is that right?---Yes.

And you also – if you go over the page, you watched the body-worn video of Chris Hand at 3 pm, and then 3.17 pm, is that correct?---Correct.

Do you know why you watched on those two occasions?---One of them was definitely to show Constable Eberl and Hawkings.

Yes, and what about the other one?---The other one might have just been setting up Axon. If I accessed it, I don't necessarily watch the video, but it would log me accessing it as 3 pm. So potentially, I logged into the website in preparation to show them. But I can't recall specifics.

So when you showed Adam Eberl and Mr Hawkings, what was the discussion you had?---The discussion was that passing on information that I'd received from Shane McCormack. We were driving to Yuendumu in order to arrest Kumanjayi Walker for the incident as seen on the body-worn footage. I passed on to them that the nurses had been evacuated. And I believe I mentioned a funeral was on that day as well. That was the discussion.

But what was the discussion when you – when you watched the body-worn video of the axe incident?---I can't recall myself saying anything. I believe Eberl said something about "Can't believe the members didn't draw their firearm".

Well didn't he say he was lucky he wasn't shot?---He potentially did, yes.

Forget what he potentially did, did he?---I can't remember that. That was again, over two years ago. I can't remember the specific words.

And what did you say when he said something along those lines?---Can't recall saying anything.

Nothing at all?---Correct.

Did you agree with him?---Kumanjayi Walker was lucky that he didn't get shot that day, correct.

So you did agree with him?---I did, I don't recall if I said anything about it.

Did you have a discussion with Eberl or Hawkings what would happen if he confronted you with an axe or edged weapon?---No, I did not.

I mean, at that stage, you knew you were going to be deployed to Yuendumu?---Correct.

And you said your mission, as you understood it, was to arrest him?---Correct.

But you're saying you can't remember any discussion at all, what would happen if he'd confronted you with the edged weapon?---No, I didn't believe it was required.

Wasn't required - - - ?---I trusted - - -

- - - what do you mean by that?---I trusted my – we'd been trained what to do if confronted with an edged weapon. I trusted my training, and I trusted each of the members that I was with that day to abide by their training. And I believe they felt the same.

But when you say – do you say you weren't required to have a discussion about what would happen if you were presented with an axe or an edged weapon?---Correct, we would refer to our training.

So that's what you said?---No. That's why I don't believe we needed to say anything.

Well forget – I'm not asking you to go into their mind. I'm asking you about your state of mind, at the time. Do you say you did not need to have a discussion with the IRT members, because you believed that you would act according to your training, if you were presented with an edged weapon?---Correct.

Why would that prevent you from having a discussion about if something happens, then we do that?---I just didn't see the need to do that.

You didn't see the need to?---Correct.

Well isn't that part of if-then training, to – to discuss scenarios that would happen?---If-then thinking?

Yes?---Would occur inside your head.

Well it can occur inside your head, and it can occur in words that are exchanged with your colleagues, can't it?---Correct, you could tell people what you're thinking.

If-then thinking isn't confined to what's inside your head, is it?---By definition it probably is. It's called thinking.

Your evidence is that you did not discuss what would happen if Kumanjayi Walker confronted you with an axe or edged weapon, because you did not think it was necessary. Is that right?---Correct.

Excuse me. Now had you met Constable Julie Frost before?---Sergeant Julie Frost I had not.

Sergeant Julie Frost, I beg your pardon?---No, I had not.

Had you ever talked to her before?---I don't believe I had.

No dealings at all with her before 9 November?---I – I had loose dealing – I had one.

And what was the dealing?---I was working on a shift and again, not sure of the date, Alistair Gall was my watch commander at that date. He asked me to come into his

office and informed me that Julie Frost had sent him a police file of an incident, again, that I can't really recall the incident. And asking me to look at the file and to arrest the offender, because the – apparently the offender had – the incident had occurred in Yuendumu and the offender had come to Alice Springs. I looked at the file, and I believed there was not sufficient evidence to arrest. And then I took that to Watch Commander Gall, who hadn't actually looked at the file at that point, because he just trusted Julie Frost, because she is a sergeant. He looked at the file, and then he agreed with me, that there was not sufficient evidence to arrest that offender. And so then he withdrew that tasking from me. And I'm not sure where that file went from there.

When you went to Yuendumu, did you understand that Sergeant Julie Frost was in command of your deployment?---I understood she was in command of the station, correct, and therefore us.

Yes. On the way to the station, you drove with Jimmy Kirstenfeldt, is that right?---Correct.

And you said to him, words to the effect of, "We should have been sent out a lot earlier"?---Correct.

When do you think you should have been sent out?---Ideally before the medical staff had been evacuated from the community.

Well what day was that?---That was on the Saturday morning.

And what did he say when you said that?---I can't recall, he probably agreed.

And why do you say you should have been sent out at that time?---I believe we should have been sent out before the situation deteriorated to the point where there was no medical staff in the community.

Now you – when you arrived at Yuendumu Station, you've been in court, when you have seen the CCTV?---Correct.

And I don't intend to replay that, unless you wish – unless you wish us to?---No, I do not wish for you to play that.

You agree, don't you, that Frost said that she wanted Kumanjayi Walker to be arrested at 5:00 or 5.30 am on Sunday morning?---Correct. I believe she said she would prefer that.

She never said, did she, that she wanted that because she was tired and wanted to sleep?---No she told me that.

You've said that you took a photograph of a document?---Yes.

And can you go to exhibit 1, tab 16?---Yes.



And if you go to page 3 and you can see there's a photograph of a - can you see there's a photograph there, what appears to be a map of Yuendumu?---Correct.

And you can see there's a description of a metadata on the left column, do you see that? "Cell bright reader download" that information? This is on the left column?  
---Yeah, yeah, yeah, saying - - -

And it's got, "Photograph created 9 November 2019 at 6.36 pm" see that?  
---Correct.

And just below it says, "Map address with image captured Alice Springs Police Station" but you understand the evidence is that's an error from the metadata, it is in fact Yuendumu Police Station?---Correct.

And do you accept that to be the time that you took the photograph?---Yes.

And if you go over the page, that is a more - that is an enlargement of that map, is that correct?---Yes.

And if you go over the page again to page 5 it seems that you took a photograph of that page at 6:37 pm?---Correct.

Could the witness please be shown exhibit 1, tab 14?---Yes.

And if you go to page 3 of that document?---Yes.

Do you accept that the photograph you took was in fact of a part - or the bottom part of page 3 of that email, is that correct?---Correct, it does look like that, yes.

And were you handed that email?---No, I wasn't .

So when you took the photograph of it, how were you able to take the photograph of it?---So I believe it was on a desk near the map and Julie Frost only brought my direction to it - attention to this corner. I didn't see the rest of the document.

When you say she only drew your attention to the corner, you're talking about that part of page 3 that you photographed, is that what you mean?---Correct, and the locations of interest part.

Okay. Did you - when you arrived there you had about 20 minutes before Adam Eberl and Mr Hawkings came, correct?---Correct.

And do I take it in that time you wanted to obtain as much information as you could about what you understood the mission to be?---I had already understood the mission, so I was trying to gain intelligence about what would assist that mission.

Well, this document that you were shown seemed to be relevant to that intelligence, didn't it?---I don't think there's any other intelligence on this document that would assist us.

But at the time - I am going now back to 6:36-6:37 pm on 9 November?---Yes.

You didn't know what was in this document, did you?---Correct, I didn't know what was in this document until the committal hearing.

Well, is there any reason you didn't look at it?---I didn't know it really existed.

Well, you did know page 3 existed because you've taken a photograph of it?  
---Correct.

Is there any reason you didn't look at the rest of the document?---I wasn't asked to.

Even if you weren't asked to, did you think you could - did you ask yourself to look at it?---No, I didn't.

Is there any reason you didn't?---It just wasn't brought to my attention as necessary.

But even if it wasn't brought to your attention you could have asked to read it couldn't you?---I didn't know what the document was.

Well, you couldn't know until you read it?---Correct.

Why didn't you read it?---I was directed just to this corner of it - of the relevant information. I wasn't directed to any to any other parts of the document.

But you weren't prevented from reading it?---No, no one physically restrained me from reading the document.

Well, forget physically restrained - you weren't restrained in any way from reading that document?---No, I wasn't.

And there's no reason you couldn't have read it?---I didn't know it was - I didn't really know what it - what existed in this document.

See, what you cared about was your mission, is that right? To arrest Kumanjaya Walker?---Correct.

And anything else didn't really concern you?---I had other concerns.

What other concerns?---Normal concerns. My operational concerns at the time. The priority was the mission, which was to arrest Walker.

And any information other than that was of no interest to you, is that right?

---No, any information given to me that would assist the mission I would've been welcome to receive.

Well, this may have been information that could have assisted the mission?

---Correct and if it was given to me I would've read it.

Well, it - it was given to you.

MR EDWARDSON: I object to that.

HIS HONOUR: Yes. The witness has said many times it wasn't.

MR STRICKLAND: I beg your pardon, your Honour?

HIS HONOUR: He has said his attention was drawn to the bottom left-hand corner as places of interest or locations of interest. You put to him that it was given to him and that's not his evidence.

MR STRICKLAND: All right.

Can I ask, when this document was given - I withdraw that - when this document was shown to you was it only shown in a single page?

MR EDWARDSON: I object. That is not his evidence. It was not shown to him in that fashion at all. His evidence is his attention was directed to a document or a portion of a document which he took a photograph of. It wasn't shown as, "Mr Strickland hands it up in front of the jury" - that's not what happened - it's not his evidence.

MR STRICKLAND: I will explore - your Honour, I am entitled to explore the evidence.

HIS HONOUR: Yes, I know you are.

MR STRICKLAND: And that is what I am seeking to do.

HIS HONOUR: But you are making an assumption in asking that question and you are asking the witness to make an assumption and that is that the page was connected to the other pages in that document that you have in your hand.

MR STRICKLAND: Okay.

Was the page connected to the other pages in the document?---I don't know.

What - was it - can I ask physically where was the document that you - that you were shown?---I believe it was on the table.

It was on the table?---I believe so.

Right. And was it on the table so that this single page was shown?---Well I can see in the photo it seems that there was other pages under it but that wasn't brought to my attention.

Right. The page was connected to other pages, wasn't it?---I don't know.

Well you don't know because you say you didn't look?---Correct, I didn't look. I wasn't given the document.

When you were at the station did you discuss with anyone what would happen if you were confronted with an edged weapon?---With an edged weapon, no.

Julie Frost asked you - or told you, I should say - that she wanted you to do high visibility patrols around Yuendumu, is that right?---I don't believe she did.

She told you that she wanted you to familiarise yourself with the community?  
---I don't believe she did.

She told you that she wanted you to gather intelligence?---She may have said that.

Now, you said this, you were asked by my learned friend about conversations you had with Julie Frost at Yuendumu?---Yes.

And you said this - this is at 1063;

"She said that if I wanted to I could conduct an RBT - which is a random breath test - and I was confused about that because at that point my belief was still that my task was only to arrest Kumanjayi Walker and I did not see how setting up an RBT would assist that task".

?---Correct.

So you do recall her saying to you that she wanted you to set up random breath tests, is that right?---No, she didn't say that. She said, "If you want to you can conduct an RBT".

Well, as a police officer who had had - you had experience doing RBTs hadn't you?  
---Correct.

Didn't it occur to you that that was an opportunity to gather intelligence about Kumanjayi Walker?---No.

When you stop people for an RBT you talk to them, don't you?---Yes.

Ask them questions?---You ask them to blow into the straw.

But you can also ask them questions, can't you?---You can.

Did you have discussions with Constable Alefaio when you were at the station?---I greeted Alefaio.

I know. Did you speak to him?---I said - apart from the greeting, I can't recall any interactions, apart from when I asked Julie Frost if he could come and assist us.

You also spoke to Constable Hand. Is that correct?---Correct. I greeted him as well.

Did you ask Constable Hand if he had any information about Kumanjayi Walker, what he was like, what he was likely to do?---I don't recall asking them that.

Did you ask Constable Alefaio that?---I can't recall if we did.

Did you ask Julie Frost that?---I can't recall if we talked about that.

Didn't you think that might be an important source of information, to ask the local police what Kumanjayi Walker was like?---Yeah, could have been, yes.

I suggest that you did not ask Constable Frost if - - - ?---Sergeant.

Sorry. You did not ask Sergeant Frost if Constable Alefaio could join you when you left at 7:05 pm?---Sorry, you're putting that to me?

Yes?---No, I did ask.

And she did not refuse that request, did she?---She did.

She told you that Constable Alefaio would come with you at 5:30 am the following morning, didn't she?---I believe she said he would start duty at 5:30 am or thereabouts. I was under the impression that was to conduct the admin processing procedures that I had talk before, which Julie Frost would have done during the night. That was my impression.

She told you, didn't she, that Constable Alefaio would accompany you during your - if you were to arrest him at 5:30 in the morning?---No, she did not.

You've accepted that the other two IRT officers, Eberl and Hawkings, came about 20 minutes after you?---Yes.

And there was a further briefing with the four of you, and Julie Frost, wasn't there?---Correct. Julie Frost was in the vicinity, yes.

Well, she was - and she spoke to the four of you, didn't she?---I don't believe she did at that point.

You don't believe she did?---No, I don't think she did.

I'm talking about - isn't it the case that after the other two IRT members arrived, there was a time between about 6:55 or 6:59, I'm sorry, and 7:05 pm when Julie Frost spoke to the four of you together?---She spoke to - she definitely spoke to Eberl and Hawkings in the form of greeting and stuff like that. She didn't run a briefing with the four of us, no.

What I want to suggest, there were the four of you there. You accept - again, I will only play it if you wish me to, but you remember the CCTV of Yuendumu between - - - ?---Yeah, correct.

- - - about 6:59 and 7:05?---Yes.

And you were all in the room together, Julie Frost and the four IRT members - - - ?---Yes, you can't see us all, but I believe we were all - the four of us were around that table. Julie Frost was either in the muster room, or I believe she was in the doorway to her office, which is connected to the muster room.

I want to suggest that during that time she was speaking to the four of you?---She may have said words to us, but she wasn't briefing us, no.

She told you about a spate of unlawful entries, didn't she?---At some point throughout that time she had told me about unlawful entries, yes.

She told you about community unrest at Nyirripi?---No, to be honest, I had never heard of Nyirripi being near Yuendumu until she gave evidence in this trial.

She told you about the funeral and that there had been a ceremony afterwards, and that it had taken place on the Saturday?---No.

And she discussed with you Kumanjayi Walker and his history. Is that right?---No.

She asked you to do high visibility patrols around Yuendumu?---No.

And to saturate the area where the unlawful entries had been taking place?---No.

She said - do you remember her giving you a phone?---Yes, I do.

And that was after the other - that was when all four of you were at the muster room?---Correct.

You saw that on the CCTV, didn't you?---Yes.

What did she say when she gave you the phone?---Not much, she just gave me the on-call phone. So that's the on-call phone, so any calls that come into the station from members of the community calling police at the time would be, I guess, patched through by VKM, our communication department, to that phone, as far as I'm aware.

When she gave you the phone, didn't she say anything to you?---There was not much of a handover, no.

Forget "not much". Did she say anything at all to you?---I believe she said, "Here's the on-call phone."

And you understood that meant that you were to be - - - ?---On call - - -

- - - on call?---Correct.

And just again, what did you understand on-call to mean?---On duty to respond to a job if it came in.

Any job. Is that right?---Yes, any job that came in.

Because you understood that another reason you were there at Yuendumu on that evening was to assist police at Yuendumu in relation to their general duties?---I wasn't told that, but it made sense, if we were on duty, to have the on-call phone.

But your only interest was in tracking down Kumanjayi Walker, wasn't it?---That was my mission given to me by superiors, correct.

But you said that Sergeant Frost was in charge of you?---Correct. And she didn't tell me anything else about my tasking.

She gave you an on-call phone?---Correct. And I carried the on-call phone and didn't receive any phone calls while doing the primary mission.

I'm not asking you about that. She gave you an on-call phone - - - ?---Correct.

- - - Yuendumu station; she asked you to do RBTs?---She did not ask me to do RBTs.

She asked you to do RBTs - what was the context in which she said RBTs?---"If you want to, you can do an RBT."

You certainly were told, weren't you, by Julie Frost, about the unlawful entries that had been taking place at Yuendumu?---At some point in that about half an hour, yes.

And she wanted you to have a high visibility in that whole community, didn't she?---I have no idea whereabouts in the community unlawful entries even occurred. She didn't tell me that.

That's not what I'm asking you. She wanted you and your team to have a high visibility in the community; drive around the community, let it be known that you were there, didn't she?---She didn't pass that on specifically.

Well, she mentioned the unlawful entries, didn't she?---Yes.

And she asked you to be visible in the community?---I don't think she asked that, no.

Did you consider yourself to be in charge, in a de facto sense, of that IRT team?---No.

Did you consider yourself to be the person who was most experienced in the IRT of those - of the four IRT members?---Within IRT experience, yes.

I want to ask you about going to House 577?---Yes.

You were asked - this is at 1063:

“Why specifically did you drive directly to House 577?” And you said, “We decided that was the best place to start our intelligence-gathering.”

Do you recall saying that?---Yes.

Your plan was to arrest Kumanjayi Walker then and there if you found him in House 577, wasn't it?---Correct.

And that's why you went into the house?---Correct.

With your hand on your holster?---That's not why I had my hand on my holster.

You said this at 1064, you said Mr Kirstenfeldt had informed you of a conversation with Ethan Robertson?---Child.

I'm sorry, I will start again. After you had that conversation with Ethan Robertson, Kirstenfeldt then came around from the side of the house and he said he had spoken to a child - you said this:

“He had spoken to a child through the window who had informed them that Kumanjayi Walker might be sleeping there that night.”

“Did he say anything else about the last time that Kumanjayi Walker might have been at the house?---Yes, I think he said he had just left minutes prior.”

?---Yes.

And you say, that you did not trust the word of that 10 year old child, is that right?---Yes.

You said that your experience was people in the community would lie to you about where, if you were trying to track down someone, is that right?---People anywhere, would lie to us, yes.



And you said you believed from that time onwards that he would not return to House 577?---Correct.

You heard Mr Kirstenfeldt say that he thought the child was genuine?---Correct.

Did you have any reason to disbelieve that – the information you'd received?---I had no reason to believe it.

Before you went into House 577, did you have any discussion with Mr Kirstenfeldt about what you would do if you came across Kumanjayi Walker in the house?---We were both aware that the mission was to arrest Kumanjayi.

That's not what I'm asking you. My last question is, before you went into House 577, did you have any discussion with Mr Kirstenfeldt about what you would do if you came across Kumanjayi Walker in the house?---No, we didn't.

Did you have a discussion with any other member of the IRT, in case you – if you came across Kumanjayi Walker in the house?---No, we didn't.

Did you have any discussion with any member of the IRT if you saw Mr Walker in the house with an edged weapon?---No, we didn't.

So you agree, you didn't have any plan, you had not discussed any plan, if that eventuality occurred?---We had not discussed any plan, no.

Do you agree that you had no clear plan of action, when you entered House 577, in the event that you came across Mr Walker?---I disagree.

You said that you told Julie Frost, that you – you wanted to introduce yourself to the community, is that right?---Correct.

And how were you intending to introduce yourself to the community?---I believe you can see it on the body-worn video the way that I talk to Ethan Robertson.

So can you – when you – go on?---Politely.

My question is, how were you intending – what were you intending to do, to introduce yourself to the community?---To introduce myself, and tell them who I am.

So that's what you meant?---Tell them who we are as a team.

I see. When you spoke to Ethan Robertson?---Yes.

He told you that he believed Mr Walker had gone into one of two houses across the oval, is that right?---Yes.

He – did he point in that direction?---I believe so. I can't recall specifically.

And he told you that he believed that Kumanjaya Walker was in one of two houses, 511 or 518, is that right?---He said he – potentially, that's where he thought he was going towards, yes.

But he thought 511 was the more likely?---I believe that he was more focussed on 511.

Right, based upon what he told you?---Based upon his looking at the map and pointing, correct.

Based upon what he was pointing to at the map?---Correct. He was more confident in pointing to House 511.

Well did you believe that information?---I believed that was information worth following up.

You didn't believe that was a lie?---I believed it was worth following up. I didn't believe it was the – I didn't believe it was the truth.

You formed a quick assessment of Mr Robertson, is that right, Ethan Robertson? You formed a quick assessment of him?---I guess.

Well did you?---As much as I form a quick assessment of anyone I talk to briefly.

Well that's what you have to do as a police officer isn't it?---Yes.

Form assessments of people?---Yes.

Did you form an assessment that he was trying to tell you the truth?---No - - -

Pardon?---I don't recall thinking that at all.

Well did you form an assessment that he was trying to mislead you?---I don't believe – I don't believe I was thinking either one.

You accepted prima facie, or at face value, the truthfulness of what he was saying to you, didn't you? About where Mr Walker had gone to?---I accepted it was worth following up.

Okay. So when you went to House 511, you had a – you had information that you accepted at face value, Mr Walker might be at House 511?---Correct, he might be there, yes.

Okay. If I can just go back to House 577. Again, I'll show you the body-worn if you wish to?---Not necessary.

But you – you've accepted that you released the safety, is that right?---I released one of the retention devices on my holster.

You released one of the retention devices. You heard Senior Sergeant Barram say that you are trained – police officers are trained not to disengage any of the safety, unless they're going to draw out their firearm?---Yeah, I disagree with that.

But I – you heard his evidence about that?---Correct.

And you say you disagree with what he said about the training that was provided to the Northern Territory Police?---Unless training has changed, that was not how I was trained.

Your Honour, is that a convenient time?

HIS HONOUR: Yes.

Members of the jury, would you retire please.

JURY OUT

HIS HONOUR: Mr Rolfe, you may stand down. But again, you're under cross-examination, so please don't discuss your evidence with anybody?---Yes your RESHonour.

Thank you, you can stand down.

WITNESS WITHDREW

HIS HONOUR: Unless there's anything that counsel want to raise, I'll adjourn.

ADJOURNED

## RESUMED

HIS HONOUR: Before the jury returns, I had some enquiries made about the request by the juror to attend a funeral on Monday. I propose to allow the juror to attend that funeral. The difficulty is that the juror is concerned about her mental state if she is asked to return after the funeral to continue with the trial that day. So subject to anything that counsel want to say, I suspect the best course is simply to write off Monday and to then proceed on Tuesday.

MR STRICKLAND: Your Honour, we have no problem with that in terms of writing off Monday.

HIS HONOUR: I mean in terms of - - -

MR STRICKLAND: The jury.

HIS HONOUR: - - - the jury.

MR EDWARDSON: I would ask that the legal issues we have to resolve be done on Monday. I'm afraid I'm unavailable this afternoon, but if we could do that on Monday when the jury are not here, if that's convenient to your Honour.

HIS HONOUR: Right, yes.

You want to be heard in relation to that?

MR STRICKLAND: No, I don't.

HIS HONOUR: Thank you.

Bring the jury in, please.

MR STRICKLAND: You will advise the jury that - - -

## JURY IN

ZACHARY BRIAN ROLFE:

HIS HONOUR: Members of the jury, I received earlier today a note from one of your number indicating that this particular juror has a funeral which they wish to attend on Monday at 10:30 am. I am quite prepared to accommodate the wishes of that juror so that the best course, I suspect, is that we will simply not sit on Monday, so that after we break today we will then resume on Tuesday.

But at that point, I think in line with the current position in terms of Chief Health Officer directions, we will resume sitting in our normal hours from 10:00 until about 4:30. There will then ordinarily be a break at about 11:15; lunch will usually be from 12:30 until 2 o'clock; and then another short break in the afternoon before we rise again at 4:30.

There is no longer any requirement, as of Monday, for masks to be worn, but I understand that an agreement may have been reached amongst the jury yourselves that you will continue to wear masks; and if that is the case, then that's a matter for you. That's your choice.

Then we're ready to proceed again, Mr Crown?

MR STRICKLAND: Yes, thank you, your Honour.

I'm just going to play to you exhibit 26, which is your body-worn video as you're approaching House 511?---Understood.

DVD PLAYED

MR STRICKLAND: Which is your body-worn video, as you're approaching House 511?---Understood.

HIS HONOUR: Is this a matter in which I should give some warning?

MR STRICKLAND: No, I'm not going, at this stage, to the - - -

HIS HONOUR: Thank you.

MR STRICKLAND: - - - thank you, your Honour. I will remind your Honour when we do.

DVD PLAYED

MR STRICKLAND: Can I just pause there. We're at Zulu time 9.48.12.

Is that you with the map in your hand?---Yes, I believe so.

And is that an A3 laminated map of Yuendumu?---Yes.

Was that given to you by Sergeant Julie Frost?---I think I found it in the station. I don't know if she gave it to me or not. She had a number of A4 smaller printout maps, but yeah. May as well as given that to me.

Thank you.

DVD PLAYED

MR STRICKLAND: I'll just pause you there please.

Do you see that other car, that had nothing to do with this did it?---No, I believe that's the canine handler's vehicle.

Right. So that's – that's Adam Donaldson's?---I believe so.

And so you knew Adam Donaldson was there, together with his dog, Lochie, is that right?---I don't know the dog's name, but yes.

Okay, well I won't ask you about the dogs identity. But did you understand what the purpose was for having the dog there?---Correct.

What was the purpose?---Adam Donaldson was there in support of us.

Yes?---And at this stage, there'd been discussions that if Kumanjayi was to run, Donaldson could utilise his canine to catch him.

That'd be relevant in terms of, particularly if you had a cordon around the house is that right? That you'd have a dog who, if Mr Walker escaped, could chase him?---Correct. It's an extra resource that you could utilise, yes.

Okay, thank you.

DVD PLAYED

MR STRICKLAND: Just pause please.

Now I think you said, "Rolling", is that right?---Yes.

And that's your – you're saying that because the – you're referring to the body-worn video being on, is that correct?---Correct.

And you knew that it was on?---Correct.

And you're approaching that red house, you now know as House 511?---Correct.

Thank you.

DVD PLAYED

MR STRICKLAND: Just pause.

And so now you said "I'll check here"?---Yes.

Did you – and who were you saying that to?---I believe Jimmy.

Okay, and when you said – what were you referring to when you said "I'll check here"?---The red house.

And did you tell – I withdraw that. There was time when the body-worn video doesn't have audio. I think about 30 seconds, is that right?---Yes.

And do you recall if you said – in that 30 seconds where you can't hear the audible, do you remember if you said anything during that time?---No I don't recall.

Thank you.

DVD PLAYED

MR STRICKLAND: Just pause please – pause there.

Now just to orientate ourselves. As you're facing the screen, the front of the house is on the left, is that correct?---Correct.

Yes, thank you. I'm sorry, when I said the front of the house, I mean House 511?---Yeah, correct.

Thank you.

I'm sorry, that's body-worn 9.48.57 Zulu.

DVD PLAYED

MR STRICKLAND: Can I just pause there please. 9.49.16.

So you can see some fences?---Yes.

And were you in the – were you – did you understand you were in the property of House 511 at this stage?---Yes.

And you were – are now going to speak to the occupant of House 518?---Yes, someone who was in the backyard, yes.

Right, okay thank you.

DVD PLAYED



MR STRICKLAND: Pause.

So you now know that person to be Rachel Lewis, is that right?---Yes.

And you said "My name's Zach, we're new in town, we're here to grab Arnold"?---Correct.

Now, that's what you call introducing yourself to the community, is that right?---Correct.

And then you mentioned immediately what you were here to do, which is to grab Arnold, is that right?---Correct.

You weren't in fact intelligence gathering?---We were in town to arrest Arnold.

Yes?---Yes.

That's in accordance with your mission?---Yes.

Thank you.

DVD PLAYED

MR STRICKLAND: Can you pause please.

So when you were saying, "Proper, proper, actual", were you really saying, look are you telling me the truth?---Correct.

Because again you are sceptical about whether members of the community will tell you the truth about these things?---Correct.

Thank you.

DVD PLAYED

MR STRICKLAND: Pause.

Now, you were showing – you agree you had a couple of photographs of Mr Walker on your phone?---Yes.

And did you get those photographs when you were at Yuendumu Police Station?---No, from Alice Springs Police Station.

And you hear yourself saying that you were – I think you believed it was House 511 that was the focus, is that right?---Yeah, I believe I said, "This one, or this one?" but I think 511.

And did you say you think – you said that, because based upon what Ethan Robertson had told you, is that right?---Correct.

You hadn't seen the warrant at that stage?---I don't believe I had, no.

You know the warrant specifies House 511?---I know that now, yes.

You understand that?---But not at that time.

Do you believe you had seen the warrant?---No.

And when I say – I'm sorry, at that stage?---At that stage.

DVD PLAYED

MR STRICKLAND: Just pause.

Now that's Adam – that's at 9.50.16, that's Adam Eberl, is that right?---Correct.

So you now decided to go into House 511, is that right?---I – I don't know at what point that decision was made, but yes.

Sorry, you say you don't know at what point the decision was made, is that right?---Well for example, at this point in time, I wouldn't have legally been able to enter that house, without permission.

I see?---In my mind, anyway.

So you were not intending to enter that house, unless you had permission?---At that point with the state of mind, that I didn't have belief on reasonable grounds that Kumanjayi was in that house. I needed permission, yes.

Permission from who?---A lawful occupant.

Do you know who the lawful occupant was at that stage?---I didn't know the names of any lawful occupants.

Right, okay, thank you.

DVD PLAYED

MR STRICKLAND: Just pause for a moment please.

Excuse me, your Honour.

Now when you said "Hey missus", who were you talking to? Were you talking to the woman you can see there, or were you talking to someone else?---I believe I was

talking to Leanne Oldfield now, but I was – shortly after this, I was speaking to both Leanne Oldfield and Elizabeth Snape.

Right, at that stage, you didn't know if they were the lawful occupant, is that right?---I believed at least Leanne Oldfield was a lawful occupant.

At that stage?---Correct.

Why – what was the basis of that belief?---They were extremely comfortable inside that property, and they were inside the property yard, the perimeter, making themselves at home.

I see, thank you.

DVD PLAYED

MR STRICKLAND: So did you - so you asked Leanne Oldfield who you believe was the occupier if you could go inside?---Correct.

And I think you said, "Whose house is that"? Is that right?---Correct.

She said, "Margaret"?---Yes.

At that stage you didn't know it was Margaret Brown?---No.

And do you - I will just find it. You said, "Whose house is this?---Margaret." Then you said, "Can we go check inside, 'cause we're looking for" - and did you hear her say, "Ask her"?---No.

You didn't hear Leanne Oldfield say that?---No, I didn't.

Yes, just continue on.

DVD PLAYED

MR STRICKLAND: Pause please.

So you then said - you then said, "Me and Adam are going to clear this red house"?---Correct.

So you definitely decided then to enter, is that correct?---Yes, after I believed I had permission to enter.

Okay?---That was made a decision.

Can we just go a little bit further please?

DVD PLAYED

Pause. Just - like a just a little bit further.

DVD PLAYED

Pause.

Now we pause at 9:51:00 Zulu time. Now, you say you didn't see Mr Walker's hand in his pocket, is that right?---I say, I don't recall noticing it.

You'd seen Mr Walker several times in the body-worn of the axe incident, is that right?---Yes.

You had photo of him?---Yes.

You were told that by Mr Ethan Robertson that, "He could be in House 511"?  
---Yes.

And do you remember Constable Eberl saying he thought there was a man who was walking to the back of the house?---Yes.

Well, didn't you think that the man walking towards you might have been Kumanjayi Walker?---Yes.

And you believed that man, you said, was extremely violent?---Yes.

You had seen him attack other officers with a weapon?---Correct.

Before you entered the House 511 you had not had any discussion with Constable Eberl, did you, about what would happen if you confronted Kumanjayi Walker in the house?---Throughout the evening it was obviously known and we'd discussed that if we come across him we'd arrest him but that's it.

But what I'm saying is you'd only made a decision to enter House 511 when you had that conversation with Leanne Oldfield, correct?---Correct.

And the body-worn video does not record you saying anything to Constable Eberl about what you would do if you happened to see Kumanjayi Walker in the house?  
---Correct.

And that's because there was no such conversation?---It had happened prior.

I beg your pardon?---It had happened prior. This is - this is the conversation - I know what - I think I know what you're saying. We had decided that if we come across him we would arrest him but you were correct in saying that we didn't - that was the extent of which that conversation went - it didn't go into actions on who did this and who did that.

Don't worry where I'm going, just wait for the question?---Okay.

You'd had no discussion with Constable Eberl before entering House 511, what you were going to do if Mr Walker resisted arrest?---Correct.

You had no discussions with Constable Eberl what you were going to do if he had presented with an edged weapon?---Correct.

In fact, you'd had no discussion with any IRT members about those topics, had you? ---Correct.

Because you had no clear plan, didn't you?---I had a plan, yes.

In your own mind?---Correct, and I believed every other officer did.

I am not asking you about what was in the mind of the other officers, do you understand that?---Yes.

I am asking what was in your mind?---Understood.

You say there was a clear mind - plan in your mind, is that right?---Correct.

The clear plan in your mind was that if Kumanjayi Walker resisted you, you would shoot him. Is that right?---Incorrect.

If he presented an edged weapon to you, you would shoot him. That was your clear plan, wasn't it?---Incorrect.

If you believed that that person might have been Kumanjayi Walker why not wait at the entrance of the house and ask him to identify himself?---We entered the house and did that.

Beg your pardon?---I followed Eberl into the house and we did just that, just inside the house.

Well why didn't you say to Eberl, "Let's wait at the entrance of the house and ask him who this man is?---It didn't seem necessary at the time.

You see, this is what you said at 1069; Question, "When you entered that house at that point" - and this is the point I am asking about now -

"Did you have your hand on your Glock in the same way you'd previously at House 577?---No, I didn't."

"Why? What's the difference between the two houses?---I don't think 511 was actually mentioned to me by Julie Frost as a house of interest and basically walking into that house and seeing this man who I didn't know was Kumanjayi,

I didn't perceive a threat, I just believed we were going to just have a conversation"

Do you recall those questions and answers?---Yes.

See, you say that at this point in time you believed that that man could be Kumanjayi Walker?---I suspected he could be, yes.

Yes. And yet you are saying you said you did not perceive a threat, "I just believe we were going to just have a conversation"?---Correct. Walking into that - seeing that, to me was not a - I did not perceive a threat - a threatening situation.

His hand was in his pocket?---I didn't notice that and I should have - correct.

Did you ask - you heard Detective Senior Sergeant Barram say your training was to say, "Show us your hands"?---It is if the hands are in the pocket and I should've noticed that his hands were in his pocket, correct.

You have said that you believe before you came into House 511 that in your mind this man was extremely violent?---Correct.

You'd watched the body-worn video multiple times?---Correct.

You'd 'shown - you've shown many police officers that body-worn video?  
---Correct.

And yet you honestly say that at this point in time you did not perceive a threat?  
---Correct.

You thought you were just going to have a conversation?---Correct.

What? Kind of, "How are you? How's your day going"?---"Who are you?"

"Who are you"?---Correct.

You wanted to identify him?---Correct.

Why not do that outside - when you were outside the house?---I didn't believe I'd be able to.

What do you mean you wouldn't - didn't believe you'd be able to?---The photo that I had did not particularly resemble the man in front of me and I was only able to identify him by being so close and seeing that minor skin fold in his left ear.

What stopped you from being outside the house and asking some questions?  
---The fact that Eberl stepped into the house.

So that's what stopped you?---Correct. In saying that, I wasn't thinking that. I was willing to go inside that house.

Is there any other reason?---Not that I can recall

Did you ask Eberl - did you - did it occur to you to say to Eberl, "Let's not go in the house"?---It did not occur to me to say that.

See, if you were - you've heard the training - you've heard the evidence of Detective Senior Sergeant Barram, if you're outside the house you've got many more options, don't you, to disengage if required?---Yes.

Do you agree with that?---In circumstances, yes.

You would've had an escape route if you'd deployed a weapon if you were outside the house?---Potentially.

You would have had cover if you were outside the house?---Not necessarily.

Well, you could have had cover?---You could have had cover inside the house.

What does cover mean to you?---For example, this, this bench is - - -

No, what I'm asking is what does cover mean?---I'm trying to explain it to you. This is cover. It's an obstacle between you and the offender.

But you're in a confined space if you're inside the house, aren't you?---More confined than outside, yes.

So you would have more options for cover if you're outside the house.  
Correct?---Potentially, if there was cover outside the house.

You've seen outside the house. There were places where you could have cover outside the house, weren't there?---Such as?

Did you notice if there were trees, for example?---I saw a - I believe I saw a tree on the edge of the property line, and mattresses on the ground.

Cars?---Not inside that perimeter.

There were cars outside the house?---Correct.

You've given evidence about this notion of a reactionary gap?---Correct.

21 feet?---Correct.

If you're outside the house it's much easier to have the 21 foot gap, isn't it?---Correct.

Can the witness please be given exhibit 62. I withdraw that. Yes, can the witness please be given exhibit 62, tab 4?---Thank you.

If you go to page 64?---Yes.

You've told this court that you were trained in relation to edged and blunt weapon awareness. Correct?---Correct.

You were trained that members should not assume they would be given warning of an impending edged weapon attack, allowing for time and room to prepare?---Correct.

You're trained about persons carrying small, easily concealed weapons. Correct?---Correct.

With that training, and seeing Kumanjayi Walker - I withdraw that - a person you believe could have been Kumanjayi Walker walking towards you, and considering what you've known about Kumanjayi Walker, I ask you again, do you seriously say that you did not perceive that person to be a threat?---Correct.

Can you turn please to that exhibit, to page 38. You've told that you received - you've given evidence that you received this training in relation to planned responses?---Correct.

That's critical, isn't it, when dealing in these kind of circumstances. Do you agree with that?---Correct.

You were trained to develop an action plan?---Correct.

And you did not develop any action plan before you went into House 511, did you?---Not specifically, no.

You were trained also to assess the threat level. Correct?---Correct.

And you're saying that you didn't perceive a threat?---My assessment of that situation, walking into the house, correct, I did not perceive that to be a threatening situation.

So you didn't properly assess the threat level, did you?---Correct.

You were trained to maintain a reactive distance and be aware of positioning. Correct?---Correct.

By going into the house you did not do that, did you?---Correct. But you can never do that if you need to arrest someone. You can't arrest someone from 6.4 metres away.



That's why you went into the house, isn't it, to arrest him no matter what?---To arrest Kumanjayi Walker?

That's right?---I wouldn't say no matter what.

You did not have regard to the training that I'm taking you through here, did you?---No, I believe I abided by my training.

So you say you followed these steps, did you?---I believe I followed the steps required of me, according to my assessment of that situation.

You didn't develop a plan, you said, an action plan, correct, before you entered House 511. You've accepted that?---Yes, not a specific action plan.

You say you didn't assess the threat level?---I said I did assess the threat level.

You did assess the threat level?---Correct.

But you didn't properly assess the threat level, did you?---I did get it wrong.

You say that you didn't perceive a threat at all?---Correct.

You didn't maintain a distance between yourself and Kumanjayi Walker, did you?---Correct.

The next element is, "If necessary, cordon and contain the situation." Do you see that?---Yes. If practical, we had a cordon.

And do you say it was not practical to cordon and contain the situation?---I say it's nearly impossible to cordon that with the numbers that we had.

You always have to work with the resources you're given, don't you?---Correct.

That's part of your training?---Exactly.

In the Northern Territory you don't have unlimited resources, do you?---Exactly.

You had four IRT officers and a dog handler and a dog?---Correct.

And you say that was insufficient to have a cordon around that single house. Is that right?---We were attempting that - the target area at that point was two houses.

Big your pardon? Two houses?---Correct. 511 and 518.

Why not - did it occur to you to have all the resources on a single house, the house you were going into?---That would be ineffective if he was in the other house.

You believed he was in House 511?---I did not believe that, no.

I see. That was where you believed he was likely to be, wasn't it?---I suspected he might be in either house; more likely to be in 511.

The other element is, "Talk to communications, supervisors, and other units attending." Do you see that?---Where are you at now?

I'm at page 39.5 - point 6, I'm sorry. Sorry, when I say page 39, you've got that?---Correct.

And number 6 on that list, "Talk to communications, supervisors, and other units attending"?---Correct.

Can I ask you, when you went into House 511 did you - you did not say to any of the members outside House 511 that you had found a person inside.  
Correct?---Correct.

You didn't ask Eberl to do that either, did you?---No, I did not.

That would have been part of your training, wouldn't it, to tell everyone that you had located a man inside the house?---Potentially, yeah.

You were trained that above all, the member, that an unplanned response or approach may precipitate a confrontation?---Correct.

And that's exactly what happened here, wasn't it? There was an unplanned response, wasn't there?---The plan was to arrest Kumanjayi Walker and abide by our training.

And that was the only plan you had, to arrest him?---Correct.

There was no - I withdraw that. You're trained that it's only possible to be threatened if you place yourself in a position where you can be threatened?---Correct.

And that's exactly what happened, isn't it? You placed yourself in a position inside House 511 where you could be threatened?---Correct.

You were trained, if you go to page 40 - sorry, page 39 - to reassess the situation - sorry, to page 40. I'm sorry. I withdraw that. Can we just play on a bit with exhibit 26.

MR EDWARDSON: Your Honour, could we have a warning, please.

HIS HONOUR: I understand that the Crown now proposes playing part of this body-worn video which will contain confronting material, and that if anybody in the courtroom believes that they may be affected by viewing that material, they should now leave.

DVD PLAYED

MR STRICKLAND: Just pausing at Zulu time, 9.51.18.

You got too close to Mr Walker, at that stage, didn't you?---I needed to be that close unfortunately.

You needed to be that close?---To identify him, yes.

You don't accept you could have done that outside of the house, or at the entrance to the house?---No I don't accept that I do – or could, sorry.

Thank you.

DVD PLAYED

MR STRICKLAND: Pausing at 9.51.34.

So I think you're getting him to remove his hat, is that correct?---Yes.

And you do that, a) because it helps you identify him?---Correct.

And b) because you are trained that there may be concealed weapons inside the hat?---I – yes, I do believe that is written somewhere in our training. We never had a scenario, I have never dealt with a situation where a weapon was concealed in a hat.

So you weren't thinking that at the time?---Correct. The reason I removed it was not because I was thinking there could be a weapon in that hat.

Thank you.

DVD PLAYED

MR STRICKLAND: Now I just want to ask you about the time before you fired the first shot?---Yes.

You said this yesterday at 1072, you said that after you said, "Put your hands behind your back" Kumanjaya Walker started resisting?---Correct.

And you can clearly see that in the body-worn?---Correct.

You say, "He raised his arms and started striking me around my head and my neck"?---Correct.

And do you say he raised both his arms?---I believe he – raised both.

And, "I immediately raised my left arm, and left shoulder, to protect my neck"?---Correct.

And then you say, "He" – now I just want to read this bit, and I wanted to tell you this is what you said. "Kumanjayi struck me twice in the top of the head in a hammer-fist motion" - - -

MR EDWARDSON: Sorry to interrupt, but I think in fairness, the whole question and answer should be read, not just a portion of it.

MR STRICKLAND: Well I'm reading the relevant portion, your Honour.

I'll go back a little bit. I think I have – I have been reading the whole answer, your Honour. But I – if there's an objection I'll –

You say, "He raised his arms and started striking me around my head and neck area, and I immediately raised my left arm and left shoulder to protect my neck", that's what I've just put to you?---Correct.

"Kumanjayi struck me twice on the top of the head in a hammer-fist motion, which is using the right" – you say the right palm?---Writer's palm. Writer's palm. I believe it's called.

What – can you write – write as palm (sic)?---Write, you know, so if you're a writer - - -

A writer's palm?---Correct.

I understand. As in W-R-I-T-E-R'-S?---Correct.

And could you just indicate to the jury what you're referring to?---This section of the palm, yeah.

I see. So you're talking about the side section of your palm, is that correct?---Correct.

I see. So you are demonstrating this motion, is that correct? A – with the hand at an angle like this?---Correct.

Perpendicular?---Correct.

And going down towards your head?---Yes, with a clenched fist.

With a clenched fist. So not like that, like that?---Correct.

I see. And you say it struck you twice. And was that with the right arm?---Correct.

And at that stage, did you see a blade in the – in his right hand?---After he struck me twice.

Right, on the top of the head?---Correct.

And could you feel, on the top of your head, a blade strike you?---No, I believe he must have connected with his wrist or forearm.

Well forget what you believe could have happened, what I'm asking is, did you feel a bladed weapon?---Not that I can recall.

On the head?---Not that I can recall.

Because after this incident, you went to the Alice Springs – I'm sorry, you went to the hospital, is that right?---Correct.

And where was that?---In Alice Springs.

Right, and they did a medical check on you, is that correct?---Correct.

Did – you didn't describe any injuries to the top of your head did you?---No previously at Yuendumu, I had Constable Eberl or Hawkings, look through my scalp to see if I'd been penetrated or anything like that, and we couldn't find any bleeding.

Okay, well suffice to say, you didn't – there was no – you did not know about any injuries to the top of your head, is that right?---Correct.

At what point did you – you then say, I'll just continue on. You said, "I thought this was strange because he wasn't using his knuckles. So at that point I looked at his hands", and so you looked at his hands after he used his right arm on the – with the hammer-fist motion, is that right?---I think I said I looked at his hand, single.

Okay?---Well that's what I meant to say.

That's fine. And when you say you looked at his – you now say that you looked at his hand, is that correct?---His right hand, yes.

Looked at his right hand. And you saw a metal – you said, "This was the first time I ID'd", meaning I identified - - - ?---Correct.

- - - "that he had a metal blade protruding", is that right?---Correct.

And when you saw in his hand a metal blade protruding, was that a single blade?---I couldn't tell. I just saw a metal blade.

But was it a – what did it look like?---A metal blade.

Okay. Can you describe it? What you saw?---I think I have, it looked like a metal blade.

Beg your pardon?---It looked like a metal blade.

Not two blades open?---I recall seeing a metal blade.

That's all you can say?---Correct.

And did you see how he was holding it?---Yes, like a dagger.

And can you demonstrate that?

Perhaps if the witness could be given, not scissors, but something?---Like this.

So you're gripping the pen, as if you are shaking it's hand – no I'm sorry, I withdraw that. I withdraw that. You're –

I wonder if, your Honour, I'm not that good at describing what he's showing.

HIS HONOUR: Well the hand is in the shape of a fist. He's holding a pen at the present time. The pen is held in this fist, with the bottom part of the pen extending beyond the bottom of the fist.

MR STRICKLAND: Thank you, indebted to your Honour.

Now you then say that you – you said, "I had my shoulder up and my arm out to protect myself"?---Correct.

And that's when he stabbed you in the left shoulder?---Correct.

And could you feel that?---Yes.

And so you then jabbed him in the face with your left fist?---Correct.

And you say – you then say, do you, that you put your hand on your Glock?---Correct.

And you say this, "At which point, I realised his left hand was already on my Glock"?---Correct.

You then say you twisted your hips back as you are trained to knock the hand off his Glock?---Yes, or off my Glock.

Well, Constable, if someone in a situation like that, tries to grab your Glock, you're trained to shout, "He's going for my gun", aren't you?---If practical, yes.

Well, you need to warn your partner, don't you, and anyone else, that this extremely violent man may be grabbing your weapon?---If practical, see - it would take more time for me to say, "He is grabbing my Glock" then to move my hips backwards and knock his hand off my Glock.

But you never said to Mr Eberl - never in this entire incident - that he had had his hand on your Glock?---Correct, I didn't.

It's one of the most serious things that can happen to a police officer in a combat situation isn't it, someone trying to grab your weapon?---Comparatively in this situation it was one of the least serious things that happened.

One of the - one of the least serious things?---Out of the things that just happened here, yes.

Well, if he grabbed your Glock he could shoot you - or Constable Eberl, isn't that right?---Correct.

And you don't think that's one of the most serious things that could happen?---I think that in this incident that is the least serious thing that happened.

I see. But you've seen the Facebook video that was posted - that was played in this court?---Correct.

In America? It's exhibit 80?---Yes.

And when the assailant runs to the officer and grabs his gun you can hear the officer saying, "He's going for my gun"?---Correct.

You never even shouted the word "gun" did you?---No, I didn't.

And you didn't shout the word "gun" because Walker's hand was never on your gun, was it?---Incorrect.

When you returned to the Yuendumu Police Station you never told Sergeant Frost that Walker had his hand on your gun, did you?---No, I didn't.

You didn't tell Hawkings, did you?---No, I didn't.

Or Eberl?---No.

Or Kirstenfeldt?---No.

Or any other officer?---No, I didn't.

So if it was the case that Kumanjayi Walker had tried to grab your gun, that would be one of the first things you would say, isn't it?---No.

Because it's one of the most dangerous things that can in fact happen to a police officer in a combat situation?---It is, I agree with that, yes.

And you have just made up the fact that Walker had his hand on your Glock, haven't you?---Incorrect.

Now, you say that after you twisted and you in fact then moved away, is that correct? You stepped backwards?---Correct.

And you had your hand on the Glock at that stage?---Correct.

And you say that what you said is "Walker's focus began to be on Eberl"?  
---Correct.

And you said that Walker started stabbing Eberl in the chest and neck area?  
---That's what I saw, yes.

Now, I want to play to you the body-worn video of those moments and I will do it in slow motion?---Okay.

I think that's the Sorell body-worn, your Honour.

MR EDWARDSON: Just before that is played, your Honour, in defence of the witness I think the second question and answer should be read to him in context. My learned friend is referring to page 1073. The first question and answer, but it is qualified in the second question and answer.

MR STRICKLAND: Your Honour, I am - that is a matter that my learned friend can re-examine - - -

HIS HONOUR: You can deal with that in re-examination.

MR STRICKLAND: Indeed. So I will just - I am starting at Zulu 9:51:56, frame 203.

DVD PLAYED

MR STRICKLAND: Pause.

I've just paused - did you see just before I paused at Zulu 9:51:58 I've paused at frame 252 but just before that could you see your hand - your arm?---Yeah and this is the point where his hand is on my Glock, which might be helpful, you see his left arm.

Okay, well let's - we'll slow - I'll rewind it just a little bit.

DVD PLAYED

MR STRICKLAND: Pause.

So I've just paused it at 266, Zulu 9:51.58. You can't - I want to suggest to you that you can't see in that slow-motion body-worn, Walker's hand on your Glock?---Well you - correct, you can't see his hand or my Glock in that body-worn picture.



We rely on your say-so that that occurred don't we?---Correct.

So if I can just continue on. Do you see at frames 266 your left arm?---Yes.

And is that the time you struck him?---I can't - I can't tell from this frame viewing what happened in what order.

Okay, thank you.

DVD PLAYED

MR STRICKLAND: And just pause there.

Do you agree at this stage, I've paused at body-worn 9:51.59, at this stage you are backing away, aren't you?---Yes, yes, I think so.

Because there's more - there's distance between yourself and the - Constable Eberl and Mr Walker, correct?---Correct.

And can you see at that point in time, or do you recall at that point in time that Eberl had Walker in a modified seat-belt hold - something like that?---I just saw them fighting.

But Eberl was behind?---At that point he was mostly behind Kumanjaya, correct.

And Walker was facing towards you?---His body was. I believed his attention was focussed on Eberl.

But he was facing towards you wasn't he - Walker?---Well his body was facing towards me.

And his head was facing towards you?---I don't believe so.

And Walker - sorry - Eberl's left arm was around Walker's upper body, wasn't it?---Correct.

Okay.

Let's continue on.

DVD PLAYED

MR STRICKLAND: Pausing there.

And so that's when you - you can see I've paused at 9:52:00, frame 316, you can see your - you are holding the Glock, is that correct?

In both of your hands?---Correct.

And at that point in time Eberl has his arm around Walker's body - upper body?  
---At this point I'm - I think Kumanjaya had slipped out of that hold.

I see. See, I want to suggest that you - you cannot see in the body-worn, can you, Walker stabbing Eberl to the chest?---I don't think so.

You can't see in the body-worn Walker stabbing Eberl in the neck?---I don't think so.

And in fact I want to suggest that Walker is facing you?---Incorrect. At times he's facing Eberl.

You have made up the evidence that you saw Walker stabbing Eberl in the chest and stabbing him in the neck, haven't you?---Incorrect.

You were then asked by my learned friend, "When you say he started stabbing him were you able to see whether the blade physically came into contact with him or was that just the impression you got?" And you then said, "That's the impression I got". Correct?---Correct.

So when your initial answer was, "Kumanjaya started stabbing Eberl in the chest and neck area" you're not describing what you actually saw, are you?---I'm describing what I perceived.

Yes. What's the difference between, "perceived" and, "saw"?---I don't think anything is - I'm describing what I saw.

Yes, and you never saw that, did you?---But that's what I saw.

Now, I will play the next part in a moment. But you know - you accept, do you, that after you fired the first shot Eberl and Walker fell onto the mattress?---Correct.

And you accept, don't you, that your training was to assess and reassess the danger or the threat based on the particular situation?---Correct.

And that meant, didn't it, that when those two men were on the mattress you had to reassess the risk. Correct?---Correct. Continual assessment.

Yeah. Even in a split second you have to reassess the risk?---Correct.

That's part of your training?---Correct.

When those two men were on the mattress did you think that you were at risk before you fired shots 2 and 3?---No.

You knew, didn't you, when Constable Eberl was on top of Kumanjayi Walker when he was on the mattress?---No. I believed he was on top of part of his arm and shoulder.

Now I intend just to play the next three seconds in slow motion.

DVD PLAYED

MR STRICKLAND: Just pause there. Zulu time 9:52:01. I just wonder if you could just rewind just a little bit, please. Just pause about there. Thank you.

You were looking at Walker and Eberl, weren't you?---Correct.

You weren't looking away to your right or your left or behind you?---Correct. My main focus was on that blade.

Could you see that Walker was on the mattress?---Yes.

You could see Eberl's legs?---Yes.

And you could see that he was in what's described - I withdraw that. You could see he was in a mount position or a side position?---Incorrect.

You disagree with that?---I disagree with that. Would you like me to explain it?

No, thank you. You could see that he was - that Eberl was trying to restrain Walker?---I saw them fighting on the ground.

But you could see he was trying to restrain him. Do you accept that?---Yes.

You knew that Eberl was a bigger man than Walker?---Yes.

And you knew that he was trying to ground-stabilise Walker?---He was attempting to.

You could see that Eberl was trying to flatten down Walker's pelvis onto the ground?---No, I saw them fighting on the ground.

You saw Walker on his side. Is that correct?---Correct.

And he was underneath Eberl, wasn't he?---Parts of him were underneath, parts of him - - -

There was no part of him that was on top of Eberl, was there?---No, but there was a lot of him that wasn't underneath Eberl.

Just continue on, please. Pause at 377. Pause at 9:52:02.

DVD PLAYED

MR STRICKLAND: Whilst Walker was on the mattress and before you fired your shots, you couldn't see Walker's right arm, could you?---I could.

It was under his own body, wasn't it?---Incorrect.

You couldn't see Walker's upper body moving, could you, before you fired shots 2 and 3?---If you count his right arm as his upper body, I could see that moving.

I suggest you could not do that?---Well, I could.

You can't see that in the body-worn, can you?---Correct.

Continue on, please. Pause there, please. 399. Perhaps go to 400.  
Thank you. You're paused at 9:52:02.

DVD PLAYED

MR STRICKLAND: That's your left arm. Is that correct?---Yes.

Frame 400. And you have moved around slightly, haven't you, from the - from about frame - from the earlier frames I was showing you, you had moved slightly towards the door. Is that correct?---I think the door is to my right at this point.

You've moved away from the door. Is that right?---I'm moving. Everyone is moving.

At that point in time you're beginning - where is your right hand at that point in time?---My right hand still has the Glock in the hand.

Continue on, please. Pause there.

DVD PLAYED

MR STRICKLAND: You could see, I think it was at frame 418, you can see your left - I'm at frame 419, Zulu 9:52:03, your left hand, on what part of - is it touching Constable Eberl?---Correct.

On what part of his body?---It's on his duty belt right now, probably just above his left butt cheek.

At that point you saw the muzzle explode at 418. Is that correct?---I was noticing the mouse - - -

Okay, I will just replay it once more.

DVD PLAYED

MR STRICKLAND: So paused at frame 419. Do you accept that's at the time of shot 2?---Yes.

And I want to suggest that you did not see Walker's upper body, which includes his right arm, moving from the time they fell on the mattress until the time of that shot?---Incorrect.

You were bracing yourself against - you braced your left hand against Constable Eberl's belt. Is that right?---Yeah, his belt or his back.

You were here when Constable Eberl gave evidence?---Yes.

And you heard him say that he believed the right arm of Mr Walker was sort of underneath his body?---Correct. I heard that.

Was Constable Eberl closer than you were to Mr Walker?---Yes, he was.

His head was closer than yours was?---Yes.

I want to suggest you did not see Kumanjaya Walker holding a blade when he was on the mattress before you fired shot 2?---Incorrect.

You didn't know where his right arm was, did you?---No, I did.

You did not see Kumanjaya Walker stabbing Eberl on the mattress, did you?---I saw that.

You've made that evidence up, haven't you?---Incorrect.

You say that you saw Kumanjaya Walker stab Eberl in the chest. Is that right?---Correct.

And in the neck?---In that area, yes.

When you say, "in that area", in the neck area?---Correct.

And in the shoulder?---Correct.

You just made that up, haven't you?---Incorrect.

Did you hear Eberl say that he was stabbed?---No, I did not.

Did you see Eberl react as if he had been stabbed?---I saw them fighting.

Did you see him react as if he had been stabbed - - - ?---I don't know - - -

- - - in the chest or the neck or the shoulder?---I don't know how you react if you have been stabbed. I imagine that would be different each person.

See, you have made up that you believe that you feared for Eberl's life when you fired those two shots?---Incorrect.

You did not believe, did you, that you needed to fire the second and third shots to protect Eberl's life?---I believe I needed to fire shots 2 and 3 to protect Eberl's life.

And you've made that evidence up to justify the fatal shooting of Kumanjayi Walker?---Incorrect.

You say that - you deny that you did what's called a double tap. Is that right?---Correct.

You say it was what you called a controlled pair?---Correct.

And do you say a controlled pair is when one sight picture is followed by a shot, and then a second sight picture is followed by a second shot, is that right?---Sight picture, or aiming in general. There's different ways to aim.

I'm just referring to what you said - - - ?---Correct.

- - - yesterday?---Yes.

You used the words, "Sight picture"?---Yes.

What did you mean by sight picture?---In the two ways that we're short – taught to aim and shoot in the NT Police, and around the world, the Glock has iron sides. It has two bars at the rear of the slide, and one bar at the front of the slide. And you line them up, until they are at the same height. And the front bar is in the middle of those two rear bars. That's the sight picture element of it. Then there's other elements such as your grip, your trigger manipulation that affect that shot. But that's a sight picture element of it. There is another way that we are taught to shoot in the NT Police, called point shooting, or intuitive shooting. An example of that would be, for example, when Detective Senior Sergeant Andrew Barram and those other officers showed the shove and shoot drill. When you shoot – it's designed for instances like this. When you're at close-quarter combat and you're shooting from your hip, or from another place where it's not practical to use that sight picture. And not required to use that sight picture. Where you are pretty much pointing towards your target, and shooting - - -

When you say - - - ?---And they're taught by the NT Police.

I'm sorry, do you want to finish?---So they're the two ways that are taught by the NT Police.

You're saying what you did on this occasion was a controlled pair?---Correct.

Where you took one sight picture, as you've described it, and then a second sight picture?---I aimed, I didn't take a sight picture. That was a definition of a controlled pair, but I didn't take a sight picture, I was using point shooting, in this day.

I see. Each shot though was purposeful, wasn't it?---Correct. I did aim, I just didn't use the sight pictures.

And you were looking at where each round went, didn't you?---When I pulled the trigger, correct.

Now, you say you saw Kumanjaya Walker holding an edged weapon, when he was on the mattress?---Correct.

You didn't shout out, "Knife, knife, knife", did you?---No, I didn't.

That's what you're trained to do isn't it?---Not in situations where you believe that delay could allow the offender to fatally strike. In this example, Eberl.

You are trained to say those words, to warn, in this case, your partner, Constable Eberl?---If practical, yes.

Well it was quite practical to say the words, wasn't it?---I don't believe so.

You're trained to say, "Drop the knife, or drop the scissors" aren't you?---Again, if practical.

Because that is a command that you are issuing to try and change the behaviour of the assailant, correct?---Correct, if practical, you would do that.

Now I want to suggest you did not say, "Knife, knife, knife", or anything of that kind, because you didn't in fact see the edged weapon, when they were on the mattress, before shot 2?---Incorrect.

See, you knew, didn't you, that when they fell onto the mattress and Eberl was in the position he was, and Walker was in the position he was, you knew that the situation had changed, hadn't you? Didn't you?---Yes, they were fighting with a lethal weapon standing up, and now they were fighting with a lethal weapon on the ground.

And you knew that the threat to Eberl had significantly diminished when Eberl was on top of Walker?---Incorrect, I think it was potentially even higher.

You believed, didn't you, that Eberl was in fact effectively, restraining Walker, at the time you fired shots 2 and 3?---Incorrect.

You say that he wasn't – Eberl was not effectively restraining Walker?---Yes.

Well, if you thought that Eberl was not effectively restraining Walker, then if you'd fired a shot, how did you know that at the time you fired a shot, Walker wouldn't have

flipped Eberl over, and you would have shot Eberl?---That's why I put my left hand on Constable Eberl's back to ensure that didn't happen.

See, I want to suggest that you were confident, that Eberl had effectively – was effectively restraining Walker, and that's why you fired the shot. Because you knew that there wouldn't be a sudden split-second flip?---No, that's not true.

You wouldn't have fired shots 2 and 3, if you thought that Eberl had not effectively restrained Walker, would you have?---No, that's incorrect.

You knew, didn't you, that you had other options to defend Constable Eberl, other than to shoot Kumanjaya Walker?---I didn't think any would be effective. I was immediate fear for Eberl's life.

Well you knew that you could have seized his arms, that is, Walker's arms?---With my arms?

Yes, with your arms?---I was immediate fear for Eberl's life, and that would go against all my training.

You could have helped Eberl ground stabilise Walker, couldn't you have?---Again, that would contradict my training.

But that's what you did after you fired shots 2 and 3, isn't it?---Correct.

So after you fired shots 2 and 3, you grabbed Walker's right arm?---After I fired shots 2 and 3, I rolled Walker onto his stomach and trapped his right arm under his body, and my body weight.

Well that's something you could have done before you fired shots 2 and 3, isn't it?---I was in fear for Eberl's life, and I didn't – I was abiding by my training. That would go against my training to go hands-on with - - -

When you say, "I feared for Eberl's life and I was abiding by my training", is that a rehearsed answer you have is it?---No, that's what was happening on that time.

So you say you hadn't incapacitated Mr Walker, even after you had shot him 2 or 3 times?---Correct.

But you still engaged in what is described as empty hand tactics, didn't you?---Correct.

And that's something you could have done before you fired shots 2 and 3?---I don't believe so.

Now I'm just going to play – and I'll play it in real time. I'll play exhibit 26.

DVD PLAYED



MR STRICKLAND: Now, paused at 9.52.24 Zulu time. And you heard Eberl – Constable Eberl saying “Did you, fuck”?---Yes.

And you gave evidence yesterday that you took that to mean did you shoot him?---Yes.

And then you said this, this is at 1077. “At this point I believe that Eberl and myself had just been involved in a potentially lethal fight, and he was at a heightened state, and the symptoms of that include tunnel vision, and auditory exclusion, where you focus on the specific thing in front of you, and you don’t hear everything that’s going on.” You’ve been trained in someone experiencing tunnel vision, and auditory exclusion, is that right?---Correct.

Where have you been trained in that?---In the police.

And you say, “I believed he was just suffering from auditory exclusion, so I needed to tell him, I needed to give him all the facts, so he could come down from that heightened state. And I told him that it was all good. Kumanjaya had – he had scissors in his hand and he was stabbing me, and he was stabbing Eberl. Just to explain to him the situation”?---Correct.

Do you recall giving that answer?---Yes.

So you had just fired three shots into Kumanjaya Walker?---Correct.

You say that you had feared for your life when you were standing up?---Correct.

And you feared for Constable Eberl’s life when he was on the mattress?---Correct.

And yet you say that you had the presence of mind to consider whether Eberl was suffering from symptoms of tunnel vision and auditory exclusion?---Correct.

You say that you had those thoughts at that time?---Correct.

You’re making that up too, aren’t you?---No, I’m not.

How could you have possibly - I withdraw that. And when you say that you needed to give him all the facts - remember that answer?---Yes.

You didn’t mention Walker grabbing your Glock, did you?---No, I didn’t.

Why not?---That wasn’t an important fact in that situation.

You said, “All good - -”?---Yes.

“He was stabbing me. He was stabbing you,” to justify what you had just done, didn’t you?---Incorrect.

Because, Constable, you knew you had gone too far?---Incorrect.

You knew you had been too gung ho?---Incorrect.

And you knew, didn't you, that the shooting had been captured on your own body-worn video?---I knew that, yes.

And you felt you needed to justify what you had just done?---Incorrect.

On two occasions you said, "All good." Correct?---Did I? When? In the body-worn video?

Yeah. Would you like me to replay it?---If I said, "It's all good. It's all good," I believe that.

Well - - - ?---If it's the same occasion, saying it twice, yes.

I'm just going to replay it.

DVD PLAYED

MR STRICKLAND: Paused at 9:52:32.

Did you hear yourself twice say, "It's all good"?---Yes.

You weren't referring to Mr Walker, who you just shot three times, were you?---No, I wasn't.

You weren't referring to yourself?---I was referring to the situation.

How was the situation all good?---A violent offender had just been trying to murder two police officers, and he no longer was.

I see. That's why it was all good?---Yes.

You were asked this by Mr Edwardson, 1075:

"Given the position of the two men in conflict as you described, what was your perception of the weapon, the blade that was in Kumanjaya Walker's right hand?" You said, "I believe he still had a lethal weapon and was utilising it against Eberl."

"In which direction?" You then said, "He would have been stabbing again in this area here, neck, chest, shoulder."

See that?---Correct.

Why did you say, "He would have been stabbing again in this area here, neck, chest and shoulder"?---It's the way I said what I said. There was not much thought to the words I was using, I guess.

You didn't give much thoughts to the words you were using?---At that time. I had been speaking all day, I imagine.

Okay. See, did you say "he would have been stabbing in those areas" because you didn't actually see it?---No.

That's why you used the words, "would have" rather than, "he was"?---No.

Your Honour, I wish to play - I intend to play part of exhibit 30.

Members of the jury, the transcript for this is exhibit 25, tab 11.

DVD PLAYED

MR STRICKLAND: Sorry, your Honour, I should have asked for a warning there.

HIS HONOUR: Yes, all right. again, there is material which is going to be depicted in this body-worn video that may be distressing for some people. If you believe that you may be affected by viewing this material, you should now leave the court.

MR STRICKLAND: I'm sorry to those members of the public that I didn't ask for that warning beforehand. I apologise.

HIS HONOUR: The warning had been given earlier, and we had been continuously watching the video since thing.

MR STRICKLAND: I know. I'm just going to replay that once more?---Understood.

DVD PLAYED

MR STRICKLAND: I pause that at Zulu time - sorry, just - I will just play about - I've been asked to play it again, and I play it again.

Your Honour, my learned friend has just raised something. My learned friend has properly raised something with me, and I just ask for a very short adjournment.

HIS HONOUR: Members of the jury, would you retire, please.

JURY OUT

HIS HONOUR: Is it something that you need to raise in front of me, or do you just need a few moments?

MR EDWARDSON: No, your Honour, I think it needs to be raised in front of you - - -

MR STRICKLAND: It needs to be raised in front of your Honour - - -

HIS HONOUR: Do you want me to ask the - - -

MR EDWARDSON: - - - (inaudible) probably be absence given that (inaudible) in his absence.

HIS HONOUR: Yes. Thank you.

Could you wait outside, please.

WITNESS WITHDREW

MR STRICKLAND: Your Honour will need to - I ask your Honour to turn to exhibit 25, tab 11.

HIS HONOUR: Just one moment. Yes?

MR STRICKLAND: Now, I make no complaint about this because there are - there's a voluminous amount of things to do but my learned friend has just said that he believes that that transcript is inaccurate - that is the one which is headed, "Part 3" beginning, "You all good - all good - he was stabbing me bro". Does your Honour have that part of the transcript? It's on page 4 of 5 I am sorry, your Honour.

HIS HONOUR: I see.

MR STRICKLAND: It begins, "You all good - all good - he was stabbing me bro"?

HIS HONOUR: Yes.

MR STRICKLAND: My learned friend says that an important part of that transcript is inaccurate and it's the words which begin, "No, it was to the head - just scissors - and then he tried to stab him". Does your Honour see that part?

HIS HONOUR: Yes.

MR STRICKLAND: My learned friend says that is not what is recorded and obviously all that is important is what is recorded. Now, I wonder if we could just play that?

HIS HONOUR: Yes.

MR STRICKLAND: Simply because I - in my respectful submission there should be some agreement as to what is recorded and if it is - - -

HIS HONOUR: Possible, yes.

MR STRICKLAND: If it is possible - if it is - if the transcript needs to be corrected.

HIS HONOUR: Mm mm.

MR STRICKLAND: It shouldn't be allowed to be there. So if we could just play that.

MR EDWARDSON: Your Honour, sorry, firstly can I just say this before it is played. Firstly, I hadn't picked that up before. The first time I picked it up was then. I might be wrong, but I am reasonably confident that it does not represent the actual words that were uttered so we needed to sort that out absent the jury before that - - -

HIS HONOUR: Yes.

MR STRICKLAND: Can I say, I accept that entirely and I don't make a complaint as to the timing of the intervention. I believe that it says what it says in the transcript but what is critical is - and in effect - this is in evidence, so in my submission, ultimately on this part if there can be no agreement your Honour will simply have to direct - give - your Honour, the usual direction and, in my submission, it should be given at a relevant stage today.

HIS HONOUR: Well - - -

MR STRICKLAND: But if we could hear it first?

HIS HONOUR: We will hear it. If there is no agreement then I will direct the jury that there is some dispute between the parties as to what is being said at that particular point.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: All right.

DVD PLAYED

MR STRICKLAND: It was, "Scissors and then he tried to stab me again" is what he said.

MR EDWARDSON: I wonder if we could hear it - play it again.

DVD PLAYED

HIS HONOUR: Well, I am - - -

MR EDWARDSON: And it makes sense anyway, your Honour, because the question is directed to what injuries did he receive. He said, "(Inaudible) here?" "No, it was the head - it was to the head - just scissors and then he tried to stab me again."

MR STRICKLAND: Your Honour, it doesn't really matter what makes sense, it's a matter of the words that were used. I just can't hear the word, "me" - and I'm not saying - I'm not making a submission as to what the word was, but I can't hear what my learned friend says he can hear.

HIS HONOUR: I have some difficulty in making out the word that comes after, "stab" in that sentence.

MR STRICKLAND: I wonder if we could hear it just one more time, your Honour?

#### DVD PLAYED

HIS HONOUR: The impression I get is that that word was cut off partially by Constable Hawkings when he then begins his next sentence, but for my part - not that it matters anything, I can't make out what that word is.

MR STRICKLAND: Yes, your Honour, I can't make out what the word is and as I can't make out what the word is - I thought I could before - but doubt has been injected into my mind - so I don't intend to put - I do not intend to put the words as they were on the transcript, but I don't, with respect to my friend, accept the word he hears and I think all your Honour can say is that they have to judge it for themselves. I accept my learned friend can hear it but I just don't think it - I accept what your Honour says, it's just not clear.

HIS HONOUR: At the end of the day it is a matter for the jury as to what they can hear.

MR STRICKLAND: Absolutely, yes. But - - -

HIS HONOUR: In one sense what is depicted in the transcript is in favour of the accused.

MR STRICKLAND: I am not talking about what's in favour or what's in not in favour, it's not - I don't intend to put that - - -

MR EDWARDSON: As long as - as long as it's not put (inaudible) - - -

MR STRICKLAND: I am not going to put - I am not going to put it in - I am not going to put - - -

MR EDWARDSON: (Inaudible) get on with the examination and just put that to one side and move on.

MR STRICKLAND: I am happy to do that and I can say I've got one more minute left.

HIS HONOUR: All right then. Look, what I will do is say that at that precise point – I will say to the jury that there is some dispute - or that the parties can't agree as to precisely what is being said by the accused at the end of that sentence, because they do have this transcript and they should know if there is some part of it where there is some doubt.

MR EDWARDSON: That ultimately it is a matter for them.

HIS HONOUR: Yes.

MR EDWARDSON: It is what they hear.

HIS HONOUR: That's right.

All right, so yes, can we bring the jury in please?

JURY IN

HIS HONOUR: Do you want me to deal with this in the absence of Mr Rolfe at the present time or do you want Mr Rolfe to return?

MR EDWARDSON: (Inaudible).

MR STRICKLAND: I agree with that, your Honour.

HIS HONOUR: Sorry?

MR EDWARDSON: Sorry, your Honour, he should be here now.

HIS HONOUR: All right, thank you.

Can we bring Mr Rolfe in please?

ZACHARY BRIAN ROLFE:

HIS HONOUR: You may be seated there.

Now, members of the jury, the video which is being depicted at the moment, you have a transcript of the recording which is in exhibit 30.

MR EDWARDSON: I think it is exhibit 25, your Honour.

HIS HONOUR: Exhibit 25.

EDWARDSON: Tab 11, your Honour, it's exhibit 25, tab 11.

HIS HONOUR: All right. It is at exhibit 25, tab 11. Now, on page 4 of 5 you will see that there is a line about one third of the way down the page and after that it is said that Constable Hawkings says, "You all good?" Now, do you all have that? In any event, further down Hawkings asks the accused, "You got any injuries mate?" And the transcript shows the accused responding, "No, it was to the head, just scissors and then he tried to stab" and then it's followed by the word "him".

Having reviewed the recording the parties are now in some doubt as to whether that word "him" is correct. It's not clear from the parties' point of view what word was said.

Now, I raise that with you because I want to point out to you that what matters is not what is contained in the transcript. What matters is what you hear when the recording is played - that is the evidence. So if you can hear what is being said then you proceed on that basis. If you can't, well then that's just life. Yes.

MR STRICKLAND: Now I'm just going to play this part and ask you a couple of things?---Let's do it.

DVD PLAYED



MR STRICKLAND: Now, you – Hawkings asked “You all good.” You said, “All good, he was stabbing me bro, he was stabbing me.” You heard it yourself say that?---Something similar to that, yeah.

You’re referring to when you were stabbed on the left shoulder, is that correct?---Correct.

Right. You then heard, did you hear Constable Hawkings say, “You got any” – Senior Constable Hawkings say, “You got any injuries mate?”?---Correct.

And you said, “No it was to the head, just scissors”, do you remember saying that?---Correct.

Could you hear what you said next?---No.

You couldn’t hear it, okay. Do you remember what you said next?---No.

Excuse me for just one moment, your Honour. They’re my questions, your Honour.

HIS HONOUR: Yes.

REXN BY MR EDWARDSON:

MR EDWARDSON: Could the witness have in front of him, exhibit 78, tab 2?---I have that.

I just want to remind you if I can about some evidence that you gave in response to the questions asked by Mr Strickland yesterday.

And your Honour, I’m referring to page – transcript page 1103.

HIS HONOUR: Yes.

MR EDWARDSON: And I’ll just read this through to you:

“Could the witness please be shown exhibit 78. Now as part of your training did” – sorry, “You did a number of exams, is that correct?---I’m sorry, exhibit 78, tab?”

“Well I’m just asking generally for the moment. You did a number of exams as part of your training, is that right?---Yes.”

“And you scored very highly in those exams, didn’t you?---Correct.”

"If I can just take you to the first one, tab 2, that's described as exam one on 20 June 2016. Have you seen this document?---Yeah, when I was in training."

He then went on and said "Yes, and is it your handwriting that's contained that document?---Yeah, I've signed the front page."

Effectively, you acknowledged in the course of your evidence, that this is the exam that you sat. It's your handwriting, and it reflects what happened in that sense?---Correct.

Your attention was specifically directed to what's described as question 11B. And at page 114, Mr Strickland said this. Sorry, 1104:

"Right if you go over the page to page 10. Can you have page 10 in front of you please?---Yep."

"Again you see there's Tactical Options model?---Correct."

And you were asked to look at question 11B. You were asked to provide an example of – of a de-escalating response to a situation.

"Can you just read that response please?" You said "11B?" "Yes please."

And your response was this. And you read out aloud what's reflected in 11B?---Yes.

"From a police officer using the hard cover of his firearm to attempt to control an apparent violent knife wielding man, who is yet to move to attack the public or police, the police officer may tactically disengage to a safe distance. And further de-escalate the situation by beginning to negotiate with the man. And apart from the training you received, which you evidenced by way of the exams, you also received a scenario based training."

And I'll come to that in a moment. The question I want to ask you about 11B, as set out on page 10 of that document is firstly, that scenario, does that have any equivalent to the scenario that confronted you and Constable Eberl, when Kumanjayi Walker deployed the scissors against both of you?---No, not at all.

Why is that?---In this scenario the knife wielding man had yet to attack the public or the police. The first I was made aware of this attack was when it happened and I was right there. I could not disengage.

Thank you. You'll see that at page 1104 of the transcript, you were then – your attention was then directed to the same exhibit but tab 4. And you were asked whether you'd seen that document as well?---Correct.

It's a scenario based training, you might remember?---Yes.

And again, Mr Strickland asked you, and if you go to page nine, that indicates that you and another training officer called Lannigan, did a scenario based training on 10 November 2016, at a bus exchange at Palmerston. Do you see that?---Correct.

Now that scenario, which the jury can read for themselves, in due course, but you were asked specifically at page 115:

“And in the scenario when asked to explain the situation, Smith pulled a knife and began threatening you and Maddie Lannigan, is that correct?---Correct.”

“In the scenario?---Yes.”

And so on?---Correct.

What I want to ask you about is this. Much like the other question that you were directed to, 11B, in the case of this particular scenario, does it have any equivalent or relevance to the scenario that confronted you and Constable Eberl when Kumanjaya Walker deployed the scissors, as we’ve seen and heard in this case?---No it doesn’t.

Why not?---In this scenario we had the advantage of distance and time to then draw, and create lethal cover and non-lethal cover, at which point the offender still hadn’t attacked police with that lethal weapon. And he in fact dropped that lethal weapon.

At one stage today you were asked specifically whether you accepted the position of Eberl at one point in the video, and I don’t need to go over it again, but it was put to you by Mr Strickland, that Constable Eberl was in what he called a mount position. Do you remember him asking you about that?---Yes I do.

And you said “Incorrect”?---Correct.

How would you characterise, from your perception, as you saw it, in those seconds, not frame by frame, but in those seconds, how would you describe the position of Constable Eberl in that short period of time?---He was constantly moving throughout that time. It was a completely dynamic incident. At no point had he achieved a position of mount which we are taught in the NT police, which is straddling someone on the ground with a knee on either side of their hips, for example, just fully straddling them. At no point was he in a static position of mount. It was a completely dynamic, moving situation.

Thank you. You were asked whether the body-worn video, or you knew that the body-worn video on your person was recording all of this event as it unfolded, and you said yes?---Correct.

And Mr Strickland put to you that you felt - when you used the words, “He was stabbing me. He was stabbing you,” or, “It’s all good,” whatever, you - it was put to you that you felt that you needed to justify what you had done because you had gone too far. Do you remember that line of cross-examination?---Correct.

And when you said the words, "It's all good. He was stabbing me. He was stabbing you," did that reflect what you had seen from your perception?---Correct.

Did you have any reason to believe, at that point in time, that the body-worn video would not have captured in fact the stabbing motion of Kumanjayi Walker with his right hand against Constable Eberl?---No, I didn't.

Nothing further, thanks, your Honour.

HIS HONOUR: Thank you. You can stand down.

WITNESS WITHDREW

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour, the defence propose to call one further witness, that's Mr Ben McDevitt, he's an expert witness. He will be the only further witness called by the defence. But having regard to the time, I think that will have to be Tuesday.

HIS HONOUR: It will have to be Tuesday.

Members of the jury, would you now retire, please. As you've just heard, we will be resuming on Tuesday at 10 am. Thank you.

JURY OUT

HIS HONOUR: There are some matters that we need to deal with. I understand your preference is that we would deal with them on Monday. Is that - - -

MR STRICKLAND: Yes, please, your Honour.

HIS HONOUR: Do you have any reason to suggest we should proceed other than on Monday?

MR EDWARDSON: I don't know. I wasn't aware, but I understand Mr Strickland said he's not available this afternoon. My preference would be to deal with it today so we can have the whole of Monday to concentrate on the address, but if my friend is not able to do that, I accept that.

HIS HONOUR: All right. Then we will - what time do you want to start on Monday?

MR STRICKLAND: Whatever suits your Honour.

HIS HONOUR: I will start at 9:30 again on Monday.

I will adjourn.

ADJOURNED 1:20 PM TO MONDAY 7 MARCH 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY BRIAN ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 7 MARCH 2022 AT 10:05 AM

(Continued from 04/03/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes. Where do you want to start this morning?

MR STRICKLAND SC: Your Honour, we're content to start with the aide-memoires.

HIS HONOUR: Thank you. Yes?

MR STRICKLAND: Now, did your Honour receive our suggested proposed amendments to the aide-memoires?

HIS HONOUR: I'm just looking at it as we speak.

MR STRICKLAND: So, can I just go to count 1, murder?

HIS HONOUR: Yes.

MR STRICKLAND: I'm not going to go to – there are some very insignificant matters on page 2. The only significant change we have sought to make is on page 3. In our submission, it is clearer if those two questions - - -

HIS HONOUR: Broke up into two.

MR STRICKLAND: Questions 1 and 2 - in the proposed formulation, those two questions were - - -

HIS HONOUR: Well, that raises a question, perhaps, that I'll put to you now does the Crown propose suggesting that there is any distinction to be drawn between the second and third shots, in terms of the accused's mental state?

MR STRICKLAND: No.

HIS HONOUR: Right. Now, it's a matter for the jury, obviously.

MR STRICKLAND: Yes.

HIS HONOUR: But I can, of course, simply point out to them that nobody is suggesting that there is any difference.

MR STRICKLAND: Correct, and when, on the critical evidence, both – on the accused's evidence, there wasn't an attempt to delineate between those two shots.

HIS HONOUR: Yes.

MR STRICKLAND: In terms of the mental element.

HIS HONOUR: All right, thank you.

MR STRICKLAND: So, that's our only suggestion with count 1, your Honour.

HIS HONOUR: Yes.

MR STRICKLAND: In relation to count 2, the only significant – we've deleted the issue of serious harm.

HIS HONOUR: Yes, there is a bit of cut and paste there.

MR STRICKLAND: Yes.

HIS HONOUR: So, somebody's got – put in inadvertently.

MR STRICKLAND: Yes, so we deleted that.

And then, the only other significant change is what is mirroring count 1 on page 4. Again, we've separated the two separate questions.

HIS HONOUR: Yes.

MR STRICKLAND: So, apart from that, there were no other changes.

In relation to count 3, the only significant proposed change begins at page 2 – well, page 1, we've just added the words, "Or activity", in little (d): "His conduct was either not part of a socially acceptable function or activity." That is just mirroring the language of 161A(4).

HIS HONOUR: Yes, but I don't know whether that really is particularly relevant, in terms of the present circumstances - - -

MR STRICKLAND: Yes, that's true. I accept that, your Honour. I accept that. That is right.

HIS HONOUR: It seems to me that, if anything, he was engaging in a function, rather than an activity.

MR STRICKLAND: I accept – when I reflect upon it, I agree with that, your Honour.

So, your Honour, the only real issue is on page 2.

HIS HONOUR: Yes.

MR STRICKLAND: Socially acceptable function. In our submission, that phrase, as far as I can see, is not defined.

HIS HONOUR: No, it's not.

MR STRICKLAND: So, we say that s 62D of the *Interpretation Act* is engaged and your Honour can get some benefit from looking at the second reading speech. We



have a copy of that for your Honour. It's the second reading speech, introducing this legislation. I have some copies for my learned friend and your Honour.

HIS HONOUR: Yes.

MR STRICKLAND: So if your Honour goes to page 278 - - -

HIS HONOUR: Sorry, which page?

MR STRICKLAND: Well it begins at 276.

HIS HONOUR: 276.

MR STRICKLAND: Your Honour, this is the second reading speech in relation to the *Criminal Code Amendment for Violent Act Causing Death Bill*.

HIS HONOUR: Yes.

MR STRICKLAND: That's what introduced s 161A. And if your Honour goes to page 278. One of the particulars of the bill that I noted is what begins at 7, under heading 7. "The bill importantly makes it clear that person will not be held criminally responsible for conduct involving a violent act, if he or she was engaged in a socially acceptable purpose, function or activity. And the conduct was reasonable given the purpose, function or activity being undertaken." Well that's the definition.

HIS HONOUR: Yes.

MR STRICKLAND: And then there were some examples given. "The prosecution bears the burden of disproving as fact if it's raised in the facts of the case." And there are examples given. "Death on sporting fields. Martial arts tournaments. Boxing or kick boxing tournaments. And giving a number of other social acceptable activities, are rare, but unfortunately they do occur." They're the examples that are provided. And so, in my submission, socially acceptable function is – would not include the official functions of a police officer.

HIS HONOUR: But insofar as you refer to the second reading speech of the minister.

MR STRICKLAND: Yes.

HIS HONOUR: It appears that the minister has focussed on activities rather than functions. Because in the final sentence, he says, and I presume it was a male minister, I don't know. "Deaths on sporting fields, martial arts tournaments, boxing or kick boxing tournaments and during a number of other socially acceptable activities, are rare, but unfortunately they do occur."

MR STRICKLAND: Yes - - -

HIS HONOUR: Now there's been a distinction drawn by the legislature between activities and functions. So that if the activity, well and that's not the right word, but if what the accused was engaged in, was not something that would fall within a description of an activity for the purposes of that section, would it not fall within a function?

MR STRICKLAND: Your Honour, the – the – if your Honour continues on - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - in the following – could I just ask your Honour to read the whole of the following paragraph?

HIS HONOUR: Yes, I will.

MR STRICKLAND: Thank you.

HIS HONOUR: So, as I understand it, you suggest that the word, “function” was included, in order to encompass such things as emergency services personnel, who couldn't be described as engaging in an activity.

MR STRICKLAND: There's just three things I would say from looking at those. First is that – first, I adopt what your Honour says, just fallen from your Honour. Secondly, your Honour will see the last paragraph – I'm sorry, the last sentence in that paragraph I've just taken your Honour to.

HIS HONOUR: Yes.

MR STRICKLAND: “The defendant will also be able to rely on all criminal defences.” And that it includes of course lawful authority. Which is picking up 208E and 148B.

HIS HONOUR: Yes.

MR STRICKLAND: So it would not be – it'd be superfluous to in effect incorporate 148B matters in socially acceptable function. Because you wouldn't need to then rely on the defences of 148B and 208E. So socially acceptable function or activity, in my submission, does not in effect, embody the 148B matters. That's a separate defence. And that's, in my submission, the concern we have about – about the three lines that we've deleted. Is that it tends to incorporate, what I might call, 148B concepts into what we say is a different concept. Which is what's a socially acceptable function. So the defence – in other words, we have no problem at all with what your Honour has said in the remainder of the document. Which fully incorporates the 148B defence. But, in my submission, it is, with respect, erroneous to in effect incorporate that concept in the notion of a socially acceptable function.

You wouldn't need to get to – in – suffice to say this, your Honour. If the jury held that the conduct, the subject of 161A was, “A socially acceptable function.” You

don't need to get to the defences. That's – count 3 is finished. That's our submission.

HIS HONOUR: Sorry, could you just say that again?

MR STRICKLAND: If the jury held the relevant conduct, which is because 161A focusses on conduct.

HIS HONOUR: Yes.

MR STRICKLAND: If the jury held that the conduct was part of a socially acceptable function and that that conduct was reasonable, then you don't need to get to any of the defences. They must acquit on count 3. So you don't need to get to the 148B issues at all. You don't need to get to the issue of whether he's performing his duty, which is what's encompassed in the defences. Particularly 208E and 148B. So in effect, you've got to get through the cascade of issues. That's our submission.

HIS HONOUR: All right, thank you.

MR STRICKLAND: In short, we think all the proposed drafts we put, we think – we don't think, hurts the defence at all. To the contrary. And in any event, we don't submit that – the submission I make is based upon our construction of the legislation, but - - -

HIS HONOUR: All right.

MR STRICKLAND: - - - but we don't think it's unfavourable to the defence at all. They're my submissions on the aide-memoires, your Honour.

HIS HONOUR: Thank you.

Now, Mr Edwardson, in relation to the aide-memoire, what do you want to say?

MR EDWARDSON QC: I don't really want to add anything to what my learned friend's put, your Honour. I'm still struggling with the notion of a socially acceptable activity, in the context of this particular matter. We did put to your Honour, unsuccessfully, that one could have regard to the second reading speech for the purposes of the construction argument. And why we argued, unsuccessfully, that count 3 should be severed. But having said that, and having regard to your Honour's ruling, I don't have any difficulty with the submissions that my learned friend's made, insofar as that's concerned. The only thing I would say, your Honour, about the aide-memoire is this. It – and it depends a little bit on the argument we're about to have as well.

It's my submission, that in the unusual circumstances of this case, what should be front and centre and upfront, is telling the jury that there are three defences that

are available to the accused, and list those three. The prosecution must negate each one of those defences, beyond reasonable doubt. If they can't do they - - -

HIS HONOUR: The prosecution has to establish each of the elements of the offence. As you can imagine, I'm well advanced in preparation of my directions. And the way in which I'm approaching it is, that I am telling the jury, that each offence has, what lawyers refer to, as elements. Which are the essential parts of the charge. That in addition to proving the essential parts of each charge, the Crown also has to disprove each of those three matters, which might be referred to as defences. And that is to the standard of beyond reasonable doubt.

MR EDWARDSON: And all three defences apply to all three charges.

HIS HONOUR: Yes.

MR EDWARDSON: If at the end of the day, if the prosecution have failed in respect of one or more of those defences, that is negating beyond reasonable doubt, one or more of them, that's the end of it.

HIS HONOUR: Mm mm.

MR EDWARDSON: And that's the end of it in respect of all three.

HIS HONOUR: Yes.

MR EDWARDSON: Now, we are about to have a much more vigorous debate, I suspect, when we turn to the next question, which is the response that the Crown have now filed at 7:38 this morning in an 11 page document that I need to address your Honour on. Obviously the questions opposed and directed to the Crown, they have now put that in writing. If they've got anything further that they want to put they should put it now and then I will respond to that orally - I'm sorry - - -

HIS HONOUR: Yes, well we are dealing with this one item at a time.

MR EDWARDSON: Sure.

HIS HONOUR: So I will go back to - - -

MR EDWARDSON: True. But what I was going to say, your Honour, in the context in which I was putting it was, depending on your Honour's ruling and determination of the submissions that are made in respect of the questions posed in the other document, that might be an issue that goes right up front as well, in addition to the defences. Because if we're correct, and we will be arguing, contending that an indispensable link in the chain of reasoning is proof beyond reasonable doubt of the incapacitation of Kumanjaya Walker by his right arm being pinned such that he could not deploy the scissors.

If we are right about that then that should go up there as well. In other words, if you are not satisfied beyond reasonable doubt because of the way the Crown has run its case et cetera, but I will develop that in a moment.

HIS HONOUR: Now, can we move then on to that issue.

Mr Strickland.

MR STRICKLAND: Yes. Does your Honour have MFI AA?

HIS HONOUR: Yes, I do. One moment.

MR STRICKLAND: Your Honour, the - - -

HIS HONOUR: Just one moment please. Yes, thank you, I have that now.

MR STRICKLAND: Your Honour, what my learned friend is the controversial part really, I suspect or anticipate is, the first two questions. I say the first two because if the answer to 1 and 2 is yes, then 3 follows. In other words if it is an indispensable link then there is no question, it must be established beyond reasonable doubt. So 1 and 2, in my submission, are the critical questions.

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour has - did your Honour get a note we made on this subject? Did your Honour receive that?

HIS HONOUR: I do have that, yes.

MR STRICKLAND: I will go through that. I am not sure there is much controversy on 4, 5 and 6 but I will address those.

HIS HONOUR: We will come to those.

MR STRICKLAND: I will address those. But the critical issue really is questions 1 and 2.

Your Honour, I wish to address your Honour briefly on the principles and I understand the principle in *Shepherd(?)*, I think, there is no issue what the principle is. The difficulty always is its application.

We have addressed your Honour on some - we say two useful cases which deal with the issue of its application but the primary - a starting point is that a *Shepherd* direction is where the case rests upon circumstantial evidence and although we accept that the case in relation to the critical issue of state of mind of the accused has an important circumstantial evidence component to it, this case, unlike as far as I can see, all the other cases that I have - that I referred to where - and I'm talking about *Shepherd*, *Burrell*, *Chamberlain*, all of those cases are either what might be

described as purely circumstantial evidence cases or almost entirely a circumstantial evidence case - and that's what distinguishes for a start, this case from those authorities.

We have here a case where there is, in terms of - there is direct evidence in this case about what the accused sees. There was expert testimony which, in my submission, although based on various assumptions, can't really be described as circumstantial evidence. I accept that when one is having regard to the body-worn - when the jury has regard to the body-worn video they are asking the jury to infer various facts from what they see, so to that extent, there was a circumstantial element. But in the self-defence case where the accused has given evidence, he has given evidence about what he saw, what he heard, what he felt, what he thought, and that evidence has been challenged, that is the credibility of that evidence is challenged and that's a significant issue in the trial, the challenge to the credibility of his evidence. Again, that in my submission, can't be described as being a case that rests upon circumstantial evidence.

In short, circumstantial evidence is a part of the fabric of the Crown case but that is one of the matters that distinguishes this case from the *Shepherd* direction type of cases.

So can I just take your Honour to - there are just three cases I wish to take your Honour to, being *Shepherd*, *Burrell* and *Davidson*. Does your Honour have those cases? I have copies for your Honour?

HIS HONOUR: My associate has - - -

MR STRICKLAND: We have copies for your Honour.

HIS HONOUR: I have got copies of *Burrell* and *Davidson* but I don't have *Shepherd*.

MR STRICKLAND: I have a copy of *Shepherd* here. We will get a copy - we have a copy for my learned friend and your Honour.

HIS HONOUR: Yes.

MR STRICKLAND: So, your Honour, as your Honour knows, the leading judgment in *Shepherd* is delivered by Dawson J with whom all the other justices agree. His judgment commences at page 577 and on the sixth line of his judgment it's clear that the whole notion of the *Shepherd* direction is when, "The prosecution case rested upon circumstantial evidence".

And then his Honour, at page 579 gives an orthodox statement about what circumstantial evidence is and refers - and then refers to the necessity to identify whether there is intermediate factors which constitute the indispensable link in the chain for reasoning. Well, that's the statement of the principle.

But importantly, his Honour goes on to remind - or goes on to observe at 580 and then 582 and 585 this principle that what is critical about circumstantial evidence is to look at the cumulative effect of it and reminds what Gibbs CJ and Mason J said in *Chamberlain* about the need to consider it all together, that one piece of evidence may resolve the doubt about other weakened parts of the evidence and then at page 582 he goes on to cite with approval the decision of the Court of Criminal Appeal in South Australia, *R v Van Beelen*.

This, in my submission, is an important passage relevant to this case - or apposite to this case -

"The requirement of proof beyond reasonable doubt relates to the final stage in the process. The jury is not, in our view, required to split up the various stages in the process of reasoning leading to the conclusion of guilt beyond reasonable doubt and to apply some particular standard of proof to each of those steps. That would be confusing and misleading. And tend to be in position of an artificial and scholastic straitjacket on their deliberations."

And we say that's quite apposite in this case, given what we say is the multiplicity of matters that the jury must consider, even on the circumstantial evidence aspect of the case.

And reminding, the last part of *Van Beelen* statement is that it is the combination of the circumstantial factors that are important and it's the combination that must be considered in determining whether a reasonable hypothesis, consistent with innocence has been negated.

If your Honour goes to page 584, there's a reminder of what Deane J said in *Chamberlain*, which is to the same effect.

Then, at page 585, Dawson J, having cited those authorities, we say this is an important judgement apropos to this case - - -

HIS HONOUR: Sorry, where are you now?

MR STRICKLAND: 585, point 4, the whole paragraph, beginning with "The judgements in *Chamberlain* did not support the proposition that, in a case resting upon circumstantial evidence, the jury may only properly draw an inference of guilt upon facts, individual item evidence proved beyond reasonable doubt, et cetera."

And, again, the last sentence, "The danger of considering each item separately." Again, the exception being where there is an indispensable or intermediate conclusion of fact that's necessary to arrive at the conclusion of guilt. And Dawson J said, on the facts of this case, which he discusses at 585 and 586, "It was not necessary to reach a particular intermediate conclusion of fact."

Now, Burrell - - -

HIS HONOUR: Can I just take you back one moment?

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: To page 582 and to the passage from *Van Beelen*.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: At about point 5 on the page, “There is a clear distinction between drawing an inference of guilt from a combination of several proved facts, none of which, by itself, would support the inference and drawing an inference of guilt from several facts whose existence is in doubt.” Now, in the present case, as I understand it, the Crown says that there are a number of circumstances - - -

MR STRICKLAND: Yes.

HIS HONOUR: - - - which the jury would need to take into account. So, in essence, it’s a “strands in the cable” type case, if we can use that metaphor.

MR STRICKLAND: Yes.

HIS HONOUR: The problem is that, is there not one of those strands which, by itself, would be capable of proving the guilt of the accused?

MR STRICKLAND: Well, your Honour, we say – and these are the authorities I am just about to get to.

HIS HONOUR: All right, I’ll let you come to it.

MR STRICKLAND: But, can I say, I won’t ignore that observation.

HIS HONOUR: I’ll let you come to it in your own time.

MR STRICKLAND: I won’t ignore that observation; in fact, I will come straight to it because – if I can just assert the proposition first. In our submission, the authorities that deal with when a – should a Shepherd direction be given, look at it in the – look at your Honour’s question, in a sense, flip it on its head and say, “If you take the impugned evidence” – which, in this case, is the incapacitation of the right arm – “if that evidence was not there, would there be a case fit to go to the jury?” If the answer to that is yes, then a Shepherd direction may be appropriate. That is as I understand the authorities.

HIS HONOUR: Mm mm.

MR STRICKLAND: Now, sorry, I’ve done the double negative. I’ll start again.



If the answer to the question was that the case was fit to go to the jury, if you remove that impugned fact, then a *Shepherd* direction ought not to be given because there is still a case fit to go to the jury.

HIS HONOUR: Yes.

MR STRICKLAND: That is how I understand the authorities, and I'll take your Honour to those. Burrell – there is just two authorities, in my submission, are of assistance. The first is *Burrell*.

Again, your Honour, the facts of *Burrell* are themselves of assistance in this case because that, again, is my submission, unlike this case, it is a purely circumstantial – there was no body. There was no evidence from Burrell. It is simply that there were a number of circumstances which led to the conclusion that he was the person that kidnapped and murdered the deceased and that is a classic circumstantial case. The accused said, "Look, there are three indispensable facts and, if you can't prove those indispensable facts, each of them, then there is no case."

So, if your Honour goes to par 94 – sorry, I'll start perhaps a bit earlier. If your Honour goes to par 82 – this relates to the first two grounds about the requirement for a *Shepherd* direction.

HIS HONOUR: Yes.

MR STRICKLAND: The three – the alleged indispensable facts are set out at par 82. That just gives the factual context.

HIS HONOUR: Yes.

MR STRICKLAND: The sighting of the Pajero, the notes found in the appellant's house and the fact that the appellant's in a phone book. They are regarded as the three indispensable facts and the submission is that the jury has to be satisfied of each of those matters beyond reasonable doubt.

HIS HONOUR: Yes.

MR STRICKLAND: That submission failed.

So, then, the court goes through the various principles, which I have just taken your Honour through in *Chamberlain* and *Shepherd*. And then, it analyses the authorities and, again, your Honour, when one looks at the authorities and when one looks at the facts in, for example, *Merritt*(?) and *Minniti* and *Zattere*; again, they're all what I would call classically circumstantial evidence cases, unlike this one.

At par 94, there is a reference to *R v Zattere*; and, again, these are just different metaphors in a way, but the utility of the metaphors are really a matter for your Honour. But, Ipp J's metaphor was, "If one particular factual matter was

removed from the list of facts relied upon by the Crown to prove its case, one is 'left with an empty shell'." That is his metaphor.

HIS HONOUR: Mm mm.

MR STRICKLAND: And, accordingly, a *Shepherd* direction should be given.

And, in my submission, what is said in – this is at par 96 – is apposite to this case, where Spiegelman CJ stated that, "Where there numerous separate facts of varying degrees of probative force, it would be very well confusing to give a *Shepherd* direction." And we say that is apposite to the facts of this case.

That is – also, a similar statement was made by Hall J in the decision of *Hannes*. Now, another – I beg your pardon - if your Honour goes to par 126 – and we simply – that's the ratio of the dismissal of a proposed *Shepherd* direction in this case.

What I'm drawing to your Honour's attention is what the trial judge said in the italicised paragraph at 126: "You can test that, can't you, in this way? Take away all the evidence of any Pajero in Parramatta" – then he says, "But there is still a case fit to go the jury." And that approach is endorsed at pars 127 and 128. That is, at 128, the point of his Honour's comments or directions is that this was not a case that was dependent upon the Pajero evidence being proved beyond reasonable doubt. I know – I'm just giving your Honour illustrations, in a sense, of how or when a *Shepherd* direction is or is not given.

The next case is *Davidson*, your Honour. And again, in my submission, what might be described as a classic circumstantial evidence case. I'll take your Honour first to the judgement of – the leading judgement of Simpson J. And at par 74, her Honour, again in my submission, very succinctly analyses the circumstances in which a *Shepherd* direction ought to be given. "Whether or not – whether a fact in which the Crown relies as part of a circumstantial case is or is not, 'indispensable; may be tested by asking whether in the absence of evidence of that fact, there would never the less be a case to go to the jury. If the answer is in the affirmative, even if the Crown case is weakened, even considerably, the fact is not indispensable." And we say that is a – that statement is consistent with what the court held in *Burrell*.

And is consistent with the principles articulated in – it's a logical corollary of what Dawson J said in *Shepherd*.

HIS HONOUR: What concerned me, at the time that I was framing this, was that there is a pathway which would be available to the jury to follow, which involves a limited number of facts. So that, if for example, the jury were to determine, as a question of fact, that the deceased's right arm was incapacitated by being trapped under him when he was on the mattress.

Secondly, if they were to determine that the accused knew that the deceased's arm was trapped under him, at that point, when he fired the second and third shots.

That they jury may be able to reason, simply from those two facts, that the accused had a state of mind consistent with one or more of the offences, and also inconsistent with the defences that have been raised. So that was the concern that I had. Whilst I accept that that is not the only piece of evidence that the Crown relies upon. And if evidence was taken away, there would – that evidence was taken out of the equation, there would never the less be a case.

MR STRICKLAND: Yes.

HIS HONOUR: It concerned me that there was a pathway available to the jury, a pathway of reasoning, based upon limited facts.

MR STRICKLAND: Well, your Honour, there are a number of pathways, as we – sorry, as we put in our document, there are a number of pathways of reasoning towards guilt.

HIS HONOUR: Yes.

MR STRICKLAND: And that's where a *Shepherd* direction would be problematic. Well I withdraw – I withdraw problematic, would be erroneous, with respect. Because that would be the elevate a single pathway, and a single part of that pathway, as something that would be required to prove beyond reasonable doubt, before – and if they couldn't, they then must acquit. And that in my submission, would be something that – given as your Honour, and we adopt what your Honour says, that there would still be a case fit to go to the jury. And it must be so that there's still a case fit to go to the jury. And that's how this case has been run, by both sides. That there is a multiplicity of matters. But if that were the case, then it's – a *Shepherd* direction should not be given. And I remind your Honour what was said by the High Court in the, what I might call, the Pressard(?) case. I don't have a copy, but I can easily get your Honour - - -

HIS HONOUR: No, I'm aware of it.

MR STRICKLAND: - - - but the DPP reference number one. If there's a matter that's fit to go to the jury, then they are, and they alone, are the constitutional – constitutionally sanctioned body to decide that. And in effect, a direction to the jury, well you must find this fact beyond reasonable doubt, in my submission, would be impinging on a – in my submission, in an incorrect way on what their function is.

HIS HONOUR: Well I don't know that I agree with that. Because you must accept that in some cases, it is appropriate to give a *Shepherd* direction.

MR STRICKLAND: I definitely do, your Honour, but – but where – of course, that is so. That's – the High Court has said so.

HIS HONOUR: Mm mm.

MR STRICKLAND: But where in a case like this there is multiple paths, or at least more than one path of reasoning towards guilt, and where there is a case fit to go to the jury, if that fact were not there, a *Shepherd* direction, in my submission, would – it would be confusing. And it would certainly be – it would certainly create a significant unfairness to the Crown. Because our case relies upon a range of matters.

HIS HONOUR: If – if it was pointed out to the jury that there are multiple ways in which they may reason towards the guilt of the accused, one of which is – I haven't worked out the precise language, where it is effectively a circumstantial case, in which one looks at everything. Then in those circumstances, they don't need to be satisfied beyond reasonable doubt of any particular fact. But they look at all of the circumstances together, and ask themselves whether all of those circumstances, taken together, convince them to that appropriate standard. But the second way of reasoning towards guilt, is in effect, a links in the chain process of reasoning. Which requires a finding of particular facts, from which – from those particular facts, guilt may be reasoned. Now would that be misleading or confusing to the jury?

MR STRICKLAND: It would, your Honour, because we say that there is – it would be introducing a – in relation to that – well can I just – the – the avenue your Honour's referring to, is where – well perhaps can I – can I do it a different way. Can I just ask your Honour to go to the document that we've - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - outlined.

MR EDWARDSON: Is this count 1?

MR STRICKLAND: This is for – no the MFI AA document. This is our 11-page document. Our outline.

HIS HONOUR: And what page do you want to (inaudible)?

MR STRICKLAND: I'm just – sorry, I'm just going to it right now, your Honour.

HIS HONOUR: All right.

MR STRICKLAND: Excuse me for one moment. So if your Honour goes to par 17.

HIS HONOUR: Yes.

MR STRICKLAND: That might be described – if your Honour goes to 17B, "There are various avenues of reasoning available." Does your Honour see that?

HIS HONOUR: Yes, I see that.

MR STRICKLAND: Now the roman number one is really what your Honour is I think referring to.

HIS HONOUR: Yes, I think that's - - -

MR STRICKLAND: And we say that in roman numeral one, undoubtedly the position of the right arm is an important fact. Without any question.

HIS HONOUR: Mm mm.

MR STRICKLAND: But that – what we say is relevant to that avenue of a number of matters. That obviously includes the position of the right arm. But it also includes both the position of Constable Eberl, and the use – and his application of force. Which they from – and from that, they will look at Constable Eberl's evidence himself. They'll consider Dr McIntosh's evidence, as the biomechanics expert. So even in roman numeral one, to say well an indispensable fact is the position of the right arm, in my submission, would not be a true characterisation of that avenue of reasoning.

So we would - that's my response to that. But in my submission also to have a Shepherd direction in the context of several avenues of reasoning towards guilt in my submissions is per se problematic because it - the jury may consider - well, if they don't find that fact - if they're not satisfied of that fact beyond reasonable doubt they will - they are required to acquit, and in every - I am not aware of a single authority where a *Shepherd* direction is given in the context your Honour is contemplating, which is where there were various avenues of reasoning towards guilty.

HIS HONOUR: yes.

MR STRICKLAND: They are my submission, your Honour. Excuse me for one moment. Excuse me. Ms Callan has reminded me what I have said - what I have sought to submit to your Honour is consistent with what Dawson J says in *Shepherd*. Can I just ask your Honour to go back to that authority?

HIS HONOUR: Yes.

MR STRICKLAND: Just excuse me. In particular the passage at page 579.

HIS HONOUR: Yes.

MR STRICKLAND: That is but where - this is - does your Honour see, "But where to use the metaphor referred to by Wigmore on Evidence", does your Honour happen to see that?

HIS HONOUR: Yes, I have found that.

MR STRICKLAND: Yes.

"But where to use the metaphor referred to by Wigmore, the evidence consists of a strand and a cable rather than links in a chain it will not be appropriate to give such a ruling.....consistent with innocence is reasonably open."

And we say if it is accepted that even some avenues of reasoning involve strands in the cable, we say that that passage reinforces our submission. And likewise - likewise - what is said, and I have taken - I have drawn your Honour's attention to this passage at 580.3, the passage in *Chamberlain* by Gibson CJ and Mason J.

HIS HONOUR: Yes.

MR STRICKLAND: Thank you, your Honour, they are my submissions.

HIS HONOUR: Yes.

Mr Edwardson.

MR EDWARDSON: If your Honour pleases. As far as the principle is concerned I don't think there is any argument as between prosecution and defence. As my learned friend suggested at the beginning, the question is the actual application of Shepherd to the circumstances of this case and, in my submission where we part company is twofold. One, there would be nothing confusing about giving a Shepherd direction. Two, we say a Shepherd direction is appropriate and three, the notion of so-called multiple paths to guilt, as foreshadowed by my learned friend is, in my submission, completely inconsistent with the way in which they have opened their case. And finally, your Honour, contrary to what is put in the outline of argument against us, filed at 7:39 this morning, can I say, your Honour, it is nonsense to suggest that we somehow have not cross-examined on this critical issue - and I will take your Honour to all of those matters so your Honour understands where we come from.

Your Honour, we take no issue with the passage that my learned friend has just referred you to obviously, of Dawson J at page 579, that is that the evidence - where the evidence consists of strands in the cable, rather than links in the chain, it will not be appropriate to give such a warning. We say the question of the extent to which Kumanjaya Walker's right arm was incapacitated is not a link in the chain - sorry - is a link in the chain rather than a strand in the cable.

I want to pick up briefly on the passage that your Honour directed my learned friend to which was the second part of what fell from, I assume it was - sorry, it was the High Court in *Van Beelen*, which is the South Australian case and in particular at page 582 and I will develop this when I take you to the evidence, your Honour, which has not been mentioned thus far.

At page 582 in the second paragraph, Gibbs CJ and Mason J said this;

"That, of course, does not mean that they ought to be encouraged or permitted to draw inferences of guilt from doubtful facts. As a matter of common sense it is impossible to infer guilty.....could not do. In the second case the combination counts for nothing.'

Now, your Honour, if you look at the questions that you posed to the Crown and asked them to consider, in particular par 1 where your Honour said;

"It is my understanding that the Crown submits that shots 2 and 3 were not justified even though shot 1 was justified."

So far, so good, that must be the case - that's always been the position taken by the prosecution from beginning to end because when shots 2 and 3 were fired the deceased's right arm was incapacitated by being pinned between himself and the mattress such that he was not able to bring to bear the scissors as a weapon towards the accused or constable Eberl and that the accused knew that this was the case. And your Honour then poses the question; "Is that understanding correct?" We say, your Honour, that position is correct. It's correct because that's the precise basis upon which my learned friend opened. It's the precise basis upon which he cross-examined my client and indeed, the whole debate in so many respects has centred and focussed around the extent to which the evidence had the capacity to prove, establish - call it what you will - the extent to which Kumanjayi Walker's right arm was somehow constrained by Constable Eberl.

Now, I want to make the point, your Honour, by firstly taking you to all of the evidence that bears on this question.

The first question is the Crown opening. At transcript pages 11 to 12 Mr Strickland said, "After the first shot Kumanjayi Walker either fell or was wrestled to the ground by Adam Eberl, who was physically larger than Kumanjayi. Eberl was positioned partly on top of Kumanjayi and Mr Walker (sic) was pressing his body over Mr Walker who was, on the Crown case - sorry who was on - sorry, I will get the transcript, your Honour, just bear with me. My apologies.

It is at the bottom of page 11, your Honour.

HIS HONOUR: Yes.

MR EDWARDSON:

"After the first shot Kumanjayi Walker either fell or was wrestled to the ground by Adam Eberl who was physically larger than Kumanjayi. Eberl was positioned partly on top of Kumanjayi.....at that point, pinned under his own body."

If your Honour now turns to page 37 of the transcript. In the second paragraph and following Mr Strickland said this,

"The Crown case, as I said yesterday, relates solely to the second and third shots. The situation had changed dramatically from the first shot.....or at the very least to cause him serious harm."

I now turn to page 40 of the transcript, your Honour. At the third paragraph Mr Strickland said this;

"Now, I have mentioned the biomechanic. I've mentioned Dr Andrew McIntosh the biomechanical engineer. He is a biomechanical expert and he has viewed these images and I anticipate his evidence will be that at the time that shots 2 and 3 were Kumanjaya Walker was only a low-level threat to Eberl."

Kumanjaya was laying sideways on the mattress, with Eberl pressing down on him. Kumanjaya Walker's right arm was pinned under his own body, and compressed against the mattress."

And according to McIntosh therefore, his ability, that is Kumanjaya Walker's ability to move his arm, which is holding the scissors, was significantly restricted, and therefore made it difficult to use the scissors as a weapon. He could not do, that is Walker, could not do what he had done, while he was standing up, which was to swing his arm downwards, and hit the accused.

Finally, if you turn to page 42 of the transcript. And the last paragraph.

"Secondly, Eberl was no longer an immediate risk of serious harm or death because Eberl had effectively, or was effectively restraining him, controlling him on the mattress."

Now that's the case that my learned friend opened on. That's the basis upon which the Crown argued to the jury, the case that they were going to present, and set out to prove. That is that there was no legal or lawful justification for the second and third shot, because Kumanjaya Walker was, at the time that the shots were fired, self-evidentially, on their case, restrained to the extent that he could not possibly deploy those scissors. And that's why the position was different from the first shot. Now, I just pause there for a moment.

That's the case that we've come to meet. That's the case that was presented to the jury by way of opening. But of course, the opening might define and shape the prosecution case, it's the evidence that counts. So what I want to do now is to take your Honour to the relevant evidence. And I want to deal firstly with Dr McIntosh. And this needs to be put into context. It seems, with the exception of the local pathologist that everybody recognises that the scissors in question are potentially a lethal weapon.

Dr McIntosh recognised - - -



HIS HONOUR: (Inaudible) Dr Tiemensma.

MR EDWARDSON: I said with the exception of the local pathologist.

HIS HONOUR: Well I don't know whether she embraced the proposition. I've read her evidence, and it's not entirely clear to me whether she embraced the proposition that the scissors were not per say, a potentially lethal weapon. Or whether it was confined to the circumstances, as she understood them to be, at the time that the deceased was on the mattress.

MR EDWARDSON: That might be a fair – as I say - - -

HIS HONOUR: Anyway, it doesn't matter.

MR EDWARDSON: - - - that's – I think it's fair to say, for the purposes of this debate, clearly the scissors fell within the description of an edged weapon.

HIS HONOUR: Yes.

MR EDWARDSON: It seems that every other doctor, pathologist, call it what you will, unequivocally said, if it's deployed in the right place, with the right amount of force, even if penetration does not occur, it has the potential to cause a lethal injury.

HIS HONOUR: Yes.

MR EDWARDSON: So I want to deal very briefly with what Dr McIntosh recognised were the limitations on body-worn video. And your Honour will find that at pages 842 to 843. In other words, and I'll just summarise, wide-angle lens. Differences in distances, as one can see on the video, as opposed to the naked eye. The fact that it might not represent what the accused himself was looking at, at the relevant time, on the camera. But ultimately, when we come to the question, which we say is a link in the chain, and should be the subject of a *Shepherd* direction, that is the extent to which the evidence has the capacity to prove, and prove and beyond reasonable doubt, that Kumanjaya Walker's arm was pinned underneath his body, such that he could not at any time, whilst on the mattress, deploy the scissors. In the case of Dr McIntosh, I refer your Honour to pages 845 to 851.

At page 845, he agreed with this proposition.

"You're only as good as what you can actually see on the video." He said  
"Yes I agree."

"And in the video, are you able to actually see the extent to which" – sorry, I'll start again.

"And in the video, are you able to ever actually see the extent to which Kumanjaya Walker's forearm, right forearm, is being controlled by Constable Eberl?---You cannot see Mr Walker's right forearm or arm."

"At all, Mr Eberl is on top of him?---No."

"We know that it's that hand, that right hand, that is in possession of the scissors and being controlled by Kumanjaya Walker?---I think that's a correct statement, yes."

At T846:

"You also qualify in par 121", that's of his report, "Do you not, your lack of qualifications to comment on the consistency between the scissors and clothing damage?---That's correct."

At transcript page 849.

"And so again, at par 128 if it is assumed that Walker retrieved the scissors during the struggle and maintained the same hand grip, until he was subdued, the possibility existed for Walker to be able to cause injury to both Rolfe and Eberl?---That's correct."

"Can I go to par 133 please? Which is where you characterise the threat as being low, do you see that?---Yes."

"You've chosen your words, can I suggest, very carefully, and properly in par 133, again qualified. You say, 'In my opinion, on balance, Walker was likely a low threat to Eberl at the time of the second and third gunshots. Walker's right arm was likely pinned under his body'. Do you see that?---Yes."

"You chose those words carefully didn't you?---Yes."

"Because whilst that might likely have been the position, we can't actually tell from the video can we?---We can't. We know from standard anatomy where Walker's right arm was."

"Yes, but the extent to which he was able to deploy those scissors with the right arm, we can't actually tell by reference purely to the video?---No, the video has to be interpreted."

"That's right. And part of that interpretation, as you've told us, involved you slowing it down frame by frame?---Yes."

"That permitted you, and particularly with your qualifications and expertise, to try and interpret what was happening, and shown and captured on the body-worn video?---That's correct."

"Would you accept that of course neither Officers Eberl or Rolfe, had the luxury of being able to slow things down frame by frame?---No of course they didn't, no."

“They of course, were dealing with this situation, this dynamic situation in a matter of seconds?---That’s correct.”

“And from their perspective, it might be quite different, as we’ve acknowledged, from the body-worn video?---Yes.”

“With your experience in biomechanics” – this is at T850, “With your experience in biomechanics, and the limitations, the quite proper limitations that you’ve identified explicitly in your report, you had the luxury of slowing down the video, we’ve acknowledged that?---Yes.”

“And looking at it frame by frame from the body-worn video perspective?---Yes.”

“Do you accept that the perception or perspective of both Constables Eberl and Rolfe, may be quite different from your analysis?---Yes.”

“And whatever opinion you have expressed, as to the threat, and whether it was low or not, must be seen in that light?---I agree with that, yes.”

And then at T815, for completeness:

“And you’re not for a minute seeking to impose your opinion about the extent of the threat, or the perception of that threat on either of those two officers?---I don’t think I’ve been asked to do that I.”

“And you’re not?---No, no.”

“Now Mr Strickland kept referring” – I’ll leave that. That doesn’t matter. So the important part, your Honour, of McIntosh’s evidence is this. Whilst he might have a preference for what he thinks, because of their position, might have been, he has unequivocally accepted, as he must do, that you cannot at any time see on the body-worn video, any part of Kumanjayi Walker’s right arm.

In other words, he is not able to say, as a matter of fact, whether there was any constraint at all, to his right arm, such that he was not able to deploy the scissors against Constable Eberl. I turn now to Andrew Barram. And your Honour will remember that over objection, Mr Strickland asked him to make some assumptions. I’ll come to the assumptions in a moment. We say those assumptions are simply not made out on the evidence. And as the High Court made quite clear in that passage that your Honour took Mr Strickland to in *Van Beelen*, it’s one thing to have a whole accumulation of facts that give rise to a legitimate inference, which can be proved beyond reasonable doubt. But you can’t go about drawing inferences based on conjecture or speculation, which have no foundation in evidence.

For completeness, I’ll start with the examination relevant to this topic on Mr Barram. At 943, Mr Strickland said, “I’m asking you some questions about what you saw on – in the body-worn video, from the time” - - -

HIS HONOUR: Sorry, what page was this?

MR EDWARDSON: 943, your Honour.

HIS HONOUR: 943, thank you.

MR EDWARDSON:

“I’m asking you some questions about what you saw in the body-worn video from the time Constable Eberl is on top of Kumanjayi Walker on the mattress. In your opinion, what did you about the position of Kumanjayi Walker?---He was on his right side.”

“Were you able to see the position of his right arm? That is, Mr Walker’s right arm?---No, I could see his right shoulder was on the mattress.”

“When was the first you could see Mr Walker’s right arm from the body-worn?---On the body-worn.”

“On the body-worn?---When they had control of his left arm and they’ve rolled him over to get the right out from underneath him.” “That’s towards the end of the body-worn we just watched, is that correct?---Yes.”

Then at T952, Mr Strickland asked:

“Based upon the body-worn video that you have seen, from the time that Kwementyaye Walker and Constable Eberl were on the mattress, what did you see, in terms of the positioning of Kwementyaye Walker’s right arm?---I couldn’t see it on the video.”

Now, that’s in-chief.

“At what point in time could you see it?---Once they commenced trying to handcuff him and had his left hand behind his back. They then rolled him on his left side to get his right arm out from under him.”

So, he has recognised that at no time was he able to ever see Kwementyaye Walker’s right arm until the time that they seek to handcuff him, which, as your Honour knows, is well after the discharge of shots 2 and 3.

“Now, if you assume that Kwementyaye Walker’s right arm was, to some extent – and I’ll now give you two different scenarios; that is, his first lower right arm. So, from his shoulders to his elbow – do you understand what I’m talking about?”

Your Honour said, “That’s the upper right arm.” Mr Strickland: “The upper right arm, I’m sorry. If you assume the upper right arm was pinned between

Kwementyaye Walker's own body and the mattress, do you understand that assumption?---Yes."

Can I just pause there, your Honour, and repeat the objection that we maintain; that is, that assumption has no evidentiary foundation at all. It's fine putting that proposition, if there is other evidence that is capable of establishing that fact; but it's simply not there.

At 952 to 953:

"If his upper right arm was pinned against his body and against the mattress, there would be very limited ability to deploy the scissors as a weapon."

That's self-evident, but there is no evidence of that.

"If you assume that the whole of the right arm; that is, from the shoulder to the hand, was pinned between Kwementyaye Walker's own body and the mattress, do you have an opinion about the ability of Kwementyaye Walker to deploy the scissors against Constable Eberl?---If the entire arm and hand was under his body, he wouldn't be able to deploy the scissors."

There is no evidence in this case, at all, of his entire arm being pinned under his body such that he could not deploy the scissors.

In cross-examination, at 973:

"It's true, is it not, that when you look at the body-worn video, at no stage after Constable Eberl and Kwementyaye Walker hit the mattress on the floor, it's true that you're not able to see the right arm of Kwementyaye Walker?---Yes."

"In other words, you can't see the upper arm, the forearm, or his right hand - - -

HIS HONOUR: Sorry, where are you now?

MR EDWARDSON: On 973.

HIS HONOUR: 973, sorry.

MR EDWARDSON: "In other words, you can't see the upper arm" – does your Honour have that?

HIS HONOUR: Just give me a moment, please.

MR EDWARDSON: I'll start again and I'll slow down; sorry, your Honour.

HIS HONOUR: Yes, 973.

MR EDWARDSON:

"It's true, is it not, that when you look at the body-worn video, at no stage after Constable Eberl and Kwementyaye Walker hit the mattress on the floor, it's true that you're not able to see the right arm of Kwementyaye Walker?---Yes."

"In other words, you can't see the upper arm, the forearm, or his right hand?---Correct."

If your Honour now turns to page 978.

HIS HONOUR: Yes.

MR EDWARDSON:

"You were asked to give evidence, in part, by reference to this frame by frame motion?---Yes."

"We did it today?---Yes."

"Do you accept from your tactical experience and training that dynamic situations, such as the one that we see in the various video footages, can change in a split second?---Yes."

"A person who might be on the bottom of, underneath a police officer, those roles can reverse again in a matter of seconds?---Yes."

"If you do not have complete control of the individual, your position can change in an instant?---Yes."

"You have conceded, and you accept, that nowhere on the body-worn video are you able to see the right arm of Kwementyaye Walker?---Yes."

"That is, his upper arm, his forearm, his hand or the scissors, until they're attempting to handcuff him?---Yes."

Then, finally, at T997:

"You have already acknowledged yesterday - and I don't want to go back over all this again - that we have no way of seeing whether his right arm had the capacity to employ those scissors on the body-worn video?---Yes."

"We know that they remained in his hand throughout?---Yes."

So, that's Mr Barram.

Then, I turn now, your Honour, to Eberl. Can I ask your Honour to turn to page 703, your Honour?

HIS HONOUR: Yes, I have that.

MR EDWARDSON: In examination-in-chief, Mr Eberl was asked:

“Could you see where his right arm was?---I believe it was sort of underneath his body.”

HIS HONOUR: Just a moment. Where is that – 703?

MR STRICKLAND: Last sentence.

MR EDWARDSON: Last sentence, your Honour: “Could you see where his right arm was?”

HIS HONOUR: Yes, thank you.

MR EDWARDSON: Sorry, I should start earlier on. At page 703, at about point 6:

“Were you putting your weight on Kwementyaye Walker’s body?---On his body, no; on his arm, yes.”

And, of course, he’s referring to his left arm there.

“What about the upper part of his body?---No, I believe it was his arm, from my memory.”

“How would you describe Kwementyaye Walker’s position?---You don’t, from your - - -

“What you can recall?---Yeah, it looks like he’s on his side, facing my direction.”

“Okay. And you say you were holding his left arm to prevent him from turning, is that right?---Correct.”

“And turning which way?---Any further towards me.”

“Could you see where his right arm was?---I believe it was sort of underneath his body.”

And then, at 704, if your Honour goes to about point 7.

HIS HONOUR: Yes.

MR EDWARDSON:

"From the time that you were on top of Kwementyaye Walker, on the mattress, until the time you heard that third shot" - well, firstly, he didn't hear the third shot, but leaving that aside – "did you see Kwementyaye Walker's right arm move?

---Not that I remember, looking at his right arm."

So, that's the evidence-in-chief.

If one turns now to cross-examination at page 724.

HIS HONOUR: Yes.

MR EDWARDSON: Just for clarity, your Honour, I'll start at page 719.

HIS HONOUR: At 719, yes.

MR EDWARDSON: At the top of the page:

"You had no idea at that stage that he was actually armed and that he had secreted, no doubt, in his pocket, this pair of scissors?---Correct."

"We now know that he deployed those scissors and stabbed Zachary Rolfe? ---Correct."

"You've told us that when you finally got to the ground and you were trying to restrain him, you've told us that you were not aware that he had been shot? ---Correct."

"You knew that he had something, some weapon of some sort, but you didn't know what it was?---Correct."

"And you were trying to control him, so he could not stab you?---Correct."

If your Honour then turns to page 721 of the transcript, at the top of the page:

"From your perspective, did you have any opportunity, for example, to say, 'Put the knife down or put the scissors down.'"?---I could have said that, but that's not what happened, no."

"You could have said that, but you didn't even know, as I understand it, that they were scissors?---Correct."

"All you knew was that he had a sharp object?---Correct."

"We know that it's only a matter of seconds between the first shot, the second and the third, one of which is while you were both standing upright?---Correct."



"But you didn't even know that the shot had been fired?---Correct."

"You're trying to control this man who is resisting police?---Correct."

"He's completely and utterly non-compliant?---Correct."

If your Honour now turns to page 724, which is the critical page, at about - - -

MR STRICKLAND: What page is that?

MR EDWARDSON: 724, starting at about point 3.

"All right, but it's not until he's formally identified that you knew it was Kwementyaye Walker?---Correct."

"And you certainly didn't see that weapon coming?---No, I did not."

"You didn't know that he had it secreted?---No."

"You had no chance to stop what he was doing at that stage?---No, I did not."

"Now after, please accept this in terms of the timing and what everyone's seen on the video, rather – I can play it again if need to, but certainly we hear you say 'stop fucking around or I'll smash you'?---Correct."

"That is after the third shot has already been discharged?---Correct."

"And that's because he was still fucking around, was he not, he was not incapacitated?---Correct."

"Indeed, it's quite some time after that, that eventually the handcuffs are placed on his wrists and he's then secure?---Correct."

"Now before that happened, you've told us already, that you'd seen at least Kumanjayi Walker with something in his right hand, and that that was when you were both standing upright?---Correct."

"You didn't know they were scissors, you've told us that?---Correct."

"But you certainly knew that it was some sort of sharp object?---Correct."

"So you knew he was armed at that stage?---Yes."

"And he certainly was not complying, as you've told us, in any way, with your attempts to restrain him?---Correct." "He was resisting at all times?---Correct."

"And you never actually got control of his right arm did you?---No I did not."

And over at 725, for completeness,

“And your control and focus, as we’ve heard, was on the left arm, and whilst you rolled him, I think you said, on the ground, you tried to roll him over, but you were never able to actually get hold of his right arm?---Correct.”

So, when the prosecution, in their written submissions this morning say at par 25:

“Mr Edwardson QC on behalf of the accused, has not opened on or cross-examined Crown witnesses on the basis that the position of Walker’s right arm, or the accused’s knowledge in that regard, as essential in this case.”

That completely misrepresents the cross-examination, all of which I’ve taken your Honour to. Including the evidence, the positive evidence, of the accused, himself. Who gave sworn testimony about the right arm and so on. Now your Honour, the prosecution have put their case for murder on two bases. As opened, and I’ve indicated the relevant cross-examination to make out, or attempt to make out the proposition about the extent to which the right arm of Kumanjaya Walker was restrained. But as part and parcel of their case theory, they’ve also put forward the notion that when my client said, “It’s all good, it’s all good, he was stabbing me, he was stabbing you.” That that really is a false defence, created spontaneously by him, out of a consciousness of guilt, because he knew he’d gone too far, so they put it.

And because it was an unlawful justification because of the restraint on the part of Kumanjaya Walker. Your Honour will remember the very last question that I asked in re-examination, which was to this effect. “Did you have any reason to believe at all, that everything that happened, would not have been captured on the body-worn video, which of course.” And he said “No.” And that’s obvious. I mean why would anybody put a false proposition, which is what the Crown are contending for, why would they put a false proposition, when they know that everything’s captured on body-worn video.

HIS HONOUR: Mm mm.

MR EDWARDSON: And that the lie would be exposed.

HIS HONOUR: Well one would be taking an enormous risk I would have thought.

MR EDWARDSON: They would. Not to mention, to have the presence of mind to utter those words, in circumstances where plainly, my client was stabbed. And what’s completely overlooked by the prosecution, is their own testimony from their witness, that the damage to Mr Eberl’s clothing, is consistent with the sharp blade of those scissors, being applied to his clothing. And, that the forensic pathologist – not – I think it’s forensic, the forensic, Ms Chong-Wing, her evidence, that she cannot exclude the possibility that the DNA from Eberl on the tip of the scissors, is his blood. So, I come back to the way in which the Crown has put its case. And why we say,

they're bound by their conduct. Just before I do, I want to make one thing clear. Obviously it's the state of mind of the accused at the time that the gun is fired, that is shots two and three, that's critical for the jury's consideration.

The evidence exposes the dynamic situation that existed, and this all happens, in a matter of seconds. Kumanjayi Walker is not standing still, or sitting still, or laying still, he's moving, he's fighting. It is a fight, which is going on on the mattress. Necessarily, as every expert, and anybody else – and anybody who watches the video would understand, he is not stationary.

So he's going to move, and the perception, inevitably, of anybody in that room, would be different, in a matter of split seconds. I've referred your Honour to a case, because it's exactly the point at one level, that we say emerges here. And before I do, sorry, I should have said this. There is no authority that's been cited by the prosecution, that suggests that a *Shepherd* direction, in the terms that we request, or that your Honour has foreshadowed, can only happen in circumstances where the entire prosecution case is circumstantial, and there is no direct evidence.

The prosecution have sought to distinguish a *Shepherd* direction, based on what they say, their case, is made out of a combination of circumstantial, direct evidence, and expert evidence. In a murder trial, almost inevitably, that will be the case. Circumstantial evidence will be the basis upon which a person's state of mind is inferred, from all the surrounding circumstances. Wherever the prosecution are obliged to prove an accused's intent, or state of mind, necessarily, that will require circumstantial or inferential reasoning. That does not in any way, mean that somehow because there's direct evidence, or expert evidence, or whatever other evidence it might be, somehow that is – precludes a *Shepherd* direction, if the fact in issue, is a link in the chain of reasoning, that must be proved beyond reasonable doubt, for the Crown to make out the case, which they have nailed their colours to the mast on.

Your Honour, I've asked that – your Associate, to refer to a case of La Bianca in Western Australia.

HIS HONOUR: Have that.

MR EDWARDSON: I'm not going to take you through it in great detail. But at one level, Mr La Bianca was quite fortunate because of the way in which the Crown had put their case. And the way they'd put their case was that they could not prove, beyond reasonable doubt, possession, he being the driver of the car. Mr Papadopoulos was a passenger. There was a bag in the foot well of – under the feet of Mr Papadopoulos, which had a large quantity of methamphetamine in it. And the question was whether or not they could prove knowledge, and therefore an intention to possess, unless he could actually see the amphetamine. And the evidence simply did not go that far. It lacked that capacity. And as the court said, quite clearly in – and understandably, that this was an indispensable link in the chain of reasoning of proving possession in the context of that case.

Well the Crown haven't put anything other in this case, than the fact that Kumanjaya Walker was so restrained, at the time that shots two and three were fired, that's the basis upon which they firstly seek to distinguish shot one from shots two and three. And secondly, the basis upon which they say, that my client is guilty of murder. Or at least, that's what they're going to be putting to the jury. And as part of that notion, they then seek in addition, to try and make good the proposition that when he said, "It's all good, he was stabbing me, he was stabbing you", that that's a false alibi, if you like, or false defence, created on the spot, because he knew full well that he'd gone too far, to use the words of Mr Strickland.

So what we say, really, it comes down to this, your Honour. In addition to the three defences that are advanced, we say, a link in the chain of reasoning, in this case, necessarily, has to be proved beyond reasonable doubt.

I hasten to add though, your Honour, even if the jury were satisfied beyond reasonable doubt, that at the critical time, and I don't see how they could on the evidence, with respect, and that's my difficulty with what the Crown are seeking to do  
- - -

HIS HONOUR: Mm mm.

MR EDWARDSON: - - - but leaving that aside for a moment. Even if they were satisfied beyond reasonable doubt, that when he pulled the trigger twice, the first one, 2.6 seconds after the first shot, and the second .53 seconds after the second shot, even if they were satisfied, beyond reasonable doubt, that at that critical point in time, he was so restrained, as asserted by the prosecution, that would not matter, if at the end of the day, my client, did not either have the requisite intent, the perception from his point of view was that he was not so restrained, and so on. And so what I can say, the converse doesn't apply.

If the Crown don't make good that proposition, and we say the evidence simply lacks the capacity to prove that he was so constrained because you can't see it on the video. I mean, that's the nub of it and there's no direct evidence that says otherwise - none at all - and the assumptions that Mr Strickland put to Mr Barram over objection - the assumptions themselves have not been made good. And as with all expert evidence, if you don't prove the facts upon which the assumptions are made, the opinion is rendered useless - it doesn't exist - it doesn't matter.

And so, if your Honour goes - for completeness - I will start with Davidson because, as my learned friend said, her Honour Simpson J encapsulates the issue at par 74 on page 165 on the judgment where Her Honour said;

"Whether a fact on which the Crown relies is part of a circumstantial case is or is not indispensable may be tested by asking whether in the absence of evidence of that fact there would nonetheless be a case to go to the jury."

Now, if you go to the facts of the case in *Davidson* and likewise the other case that our friends rely on, it is plain, for the reasons expressed by the court, that the circumstances of the case that was presented is quite different from this.

If you take away the notion - let's assume for argument's sake there is no evidence which is capable of proving that Kumanjaya Walker - if you accept what I have been putting to your Honour, that Kumanjaya Walker was so incapacitated. In other words, the evidence is incapable of proving what the Crown contended as the sole justification for their argument that shots 2 and 3 was unlawful. If you take that away what alternative path to guilt did they open on? What alternative scenario did they put forward that could ever justify any one of these charges that my client now faces?

The whole premise upon which they have sought to justify shots 2 and 3 is that he was - and they even foreshadowed that the evidence would be from Dr McIntosh, for example, and Mr Barram, that he lacked the capacity. That's not come good. That's not been made out. The high-water mark is they are asked to assume certain things which may or may not be correct but there is no evidence that is capable of making good that proposition because of the limitation of the body-worn video in that nobody - and everyone agrees on this - nobody at all can see that right arm at any stage during this whole altercation.

And so in those circumstances it is my submission that this is plainly a classic indispensable link in the chain of reasoning which the prosecution must prove and must prove beyond reasonable doubt.

Your Honour, I turn now briefly to the other questions, if I can find it - I agree with my learned friend that if we are right about questions 1 and 2 then 3, the answer to that, "Yes". What is not clear to me and I think the Crown should nail their colours to the mast, is the questions 4, 5 and 6 because there has been a whole host of criticisms that have been levelled at my client about, for example, why they say that his training is - he didn't comply with his training.

At the end of the day, your Honour, he is not on trial for - - -

HIS HONOUR: It's not a charge of breaching some sort of police regulations or not complying with training.

MR EDWARDSON: No. Or whether he complied or didn't comply with a general order. The primary consideration for the jury, really, is what actually happened, what was his state of mind at the time that he pulled shots 2 and 3. For example, there's been a whole host of stuff - at one stage I think they were running with the notion that because he had his hand on his gun at the time that he searched House 577, that was somehow an indication that he was prepared to fatally shoot Kumanjaya Walker should the opportunity present itself - that seemed to be the theme that was being run. Again, the difficulty with all of that of course, and the difficulty that's always been obvious in this case, is that the Crown have always accepted that when he pulled the trigger the first time it was reasonable,

proportionate and lawful - and that's the difficulty - and that's always going to be the difficulty for the Crown in this case.

HIS HONOUR: Yes.

MR EDWARDSON: If your Honour pleases.

HIS HONOUR: Perhaps I will address this to the Crown. In relation to questions 4, 5 and 6, what do you want to say?

MR STRICKLAND: Your Honour, have you had a chance - we put what we want to say in that written document.

HIS HONOUR: You've dealt with those in the - yes.

MR STRICKLAND: Dealt with those.

HIS HONOUR: Just give me a moment while I find the document again.

MR STRICKLAND: From page 10 on, your Honour.

HIS HONOUR: I only received this this morning so I haven't had an opportunity to fully read it.

MR STRICKLAND: I understand, your Honour. Would it be convenient to deal with the *Shepherd* point discretely in reply?

HIS HONOUR: Yes, all right. So you want to respond to that?

MR STRICKLAND: I would, thank you.

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, there does appear to be, in one sense, a conflict or disagreement as to principle because my learned friend says, "Well, we haven't cited a case where *Shepherd* isn't given in circumstances where you have circumstantial direct and expert evidence." Well, I've taken your Honour to what Dawson J said in his opening paragraph in *Shepherd*, which is that the whole are of giving a *Shepherd* direction only arises where the case rested on - I think that's his word "rested on" a circumstantial case and indeed, that in my submission must logically be so because you wouldn't give that - you wouldn't give a *Shepherd* direction if the case did not rest on a circumstantial case, there would be no place - there would be no logical place for it.

So we do rely upon authority for our proposition and that authority is *Shepherd* itself and the other authorities that I've taken your Honour to and indeed the authorities cited in those authorities are all cases - are all circumstantial evidence cases by necessity. So my learned friend can't point to other precedents where a

Shepherd direction is given where there is - where the circumstantial case is really but one of the features of the case - and again, your Honour, if I may remind your Honour, critically here, the accused has given evidence.

HIS HONOUR: Yes.

MR STRICKLAND: And so the credibility of his evidence is very much now - and it wasn't at the opening because - well - the evidence he has given was evidence he gave at the trial - only at the trial.

HIS HONOUR: Yes.

MR STRICKLAND: So the issues have necessarily developed a different focus as a result of giving that evidence. But - so that's the first point about where the circumstances in which a Shepherd direction applies at all.

The second point, your Honour, is my learned friend doesn't appear to cavil or at least doesn't directly challenge what we put at par 17 of our written submissions, which was part of the discussion between your Honour and myself about the - there were different avenues of reasoning available to prove that fact. I mean - and in my submission, the debate about the incapacitation of the arm applies to one of those avenues of reasoning only.

The third point is that my learned friend has said - and has cited evidence, to the effect that a significant issue in this case, an undoubtedly significant issue in this case, is the position of the right arm and what the accused knew about that.

My learned friend says - and this is, in effect, possibly a matter for the jury to decide. Well, there is all this evidence to suggest one doesn't know and we say we will point to evidence of Constable Eberl and point to Constable - the evidence of Dr McIntosh, who says - this is at page 851, from memory - 851, where he said, I think in re-examination - because his evidence is that he believed the right arm was in a position where it didn't have the capacity to inflict serious harm, and he said: "Well, I take that from looking at the body-worn and just the anatomical position of the right arm." Your Honour will recall that.

Suffice to say, there is contended in evidence that the jury will have to determine about the position of the right arm. But it is not the Crown case, and has never been the Crown case, that the precise position of the right arm is - and I use the word - an essential part of the Crown case. My learned friend can't point to anything in the opening, let alone the fact that the case is developed since the opening, as a result of the accused's evidence, which suggests that that is an essential part of the Crown case.

My learned friend (inaudible) the difference between the position of the right arm and what he's referred to in the opening as having Mr Walker being, "restrained or under control." And the position of the right arm is one aspect of that, we accept, an

important aspect of that. But a good illustration of why the issue of restraint and control doesn't only focus on the position of the right arm is captured in Dr McIntosh's report. If I could ask your Honour to go to that – does your Honour have the exhibits handy? I think it's exhibit 69.

HIS HONOUR: Yes, I have that, thank you.

MR STRICKLAND: So, your Honour, the key opinion in exhibit 69 is at par 133 and this is – supports one of our avenues; that is, one of the avenues of reasoning available to the jury to prove the Crown case, which is that Kwementyaye Walker was likely a low threat to Eberl at the time of the second and third shots. Of course, that's what – that's an opinion – I'm simply drawing your Honour to one illustration. But Dr Tiemensma gave an opinion of a similar vein, based upon her opinions and also Dr – and Andrew Barram, all somewhat different perspectives, but I'm just giving you an example of one of them.

Now, from – you will recall that Dr McIntosh was asked about the bases of that opinion, and I think his evidence went over several pages; I believe, beginning at about page 830, or thereabouts. It begins at page 830.

HIS HONOUR: Yes.

MR STRICKLAND: And that's when he was taken to par 133. And what was developed in the course of his evidence-in-chief, really over the next five pages, was that there was a number of bases to his opinion that Kwementyaye Walker was a low threat. The first of the opinions, the first basis was his opinion about the right arm being likely pinned under his own body – and that's the subject of this application – sorry, this debate.

And, even there, your Honour, you will note the complexity of it because at page 831, he gives an opinion – at 831 and 832 – it depends whether it's the upper right arm that's pinned or the entire arm, or whether – how much of the right arm was actually underneath the side of the chest. So, his opinions depend upon what part of the right arm is under the body.

But, his opinion about the low threat is not confined to that. He says that's one of the factors. Another factor, if your Honour goes to page 833, is what – the second factor is the position of Constable Eberl's body on the top of Kwementyaye Walker's upper body and what he describes as the resistance applied by Eberl's body mass. And again, I won't go through it all, but there is two or three pages of evidence, which elaborates on his opinion at par 133 – if we can go back to 133, where he talks about – where he gives an opinion about Constable Eberl.

This is a very big paragraph, 133, but it's that part where he says Eberl was physically larger than Walker. He would have to contend with the resistance applied by Eberl's body mass, in addition to active restraint forces. So, in suffice to say, that's another aspect of his opinion and it's another aspect of the Crown case; that is, the restraint or control has a number of features to it.



Then, he goes onto refer to the significance of the softness of the mattress. He goes on to talk about the - he then goes onto talk about the nature of the scissors themselves. That's in his evidence, your Honour. He refers, I think it's at page 840, he talks about the nature of the scissors themselves being likely a low threat.

And your Honour will recall there is a significant body of evidence about the nature of the scissors themselves; that is, what the accused saw of the scissors, his description of them; what Mr Eberl's description of the scissors was; Dr Tiemensma's evidence about how those scissors and those circumstances might cause a significant penetrating injury – she thought they could not. Dr Towsey gave a different opinion. Dr Botterill gave an opinion.

They are matters that are different from, and is discrete from the issue of the position of the right arm, and they're matters that the Crown relies upon for an avenue of reasoning, which is the accused believed that he was a low risk at the time. Suffice to say, my learned friend has not made out that the incapacitation of the right arm, which we – and I put this in our submissions – that, itself, is a difficult concept, whether it means total or partial. But the incapacitation of the right arm is not an essential feature of the reasoning towards guilt. It is an important part of one of the avenues of reasoning towards guilt.

HIS HONOUR: All right, thank you.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Can I take you to - - -

MR STRICKLAND: I'm sorry, yes.

HIS HONOUR: - - - questions - - -

MR STRICKLAND: Four, 5 and 6.

HIS HONOUR: - - - 4, 5 and 6.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: You refer to the decision of Mildren AJ at par 49. That doesn't really  
- - -

MR STRICKLAND: Well, your Honour, I think we've come across this problem before. It's because – there are different – the paragraph numbers are difficult.

HIS HONOUR: Yes, I do remember.

MR STRICKLAND: I shouldn't have referred to par 49 because it's somewhat confusing.

HIS HONOUR: Yes. Do you know what page it's on?

MR STRICKLAND: Page 37, your Honour.

HIS HONOUR: I was looking at the wrong paragraph.

MR STRICKLAND: Yes, I shouldn't have said par 49. There are paragraphs within paragraphs.

HIS HONOUR: Yes.

MR STRICKLAND: If I could just ask your Honour to read par 49 at page 37.

HIS HONOUR: Yes. There was evidence given by Sergeant Barram - - -

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: - - - to the effect that Constable Eberl and the accused shouldn't have gone into House 511.

MR STRICKLAND: Yes.

HIS HONOUR: Now how does the Crown say the jury can use that?

MR STRICKLAND: Well, your Honour, we say that that is relevant to – assuming the jury found that that conduct was not in accordance with his training - - -

HIS HONOUR: Yes.

MR STRICKLAND: - - - we would say that is relevant to his state of mind, in what we've described as being either reckless, or having a disregard for safety. And what we've described, perhaps in the vernacular, as having a gun-ho attitude. And that is, as we opened on, part of a – the context in which the accused regarded his mission, to track down Kumanjayi Walker. And that is, your Honour will recall the accused's evidence, that when he walked into the house, he believed that Kumanjayi Walker might – that the person walking towards him, could be I think Kumanjayi Walker.

And if the jury accepts the evidence of Detective Sergeant Barram, that proper training was that he should have recognised the danger, recognised the risk. Talked to him from outside the house. Followed his training in relation to ensuring there was a reactionary gap, or a gap of time, cover, et cetera, we would say that that entering the house in circumstances where he either did perceive a risk, in fact. Or ought to have perceived a risk, one of them, informs in effect, his conduct in conducting himself in a way which created a risk to himself and to Constable Eberl.

It informed – it informs – it could inform the jury's view as to if he was reckless in relation to that aspect of use of force principles, he would be reckless in relation to use of force principles in relation to the circumstances in which it's appropriate to draw a firearm and fire a firearm.

HIS HONOUR: I can see how it would feed into the Crown submission that he was on a mission to – to arrest the deceased. And that if the deceased were to show any resistance to arrest, that he was prepared to use unreasonable force.

MR STRICKLAND: That's right.

HIS HONOUR: But I can see that. But I have some difficulty with the concept of that it being somehow relevant that the accused was putting himself and also Constable Eberl at risk. How does that feed into anything that the jury has to decide?

MR STRICKLAND: Well, in my submission, it's an aspect of the first matter, your Honour, raised. That is, if he was on a mission to - - -

HIS HONOUR: But it's demonstrative of the fact that he's on a mission to - - -

MR STRICKLAND: Correct, that's so.

HIS HONOUR: - - - the failure to comply with his training, the Crown says, is demonstrative of the fact that he was on a mission to – to arrest the deceased, and that in doing so, he was not going to comply with his training, and particularly his training and directions in relation to the use of lethal force.

MR STRICKLAND: That's right. Or if either he was not going to, or he didn't – he didn't think it – it may not be necessary in the circumstances.

HIS HONOUR: All right.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: All right.

MR EDWARDSON: Your Honour, can I just reply to that last matter if I may?

HIS HONOUR: Yes, yes of course.

MR EDWARDSON: Your Honour, the difficulty with that notion is – in respect of going into the house. The evidence is, first of all, Eberl – all of this was not put to Eberl.

HIS HONOUR: Mm mm.

MR EDWARDSON: By the prosecution. So this so-called theory about non-compliance with training going into the house - - -

HIS HONOUR: Well I'm not necessarily embracing it as a good theory.

MR EDWARDSON: No, I understand that. But the second thing is that it wasn't my client that went charging into the house first. It was actually Mr Eberl.

HIS HONOUR: Yes, I know that.

MR EDWARDSON: And as my client said in evidence, in response to the question that was put to him, well he wasn't – he was hardly going to let Mr Eberl go in there alone. The two of them had to go in – once Mr Eberl had made the decision to go in first, obviously, he, as his partner, would necessarily accompany him. So quite frankly, this so-called mission, when I say mission, I don't mean a mission to arrest. Yes, their mission was to arrest Kumanjaya Walker - - -

HIS HONOUR: Yes, I understand.

MR EDWARDSON: - - - which of itself requires physical contact, in circumstances where they have to effect that arrest. I mean this notion of him standing outside in the front paddock with Constable Eberl and so, "You know, come out son, just – can you do the right thing", it's just – it's absolutely fanciful.

HIS HONOUR: That's a matter for the jury, ultimately.

MR EDWARDSON: I understand.

HIS HONOUR: I merely wanted to know how the Crown was going to say that these things were relevant.

MR EDWARDSON: I understand that, your Honour. But one – finally, my last point is this. How is that sustainable, in circumstances where the Crown have conceded that the first shot was lawful? So anything that happens before then, and including shot one, it can only ever – it can only be conduct subsequent to the first shot. Which is the case for the prosecution. Shots two and three. So I – sorry, your Honour, I really struggle to see how they can, with any sense of propriety, or legitimacy, seek to justify the notion that him following Eberl into the house, is part and parcel of a pre-meditated determination, not to comply with his training. But that seems to be what the prosecution are putting.

HIS HONOUR: Well, as I said, I don't necessarily embrace it as being an attractive proposition. But that's a matter for the Crown.

MR EDWARDSON: If your Honour pleases.

HIS HONOUR: All right, now are there any other matters that anybody wants to raise at this point?

MR STRICKLAND: Just an administrative one, your Honour. Could I just speak to my learned friend?

HIS HONOUR: Certainly.

MR STRICKLAND: Your Honour, in terms of tomorrow?

HIS HONOUR: Yes?

MR STRICKLAND: My learned friend thinks that he will be 45 minutes to an hour with Mr McDevitt, that's roughly the same, so we'll say two hours. I still intend to try and limit my address to - I said one and-a-half - more likely two hours, I intend to do that if I can, but I can't guarantee it - that's my intention.

HIS HONOUR: Yes.

MR STRICKLAND: Your Honour, what I would ask that before I conclude the address I would like to read the transcript of Mr McDevitt's evidence because he is a - it's expert evidence. I don't know - I assume it is of some significance, so what I would ask to do is at a particular point in my address I would like to conclude - which may be around about whatever mark it is and I would like to conclude the address when I have had a chance to read Mr McDevitt's evidence.

HIS HONOUR: Well of course that may depend upon what evidence Mr Mc Devitt gives.

MR STRICKLAND: It does, I accept that. If it is of no moment - but I doubt that because Mr McDevitt in effect is the response to Detective Sergeant Barram.

HIS HONOUR: Yes, I understand.

MR STRICKLAND: So that's the logistical matter I wanted to raise with you.

HIS HONOUR: All right.

Do you want to say anything at this point?

MR EDWARDSON: No, your Honour.

HIS HONOUR: Yes. Apparently, it has been brought to my attention that one of the jurors has reported that the juror's son has tested positive for COVID. That particular juror has isolated themselves away from their son and has undertaken a rapid antigen test which has been negative and has told the Sheriff's Officers that they will continue to isolate themselves and I will encourage the jurors to perhaps use the rapid antigen tests that are available to them. But at the present time I don't see any difficulty at the moment unless a test ultimately comes back positive with regard to that juror at some later stage.

MR EDWARDSON: Yes, your Honour.

MR STRICKLAND: Your Honour, can I - in my submission it is entirely within the domain of your Honour of course. My experience is that the rapid antigen tests, there is a delay between the becoming infected and the negative tests. We have got to week 4 - weeks without anyone and it would be a disaster if one - particularly as we've got 13, if one juror became positive and was in the presence of the whole jury - and I just - I don't know the solution to that other than we've got 13 and we've had 13 for a reason and I just would be - I mean the one thing that unites my learned friend and I - well, it's not the only thing - but is that it would be a disaster if at this last moment - particularly as we've had a three day break and the masks are no longer mandated but we were - - -

HIS HONOUR: Well the jury are, I am told, going to continue to wear the masks.

MR STRICKLAND: Yes, I understand.

HIS HONOUR: But perhaps the best thing to do at the present time is for you to give some thought to it.

MR STRICKLAND: Yes.

HIS HONOUR: I will ask that that juror be isolated from the rest of the jury tomorrow morning - - -

MR STRICKLAND: The court pleases, yes, thank you.

HIS HONOUR: When they arrive and it really seems that the only alternative is - well, I will take a step back. I will ask through the Sheriff's Office that that juror undertake further rapid antigen tests before they attend tomorrow and then when they attend tomorrow they will be isolated from the remainder of the jury and at that point if it remains a negative test the only alternatives we have are either to continue with that juror or alternatively to discharge that juror and proceed with the remaining 12.

MR STRICKLAND: Indeed, I accept they are the only two alternatives. A part for his - apart from the rapid antigen test itself, there is the issue as to whether he symptomatic.

HIS HONOUR: Yes.

MR STRICKLAND: If he is symptomatic and he still tests negative, in my submission he should be discharged, and so an enquiry - - -

HIS HONOUR: Perhaps if further enquiry is made about that.

MR STRICKLAND: And, your Honour, Ms Callan has reminded me, if - again I - if it is the case that there was a risk that this juror has COVID then if he was - if they were sitting less than four hours a day then that would not infect the rest of the jury, so I am just in a sense, raising a constellation of issues. But I accept that one has to take it in a step by step basis.

HIS HONOUR: Yes, I think that all we can do at the moment.

MR STRICKLAND: Yes, your Honour.

MR EDWARDSON: Your Honour, would you mind if your associate could perhaps give us an update later today by email as to what the position is and I can then confer with Mr Strickland. We could then - because I do agree that it would be of great concern if we have got this far, and we do have that extra juror, but I just want to think about that and talk to my client.

HIS HONOUR: Look, I will have further enquiries made later today and certainly counsel will be advised of the results of those enquiries.

MR EDWARDSON: Thank you.

HIS HONOUR: I will adjourn.

ADJOURNED 12.05 PM TO TUESDAY 8 MARCH 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY BRIAN ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON TUESDAY 8 MARCH 2022 AT 10:08 AM

(Continued from 07/03/2022)

Transcribed by: EPIQ



HIS HONOUR: Now I think counsel were made aware yesterday afternoon by myself, of an issue with one of the jurors. The juror has undertaken another rapid antigen test last night, and then a third one this morning. Both of which have returned negative. But I'm given to understand that counsel contacted my Associate yesterday afternoon to indicate that there was a joint position that the juror should be discharged. Now is that the case?

MR STRICKLAND SC: It is, your Honour.

MR EDWARDSON QC: It is, your Honour.

HIS HONOUR: All right, well I will accede to that suggestion. I'm going to have the juror brought in, and I will attempt to explain why they are being discharged. I should say, the juror has been kept isolated from the rest of the jury this morning.

#### A JUROR ENTERS

HIS HONOUR: Now, as you know, at the outset of the trial we empanelled 14 jurors. One of the reasons why we did so was because of the length of the trial, but also, in recognition of the fact that there may be reasons, by reason of the COVID situation where individual jurors may need to be discharged.

Now, I understand that you have taken all the correct steps, that whilst a member of your family has been diagnosed as positive with COVID, you have isolated yourself and have undertaken a number of rapid antigen tests, which have all proven negative.

The decision has been made, however, that you will be discharged as a juror. This is because the risk of placing somebody into the jury room with the other jurors, at this particular point in the trial, is so great that it is better to discharge an individual juror, than to place the continued ability of the trial to continue at risk.

Do you understand that?

A JUROR: (No audible response).

HIS HONOUR: I want to thank you on behalf of the community for participating in this trial. It is never easy to be a member of a jury and I don't want you to think that your time has been wasted by participating in this, because, by being a member of the jury, even though you will not be present when the jury deliberates at the end of the trial, you have ensured that the trial has been able to continue to this point.

So, again, I want to thank you and I am now discharging you as a member of the jury. So, you may now go.

A JUROR: Thank you.

#### A JUROR DISCHARGED

HIS HONOUR: Thank you.

Now, we are otherwise ready to proceed?

MR EDWARDSON: Yes, thank you, sir.

HIS HONOUR: Bring the jury in, please.

JURY IN

HIS HONOUR: Members of the jury, before we proceed any further, you will notice that one of your number is not with us. That juror had a member of their family test positive for COVID. The juror did the right thing - and this was yesterday that that test was undertaken – the juror did the right thing and isolated himself.

He then undertook a number of rapid antigen tests, which proved negative, including one this morning which also negative. But, the decision was taken, in the light of the fact that we had 13 jurors and we would have to come back to 12, in any event; that to avoid the risk, even the small risk of infection in the jury such that the trial would not be able to continue, that that juror would be released, so that, whichever one of your number was the reserve juror is now a juror in this trial.

So, the trial will proceed with the 12 that we now have left. Thank you.

Yes?

MR EDWARDSON: Thank you, your Honour. Your Honour, I call Mr Ben McDevitt.

BEN MCDEVITT, affirmed:

XN BY MR EDWARDSON:

MR EDWARDSON: Can you state your name for the record, please?---My full name is Ben McDevitt.

Are you now retired?---Semi-retired.

Semi-retired, semi-retired from what?---From what?

Yes?---From – well, sir, I spent 38 years in various law enforcement and regulatory agencies and, after that 38 years, I retired as a full-time employee, and, since then, I have worked as a consultant.

Thank you. I'm going to let you have a look, please, at the Curriculum Vitae; that is, your Curriculum Vitae which I hand to you, together with copies for the jury.

MR STRICKLAND: No objection.

MR EDWARDSON: Firstly, can you confirm that that is your Curriculum Vitae and represents pages, in fact, of your qualifications and work over many years?---That's correct.

I tender that, your Honour.

HIS HONOUR: That will be exhibit 83.

EXHIBIT 83 Curriculum Vitae of Ben McDevitt.

MR EDWARDSON: Now, with my learned friend's consent, mercifully, I don't have to go through each one of your qualifications, but I do want to focus on some specific qualifications, if I may. Are you familiar, within the AFP, of a group known as the special operations team?---Yes, that's correct.

What are they?---In simple terms, the special operations team of the AFP is equivalent to the special operations or special response group of the Northern Territory Police.

In other words, the TRG?---The TRG.

Are you a former member of the AFP special operations team?---That's correct.

For how long?---Twelve years.

I want to deal specifically, if I can, for – and were – sorry, I should have asked you this. Were you the longest serving member of the special operations team when you left?---That's correct.

I want to ask you about some specific roles of the special operations team. Can you tell us a little bit about it?---Probably the basic role, when somebody is introduced to a specialist team, is what's called a member of an assault team, which is one of the people who would go in and engage in the term that you've already heard, which is the clearing of a premises. Ultimately, within the assault team itself, you would have different positions, such as a team leader of the assault team. You then have specialists in other roles, which might be, for example, specialists in methods of entry, who are taught to use, for example, explosives to gain access to a building, or they use shotguns to blow the hinges off a door to get in, or they get techniques to remount a window or to be able to physically run through a window, so that it the specialty. There is another specialty which is on chemical munitions, which are specialist police who are trained to deploy gas, like CN gas or CS gas, into a premises and then there is another specialist position is the sniper position, which generally is a role where they are - they are deployed in the event that long range shooting may be required, or they may be deployed simply to conduct surveillance from a distance and be able to communicate back to other members of the team.

Having given an overview of the Special Operations Team, can I ask you this, have you been a former member - team member - of the Assault Group, as you described it?---Yes.

Having been involved as a sniper?---Yes.

A method of entry specialist?---Yes.

Chemical munitions deployment?---Yes.

Team leader of the assault group?---Yes.

Field supervisor?---Yes.

What is that?---The field supervisor is the person who reports directly to the forward commander, so if you imagine the overall police response, you would have a forward commander who is in charge of several elements such as the specialist operation teams, you know, the TRG type element, the hostage negotiation team, the investigation team and so on, that's the forward commander role. The field supervisor of the TRG equivalent reports directly to that person.

Have you served in every role associated with the special operations team?---Yes.

And were you responsible, as the Australian Federal Police - for the Australian Federal Police - as chief of firearms?---Yes.

And defensive skills instructor?---Yes.

For the delivery of all of the special operations team?---Yes.

As chief firearms and defensive skills instructor, were you also, as you said, the - as it happens - the special operations team field supervisor?---That's correct. I held those roles simultaneously.

And were you also responsible for all of the Australian Federal Police training, from teaching recruits how to apply handcuffs through to teaching the Special Operations team how to assault a terrorist stronghold?---That's correct.

Have you also trained as a police negotiator?---Yes.

And the last - you were last deployed in this role in 2003 to negotiate with a militia war lord in the Solomon Islands?---That's correct.

Have you also trained as a police forward commander and were you deployed in this capacity for the 2000 Olympics?---That's correct.

In the context of this case, have you been asked to review primarily and specifically, the opinions that have been expressed by Senior Sergeant Andrew Barram?---That's correct.

And for the purposes of expressing that opinion and considering the matters relevant to this jury, have you been provided with a vast amount of material?---That's correct.

I am not going to go through each one, my learned friend has a list of all of the documents and materials that have been provided to you for that purpose, but I do want to focus on some critical documents - key documents - that the jury are familiar with. Have you been provided with each one of the reports prepared by Senior Sergeant Andrew Barram?---Yes, I believe I have.

And you were present in court throughout his evidence?---Yes, that's correct.

So you were able to hear what he had to say that may have supplemented or qualified anything that was contained in the reports that he had previously written up on?---Yes, that's correct.

Have you also viewed all of the body-worn video of the members of the Immediate Response Team for 9 November 2019?---I believe so.

And specifically and more importantly in the context of this case, Officers Eberl and the accused, Zachary Rolfe?---That's correct.

Have you also been provided with the documents that are attached to all of the statements of Senior Sergeant Andrew Barram including a document - which is tab 4, your Honour and ladies and gentlemen of the jury, exhibit 62, which is a document described as "Defensive Tactics for the Purposes of the Northern Territory Police Force"?---That's correct.

Now, before we turn to the question of any opinion that you might express, I want to ask you a little bit about your work with the Australian Federal Police, in particular between 1994 and 1996 were you responsible for the completion of what is described as "Assess and Reassess a Conflict De-escalation Model"?---That's correct.

What is that?---The "Assess and reassess model" is aimed at a different methodology for delivering police use of force training. It's a - it was a review of all of the options that were available to police officers in the course of responding to threats and also addressed emerging options and technologies.

In that regard are you familiar with the expression, "Linear model" as opposed to "situational model"?---That's correct.

Can you explain the difference between the two models?---So the - prior to the advent of assess and reassess, the general thinking for police officers who were - who were faced with a threat was that they had a range of police options - of response options to them, so if you imagined sort of a ladder or something like that and the bottom rung of the ladder was the police themselves - so their presence, which is a use of force option in its own right and then there would be things like verbalisation and then there'd be soft empty-hand techniques and then there'd be hard empty-hand techniques, then there might be the baton and OC spray, the Taser and so on until the top rung of the ladder was where the firearm sat as the option of lethal force. So, the linear model - the expectation under the linear model for police that was given to them in training was that they would start with police presence and they would then go into verbalisation and then if it was necessary they would utilise the baton or OC spray or whatever. They didn't have the - it wasn't totally rigid but the teaching was along that linear progression in terms of use of force, so that's a linear model. A situational model, such as this, actually changes that in terms of putting the officer in the centre and the officer then, depending on their own perception and their own decision-making, decides which option may be most

appropriate. So it may well be they may determine that it's appropriate to move beyond verbalisation or use of the baton or use of OC spray, for example and move immediately to a higher option, such as the firearm. So it was a fundamental shift in the thinking.

Now, you mentioned the term "Assess and reassess" why was it called "Assess and reassess"?---Because in the situational model where there is no longer a sort of laid out progression, you need to be able to focus on the perception that the officer has and the assessment and, you know, the degree to which they assess that, so if anybody is faced - not just a police officer - but any of us are faced with a threat here's four stages in the cognitive processes that the mind goes through. So the first one is that we perceive the threat - and we generally perceive the threat through, you know our stimulatory senses, you know, our hearing, our sight, touch, those sort of things, so we perceive something. We then go through a process where we assess that - and we all do this - it's just a natural thing, if a spider jumped on the table here I'd go through that. So we assess it and determine what that threat at that particular time means to us. The next cognitive process is on formulating a response to that. So if the spider is on the desk my response might be to push it away or my response might be to whack it or whatever, but we formulate a response based on that assessment and then the last and final step is initiation of the muscle action and so on, to actually put that formulated desire into place, so if the option for me is to run, then I activate the muscles and I run. So it's a simple four-step process, it's just the way that our cognitive processes actually work when we're confronted with a threat and it was very important to focus on that assessment phase because it's just so critical.

So in January 1996 you conducted a rewrite, did you not, of the entire approach by the AFP to the use of force?---That's correct. I started in 1994 and finished it in 1996.

And it culminated in the paper which is described as "Assess and Re-assess a Conflict De-escalation Model"?---That's correct.

What do you mean by de-escalation model?---A de-escalation model is – is basically premised on the fact that we want to, wherever we can, to – not to escalate a situation, but to de-escalate a situation. So I mentioned police presence for example. You could de-escalate certain situations by just not being there. Just get the police out, altogether. And that could de-escalate a situation.

I'll come to the specifics in due course. But in simple terms, is the de-escalation of a particular situation entirely dependent upon the circumstances that confronts police or police officers?---That's correct.

Now in the course of completing, in January 1996, your rewrite of the entire approach to the use of force, did you visualise what's described as the 'AFP Response Options'?---That's correct.

What I want you to do is to have a look at a document, which is now produced to you. There are, in fact, four documents together. And I'll take you through them in a moment.

Do you have any objection to me tendering it now so the jury can have it?

I tender it now, your Honour, so that the jury can have a copy, and can follow the evidence.

MR STRICKLAND: No objection.

HIS HONOUR: Exhibit 84.

EXHIBIT D84: Bundle of four documents.

MR EDWARDSON: Exhibit 84, which is now before you and the jury is – consists of four documents. I'll deal with the first document. You mentioned before that you visualised or – what's called the AFP Response Options, the first document in the bundle of four?---Yes I have that.

What is that?---So what I produced with Assess and Reassess, was essentially a discussion paper, with a series of recommendations. And I wanted to create the sort of situational model in a way that was easily understood. So that first document actually shows it as a – as a semi-circle, rather than – rather than full circle. So that was my – my first effort, if you like, or my draft effort. Which I circulated and then had numerous consultations and find that to end up with the second model.

All right, can we move to the second model. If we turn to page two. Is that the final product, if I can put it, after you had put out for consultation and consideration, the first effort, my words, not yours, that is, the semi-circle in the first page?---That's correct.

So can you tell us what we now see on the second page?---So the second page is pictorially the situational type model that I described before. Which places the officer, or indeed several officers, or indeed, the whole police force, in the middle. And they then go through that process that I just described to you. And they then formulate a response, which they – which they think is the most appropriate under the circumstances. And then they have the options around there that we also spoke about before, to make a decision on what they think is the most appropriate response. And then underneath there something that I created an acronym, you'll see the words, "reasonable, evaluation, safety, preparation, objectives, negotiations, sensitivity and empowerment." And that's an acronym for the word, "Response", to try to shape the thinking.

All right. And so did this ultimately, this training model, become the method of teaching for all AFP officers?---Yes, sir, it still is.



Thank you. Can you – I'll come back to this in a minute. But can you come to the next two documents. You'll see that they are, and I think you'll see that one is page 56 of Mr Barram's report – sorry, your report. But it's taken from Mr Barram's report. And then if we turn to the last page, you'll see that there's effectively page 10 of one of the statutory declarations of Andrew Barram. But showing in colour form, what's described as the, "Tactical Options Model in the Northern Territory"?---That's correct.

Did the Northern Territory, two years after your model was implemented throughout the entire Australian Federal Police, and still is the model, was it effectively adopted by the Northern Territory Police?---Well, sir, if you look at the two models, you can see that the central elements are pretty much entirely reflected. There's – there's some slight variations. So for example, they don't incorporate that acronym that I described, Response. But other than that, the – you know, the listing of the options. The officer in the middle. The safety first. The focus on communication. All those things are – are pretty much identical. And pretty much what most of the police services now operate on.

So in effect, you created the Tactical Options Model, which Senior Sergeant Andrew Barram relies on for the purposes of his opinion?---Well my model heavily influenced the model that he relied upon.

Are there any differences, as far as you can tell, between the two models, that would change any opinion that you might otherwise express?---No.

I want to ask you a little bit about some general propositions if I may, before we move to the specifics. Perhaps if you could have exhibit 62 in front of you. And in particular, I want tab 4, which is the, "Defensive Tactics Model in the Northern Territory", the training of Zachary Rolfe. And you've heard evidence to that effect in this court?---Yes, that's correct.

If you turn to tab 4, in particular, page 22. And you'll see that at the top of the page, it should have the heading, "Force Philosophy"?---That's correct.

"The success of an operation will be primarily judged by the extent to which the use of force is avoided or minimised"?---That's correct.

Is that a concept that you're familiar with, as a long serving member of the Australian Federal Police?---Yes.

Is it a fairly uniform force philosophy amongst law enforcement agencies, across the board?---Yes.

In other words, is it the training of police officers, that wherever possible, the use of force should be avoided or minimised?---That's correct.

But is that always contingent and dependent upon the circumstances that confront the individual police officer, on any given occasion?---That's correct.

Can you turn now please if you could to page 24 which deals specifically with lethal force?---Yes.

“Any use of force that is likely to cause death or serious harm, points to consider must be the option of last resort. Could be the subject – could the subject cause death or serious harm? Is there the opportunity for the subject to cause death or serious harm? Is an officer or third party in jeopardy? Is there any less than lethal alternative available? And is it likely to be effective” Do you see that?---Yes.

Is that again, consistent with the training that you, yourself, have taught, and that you understand Australian Federal Police Officers, and for that matter, all police officers in law enforcement agencies, are trained in?---That’s correct.

So in other words, lethal force must be the option of last resort?---Yes.

And it embraces the points to consider, as we can see on page 24?---Yes.

And there is no difference between the AFP on the one hand, or indeed, the Northern Territory Police, in that regard?---That’s correct.

Now if we turn to page 27. You’ll see effectively, your Tactical Options Model in colour?---That’s correct.

Now I want to ask you just a little bit more if I may about the model itself. Is there a reason why ultimately, the design was circular?---Because it – the circular design represents the fundamental shift from the linear model that I described earlier.

And in terms of training, and the application of the Tactical Options Model, was it to be understood that it could move in either direction?---Precisely.

Now just explain that if you could, to the members of the jury please?---So the – the officer has available the range of options outside the circle. And depending on their perception of the threat, and the formulation of their response, they can move immediately from one. They can go directly to one. Or they can determine there might be a combination of what’s on there. So they might determine we’re going to cordon and contain, and then we’re going to negotiate, or whatever.

Excuse me a minute. You’ll see, at the bottom of page 27 in this training model, the words appear as follows: “Physical confrontations are not static, but are dynamic by nature. The tactical options wheel turns in either direction, moment by moment, to the appropriate option, depending on all the circumstances. These circumstances may include factors such as size, special skills, age or sex of the subject, and police officer.” Do you see those words?---Yes, I do.

Do you embrace that notion?---Yes, I do.

And, specifically, “The physical confrontations are not static, but are dynamic by nature.”?---Absolutely.

Now, you have viewed the body-worn video of both officers, amongst others, Officers Eberl and Rolfe?---Yes, I have.

How would you describe – would you describe that as a physical confrontation?  
---Yes.

Which is not static?---That's correct.

And is dynamic in nature?---Yes.

Before I move to the specifics of that particular occasion, and also the opinions that have been expressed by Senior Sergeant Andrew Barram, I am going to ask the court to play again exhibit 80, which you will remember is video footage that was posted by Senior Sergeant Andrew Barram on his Facebook. Do you remember that video footage?---That's correct.

I'm going to ask that it be played, and then I'm going to ask you some questions about it, in the context of the tactical options model.

HIS HONOUR: Just before you do so, the video which is about to be played depicts seems that may be distressing to some people viewing it. Accordingly, if anybody believes that they may be affected by watching this material, they should now leave the court.

#### DVD PLAYED

MR EDWARDSON: We were discussing earlier, and you were looking, for example, if one has reference to the tactical options model, one of the things that we can see is the different options that might be available to a police officer, depending upon in a physical confrontation and, bearing in mind the dynamic nature of that confrontation?---That's correct.

Before I go any further, I just want you to turn, if you could, please, in this model, to page 64 of exhibit 62 – sorry, 64, yes, which is the edged and blunt weapon awareness, Pt 4 training. You see that?---Sorry, which tab is that?

Page 64, still tab 4, same document, page 64 at the bottom. It is Pt 4, Edged and blunt weapon awareness?---Yes, I've got that.

I'm just going to ask you some questions about that, and I'll come back to this video in a moment, in that context. You'll see that, right at the beginning, it says, "Members should not assume they will be given warning of an impending edged weapon attack, allowing for time and room to prepare. A person carrying a small, easily concealed weapon with a very limited range is unlikely to reveal it until they are within range. Members facing edged weapons can have fractions of a second to respond if the weapons are employed at very short range. People who are attacked

with edged weapons often don't see it coming, until it's too late." Firstly, do you agree with those sentiments?---Absolutely.

And, indeed, is that consistent with the training that the AFP would have received in the course of their training?---Yes.

And training that you, yourself, would have given?---Yes.

That is, that "They cannot assume that they will be given warning of an impending edged weapon attack, allowing for time and room to prepare."?---That's correct.

Does the situation itself determine the appropriate response in any given circumstance?---Yes.

So, here, looking at the video that we're now looking at, which was posted by Senior Sergeant Andrew Barram on his Facebook, with the caption, "Puts things into perspective", or words to that effect, we can see, can't we, that the police officer is armed with what appears to be a Glock?---Yes.

We can see that there is significant distance between him and the assailant?---Yes.

Who is apparently armed?---Yes.

I think you hear the officer say, "Put your weapon down." It's difficult to see in the video; but, nonetheless?---Yes.

I need to ask you some questions about that. Is distance between a person who is armed with an edged weapon and the police officer important?---Absolutely.

Why is that so?---Because the closer the distance, obviously, the greater the danger.

And is there a particular danger zone or distance between the person who is armed with an edged weapon and the police officer?---Well, the general teaching for many years has been based on the Tueller Drill, which, essentially is around 21 feet, being the point at which it could be quite dangerous or considerably dangerous for a police officer.

If you've got distance between – that is, between the police officer and the assailant, does that permit other options that might de-escalate the situation?---Yes.

What sort of options might they be?---Well, if you had such as this here – if you've actually got distance, then – and I'm not sure how many other officers are involved here, but you might, for example, have this officer maintaining lethal cover, whilst one or more other officers, perhaps, would have a Taser ready. So, you can be ready to deploy a choice of multiple options, for example.

What about verbal commands?---Verbal commands is – you hear the verbal commands here, and you would deploy those, I think it would be appropriate to

deploy those, whether or not they were effective. In this case, it appears that they were deployed without effect.

As far as the appropriate response is concerned, in circumstances where an assailant presents an edged weapon to a police officer, what is the training as to what is the appropriate response, understanding that I might depend on the circumstances, of course?---Well, the default response option, which is taught to police around the country, is that when they are confronted with an edged weapon, the default option is the firearm.

Thank you. And, if you present a firearm, do you have to be prepared to pull the trigger?---Yes.

Is there training as to when and if, in fact, the trigger is pulled, how many times a shot should be fired?---Yes.

What is the training?---Well, there are a couple of issues there. The national minimum guidelines released in 1994 train – recommended that police be trained in the firing of multiple shots. And so, the teaching for police is to fire as many shots as they deem necessary to remove the threat.

To remove the threat. So, if one shot does not remove the threat, the training would be that you continued to fire until the threat is removed?---That's correct.

And does the training include where the shot should be aimed at?---Yes.

Where?---Well, they're generally taught to fire to the centre of the seen mass.

Thank you.

All right, can this – now push play again, if you could, please?

DVD PLAYED

MR EDWARDSON: You heard the officer say, "He's still walking towards us with a knife and not following commands." And you would have seen quickly a camera shot of another police officer who has got lethal cover with another weapon as well? ---That's correct.

So, in this case, we have got two officers, both armed with a Glock, reversing or stepping away and trying to keep distance between that individual?---That's correct.

Is that as you would expect police officers, consistent with their training, to respond, at least at that point in time?---Yes.

Can you push play, please?

DVD PLAYED

MR EDWARDSON: Pause there, please.

Now, clearly, it's not possible to tell how many shots actually hit the individual, but multiple shots were fired?---Around seven, I think.

Again, was that consistent with the training that you would expect any police officer to respond?---Yes.

All right. And, at that stage, commands are still being given, as we will see in a minute and I will ask you in a minute whether you believe, at that stage, that the threat was removed.

Push play, please.

DVD PLAYED

MR EDWARDSON: And at that stage, commands are still being given, as we'll see in a minute. And I'll ask you in a minute, whether you believe at that stage, that the threat was removed.

Can you push play please.

DVD PLAYED

MR EDWARDSON: Pause there for a minute.

Now this man's been hit, you don't know how many times, but you think seven shots have been fired. He's hit the ground - - - ?---Either six or seven.

- - - he's hit the ground. He's continued to not comply with the directions that are being given by police officers. And when he gets up, in your opinion, had the threat been removed?---No.

And what happens next?---He – I think on the right, you saw another officer, who had a Taser in his hand, who may have been – may have then determined to try that. But unfortunately, this escalated to a point where it looks like the – the offender has now managed to get hold of another officer, and there's still lethal danger.

Can you push play please.

DVD PLAYED

MR EDWARDSON: Now in this case, lethal force was applied, on two separate occasions, as we can see in that video footage?---Yes.

Initially, when he got within that danger zone, close to the police officer, and multiple shots are fired?---Yes.

The offender then hits the deck, and then gets up?---Yes.

He then takes hold of another police officer?---That is correct.

In obviously dangerous circumstances. And then ultimately, further shots are fired, and that is the end of the confrontation between him and police?---Yes.

Are there any parallels between what we see in that video, and what confronted Zach Rolfe, on 9 November 2019?

MR STRICKLAND: I object.

HIS HONOUR: On what grounds?

MR STRICKLAND: Well your Honour, a) no notice has been provided in relation to that. That's the – there's a procedural issue. That's – that's the preliminary matter.

MR EDWARDSON: Your Honour, this has been – the court – subject of cross-examination, throughout the whole of this trial. This is not some secret.

HIS HONOUR: Is there some other ground that you wish to raise?

MR STRICKLAND: Your Honour, I don't – my learned friend – I withdraw that. The – the issue is whether this witness, whether this opinion is based upon his specialised knowledge. He's seeking to compare – he's not – this is not an opinion about training. He's asking to – he's asking in a broad sense, whether there are parallels between the two events, as distinct from whether there are – if he has an opinion about the training in relation to different officers. So the question is – the objection is, whether his opinion, about the parallels between the two scenarios, is based upon his specialised knowledge. And in my submission, it's not. It offends the opinion law.

MR EDWARDSON: Your Honour, these questions were put to - - -

HIS HONOUR: I don't need to hear you.

MR EDWARDSON: Thank you.

HIS HONOUR: I think you're entitled to ask these questions.

MR EDWARDSON: Thank you.

HIS HONOUR: It appears to me that this is preliminary in any event - - -

MR EDWARDSON: It is.

HIS HONOUR: - - - upon an opinion being given by the witness.

MR EDWARDSON: Of course, it is, yes, thank you, your Honour.

Sorry, are there any parallels between what we see in this video footage that was posted by Senior Sergeant Barram on his Facebook, and the situation that confronted Zachary Rolfe in November 2019?---Yes.

What are the parallels?---Well the major one obviously is that there was an edged weapon involved. There was an attack on police, with that edged weapon.

But are there matters which clearly distinguish the two events?---Yes.

And what specifically can you say about that?---Well the – probably the main one is that – you know, there was significant distance between the subject and – and the officers in this case. So that's – that's very different than a struggle which is, you know, starts off pretty much face to face, and then ends up in a ground struggle.

All right. I'll come to more detail shortly. But there's an expression which has been discussed at some length, certainly by Senior Sergeant Barram and others, known as cordon and contain. Are you familiar with that description?---Yes, I am.

What does it mean to you?---Well cordon and contain is, the easiest way to describe it is what's known in policing as the four C's. So it's a four step process. The first C is to confirm the location of the threat, or of the activity, that it is that you actually want to cordon. The second C is for clear. Which is to clear the area of non-essential personnel, if that's – if that's possible. The third step is to – is the cordon itself. Is to establish the cordon and ideally, you would establish a – a double-cordon, if you like, so that there would be an inner cordon. Whose job is to, for example, cut off runners from a premises, or things like that. And then there's an outer cordon, whose job is to control the access. So in a sense – essentially, the outer cordon is facing outwards, to control access. The inner cordon is – is facing inwards, to basically to be able to see what's happening. And the final element with the cordon and containment is that you then have – have a safe area cordoned, so that you can then send in your arrest teams, or your negotiation teams, or whatever it is that you want to do.

Sounds like a lot of people to be able to cordon and contain?---It does take considerable resources.

In this particular case, in your opinion, on 9 November 2019, given that there were four members of the IRT, and one dog handler, Mr Donaldson, did those officers collectively have the capacity to properly cordon and contain either House 577 or for that matter, 511?---No.

And why do you say that?---Because there's simply inefficient numbers – I just went through the process, ideally, you would have an inner and outer cordon. Forget altogether about the outer cordon, there's just not enough to do the inner cordon.



And you establish the cordon so you can then do something, like send in the arrest team. And five people just doesn't cut it when you want to do those things.

Now you have watched the video footage, have you not, of what's been described as the axe incident?---Yes.

And that's the incident where Kumanjaya Walker, when confronted by two police officers, presents an axe, in a threatening fashion, to Officers Hand and Smith?---That's correct.

And you've seen both videos?---Yes.

That axe would be properly described as an edged and blunt weapon, would it?---An edged weapon, yep - - -

Edged weapon?---Like at the other end.

And again, from a training perspective, let's assume where we're using that as a training model, for example, what would the training tell you about the default response to that event?---Well it'll be similar to the response to any other sort of edged weapon. So the default response would be the firearm.

Now we know that that incident occurred inside House 577, at Yuendumu?---That's correct.

Have you also been shown video footage of Zachary Rolfe, together with Officer Kirstenfeldt, what's described as clearing House 577, before they moved to House 511?---Yes I have.

And I can play it if need be, but in that video, we see, and indeed you would have heard Zachary Rolfe say how he had his hand effectively on his Glock, as he moved through that house?---Yes.

In your opinion, is that consistent with training, and was it appropriate in the circumstances?---Yes, it was consistent, and it was appropriate.

Why?---Because – well there's a couple of reasons. Firstly, hand on firearm is one of the six steps which are outlined, and officers are trained in, if they are to deploy their firearm. It's one of the – it's one of the six logical steps. The second issue is that they were aware, as I understand it that they were about to enter the very same premises where three days before two of their fellow officers were subjected to an attack with an - with an edged weapon, so in my mind in perceiving - going through that process of perceiving that and formulating a response, then it would be entirely appropriate to - at the least - have the hand on the weapon.

When you say, "At the least" you seem to suggest that he could've gone a lot further?---Absolutely.

What do you mean by that?---If that was a training - if that was a training scenario I would make some comment at the end of it about why didn't they actually have the firearm out.

And why is that?---Because the reasons that I just described, they are going into potentially a very very dangerous situation. They had certainly reason to believe that Kumanjaya Walker may be inside the premises. They were aware of his history of violence in terms of his criminal record and they had also been made quite graphically aware of the propensity and preparedness by him to take up a weapon.

Thank you. I am going to direct your attention to some evidence that was given by Senior Sergeant Barram, at page 928 and 929, your Honour. I will just read this evidence to you. Now, I just reconfirm, you've watched the video footage and you've seen the whole incident from different perspectives, that is the incident on 9 November 2019 inside House 511?---Yes.

At page 928 Mr Strickland said this; "Your Honour, I paused it Zulu" -

This when asking questions in examination-in-chief of Senior Sergeant Andrew Barram.

"Your Honour, I paused it, Zulu 9:52:55. Senior Sergeant, in your opinion was it reasonable or necessary for Constable Rolfe to have fired either shots 2 or 3?---No".

"Why do you say that?--Because things have changed substantially from when the first shot was fired."

What had changed substantially?---They'd gone from a standing position in a fairly equal fight to being on the ground with Constable Eberl on top and pinning Mr Walker down."

I will come to the specifics of shots 2 and 3 versus shot 1 but I want to ask you firstly about Senior Sergeant Andrew Barram's description of this being "a fairly equal fight" - what do you say about that?---It's just an extraordinary assertion and it's a ludicrous proposition.

And why do you say that?---Well, firstly it's patently wrong. Secondly, it goes against the very training material that apparently Sergeant Barram has given to so many officers and thirdly, it's in direct contravention of the model itself, which says front and centre - safety first.

All right, I am going to take you now to the specific opinions that have been expressed by Senior Sergeant Barram. By reference to par 128 of his report on 13 March 2020, replicated in evidence, he said this:

"It appears to me that Rolfe fired shot 1 in defence of Eberl. In line with training to have drawn and fired his firearm, Rolfe must've formed the belief

that death or serious harm would result to Eberl and that he had no other option other than to shoot to protect Eberl from being stabbed."

Now, do you agree with that in relation to shot 1?---Yes.

He goes on to say;

"In my opinion that it would be a reasonable belief at that moment in time, given the following circumstances"

And he lists six circumstances;

One, prior knowledge that Walker had armed himself two days prior, to resist arrest. Two, Rolfe had seen a bladed weapon in Walker's hand. Three, Rolfe had actually been stabbed by Walker with that improvised weapon, the logical extension of which is that if Walker was prepared to stab Rolfe he was also prepared to stab Eberl. Four, Eberl was in close physical contact with Walker, who was still armed. Five, police training around the potential lethality of edged weapons, particularly when in close proximity and six, such close proximity means that there is no time or distance in which to consider and deploy other tactical options."

Now those six matters he identifies as supporting his opinion that it would be a reasonable belief that he was defending Eberl at the time that he fired shot 1. Do you agree collectively with those six circumstances he identified in relation to shot 1? ---Yes, I do.

Now, whilst Senior Sergeant Barram acknowledge in cross-examination that all six of those circumstances were still present at the time of shooting shots 2 and 3, he asserted that things had changed, primarily because of the position of Eberl and Kumanjayi Walker on the mattress, you remember that evidence?---Yes, I do.

I need to ask you some questions firstly about your assessment of the extent to which Mr Eberl - Constable Eberl - was in a perilous position on the mattress. Firstly, having viewed the video, was there anything that indicated to you that after the first shot had been fired that the threat had been removed?---No.

And why do you say that?---Because - well, several factors. The - it had - that the struggle had - had gone to the ground but there was still - it was still an extremely active struggle. The evidence would appear to me to show that throughout that struggle Mr Walker remained armed with the edged weapon and it would appear, certainly from his statement after the third shot that he - he intended on using it.

And you are now referring to when he said, "I am gong to kill you" or words to that effect?---That's correct.

What is your opinion as to the danger or dangers that exist in a fight such as the one that we see in the video footage on the mattress - that is on the ground?---In my view

once - once the - once the struggle went from a standing struggle to the ground it became a far more dangerous and dire situation for Constable Eberl and the reasons that I say that is that Constable Eberl no longer had the use of his legs and there's two primary uses of those legs. One is to be able to actually create distance and get away, which is a lot harder when you're on the ground. The second is that in his training he would've been taught - similar to all other police - that the legs can be a very powerful strike weapon and again, that power is - you know, that capability is greatly diminished once you're lying down on the ground and the third reason why I think the situation had become more perilous is that it is far more difficult in a ground struggle to be able to retain the retention of your own weapon. So not only was there potentially the threat of the - of the edged weapon, but it's easier, in my view and in my training, to be able to take a weapon from somebody during a ground struggle than it is during a standing struggle where they can simply push away and twist and create distance.

Does your training tell you anything about how quickly there can be a reversal of position in a ground struggle?---Yes, sir, I've seen hundreds of ground struggles. Taught them for years. I've been involved in ground struggles. It can, you know, you can be watching it, and there's a lot of latent power in that struggle on the ground. And so the result of that is that things can change incredibly quickly. One person can be in a dominant position, half a second later, they're not. And the other person's on top. So it's extremely unpredictable. And extremely dynamic.

I want to ask you a little bit about the comment that was made by Senior Sergeant Barram about what he regarded as the inappropriateness of the second and third shots, when what should have happened, in his view, was that Zachary Rolfe should have reverted to empty hands tactics. Are you familiar with that expression?---Yes.

What does it mean?---Empty hand tactics is - is when you engage using strikes or holds, or you know, might be pressure point techniques, or whatever. So you're engaging with the subject without the use of a firearm or Taser or OC spray. So it's reliant on your - your hands and feet, and what you can do.

In so far as Senior Sergeant Barram has expressed the opinion that after shot one, Zachary Rolfe should have resorted to empty hands tactics, consistent with his training, what do you say about that?---I again say it's a ludicrous statement. And it's - it's just not in accordance with the training, or with the use of force model. I don't understand it.

I want to ask you a little bit more about the weapon itself.

Is - I'm sorry, I should have said this to the Associate before.

Can the scissors be produced, your Honour?

HIS HONOUR: Yes.

MR EDWARDSON: I can keep going with some questions, if you don't mind. If the Associate would perhaps get the scissors while I continue.

HIS HONOUR: Yes.

MR EDWARDSON: And I'll come back to it in a moment.

We know that Zachary Rolfe, apart from his Glock, was also armed with – I think it's called OC spray, and he was also had a Taser on him?---That's correct.

You're familiar with those items?---Yes sir, I've been engaged with both.

What if anything, can you say about the appropriateness of deploying either one of those weapons, if that's the right description, as an alternative to the discharge of the firearm?---Well if I address them one at a time. The OC spray is – is quite effective. But there can be a lot of issues with OC spray. For example, if you're going to deploy OC spray, you need to be at a – at a minimum distance, because ideally what you want is the spray – the spray, the droplets of the aerosol to actually strike the eyes of the person who it's being deployed against. So if I'm trying to use it from inches away, it's just not going to be effective. You need to be a few feet away to use it. It's – you know, even if someone's wearing glasses, you can significantly reduce the effects of OC spray. It's – it's subject to wind and so on. So it's really something that you use to avoid a struggle, rather than when you're in the struggle, if you know what I mean.

All right, was it an appropriate weapon to use in the context of this exchange between Rolfe, Eberl and Kumanjayi Walker?---It would have been totally inappropriate.

And what about the Taser?---Well again, the Taser is a useful use of force option in some situations. But the issue with the Taser again, and I think you heard one of the witnesses explain basically that it fires out a couple of prongs, and then an electrical current goes in-between those prongs. I think it's in the order of 50,000 volts. If you're too close with it, it just has a very localised effect. So it's – the idea is that the two prongs come out at an eight degree angle and they spread as it goes further. So – to a maximum range of about seven metres. And the idea is to get the prongs far enough apart, so that when the current goes through, and it's the amperage, obviously that's more important than the voltage, but it actually effects the major muscle groups. And will then cause the person to, you know, there'll be momentary sort of loss of control of those muscle groups, which will cause sort of involuntary type spasms. So if someone's standing, for example, and they're – and they're hit with a Taser from about three metres, they in all likelihood will lose control of those major muscles, and they'll collapse to the ground. And that then enables you to – to then use other – other methodology. So – the other problem in this particular case as to why it would be inappropriate is, obviously there's two people struggling on the ground. You know you've got to get far – far enough back, for the Taser to be effective. You know, I mean there's a good possibility one prong would hit one subject and the other prong might hit the other subject.

In short, in your opinion, after the first shot had been fired, and after Constables – Constable Eberl and Kumanjayi Walker hit the mattress, was the Taser a proper or appropriate option?---Absolutely not.

Now I wonder if – I think it's Detective Keen, can please ask that the scissors be produced to Mr McDevitt please.

You have to wear some gloves I think?---Can I hold them?

Yes, could you hand them to Mr McDevitt.

Now what I want to ask you about, and just make sure you know what you're doing with it. I want to ask you a little bit about that particular edged and blunt – or blunt weapon. With the exception of the local pathologist, Detective Tiemensma, almost without exception, every witness, who's qualified, has described that as potentially a lethal weapon?---I would agree with that.

MR STRICKLAND: I object

HIS HONOUR: Yes.

MR STRICKLAND: Sorry, I withdraw the objection.

MR EDWARDSON: Do you accept, given your vast experience, that that is potentially a lethal weapon?

MR STRICKLAND: I object, your Honour. If this witness – it's not an opinion based upon specialised knowledge, in my submission.

HIS HONOUR: I understand, if I remember correctly, Senior Sergeant Barram gave an opinion in that regard - - -

MR STRICKLAND: Yes, the foundation for that was laid. That's the difference in my submission.

MR EDWARDSON: Your Honour, in this case, part four, describe scissors as being an edged and blunt weapon. In their training, we've got the various parts of the body, that if exposed to a blunt and edged weapon, will result in death. We've had led by the prosecution, the timetable of death. To suggest that this man, given his qualifications, is not qualified to express an opinion as to whether those scissors are capable of lethal force, is absurd.

HIS HONOUR: I agree with you. You may ask the question.

MR EDWARDSON: Do you accept that that has the capacity, if deployed to the right region, of causing lethal force?---Absolutely.

And indeed, your training permits you to express that opinion, does it not?---Yes, I believe it does.

Don't you train people about areas of the body that are potentially vulnerable, if exposed to weapons such as that?---Yes.

And what does the training tell us?---About the lethality of the weapon?

Yes?---So the lethality of the weapon is determined by three factors. The first is the – the manner in which this weapon is deployed. So if it's – if it's held like that, for example, where we can see just a small – a small part of the weapon - - -

And you're now demonstrating a dagger striking - - - ?---And I could do it like that - - -

- - - highs and low fashion?---So that's – that's correct. That manner of deployment, if which is quite a common methodology used with deployment of scissors, specifically - if the scissors are deployed as what is called a push-knife – so, if I hold these scissors like this – sorry, but – and the rings of those scissors – I'm using the meaty part of my arm – sorry, my hand, so I can lock them in then like that. So, is it okay if I stand up?

Yes, please do?---So, if I then deploy this same pair of scissors in a push-knife technique, you can see, for a start, as opposed to that - - -

As opposed to the dagger motion?---As opposed to that, where there is a limited blade, once I go to the push-knife, I've almost doubled the length of what is available to penetrate exposed areas, and if I was to – instead of going like that, if I was to use the push-knife and – so, it's how the thing is deployed. It is the amount of force that is deployed behind it, and it's the specific area that is targeted. For example, exposed – for an exposed neck and, you know, carotid arteries and so on, you can imagine that could be quite lethal.

I'll just ask that that be put back please - thank you, Detective.

Mr McDevitt, I want to turn now to a separate topic – and I have nearly finished. We heard some evidence about my words – but the separation of this incident; that is, the ultimate arrest of Kumanjaya Walker, into two separate phases; on the one hand, what I'll call the standing up phase, and then the mattress phase. In your opinion, is there any element of artificiality about separating those two things into two separate phases for the purposes of expressing an opinion as to whether Zachary Rolfe did or did not conduct his affairs consistent with his training?---I don't think it makes any sense. I can't see the logic between putting up a divide for two reasons. The first is that this was a single incident, in terms of their training around the issue of subject control. So, subject control is about getting a person who is aggressive to a state where they are non-aggressive or getting a person who is, you know, uncooperative to being compliant – sorry, to being cooperative, or a non-compliant person to being compliant. So, from the point at which they asked Mr Walker to place his hands behind his back, they were attempting subject control. They didn't actually achieve

subject control until two things had happened; one, which would have been the removal of the edged weapon from Kumanjayi Walker - - -

This is after all three shots have been fired?---That's correct. And the second was that they – in order to achieve subject control, it needed to involve Mr Walker being handcuffed, so that he could then be searched or whatever needs to happen then, and that didn't happen until, I think it was 1 minute and 6 seconds after the third shot had been fired. So, it is one event, in terms of subject control, and it's also one event, in terms of the threat presented. So, the only real change – you still have an attack, an ongoing attack with a lethal weapon, it would appear to me, from the standing position, and then on the ground. The only difference was it had moved to the ground. So, in terms of not only subject control, but the threat itself, it was still an ongoing single incident.

Thank you. I'm going to finish now by asking you this. Obviously, you can't speak to Zachary Rolfe's state of mind; that is, what he saw, heard, felt or perceived. But, insofar as your expertise permits, and having looked at all of the evidence in this case; and, in particular, the body-worn video, is there anything that Zachary Rolfe did, on 9 November 2019, which appears to you to be inconsistent with the training that he received?---No, nothing.

Nothing further; thank you, your Honour.

HIS HONOUR: We'll take a short adjournment at this point. Members of the jury, will you retire, please.

JURY OUT



MR EDWARDSON: Your Honour, I'm sure Mr McDevitt would be well aware, being a former police officer, but I didn't actually remind him that we can't talk to him any longer because examination-in-chief is finished.

HIS HONOUR: Yes.

Well, you have heard what Mr Edwardson said. So, you can stand down now, thank you.

WITNESS WITHDREW

HIS HONOUR: I will take an adjournment.

MR STRICKLAND: Excuse me, your Honour.

HIS HONOUR: Yes?

MR STRICKLAND: I will be in a position to deal with any new materials, but I just wish to have half an hour for the morning tea break, to consult - - -

HIS HONOUR: Half an hour?

MR STRICKLAND: Yes, thank you, your Honour.

HIS HONOUR: All right, we will resume at 12:00. Now, perhaps if we go through until 12:45, before the lunch break.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: And then we will resume again at 2:00.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: If that's convenient to everybody.

MR STRICKLAND: Yes, your Honour.

MR EDWARDSON: Thank you, sir.

HIS HONOUR: I will adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Bring the jury in please.

JURY IN

BEN MCDEVITT:

XXN BY MR STRICKLAND

HIS HONOUR: Before cross-examination commences, members of the jury, for your benefit, we'll now sit through until 12.45. At 12.45 we'll take the lunch adjournment through until 2:00 and then we'll resume again at 2 o'clock.

Yes, Mr Strickland, whenever you're ready.

MR STRICKLAND: You – do you agree that you are not giving evidence here today, representing any member of any Australian Police Force?---That's correct.

You're giving evidence because you've been retained as a paid private consultant by the accused, is that right?---No, sir. I'm not being paid a cent.

I see. But you've been retained by the accused, is that right, as a consultant?---That's correct.

Do you have your report there please?---Sorry, sir?

Do you have your first report?---Yes, I do.

And what date is that?---The date I signed the affidavit was on 2 July 2021.

And how many pages was that? Is it 57 pages?---57.

Your Honour, could that be marked please.

HIS HONOUR: That'll be marked for identification with the letters AN.

MFI AN: Mr McDevitt's report dated 2 July 2021.

MR STRICKLAND: Now the last question you were asked by Mr Edwardson, before the morning tea, was, "Is there anything that Rolfe – Mr Rolfe did on 9 November 2019, which appears to you to be inconsistent with the training that he received?" And you said, "No, nothing"?---That's correct.

Can I ask you to turn to your report please, MFI AN, and go to page 55. You were asked to prepare this report by the accused's instructing solicitors, is that correct?---Yes, that's correct.

Having been given a wealth of material, is that right?---Yes, that's correct.

And you've watched the – at the time you prepared the report, you watched the body-worn videos you've given evidence about?---Yes, I did. Yes, I did.

And you've read various committal transcripts of witnesses?---That's correct.

And you'd read the statements of many of the witnesses, including the IRT officers, is that right?---Yes.

And you've been given a lot of other material, apart from that?---Yes.

And do you agree, that in your report, you gave the opinion that you thought Constables Rolfe and Eberl got too close to Mr Walker when they were in House 511?---That's correct.

Do you agree that you gave the opinion that Constables Eberl and Rolfe were focussed, it appears, on initially establishing Mr Walker's identity rather than on their own safety?---That's the way it appeared to me.

Do you agree that you gave the opinion that Constables Rolfe and Eberl did not enter House 511 with a clear plan of action?---That's correct.

Would you agree - do you agree that you gave the opinion that Constables Walker - sorry Constables Eberl and Rolfe failed to instruct the other police that they were in House 511 with an unknown male?---That's correct.

Do you agree that you gave the opinion that Constables Rolfe and Eberl - there was limited effective communication?---That's correct.

And do you agree you gave the opinion that to some extent Constables Eberl and Rolfe allowed Mr Walker to dictate what happened next?---Yes.

And they are your opinions now aren't they?---In terms of the way I looked at this was in terms of hindsight where I've got two pieces of knowledge that they didn't have.

That's not what I'm asking you sir. The opinions you've given in that report remain your opinions, don't they?---From a tactical perspective, yes, with the knowledge that they possessed at that time.

You haven't changed - in relation to those six matters you haven't changed your opinions, have you?---No, they're general lessons learned.

And you would agree, wouldn't you, that in relation to those matters, Constable Rolfe, what he did did not appear to be consistent with his training?  
---No.

Do you agree with that?---No.

Well - - -?---I made these possessed with certain pieces of knowledge that he simply didn't have when he entered that house.

Sir, you know perfectly well that it's part of your training as a police officer to have a clear plan when you enter a house where there is a potential high-risk target, don't you?---Wherever desirable you would - time permitting.

And it was desirable in this case, wasn't it?---Yes.

Right, and if you remain of the opinion that Constable Rolfe not enter with a clear plan of action to enter House 511 then it follows, doesn't it, that he wasn't acting in accordance with his training. Do you agree with that?---I need to explain that, your Honour.

Do you agree - - -?---I can't give a simple yes or no. I made these - - -

HIS HONOUR: If he wishes to give an answer with something more than a yes or no then he is permitted to do so.

MR STRICKLAND: I understand that, your Honour, and I will give him full liberty to do so.

HIS HONOUR: Well, do you want to do that now?

MR STRICKLAND: I will.

HIS HONOUR: Yes.

MR STRICKLAND: I just want to understand the steps of reasoning first. You accept now that when he entered House 511 he did not have a plan of action? ---It appears that way to me.

You accept that he is trained to do so?---Yes.

So can you explain then why you say that he was acting in accordance with his training when he entered House 511 without a clear plan of action?---Okay, I've made six - pointed out six areas where I believe, in hindsight, that they were tactical errors that I believe that the police officers made and the reason that they made those tactical errors were that they did not have in their possession two critical pieces of information that I had at the time that I wrote this. Firstly, they did not know - they may have believed - but they did not know that the person they were about to confront was, in fact, Mr Walker. They secondly did not know that that person that was, in fact, Mr Walker - or the person they believed to be in the house - had, in fact, as we all know, armed himself with an edged weapon. If they had've known those facts I don't believe they would've got too close. I don't think they would have focussed on establishing his identity, I think they would have gone straight in and directed him to the floor or something else. They would've had a clearer plan of action. "He's definitely in there - he's definitely got a weapon, this - that's why we're going to do it this way" - they would've instructed the other police on exactly what was happening and shared the facts that that person was Mr Walker and that person was armed. There would've been much more communication I believe, if they knew

that and I don't think they would've allowed Mr Walker to dictate what would happen next.

Were you aware of the accused's evidence that when Kumanjaya Walker walked towards him, after they entered the house, that he believed that man could've been Kumanjaya Walker?---Well, he seemed to be focussing on trying to identify whether or not that was the case.

That's not what I'm asking, sir. Are you aware that that was - - -

MR EDWARDSON: Can you just put (inaudible) that passage please?

MR STRICKLAND: Sorry. It's an objection?

MR EDWARDSON: Sorry, would you mind just - if we could just go to the actual passage of the evidence he gave in that regard.

MR STRICKLAND: Yes.

MR EDWARDSON: Rather than the descriptive?

MR STRICKLAND: I'll read from page 1158. I'll just read this - you were here for the accused's evidence, is that right?---That's correct.

You'd seen - this is a question:

"You'd seen Mr Walker several times in the body-worn of the axe incident, is that right?---Yes."

"You had a photo of him?---Yes."

"You were told by Mr Ethan Robertson that, 'He could be in House 511'? ---Yes."

"And do you remember Constable Eberl saying he thought there was a man who was walking to the back of the house?---Yes."

"Well, didn't you think that the man walking towards you might have been Kumanjaya Walker?---Yes."

You heard that evidence?---Yes.

And do you remember hearing the following evidence:

"And you believed that man you said was extremely violent?---Yes."

"You'd seen him attack other officers with a weapon?---Correct."

Do you remember hearing that evidence?---Yes.

So, if the accused believed that the man walking towards him might have been Kumanjayi Walker and bearing in mind the accused - and bearing in mind the axe incident and the accused's knowledge of Mr Walker's criminal history, do you really say that it was consistent with his police training to enter House 511 without a clear plan of action?---Given the circumstances that they were faced with - yes, they were - they'd seen a person in the back of the house, they had reason to believe that it might be Mr Walker, they approached the house, it didn't appear to me that they had a clearly agreed plan of action, I agree, but I think that their actions were entirely reasonable in seeking to establish that person's identity. They weren't tactically perfect.

Sir, you have said that the reasons for your criticism of Constable Eberl and Walker (sic) was because they didn't have two pieces of information that you had. The first is they did not know that Kumanjayi Walker was the person that was coming towards them, correct?---That's correct.

But if you believe it might be, that amounts to the same thing, doesn't it?---No, it's a different thing. They may have taken other actions. They may have decided not to seek to first establish his identity if they believed it was Mr Walker. Other options were open to them. As I say, as Mr Walker came towards them, they could have said, "Freeze. Stop right there. Don't move. Get on the ground", or whatever. That's just a simple example, but they chose the way it was. They focused on establishing his identity.

Police officers are trained to deal with risk, aren't they?---Yes.

And risk, in real situations, often involves imperfect information, doesn't it?---Well, ideally, you do a risk assessment before you do anything.

That's not what I'm asking, sir. Real live situations involve assessing risk with imperfect information. That follows, doesn't it?---You assess it with what's available to you, with the intelligence available to you.

And it's often imperfect, isn't it?---Yes, it's often lacking.

And so, what the accused had was he was told by Mr Robertson that Kumanjayi Walker could be in House 511, you understand that?---I think he said, "Over that way, 511 or 518."

Could be in House 511?---Yeah, or could be in House 518.

He spoke to a woman in House 518 who indicated that Mr Walker could be in House 511, did you know that?---I believe that's correct.

But you're not sure?---I'm trying to recount the evidence.

He was told that there was a man walking in the back of the house?---That's correct.

And he believed that the man in the house walking towards him could be Kumanjayi Walker. You understand all that?---Certainly open to consider that, yes.

And yet, you think that, because he didn't know that man was Kumanjayi Walker, that justified him going into House 511 in the manner he did, is that right?---No. I base these comments – I'll say it again. I base these comments knowing that the man was Mr Walker and knowing that that man was armed with a concealed edged weapon. I make these comments in that context and I pointed out the tactical errors that I believe had been made.

What you describe as the tactical errors arise whether the accused knew the man was Kumanjayi Walker or whether he realised he could be Kumanjayi Walker. Do you agree with that?---No, I think knowledge – if they had the knowledge of those two things, then I believe they would not have made those errors. They would have approached it slightly differently.

You have no idea what Constable Rolfe would have done if he had different knowledge, do you? You're just guessing?---Well, I do, if he was following his training, because if he was following his training, and he knew for a fact that the person he believed was Mr Walker, and he knew for a fact that that person was in possession of an edged weapon, then his training would have dictated that he take a different approach. The fact is, he didn't know those things.

I want to suggest that, if he was aware there was a risk of those things, you would also – it also consistent with your training to have a clear plan of action. Do you agree or disagree with that?---I agree.

You say that they failed to instruct other police; that is, Eberl and Rolfe, that they were in there – that is, in House 511, with an unknown male?---Yes.

And you could hear some communication on the radio, couldn't you?---Yes.

But that communication did not include, "We have found someone" or "There is someone else." Is that what you mean by that?---That's correct.

And that is something that they should have done?---I think so.

You say that there was limited effective communication?---Yes.

And that is something different from the previous point, about failing to instruct other police that they were in there with an unknown male. It's a different point?---Well, it's – there was limited effective communication shown by the previous point as well.

But 5 is a separate point from 4, isn't it?---Yeah, it is.



And what's the separate point?---Well, if you're going to go into the house, ideally, every person of that five-person team would know what it was that you were going to be doing and, to me, that didn't seem to be the case.

When you say "ideally", from your knowledge of the circumstances of this situation, there was no reason, was there, why Hawkings, Kirstenfeldt and Donaldson couldn't have been told they were going into House 511?---They could have been told.

And they should have been told?---Yes.

Now, you were asked to look at exhibit 80 – that is the Facebook posting, do you recall that?---Yes.

I'll just ask if the last half of that could be played again, please.

What I will do, I'll just ask you some questions, but if you want to see it again, we'll play it again, because - - -?---I don't need to see it again.

You don't need to see it again? How many times have you seen it?---Twice, I think, now.

All right. Do you recall, in the last part of that video, the officer – you recall that the assailant, having been shot, gets up, correct?---Yes.

And he then runs and grabs one of the officers?---Yes.

You recall that officer saying, "He's got my gun."?---Yes, or words to that effect.

You recall that?---Yes.

And that is part of police training, isn't it?---Yes.

To yell out, "Gun" or, "He's got my gun"?---Yes.

Because you are aware, aren't you, that it is potentially extremely dangerous for an assailant to grab a police officer's gun?---That's correct.

It is regarded as one of the most dangerous things that can happen in a combat situation, isn't it?---Yes.

And that's one of the reasons that a Glock, for example, has a retention safety device, or a retention device?---Yes.

To prevent an assailant from immediately grabbing the gun?---Yes.

One of the reasons why a police officer is trained to yell out, "Gun", is to warn anyone else in the vicinity of that fact?---That's correct.

And you are aware, aren't you, that in House 511, the accused says that Kumanjayi Walker put his hand on the accused's Glock?---That's correct.

And you didn't hear the accused yell out, "Gun, or, "He's got my gun", did you?---No.

And that is not consistent with police training, is it?---I need to just explain this a little bit. The gun calling out is a verbal command - - -

Can I just ask – you may explain it, but do you agree or disagree with that?---That, where possible, you would yell out and that would be consistent with the training, if the circumstances allowed it.

Sir, have you had any experience in the Northern Territory operational policing context?---No.

Have you had any experience in policing in Aboriginal communities in the Northern Territory, or Western Australia?---No.

Do you know how many police officers there were in the Northern Territory in 2019?---In the order of 1400.

And how many were in the AFP at that time?---When I left the – I think when I was a senior executive there, there were about 2700 and the AFP went through a significant growth process, in response to counterterrorism. I'd say it's now in the order of about 7000.

The Northern Territory is one of – is the smallest police force in Australia?---No.

ACT?---Yes.

All right, apart from the ACT, it's the smallest is it?---Yes.

And you understand that policing depends upon the actual resources that can be deployed at any given moment?---Yes.

That in considering, for example, matters such as cordon and contain in a given environment, you deal with the resources you are given, is that correct?---Yeah, you deal with the resources that are allocated to the operation by management and the executive team.

And that allocation can often depend upon the resources that a particular jurisdiction has, correct?---That's correct.

Yes. Are you aware that in the Northern Territory, police officers face assailants with edged weapons on a fairly regular basis?---I'm not aware of the number. I would expect they would be. That would be consistent with most police forces.

Are you aware that in the Northern Territory, officers facing edged weapons often arrive at or have a peaceful resolution to the situation?---I don't have – I don't have the specific outcomes of particular confrontations.

AFP officers – would you agree with this, AFP officers would not face edged weapons with the same regularity as Northern Territory police officers?---Incorrect. Incorrect.

You disagree with that do you?---With had an AFP officer in Melbourne on a counterterrorism job that was stabbed only a few years ago.

I'm not suggesting - - - ?---We've had - - -

- - - I'm not suggesting it doesn't happen. It doesn't happen with the same frequency, does it?---I don't know.

You don't know. Right. I want to ask you about what you say about House 577. You said that hand on a firearm is a legitimate step?---Yes.

Right. But do you agree, or do you know, whether in the Northern Territory, police are trained not to release a retention device, until the firearm is drawn?---I didn't find any reference to that in the training material that I read.

I understand that, but I think – you haven't trained any officers in the Northern Territory have you?---No.

So do you know whether Northern Territory officers are in fact trained whether to – that they're not to release the retention – retention devices until they've actually drawn the firearm?---It doesn't appear either way, in the training material.

I'm not asking about the training material, I'm asking you about the actual practicality, the practise of their training. Do you know one way or another?---I draw my knowledge from the practise from the material that I've read - - -

And that's - - - ?---The training material.

- - - and that's the only source of the knowledge isn't it?---Yes.

Because you haven't trained Northern Territory Police Officers, have you?---I've trained with Northern Territory police instructors.

But you haven't trained the Northern Territory Police Officers themselves, you admitted that?---I'm a member of the Australian – I was a member of the Australian Federal Police. Not the Northern Territory Police.

Yes, so can you answer my question?---So the answer's no.

And you know that – withdraw that. A hand on the firearm indicates that a police officer intends to deploy the firearm, doesn't it?---Not necessarily. You could place the hand on the firearm and then go back down to step one. You don't – once you're embarked on those six steps, you don't necessarily have to go through all of them. That's the whole idea of the model.

But a hand – to put it more precisely perhaps. A hand on the firearm indicates a readiness to deploy the firearm, doesn't it?---It's a logical step in that process, yes.

Well a logical step in the process means, doesn't it, in normal speak, a readiness to deploy?---Yes, yes.

And you know that in House 577, there were children present in that house?---I believe there was one child. I think a 10-year old, I'm not sure if there were others, or a 10 or a 12 year old.

Have you seen the body-worn video of the search of House 577?---Yes.

Did you notice whether there was any children in the house?---I'd have to see it again. I'll take your word for it if there was.

Let's assume there was?---Let's assume there was.

Do you think that before a police officer enters a house, or entered that house, with their hand on the Glock, being ready to deploy it, that any children should have been evacuated beforehand?---No.

No? Is that what you say?---It wouldn't have been practical.

How do you – how do you know that sir?---Sir I've – I've – sir I've gone into dozens of houses, with far more fire power than what Mr Rolfe had, which have had children inside them.

What – what was the urgency in entering House 577 – withdraw that question. Do you understand, or do you know, that evidence in this case is that the accused and Constable Kirstenfeldt were told that the accused was not in House 577, at that time?---That's correct, by the child - - -

I withdraw that – I'll start again. Were you told that Kirstenfeldt and the accused were told that Kumanjyi Walker was not in House 577 at the time?---By the child.

That's right, by the child?---That's correct.

And that he'd just left?---That was the child's words.

That's right. Happened to be correct. Was there any urgency in those circumstances, to go into House 577 before asking the child to leave the house?---Yes.

You're saying the situation was so urgent that you had enter the – they had to enter the house, without suggesting the child leave beforehand?---Sir, the information that they'd been given was a single source, uncorroborated by a child that Kumanjayi Walker was not on the house. They had been given five different locations of interest. This was the first one. It was logical to – to me, that it would make good sense to eliminate each of those houses, and be sure that before they went to 511, that in fact, Kumanjayi Walker wasn't in 577. So there was a sense of urgency. Because they had been told that he had left three minutes earlier. They needed to ascertain if that was a fact. And they needed to do that quickly. And that involved checking 577, to make sure that in fact what the child – the child's uncorroborated evidence, was actually true.

You say that five people in that situation was not enough to cordon House 511, is that correct?---Yes.

Do you know there was only one entrance to the house?---Yes I think that's the case.

You think five people are not sufficient to cordon a house with one entrance?---I think – I think it would depend on their knowledge at the time, about how many entrances there were. I think there were windows in the house, and so on. There's other points of exit other than doors.

Which other point of exit was there in House 511?---I'm not sure - - -

Apart from the front door?---I'm not sure. I'm saying most houses have windows. I don't know if that one did or not. But if it did have a window, that's a point of exit.

Assuming there was only one point of exit. Five people sufficient to cordon that house isn't it, do you agree with that?---No.

You don't?---No.

You need more than five people to cordon a house with only one exit?---You can't - you can't cordon a house without doing something - what are you going to do when you cordon a house - where's the people who have been going to be the arrest team? There's - you do the cordon so you can do the other thing. You don't set up a cordon for the sake of setting up a cordon.

So you disagree with that - my proposition, do you?---Yes.

If you needed more people for a cordon - there was nothing preventing the officers from calling more people out - or another person or other persons out, was there? ---That was an option available to the NTPS long before these five officers arrived.

It was an option available to Constable Rolfe before he entered House 511 wasn't it? ---It would have been an option, yes.

Now, you have provided an opinion that you thought that there was greater danger to Constable Eberl being on the mattress than when he was standing up?---That's correct.

And in your report - do you have MFI AN?---is that the first statement?

First report?---Yes.

Page 47. I'm sorry, I beg your pardon - page 44. You said,

"In my view" - this is about halfway down the page - "the situation for Constable Eberl who did not appear to have been aware of the potential lethality of the weapon held by Mr Walker was dire".

Do you recall giving that opinion?---I wrote that on the information that I had at that stage, I wrote this - - -

And you understand that information is wrong, don't you?---Well it - it now appears that it - it has emerged that Constable Eberl was aware - - -

Yes?--- - - - that there was some sort of implement in Mr Walker's hand.

Something sharp in his hand?---That's correct.

So that part - that assumption that you have made was incorrect, is that - do you agree with that?---Based on the current knowledge that we all have, yes, I made that assumption based on the statements that - the knowledge that I had at the time of writing this report.

So you now know that when Eberl - at the time Constable Eberl was on the mattress he had seen something sharp in Kumanjaya Walker's hand. Do you agree with that? ---That would appear to be the evidence that he has given.

Yes. Now, do you agree that there were two distinct phases to this struggle?---No.

I haven't quite finished the question. The first one is when Kumanjaya Walker and Constable Eberl were standing up and the second one is when they are both - when Constable Eberl is on top of Kumanjaya Walker on the mattress?---Well, you could break it into phases. As I've already stated, it was a single struggle. At one point they were standing, at one point they were on the ground, the contact - the physical contact between them was continuous throughout so I would describe it as, you know, I mean you can break it into however many phases you like, but the way I see it it was a single encounter.

Your opinion that it was necessary - or it was reasonable - for the accused to fire shots 2 and 3 is based upon an assumption isn't it, that Constable Eberl did not have effective control of Kumanjaya Walker on the mattress. Do you agree with that?---No.

What is a critical part of your opinion that - you assume, don't you, that Constable Eberl did not have effective control of Kumanjayi Walker on the mattress?---No, that's not why. I express the opinion based on several things, one which was that there was an ongoing dynamic unpredictable struggle. I'd also read the statement from the medical practitioner who had said that the first shot had not incapacitated Mr Walker and I'd also seen the evidence of Constable Hawkings who had stated that the struggle was ongoing, so I based that opinion on several factors, not just the factor that - of that he wasn't under control by Constable Eberl.

What you have - I'll take you to page 43 of your report. You said:

"It appears to me from watching the body-worn video that Constables Rolfe and Eberl did not have effective subject control of Mr Walker until some 30 seconds later"

?---That's correct.

"When they appear to have him stabilised on the ground"

?---Yes.

So your assumption isn't it - to the extent that they were able to apply the handcuffs - that's what you said isn't it? I'll read the whole sentence - - -?---Yes, yes, yes, I've said that it - they did not have effective subject control of Mr Walker because there was an ongoing struggle, they had not achieved subject control until they had him stabilised to the extent that they were able to apply the handcuffs.

And you say, don't you, because you believe that during that whole period your opinion is that Kumanjayi Walker was constantly moving?---From - from - it's extremely difficult to tell because of the lack of clarity but it seemed to me that both parties on the ground seemed to be moving quite continuously.

You understand the critical - a critical period - if not the critical period - is from the time Kumanjayi Walker and Constable Eberl fell onto the mattress until shots 2 and 3 were fired. Do you understand that?---Yes.

And that's approximately - a period of approximately three seconds?---Yes, 2.6 and then .5.

I want to suggest that you've seen the body-worn video?---Yes.

Of Constable Rolfe?---Yes.

And you can't see, can you, Constable - you can't see Kumanjayi Walker's right arm moving during those three seconds, can you?---No sir, there's a lot of - there's a lot I can't see.

You can't see Kumanjaya Walker's upper body moving during those three seconds, can you?---I can't see whether it is or not sir.

You can't see Kumanjaya Walker stabbing Constable Eberl in those three seconds, can you?---I can't see - I can't see a lot of detail because there isn't a lot of detail to see.

See, you gave evidence - you were asked about the scissors that you were shown? ---Yes.

And you vigorously and enthusiastically moved your arm, demonstrating how those scissors could be deployed, correct?---How they could be deployed.

You stood up and you demonstrated to the jury how those scissors could be deployed, is that right?---To assess the - to demonstrate the potential lethality of that type of weapon.

And when you gave that demonstration you had your full range of arm movement, didn't you?---Yes.

But you had no idea whether Kumanjaya Walker had any range of movement at all during the three seconds, do you?---I can't comment because I couldn't see what range of movement was available to him.

So if he had no range - just assume he had no range of movement in those three seconds, he couldn't have deployed the scissors, could he?---Well, that's making the assumption that he was pinned for the entire period of the three seconds that the actual struggle wasn't moving, so - - -

Assume that. Assuming he couldn't have deployed - he could not have moved his arm during those three seconds, do you accept - you accept that he couldn't have deployed the scissors?

MR EDWARDSON: I object to the question. Your Honour, it's hopeless putting an assumption which has no foundation in evidence. We've been through this time and time again, there is no evidence at all because the video itself does not depict in any shape or form - and everyone has acknowledged this including Senior Sergeant Barram and indeed Dr McIntosh. My learned friend can put whatever assumptions he likes. But the assumptions have to have a foundation in evidence. And there is no evidence - - -

HIS HONOUR: And the jury will be told that in due course.

MR STRICKLAND: Well your Honour - - -

HIS HONOUR: I'm allowing you to ask the question.

MR STRICKLAND: You are, thank you.



Do you want me to repeat it?---Yes please.

Assuming that Kumanjaya Walker's right arm, that is from his upper arm to his lower arm, was pinned underneath his own body and the mattress, then you accept, don't you, that he would have had no ability to deploy the scissors. Do you agree with that?---He would have had a partial, and a temporary incapacity, in terms of the full movement of that arm.

Do you accept what I put to you or not?---Yes.

You have given the opinion that – I withdraw that.

HIS HONOUR: Are you likely to be much longer, Mr Crown?

MR STRICKLAND: I note the time. That's a convenient time, your Honour.

HIS HONOUR: All right.

Members of the jury, would you retire please.

JURY OUT

HIS HONOUR: And you may stand down, Mr McDevitt, and again, because you're under cross-examination, please don't discuss your evidence with anyone. Thank you.

WITNESS WITHDREW

HIS HONOUR: Now, unless there's anything that counsel want to raise, I'll adjourn.

MR STRICKLAND: No, your Honour.

HIS HONOUR: Thank you.

Look, Mr McDevitt's first report has been marked for identification. Are you content for it to remain with Mr McDevitt for the moment?

MR STRICKLAND: I don't mind at all, your Honour.

HIS HONOUR: All right.

And in fact, perhaps another copy of the report can be provided.

MR STRICKLAND: We'll arrange – is your Honour – yes, we'll arrange that.

HIS HONOUR: All right.

I'll adjourn.

LUNCHEON ADJOURNMENT

RESUMED

HIS HONOUR: Yes, can we bring the jury in, please?

JURY IN

HIS HONOUR: Yes, whenever you're ready, Mr Strickland.

BEN MCDEVITT:

MR STRICKLAND: Sir, do you still have your statement in front of you?---Yes, I do.

Can you turn to page 49? In the last paragraph of that page, and over the next page, you give some – make some observations about both the substantial benefits of the body-worn video that you were provided, and the limitations, is that correct? ---Yes, that's correct.

What you have observed is, in your opinion, there were substantial benefits to be obtained for the technical capacity to significantly slowing down and freezing – and freeze-framing body-worn video footage, to ascertain timings and sequences of movements seen on the screen?---That's correct.

You said there are also benefits to be obtained via enhancing images with additional light and magnification, is that right?---To improve clarity, yes.

But you also, quite properly, if I may say so, made observations about the caution you should use in you looking at the body-worn, is that correct?---That's correct.

So, first, you observed the footage on the screen emanates from the camera lens, as distinct from the human eye, is that right?---That's correct.

And, therefore, there may be a different height, angle and perspective, as compared to the human eye?---That's correct.

And you say it may vary significantly; that is, what you see on the body-worn may vary significantly from what the human eye sees, is that correct?---Yes.

I should say, from what the wearer of the body-worn video sees?---Yes.

And you say there is another what you described as a cautionary note, which relates to creating a somewhat false perception of time by looking at it frame by frame, as distinct from in real time, is that correct?---That's correct.

And what you have to do – what you had to do was assess what was happening in real time, not in frame by frame, is that right?---Also what the officers had to do.

That's right. Okay. Now, if I can just take off – if I can just commence where I left off before lunch, I was asking about – to make an assumption about the position of Kumanjayi Walker's right arm and the mattress?---Yes.

Before shot 2 and 3 are fired. Do you understand that is the area I'm asking about? ---Yes.

So do you agree that if you assume that Kumanjaya Walker's right arm only was pinned between his own body and the mattress, that would affect his ability, or capacity to deploy the scissors against Constable Eberl?---If I was to assume what you're saying.

Yes, just assume, do you agree with that?---Well, yes, I would.

Yes. It would affect the speed in which the arm could be deployed, correct?---Yes.

The velocity of the – and the force to be used?---Yes.

And that in turn, can affect the level of threat?---Yes.

So when I – just to be clear, I was talking – you understand those questions were assuming there was only the upper arm. That is, it was partially under the body, do you understand what I'm saying? The questions I asked you were if only the upper arm was pinned?---Yeah well the - - -

HIS HONOUR: I don't think that was the question that was put.

MR STRICKLAND: I'm sorry, I didn't hear you, your Honour.

HIS HONOUR: I don't think that that was the question that was put.

MR STRICKLAND: Okay, just excuse me, your Honour, I'll just – I'll just – I'll have to clarify. Excuse me for a moment, your Honour.

I'll have to start again.

HIS HONOUR: I think it was just generally the arm. But I could be wrong.

MR EDWARDSON: That was the case, your Honour.

MR STRICKLAND: Okay, I understand.

I'll move to the next part. If you assume – when I say the upper arm, I'm talking about from the shoulder to the elbow. Do you understand that?---Yes.

So if you assume that only the upper arm was pinned between the mattress and his own body, do you agree that would also affect, to a degree, his capacity and ability to deploy the scissors?---Yes.

All right. That is, it would affect it in the way described. It would affect the speed in which the arm could be deployed, and the velocity and force to be used?---Yes.

And that itself can affect the level of threat?---Yes, the level of that incapacity - - -

Thank you?---Would affect the level of threat.

So can I just ask you about something you said before lunch. This is at 1254 at line three. You were – one of the bases of your opinion about – that it was more dangerous and dire when Constable Eberl was on the mattress as compared to when he was standing up, was because to use your words, “Constable Eberl no longer had the use of his legs”, recall saying that?---That’s correct. He didn’t have the full use of his legs.

Well what – I’ll just repeat what you said. “And the reasons that I say that is that Constable Eberl no longer had the use of his legs, and there’s two primary uses of those legs”. Do you remember saying that?---Yeah, that’s correct.

Okay. You know, don’t you, that officers are trained to use their own legs to assist an assailant to go to the ground for example?---I’ve taught techniques such as tripping and so on.

The answer is yes to that question?---Yes.

All right. And – by the way, when you say you’ve taught such techniques, when did you last teach those kind of techniques?---In the 90’s.

Which part of the 90’s?---Probably the mid-90’s.

Mid-90’s. So we’re talking about, what 25 to 30 years ago?---That’s correct.

Now do you agree that – well do you know whether officers are trained, that when they are on the ground, that they can control persons by using their legs?---They may use their legs to partially hold part of another person on the ground.

Well, you’ve seen the footage of Constable Eberl, haven’t you?---Yes.

While he’s on the ground?---Yes.

On top of Kumanjaya Walker?---Sir, when I look at that video, I find it extremely difficult to discern with any certainty, exactly where each body part is. It’s swiftly moving.

But, do you say you can’t – there is no part of that body-worn video that you’ve seen, where you cannot discern Constable Eberl on top of Kumanjaya Walker?---That depends on what you mean on top of him. I don’t see him fully on top of Mr Walker, if that’s what you’re saying.

Well do you see him on top of Mr Walker at all?---I see a – I see a struggle and I see – I see people – I see movement.

I understand?---So I’m not sure there’s – if you – if you want me to identify a specific frame - - -

The first - - - ?---Where – where what you’re saying is right, then you could maybe take me to it and I’ll tell you exactly what I can see.

What I’m asking is, do you say now, that when you look at – you understand that from the time they fell onto the mattress, Eberl and Walker, until the time of the third shot, we’re talking about three seconds?---That’s – that’s correct.

I beg your pardon?---That’s correct.

So in those – and you understand that’s the critical period - - - ?---Yes.

- - - that you’ve been asked to consider?---Yes.

Can I ask you this. In those three seconds, are you saying that you couldn’t discern whether Constable Eberl was at any stage on top of, to any extent, Kumanjayi Walker?---He may have been partially on top of him.

And do you say that at – in those three seconds, do you say Constable Eberl wasn’t using his legs at all, to control Kumanjayi Walker?---I can’t tell what he was using his legs for. His legs may have been there purposefully, placed there. Or it made have been – may have been simply the momentum of the struggle, which ended up with one of his legs being across Mr Walker. I’m not sure.

Do you agree that officers are used – are trained to use their legs, when they’re on the ground, to try and control the subject?---I never specifically trained officers on the ground to use their legs to try to pin down a –a subject.

And do you know whether that occurred in the Northern Territory or not?---No.

Because your opinion, is based in part, upon the assumption, to use your words, “That he no longer had the use of his legs”?

MR EDWARDSON: Well I object to that question, your Honour. Because that doesn’t accurately reflect the evidence that he gave. At page 1254, he explained what the legs could be used for, in that context. Not the way in which my learned friend’s put the question.

MR STRICKLAND: Well, your Honour, he – the opinion is, “That he’s in a far more dangerous situation, more dire situation. And one of the reasons is, the reasons that I say that is, is that Constable Eberl no longer had the use of his legs, and his two primary uses of those legs.” And that’s what I’m putting to him.

HIS HONOUR: All right, continue.

MR STRICKLAND: Do you agree with what I’ve just put to you? That one of the bases of your opinion about the fact that it’s a more dangerous and dire situation, is because you assumed, that Constable Eberl no longer had the use of his

legs?---Yes, and when I made that statement, I referred my – my reference point was that the legs can be used as a strike weapon. For example, to use the knee with force and target the common perineal nerve, similar to when you give someone a dead leg, or whatever, when you can get momentum behind it and that sort of thing. So my reference to him not having the use of his legs, was more about the use of those legs as to deliver strikes, than it was to use those legs to potentially try to restrain a subject.

But you accept that a person's legs can be used to in fact attempt to restrain a subject, whilst on the ground?---I don't know if the Northern Territory Police teach that particular technique or not.

But you - - - ?---I didn't teach it.

But you know a person can do that?---Potentially they could.

Well, a – of course potentially. But a person can actually use their legs to actually attempt to control a person on the ground. You'd accept that, wouldn't you?---You could attempt to control their movement. You're certainly not going to control a person on the ground by just having your legs over their legs.

I'm not suggesting that is the only way, but it's one of the measures, isn't it?---If – if they're trained in techniques to do that, then I would accept that.

Okay, you know – were you aware that Constable Eberl had significant martial arts training?---No.

You gave evidence that an officer is trained to fire until the threat is removed?---That's correct.

And that you accepted before lunch that an officer should only fire their weapon if there is a threat of death or serious harm?---That's correct.

And you accept, therefore, that if there was no immediate threat of death or harm, then it's not necessary or reasonable to fire a weapon?---That's correct.

Do you agree that if, as a consequence of the first shot, the level of threat changes, then that is a reason why an officer should no longer – or the officer in this case, Constable Rolfe, should no longer fire the weapon?---That's correct, if the threat had been removed, after one shot, then it wouldn't be appropriate or necessary to discharge further shots.

So, it's your evidence that the threat of death or serious harm was unaffected by shot 1?---It remained.

Was it unaffected by shot 1?---I can only take into account the material that's been put before me, which included the medical report, to say that it didn't hit any – for example, it didn't hit the arm that was holding the edged weapon. I also reference



the statement of Constable Hawkings' observations, that there was continual movement.

Do you know where shot 1 did hit?---Sorry?

Do you know where shot 1 did hit?---My understanding it was the lower torso, at the back.

Do you know the trajectory of the bullet, or where it went?---No, not with detail. I'm not sure what organs it may have struck, if any.

Well, you know because you've included in your report that it disrupted the rib, correct?---If that's in the report. I read the report.

Have a look at your report, at page 51?---Where I'm quoting Dr Towsey?

You said this, recording what you said about Dr Towsey: "After reviewing the body camera footage, the first shot was into the right posterior chest wall at the right 11th intercostal space. According to the autopsy report, this was associated with the disruption of the right 11th rib. The posterior aspect of the right hemi-diaphragm and the projectile was found lodged in the right psoas muscle."?---Yes, that's me quoting Dr Towsey.

Yes, and do you know what the psoas muscle is?---No.

Well, would it be right to say that you don't have the medical experience or knowledge to know whether the first shot affected Kumanjaya Walker's ability to resist Constable Eberl?---Well, I'm simply referring to the same document you are, in the line where it says, "No vital organs were injured with this projectile and I would not consider this shot to be incapacitating to the deceased." So - - -

That's not what I'm asking?--- - - - I'm referencing the same paragraph.

Your opinion - is your opinion that the threat of death or serious harm was unaffected by shot 1?---Yes.

Do you know whether shot 1 had any affect, not to his vital organs, but to, for example, his strength – that is, Kumanjaya Walker's strength?---Well, I don't have the specific knowledge to be able to comment on that.

Do you agree that you couldn't say whether the threat of serious harm or death to Constable Eberl was unaffected by shot 1?---On the material that I reviewed, including the comments that we have here in front of us from Dr Towsey, including the eyewitness evidence given by Constable Hawkings, who was standing and seeing part of this ongoing struggle, and the evidence and what we see, in terms of the continual movement and the dynamic nature of the struggle, it's a combination of those three things that led me to conclude that it would be reasonable to consider

that the first round fired did not incapacitate Mr Walker to the extent that the immediate threat had been removed.

I'm talking about – I'm asking you something subtly different, do you understand that? I'm talking about the effect of shot 1. Do you understand that?---Yes, and I said I don't know enough about anatomy to be able to say what particular effect it is. I only know what Dr Towsey has said about that shot.

Can I suggest, it's not just a matter of anatomy? You don't know whether shot 1 affected Mr Walker's ability to resist Constable Eberl with the same degree of strength as if – compared to if shot 1 had not occurred?---Sir, as I said, I can't discern a lot of detail from struggle, but it seemed to me that it didn't because, even after the third shot, what I could see was vigorous resistance and vigorous struggling by Mr Walker, accompanied by a clear intent, so it would seem to me that certainly the first shot didn't seem to remove – certainly didn't remove the immediate threat and I don't really see any evidence of it even reducing that threat.

And you say that there was still resistance after shots 2 and 3, is that correct? ---Absolutely.

So, from your opinion, shot 1 had not effect, from a tactical perspective, is that right? ---Yes.

And nor did shots 2 and 3?---I didn't say that in relation to shots 2 and 3.

But you say that - - -?---I said that he continued to struggle and resist after the third shot.

So, he continued to struggle and resist after shot 1, correct?---That's correct.

He continued to struggle and resist after shots 2 and 3?---Yes.

So, shot 1 had no effect from a tactical perspective, correct?---That's correct.

And doesn't it follow, from what you just said, that shots 2 and 3 also had no effect, tactical effect either?---No, it doesn't because we saw from the autopsy report and the medical evidence that the trajectory of those second bullets was – did strike vital organs. So, there was obviously some physical incapacitation, in that the normal functioning of those organs had been affected.

But what you're saying, as I understand your evidence, is when you observe the body-worn – forget – at the time you're observing the body-worn, you're saying shot 1 had no tactical – had no effect from a tactical perspective because resistance continued ?---Yes, based on those three different pieces of evidence that I - - -

And you're also saying based on the body-worn, given that he continued to resist after shots 2 and 3, based on the body-worn, then that also had no tactical effect, simply looking at the body-worn?---Well, I can't comment with the same confidence,

in relation to shots 2 and 3 because at the time of writing this report, I knew that, in fact, shots 2 and 3 had caused some incapacitation to Mr Walker.

You say that the threat did not disappear until the accused's right arm was grabbed by Constable Rolfe, is that right?---The threat didn't disappear?

Yes?---Okay.

Is that what you say?---In my view, subject control had not been achieved, nor had the threat been removed until the weapon had been removed from Mr Walker and Mr Walker had been handcuffed. At that point the threat was removed.

So, the threat was removed by the accused grabbing Mr Walker's right arm and putting it behind his back, correct, and then handcuffing him and removing the scissors. Is that right?---Once the hands are put together and handcuffed the threat would have been removed. If he just had hold of one arm, and this would have been a scenario, I would have failed him because he had not removed the threat. Once the arms were together and handcuffed the threat was removed.

But do you accept that the accused could have grabbed Kwementyaye Walker's right arm, put it behind his back and handcuffed him without firing shots 2 and 3?---He could have done that without firing shots 2 and 3. No I would have gone against his training and it would have been extremely risky.

I suggest that would have been consistent with his training?---No, it wouldn't.

Do you agree or disagree with that? Do you disagree with that?---Totally.

You've said that you can discern Kwementyaye Walker's intention when he said, "I'm going to kill you mob."?---I didn't say that. I said that the comment that he made would be considered to be indicative of his intent.

What was his intent before shots 2 and 3 were fired?---What was his intent was throughout the entire encounter.

Well, has it occurred to you that Kwementyaye Walker said, "I'm going to kill you mob" after he was shot three times?

HIS HONOUR: The Crown is quite clear that he said it after. I think the question you're asking the witness is he said it because he had been shot three times.

MR STRICKLAND: I'll put it another way.

You know before he said, "I'm going to kill you mob" he said, "You shot me"?---No.

You don't recall him saying that?---If he does you'll see my report you'll see no reference whatsoever to those comments and I don't recall actually discerning that from the video.

Did it occur to you that he in fact said, "I'm going to kill you mob" because he had been shot three times?---No. It seemed to me that his intent was obvious from the attack that he initiated and, in my view, the words were just simply a continuation of that obvious intent that he had held from prior to the first shot being fired.

Let me just be clear about your evidence. You say, do you exclude do you the reasonable possibility that he said, "I'm going to kill you mob" because he had been shot three times?---I don't know what his motivation was for uttering those words. I simply gave you an explanation that was consistent with his actions.

You don't know why he said those words do you?---I don't know why he said those words.

You don't know what was in his mind when he said those words do you?---No.

And you don't know what was in his mind before he was shot three times do you?---Well, I think the fact that he'd just launched an attack on two constables gives me some indication of what may have been a driving force in his thoughts at that time.

You have no idea, sir, whether the accused intended to kill Kwementyaye Walker, to kill Constable Eberl or Constable Rolfe before those shots were fired do you?

HIS HONOUR: No you said the accused. I think you mean - - -

MR STRICKLAND: I'll start again.

You have no idea whether Kwementyaye Walker intended to kill Constable Eberl or Constable Rolfe before those three shots were fired do you?---He initiated lethal attack. It seems pretty clear to me, sir.

You say he initiated a lethal attack?---Yes.

There's a slight puncture wound on the shoulder of Constable Rolfe. Do you understand that's the injury that Constable Rolfe sustained?---That may have been where the blow landed. We don't know where the blow was targeted at.

Exactly, sir. You don't know where the blow was targeted do you? Do you? Do you know where the blow was targeted? Do you know where the blow was targeted?---Well, how could I know?

Thank you. You say that, can I ask have you ever trained anyone in relation to using Tasers when that person is on the ground?---No.

You gave evidence, this is at 1254, that, you've said that in a ground struggle things can change incredibly quickly. One person can be in a dominant position, half a second later they're not and the other person's on top so it's extremely unpredictable and extremely dynamic?---That's correct.

That's one of the reasons you have, in your opinion, a Taser should not have been employed, is that right? One of the reasons?---Well, it was dynamically moving so it would be very difficult to target, to utilise the Taser with certainty that, for example, both prongs would hit the desired the target.

So, one of the reasons why in your opinion it would have been appropriate to use a Taser was because things can change incredibly quickly. Is that correct?---That's correct.

And that same reason would apply to discharging a firearm during a struggle wouldn't it?---Well, the key difference is that the firearm can be applied with effect from close range. The Taser can't.

If it was the case that there was a struggle where one person can be in a dominant position and half a second later they're not it would follow wouldn't it, it would be dangerous to fire a firearm at close range in those circumstances wouldn't it?---No.

Nothing further, your Honour.

MR EDWARDSON: No re-examination thank you, your Honour.

HIS HONOUR: Thank you.

WITNESS WITHDREW

MR EDWARDSON: Thank you, your Honour. That is the case for the defence.

HIS HONOUR: Yes.

MR STRICKLAND: Yes, your Honour. Could I just have three minutes and I'll get some instructions and I imagine I'll be in a position to commence my address.

HIS HONOUR: Members of the jury, would you retire just for a very brief period please.

JURY OUT

ADJOURNED

## RESUMED

MR STRICKLAND: Your Honour, thank you for that opportunity. We do not have a case in reply. I'm ready to address.

HIS HONOUR: All right.

MR STRICKLAND: Your Honour, can I just indicate this. The part on legal justification of the address is taken, I believe, verbatim, or close to verbatim from your Honour's aide-memoire. If there is any matter of law that arises in my address, would your Honour mind if we do that in the absence of the jury?

HIS HONOUR: Yes.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Could we bring the jury in please.

## JURY IN

HIS HONOUR: Members of the jury, as you have probably gathered before we broke for a few moments, that concludes the evidence in this trial. I'll now call upon Mr Strickland to commence his closing address.

MR STRICKLAND: Members of the jury, the Crown brings three charges against the accused. The first charge of murder requires the Crown to prove, beyond reasonable doubt, that the accused intentionally engaged in conduct. That conduct here is the firing of the second and third shot.

Secondly, that conduct caused the death of Kumanjaya Walker.

And thirdly, when the accused fired the second and third shots, he intended, either to cause serious harm or death to Kumanjaya Walker.

Let me speak briefly first about cause of death. You have in your folders exhibit 57. Which is the diagram produced by Dr Tiemensma. And you'll recall what she said, that the two shots, which were shots 2 and 3, and she doesn't know which order they were fired in, is represented by B1 and C1.

Now C1 penetrated Kumanjaya Walker's chest cavity, and C2 is where the projectile ended up. But the fatal shot was B1. And you can see where B2 – projectile for B2 ended. Now according to Dr Tiemensma, the projectile in B1, or the bullet, perforated, that is damaged, Kumanjaya Walker's spleen, his kidney, and it caused what she called a big gaping hole in his right lung. And that big gaping hole caused a large amount of blood and air to leak out of his chest cavity, causing his right lung to collapse. And she – and Kumanjaya Walker died because he could not breathe. And a secondary cause of his death was the loss of blood. In short, his death was caused by bullet B1.

Let me turn to evidence of his intention. All matters of fact are you – are yours, and yours alone to decide. It doesn't matter what I say about the facts. It doesn't matter what Mr Edwardson says about the facts. Ultimately, it doesn't even matter what his Honour says about the facts, although he of course is entitled to express an opinion. What his Honour says about the law you must follow. But about the facts, you are sovereign.

So I'm now going to offer an opinion, which you can reject or accept. But my submission to you is that in relation to intention, you would not have much difficulty in finding that the accused intentionally shot Kumanjaya Walker three times. You'd have little difficulty in finding that shots 2 and 3 caused his death. And you'd have little difficulty in finding that he either intended to kill him, or cause him serious harm. Serious harm meaning, harm that endangered his life, or was likely to endanger his life or that was significant and long-standing.

Now the accused was asked about these matters when he gave his evidence. This is at 1097. And I read pages, so my learned friend can follow, and his Honour can follow. If you need parts of the transcript, you ask his Honour.

“And you knew that those two shots fired in quick succession at point blank range, in an area that contained his lung and his heart would probably kill him?---I’ve been trained that shooting centre of mass is likely to cause death or serious harm.”

“What I’m asking you about is this occasion?---I knew its potential outcome.”

And then I asked a few more questions, which I’ll come back to a bit later. But I then asked him this.

“And you knew that if you fired two shots in quick succession, at point blank range, or five centimetres away, and you recall there’s an agreed fact about the shots were fired five centimetres away, you fired two shots in quick succession at point blank range, or five centimetres away, at an area containing his heart and lungs, that would cause – would likely cause his death, didn’t you?---I knew it would likely cause death or serious harm.”

We say from that, together with the facts of the case, you can conclude that that was his intention. To kill or cause serious harm. He knew that what he calls the centre of seen mass, included his lungs and his heart. And as Constable Jimmy Kirstenfeldt said, in his evidence:

“It’s common sense that firing at close range, point blank range, at the centre of seen mass, that is likely to cause death or serious harm, because that is where the vital organs are.”

Now the accused also gave some other answers on this question. And I’ll read those to you.

1097, “You know that firing those two shots, five centimetres away, in an area that contained his heart and his lungs would probably kill him, didn’t you?---No.”

“But did you think it would probably cause him serious harm?---I wasn’t thinking that at the time.”

“Did you think it would cause him any harm?---I wasn’t thinking that at the time.”

And it’s a matter for you whether you think those answers are inconsistent or different from the answers I just read out a little earlier.

But let’s say that you accept those last three answers. That is, when the accused fired shots 2 and 3 at point blank range, at Kumanjaya Walker’s torso, he was not thinking at all about whether he intended to kill or cause serious harm, or indeed cause any harm. Let’s say you accept that. Well, our case is that you would then be satisfied beyond reasonable doubt that his conduct was either reckless or negligent as to causing his death. And so then we go to a manslaughter, which is



that the accused intentionally engaged in conduct, that is he intentionally fired shots 2 and 3, the accused admits that, that his conduct caused the death of Kumanjayi Walker. I've addressed you on that. And that when he did so, the accused was reckless or negligent, as to causing the death of Mr Walker. Our case is that even on those answers we've just given, that he wasn't thinking at all. That he was – that you would be satisfied he was reckless or negligent, as to causing the death of Mr Walker. And you would bear in mind, in considering that, the considerable amount of evidence about his training at firing at the centre of seen mass, and the likely consequences of firing at point-blank range at the centre of seen mass.

Now, there is a second alternative, or third charge, which violent act causing death. That is the shorthand, and that is a verdict available to you if you are not satisfied beyond reasonable doubt, either about the intention in relation to murder, or in relation to manslaughter. His Honour will give you directions about this offence.

I now turn to the key issues in this case, because the central issue is whether the accused's conduct, in firing the second and third shots, was legally justified. As his Honour will tell you, and as, no doubt, Mr Edwardson, there are three defences available to the accused. Let me turn to self-defence.

To establish the accused's conduct was not legally justified, then, in relation to self-defence, the Crown must prove beyond reasonable doubt either that the accused did not hold an honest belief that it was necessary for him to fire the second, and/or third shots, in order to protect himself or Constable Eberl; or that firing the second and/or third shots was not a reasonable response in the circumstances, as the accused perceived them to be.

In relation to the second defence, which is called acting in the course of duty – that's what's called 208E of the *Criminal Code* – the Crown must prove beyond reasonable doubt that the conduct of the accused in firing the second and third shots was unreasonable, in the circumstances as the accused perceived them to be, for the performance of his duty as a police officer.

In relation to the third defence, the Crown must prove beyond reasonable doubt that the accused did not honestly believe, when he fired the second and third shots, that this was reasonably necessary to perform his duty or function as a police officer.

So, let me go to the core of the Crown case, having set out what the critical issue is. The Crown case is twofold. The first is that Constable Eberl, in fact, effectively restrained Kumanjayi Walker when he was on top of, or partially on top of Kumanjayi Walker on the mattress. Call that - what we call, the objective fact.

Secondly, the case is that the accused did not hold an honest belief that it was necessary for him to fire the second and/or third shots in order to protect himself; and that those two shots were not a reasonable response, in the circumstances, as the accused perceived them to be.

Now, there are a number of ways that you can or could arrive at those findings. The first is the accused knew or believed that Constable Eberl had Kumanjaya Walker effectively restrained. Or that the accused knew or believed that Kumanjaya Walker posed a low risk to Constable Eberl. Or that the accused did not know or believe whether he was – whether Constable Eberl was at risk. Or that the accused knew or believed that Constable Eberl was at some risk of harm, but not at risk of death or serious injury, so as to justify the second and third shots; that is, of firing lethal shots.

So, to expand on this, we say that, on the evidence before you, you can conclude the following; that the accused did not see Kumanjaya Walker stabbing Constable Eberl in the chest or neck area when he was on the mattress, or when he was standing up; and, secondly, that the accused did not fear for Constable Eberl's life when he fired shots 2 and 3.

The Crown case is that the evidence that the accused gave in court, that he did have those beliefs, was a lie, and the accused lied to justify the unjustifiable; namely, the fatal shooting of Kumanjaya Walker. Even if the accused believed that Kumanjaya Walker was at some risk of harm whilst on the mattress, the accused did not believe that Eberl was at risk of death or serious injury.

So, let me turn to the important evidence of the body-worn video, because we say that in assessing what the accused perceived, what he honestly believed, there is a lot of evidence you can look at in this case and you should pay close attention to the body-worn video. Now, the use of evidence like the body-worn video – that is, video - or photographs or videos, is part and parcel of what juries consider every day in Australia.

The limitations of body-worn video should be recognised and they are – you just heard some evidence from Mr McDevitt about that, and it is evidence that we accept entirely. The body-worn video has its limitations. If you slow down the body-worn video, frame by frame, you don't get a sense – if that's all you do, you don't get a sense of events in their real time and you must assess the events in their real time, as the accused did.

There are other issues about the difference between what a camera can perceive and what the eye can perceive, based on angle and light and all those things. But, the benefits of the body-worn video should not be ignored, and their limitations should not be overstated.

I suggest that what Dr McIntosh said about the body-worn video is pretty much spot on. He said that when you look at Eberl and Kumanjaya Walker on those critical sections – sorry, the three seconds, when they're on – when they go to the mattress and before shots 2 and 3, that he believes that what the accused would have seen is something similar to what you can see on the body-worn. Now, that, of course, is a matter of some controversy, but that is his opinion.

Mr McDevitt also, in my submission, sensibly referred to the substantial benefits from slowing down the body-worn and freeze-framing it, in terms of the determining the sequence of events. If there was no body-worn video in this case, it would have been far more difficult for you to determine what the facts of this matter were.

Now, when I addressed you at the opening of this case, almost a month ago now, I suggested that you don't look at this case simply from the moments immediately before and during the firing of the three shots; that you need to look at the case in some kind of context. You need to consider what brought the accused, as a police officer, to the point inside House 511, when he discharged those two shots because in assessing what was in his mind when he chose to fire the second and third shots, it is valuable to look at the context or the background to those events.

The accused applied to join the Commandos and then the general - and then the Army in 2010, the SAS in 2018. He, in fact, joined what you would call the, "General Army" and served there between mid-2010 until 2015. After he left the Army he did further training in Arkansas, United States, a four to five week course with Trojan Securities International which included a weapons familiarisation course, including in semi-automatic pistols.

In 2016 he joined the Northern Territory Police and he did recruitment induction there for some six or seven months in the second half of 2016. That training included theory-based training, practical hands-on training, scenario-based training, training in defensive tactics and you've heard all of that and you've got the training manual, in exhibit 62. In particular he was trained on the use of force when it is appropriate to use force, when it is appropriate to use lethal force and how to use firearms.

The accused applied to join the TRG, the Territory Response Group because he wanted to receive extra training in weapons and tactical operation. He did not end up - he didn't end up joining the TRG. What he did join up was the Immediate Response Team, the IRT, in May 2017 and before this operation in Yuendumu he'd been deployed about ten times with the IRT, most of which were to arrest high-risk targets.

In 2018, after about two years in the NT Police Force, the accused said he was in a bit of a rut in the NT Police Force and he applied to join the ADF, Australian Defence Force, Special Force entry test. He didn't end up joining the ADF.

Now, the theme we say which runs through the accused's career aspirations was an obvious desire to become involved in direct action. He said he was motivated to enhance his career and he described his weapons training he did in Arkansas as "upskilling" and likewise the specialist skills he learned in the IRT in the same way. But you may think that he had firearm training above and beyond that of a general duties police officer if for no other reason than by reason of his Arkansas private training - above and beyond what was provided by the IRT. And we suggest that the accused would have known, better than most, in the NT Police Force, when and how

to deploy his firearm - even in a split second. And we say that is relevant to how the accused reacted both when he saw the body-worn of the axe incident and when he was tasked to arrest Kumanjayi Walker on 9 November and when he decided to fire the shots in House 511.

Now, the second relevant context evidence is the accused repeatedly viewed the body-worn video of the axe incident. So from 7 November 2019, the accused watched Lanyon Smith and Chris Hand's body worn video on many occasions. He agreed from that day he took an active interest in Kumanjayi Walker. He said that from watching the body-worn video and from reading the initial job write-up he seemed to think that the incident was being - in his words "swept under the rug" which he meant either deliberately downplaying the incident or deliberately hiding it.

Now, the accused admitted he hadn't spoken to Hand or Smith but he came to that conclusion that the incident had been swept under the rug because he believed that the most realistic - the truest depiction of that incident was captured on the body-worn video which he had witnessed or he had viewed so many times.

Now, the accused admitted that he never asked Hand or Felix Alefaio anything about Kumanjayi Walker when he got to Yuendumu on 9 November. His evidence was that, on arrival at Yuendumu Police Station he greeted Constable Alefaio and when asked if he spoke to Hand he said, "Correct, I greeted him as well" but he didn't - he didn't recall asking the local police what Kumanjayi Walker was like and the accused accepted in his evidence the local police could have been a useful or important source of information about Kumanjayi Walker. Indeed, we know that Felix Alefaio knew Kumanjayi Walker, he'd arrested him at least once or twice before. Alefaio said that Walker was never violent towards him when he tried to arrest him, but there was a risk he might run. And, of course, Sergeant Julie Frost had planned for that possibility by specifically requesting the deployment of a dog handler and a police dog.

So, getting back to the body-worn video. You have an email on 7 November 2019, it's in your folder, your exhibit 1 folder, it's in tab 8, and that is Travis Wurst, on the day after the axe incident, sent an email to Chris Hand saying, "Are you all right?" And Hand replied that he was good and said, "I don't think he" - that's Walker - "wanted to chop us up, he just wanted to escape. No-one was injured and that's the best result in my view".

Now, Lanyon Smith was asked why he did not draw his firearm during - in House 577 during that axe incident and Lanyon Smith said this, that he knew that "Kumanjayi Walker was a Warlpiri man and that brandishing an axe was more of a show - a show to his partner, who was there Rakeisha Robertson and his family. He just wanted to get away." And he gave some evidence about his knowledge of Warlpiri man brandishing nulla nulla's and trampoline poles, all trying to impress their families that they were a strong person.

He said the second reason - this is Smith - that he didn't draw the Glock was because there was a possibility that may escalate matters as opposed to de-escalate

them and if he fired the shot he didn't know where the shot would go because you can recall from looking at the body-worn video at House 577 there were other people in the room when the axe was brandished, including of course, his partner Chris Hand.

So even if Lanyon Smith did momentarily freeze in fear - as he admitted he did, he also acted courageously in not drawing his weapon. An up shot was that Kumanjayi Walker escaped but no one got hurt.

You will recall the evidence of Derek Williams, who said that when he went - when he went to arrest Kumanjayi Walker Walker would in fact get into the front of his police car and he had no problems.

Now, there was a lot of evidence in this case that the accused was at the very least preoccupied with Kumanjayi Walker and wanted to be involved in tracking him down. And you can look at - and I don't intend to take you through it - look at the agreed facts, exhibit 1 in tab 1 and those two paragraphs that I took the accused through, pars 69 and 70 is all the times that those two body-worn videos were accessed - the body-worn videos of the axe incident.

So, apart from that, or those viewings on 7 November, the accused called Lee Bauwens on his mobile phone. Lee Bauwens was on leave. He told Lee Bauwens about the axe incident that that it was, quote, "A potential job that the IRT should already have been called out for." Now, you will remember that Lee Bauwens wasn't asked about this, but this is what the accused said. The accused was asked, "Well, why did you call Lee Bauwens"? His answer was this. "I had intelligence of an incident, and I was passing it up the chain of command."

Well the accused said he had two chains of command that day. One was to his shift sergeant, Evan Kelly, and the other was to Lee Bauwens. But you'll recall the evidence that the accused was only on duty with the IRT when he was actually deployed by them. That was 10 times approximately over the last two or three years. So you can treat with a large grain of salt, his assertion that he had two chains of command on 7 November. Crown case is he only had one.

Of course, when asked, the accused said he was quote, "Indifferent", that's his word. He was indifferent about whether he was called up for deployment to Yuendumu to track down Kumanjayi Walker. Well, being indifferent, as he was, he nevertheless, he looked at the body-worn video, with his patrol group, and his shift sergeant, on the afternoon of 7 November. He gave briefings at Bunnings on that day. And then he went to do the search at Warlpiri. He came back, and once again, at 7.55 pm on that day, until 8.02, he again watched the body-worn video, on several occasions, with his patrol group. He was asked, "Why did you watch it again?" He said he "couldn't remember". He watched it again on 8 November. He said he wanted to disseminate it to his - it, being the body-worn video - to his patrol group and other patrol groups.

He watched that body-worn video, disseminated it, watched it with his colleagues, many times. And the Crown case is that his conduct in looking at that body-worn video, showing it, disseminating it, calling Lee Bauwens, all suggest that the accused was not indifferent at all. Not indifferent to being deployed to Yuendumu. Indeed he was asked:

“You certainly were not indifferent to what happened at House 577 on 6 November were you?---I have thoughts about it, correct.”

“Well you weren’t indifferent to it, were you?---No.”

Let me turn to the Yuendumu Police Station. And the role of Sergeant Julie Frost. She knew about the axe incident. Her partner was involved in the axe incident. She regarded the axe incident to be very, very serious. But, from the get-go, she was intent on trying to achieve a peaceful resolution to the situation. She tried her best to get Kumanjayi Walker to surrender himself without the use or necessity of force.

She was a woman experienced in remote communities, both as a police officer, and before that, a nurse. She didn’t want the situation in her words, “Blowing up.” So she negotiated with his family, ultimately that he hand himself in after the funeral. She understood that funerals were extremely important for Aboriginal people. They have a lot of cultural significance. And you’ve heard some evidence about that from a number of different people. But she was also realistic, as to whether Kumanjayi Walker would, in fact, hand himself in after the funeral. And the situation she faced, as at 9 November, was that her police resources were overstretched. She had a very large area she had to deal with. Not just Yuendumu, but other outlying areas that were a long way away. She’d been told her medical staff were leaving. And she needed general support in relation to policing of her community, and she also wanted help with arresting Kumanjayi Walker, if he didn’t hand himself in.

And that is what led to her asking Superintendent Jody Nobbs for the IRT. And I don’t intend to go into the evidence of Superintendent Nobbs. You’ll recall that evidence in the background, and the circumstances in which the IRT came to be deployed. I’ll go directly to 9 November. When Sergeant McCormack became involved. Sergeant McCormack rang the accused, to inform him that he was being called out for the IRT on that day. The accused said that McCormack told him the call-out was for travel to Yuendumu to arrest Kumanjayi Walker. He was the first one, that is the accused, to travel to Alice Springs Station, followed then by Constable Eberl, Hawkings and Kirstenfeldt. Now the accused knew Constable Eberl well within the working environment. And, we say, that’s an important fact. They worked close to each other.

Once they were at the Alice Springs Station, McCormack gave the four IRT members a very quick briefing as to the nature of the deployment that they were about to undertake. He said, basically what the plan was, to go out to Yuendumu, assist obviously the local members out there, go find Mr Walker, and bring him back. Now once again, the accused wanted to show the body-worn video. And he did so.

He showed it to Constable Eberl and Hawkings. He logged onto the website and showed them. And he remembered Constable Eberl saying, "Can't believe the members didn't draw their firearm." The accused was asked, if he had any other discussion with Eberl or Hawkings, or other IRT members, on 9 November, about what would happen if Walker confronted him with an axe, or an edged weapon. And you might think that's an obvious discussion you would have. They've watched – he has watched the body-worn video on many occasions.

And you'd think he would have some discussion with members of the IRT, look, if something like that happens to us, what are we going to do. The accused said he didn't have any such discussion because he didn't need to. He believed that both he and the IRT would act according to their training, if Kumanjaya Walker confronted them with an edged weapon. Well you know that he was trained to have a planned response. And that was necessary to minimise the need to resort to the use of force. You knew that he believed that he was a high-risk target. He'd looked at his criminal record, which included records of violence. And you would think that it was necessary, it would be required, that he would discuss a plan with the IRT members. Well, if you accept the accused's evidence, then the plan he had was in his head. And you recall evidence about the training about if/then thinking. If I'm confronted with this, if I'm presented with a threat of a knife or an axe, then this is what I plan to do.

And he said if/then thinking only occurred in his own mind. Because that's what his training required him to do. Excuse me. And – and you may think that if you accept that evidence, that there was in fact no discussion, you may be sceptical about that. You may think, well obviously there was some discussion, and there was some kind of collective amnesia with the IRT about it. But if you think, oh well, no I accept that. He's thinking about what would happen if he was confronted with an edged weapon, just occurred in his own mind, then you may think that his thinking was, in his own mind, "If I'm confronted with a knife or an edged weapon, then I would draw a firearm."

You recall that during the drive to Yuendumu from Alice Springs, a three-hour drive, there was a discussion with Kirstenfeldt, who was in the car with him, and that is, "The only comment I can recall myself making is we should have been sent out earlier; as in, days earlier", meaning that the IRT should have been called out a lot earlier. And, again, that is consistent with his call to Lee Bauwens.

Again, you may think that he was preoccupied in wanting to track down Kumanjaya Walker, and that, if confronted with any resistance or any edged weapon, he would deploy his firearm. Now, at about 6:33 pm, on 9 November, he and Kirstenfeldt arrived at Yuendumu Police Station and you will see - I think it's in exhibit 2 – you've got the still photographs of the – sorry, the still photographs of the CCTV footage in Yuendumu, and you work out the times when people arrive – at 6:33 for the accused and Kirstenfeldt.

Now, you recall – and I'm sure you don't need to get it out; you probably never want to see it again – but that email, exhibit 1, tab 14, the one sent, I can just

remember it, we probably all can, the time, 4:59 pm. That is the one that had the plan for arresting Kumanjayi Walker at 5 am or 5:30 am the next morning, with Alefiao on the ready.

Now, that email was definitely sent whilst the accused and Kirstenfeldt were on their way to Yuendumu. So, the Crown accepts they didn't read it on the way, or there is no evidence they did, because there is no internet reception until just before you get to Yuendumu; just after you leave Alice, just before you get to Yuendumu.

But, Frost did discuss – and there seems to be no doubt about this – the content, at least of the call, of the plan to Kirstenfeldt and Rolfe when they arrive, because, remember, they arrived at 6:33. The other two arrived about 20 minutes later, Hawkings and Eberl.

Kirstenfeldt said in his evidence, “I believe” – this is in the discussion with Frost – “I believe it was suggested that we go arrest Kumanjayi Walker around 5 am in the morning.” Even the accused said that Frost said it was quite her preference that the arrest of Kumanjayi Walker takes place at 5 am on Sunday.

Now, Sergeant Frost said that she had printed five copies of this plan – that's exhibit 1, tab 14, the email – and she had it on the table for the IRT members and she was standing there when they grabbed the plan. Now, there was a copy of her email on the same desk when the IRT got back to Yuendumu station after the shooting. Have a look at exhibit 11 and the images of Hawking's body-worn video.

But, even apart from that, you remember that Constable Kirstenfeldt was interviewed. He was interviewed shortly after this incident, on 21 November 2019, but the police, investigating police, and he said, “Look, what I told the police back in that time, 21 November, was the truth.” He said he had seen an email whilst at Yuendumu Police Station, but he just skimmed through it.

Kirstenfeldt said he didn't accept – he was shown exhibit 1 and tab 14, the 4:59 pm email in the witness box, and said that he didn't see that one, but he accepted that he saw an email when he was at – he saw and glanced at an email when he was at Yuendumu, and the contents of that email were, “Mention RBTs, going out to help out Yuendumu police, but there was a funeral, and arresting Kumanjayi Walker at 5:30 in the morning.” Well, if that's what he read at Yuendumu Station, then what he read at Yuendumu Station was exhibit 1, tab 14, because that was what was in that email.

There was another reference to another email, which you'll see is exhibit 1, tab 12, but the details that Kirstenfeldt mentioned, which I just mentioned to you, “RBTs, arrest at 5 am in the morning, helping Yuendumu Police, funeral”, not all of those are mentioned in the other email. So, our case is that it's fairly clear that you believe Sergeant Frost about that.

Now, the accused, undoubtedly, read part of exhibit 1, tab 14, which is that Frost plan. You know that because he took a photograph of that. If you look at the



photograph, there is a couple of photographs of that – that's at page 3 of the plan which has the locations, House 577. And there is a close-up photograph as well and – a matter for you, of course, but you can see on the photograph that there are several pages, or at least two pages. It's not a single page. So, he certainly saw at least a part of that email.

He said he didn't read the other pages because he was not asked to read them. He was only directed to this one corner of the one page of the email. You may regard that evidence with some scepticism. But, you may also think that, if you accepted that the accused and Kirstenfeldt were not paying much attention at all to what Sergeant Frost was telling them, even though he admitted that she was the officer-in-charge of the station and that she was, in effect, in control of them, the accused did recall that Sergeant Frost had told them at Yuendumu on Saturday evening, that the funeral should be over.

Now, the accused, we say, paid no attention to Sergeant Frost's preference, to use his words, to "Arrest Kumanjayi Walker at 5 am on the Sunday". His only mission, in his mind, was to arrest Kumanjayi Walker immediately. He had no interest in intelligence-gathering, other than getting information about the current whereabouts of Kumanjayi Walker, so he could immediately arrest him.

You recall his evidence about the on-call phone. You can see, in that CCTV image – I think it's at 6:59 pm – Sergeant Frost gives a telephone to the accused - you'll see it at exhibit 2, tab 4, photograph 34 and Frost said she did that, she gave the phone over to the accused so he could respond to any call that came into the station from members of the community who were calling the police.

According to Sergeant Frost, apart from arresting Walker, she wanted the IRT to do high visibility patrols, and that makes sense because of all the break-ins in the community. She wanted them to do RBTs, random breath tests. The accused accepted that. She wanted them to be on-call as part of their general duties. And, importantly, she wanted Alefaio to be ready at 5 am the next morning, not just to process Kumanjayi Walker's arrest, but to effect the arrest of Kumanjayi Walker. That is the words used in that plan, "Effect the arrest of Kumanjayi Walker."

Now, you remember Alefaio's evidence was this:

"He heard Sergeant Frost say to the IRT officers, including the accused, that Frost wanted him, Alefaio, to actually accompany the IRT to arrest Kumanjayi Walker the following morning, Sunday morning."

Why? Because Alefaio knew Walker. He could identify Walker.

Alefaio was asked:

"And did any of those IRT members present during that briefing disagree with that plan?---No, not that I know of."

Frost said, not only did she want Alefaio because he knew the local community and he knew Walker, but he knew the locations where Walker would often be, and he knew the exit and entry points of those locations. And you may think that makes complete sense. The accused said that he asked for Felix Alefaio to accompany the IRT when they left at 7.05 pm. Well you would not accept that evidence. Frost denied that she said that. And that evidence is not corroborated by any other officers who were present in that room.

The Crown accepts that Sergeant Frost also said, "If you come across Walker, obviously arrest him." But the accused has sought to use that to justify his ignoring of Sergeant Frost's plan, which was that the IRT was to gather intelligence on the Saturday evening, and to arrest him on the Sunday morning. Sergeant Frost, in response to Mr Edwardson's question, as to why Felix Alefaio wasn't available there and then, that's on the Saturday evening, said simply because they, being the IRT, weren't meant to be making an arrest at that time.

Whatever you make of all that, and the differences between the evidence, as to what was said in that discussion, from the time the accused came in. And of course, there's no recording of it. The critical part of the evidence you got is that email at 4.59 pm. That's the critical evidence as to what was said. And there's dispute as to what – whether it was read or not. But whatever you make of that, we say there was a lot of evidence to prove that when he left, when the accused left Yuendumu Police Station, at 7.05 – 7.06 pm, his sole mission and preoccupation was to track down Kumanjaji Walker. His sole mission and preoccupation, was to arrest him, as soon as he could.

Let me turn to what they did at House 577. Mr Kirstenfeldt admitted that the reason they went to House 577 was to locate Kumanjaji Walker there. And you'll see, remember in the operational plan, that was I think the first house that was referred to. And obviously that's the house where the axe incident occurred.

You'll recall there was some questions, or there was some evidence given about what were the discussions that Kirstenfeldt and the accused had, before they went into House 577, about what they were going to do if they came across Kumanjaji Walker. What were they going to do if Kumanjaji Walker presented them with an edged weapon. And the answer, from both Kirstenfeldt and the accused is, there was none. No discussions at all. Kirstenfeldt talked with that young boy in House 577. He asked the boy if he knew Kumanjaji Walker. The boy did.

"Do you know where they're staying tonight?" They, being Rakeisha and the accused. The – I'm sorry, I beg your pardon, Rakeisha and Kumanjaji Walker. The boy said, "Here", meaning House 577. The boy told Kirstenfeldt that the accused – that Kumanjaji Walker had just left a few minutes before. And Kirstenfeldt told the accused, "Little fellow just give me the go. He's going to be staying here tonight with his girlfriend he reckons. He seems pretty genuine that kid."

And of course, when he was asked about saying he seems pretty genuine, Kirstenfeldt meant not that he was truthful, but he was a good bloke. And you just

would think that evidence might be nonsense. Of course when he was saying, "He seems pretty genuine." He wasn't talking he was a good bloke. Kirstenfeldt said you can believe him. Now the accused was sceptical, he said, of any information received from members of the community. He didn't trust the word of that 10-year old boy who told Kirstenfeldt that the accused would be in the house that night. The accused said, he believed that Kumanjayi Walker would not return to House 577, because the IRT had already been there. So the accused admitted that he went through House 577. He had his hand on his Glock, and you can see that from the body-worn video. And he released the initial retention device on his holster. And you can see that from the body-worn video.

You recall the photographs that were tendered through Detective Sergeant – through Senior Sergeant Barram. If you listen to it, the body-worn, you may or may not be able to hear it click. He said, that is, the accused said, "If you're trained to draw your gun, you must be prepared to use it." So hand on the Glock, ready to draw the Glock, is not some empty gesture. It's not symbolic. If you have your hand on the Glock, then you're ready to draw it. And if you draw it, you must be ready to deploy it.

Now Senior Sergeant Barram gave evidence that police officers are trained not to disengage any of the safety devices on their holster, unless they're going to actually draw their firearm. And you may think the reason for that is that ensures that if someone else wants to grab the Glock, they can't do so. Because the safety retention devices are on. The accused denied that's how he was trained. But I'd suggest you would accept, without any reservation, Senior Sergeant Barram's evidence on that point.

The accused also said that he received an injury to his thumb, which caused him pain and made it hard to release that device, pushing it down and forward. Whatever the reason, it's clear from looking at the body-worn video, and the accused's own evidence, that he had his hand on his Glock. Not his Taser, not his OC spray, but his Glock. And it was clear that he released the retention device, because he intended to draw his firearm, if he came across Kumanjayi Walker. The accused said that when he was quote, "Clearing House 577" he was preparing for a violent offender. That is, the person who deployed the axe, or that used the axe three days before. He said, "All I was doing was preparing for, if I was presented with a case, or had to follow my training, and utilise drawing my firearm, depending on the situation I was presented with." Now you heard the accused give evidence about what he understood was the expression you've heard a lot about, knife equals gun or edged weapon equals gun.

He was asked, "What does that expression mean to you in terms of your training?" And he said, "The way I was trained, was if someone was threatening us with an edged weapon, our first response, was to go for our firearm, unless that was impossible." Well, you recall Senior Sergeant Barram's evidence about the training Northern Territory officers receive about drawing a firearm, when presented with an edged weapon. That is, a firearm was used as a last resort, where there was an

immediate danger to life. And that is the essence of what is taught in the Defensive Tactics Manual that you have, exhibit 62, tab 4. The model sets out a series – I withdraw that. If indeed a firearm was drawn, or if one contemplated the firearm as part of the tactical options, then according to Senior Sergeant Barram, there are a number of further steps. You point it at the ground. You assess, if the offender's behaviour does not change, you may then have to point the firearm at the person, and issue what he calls dynamic verbal commands.

You recall what Robert Kent said, an officer of 14 years' experience. "If presented with an edged weapon", he said, "You draw your firearm, dependent on the circumstances. In particular the level of threat you face." You don't draw it necessarily, as the accused said, was his training, as a first option. You draw it, dependent on the circumstances, in particular, the level of threat you face.

Kent said, "If they are actively threatening me with an edged weapon and potentially I escalate to drawing my firearm or giving them some verbal direction first." And that evidence is what Senior Sergeant Barram said that the training was. It's consistent with this tactical options model that you see in exhibit 62, tab 4.

It's apparent from that model that people are trained the drawing of a firearm in response to an edged weapon involves an escalating series of steps or a series of escalating steps. The verbal warnings, the continuous assessment, then hand on firearm, then drawing firearm. None of those are automatic responses. But the accused insisted that he was trained if faced with an edged weapon he had to draw his firearm as a first option.

Now, we say - and we are now leading up to - that was a long - indeed long introduction into what we say about the context - what I said at the beginning, you try and look at what his state of mind was when he goes into House 511 and, we say, when you look at all the evidence that I have tried to draw your attention to.

One, his preoccupation with the axe incident and the body-worn. Two, his keenness to be deployed on the mission to track down Kumanjayi Walker. Three, his insistence that when he left Yuendumu Police Station he should immediately track down Kumanjayi Walker and arrest him rather than wait until the following morning. Four, the manner in which he went through House 577, in a state of readiness to draw his firearm, even though there was a young child there.

All of those matters, we say, are evidence of a particular state of mind, they are all evidence of a mentality that the accused had at that time and that mentality was that if Kumanjayi Walker showed any resistance, if he presented with an edged weapon then he would be prepared to draw his weapon and if necessary fire it at Kumanjayi Walker.

Now, I want to play you - your Honour I just - I am going now to entering house 511. Does your Honour intend to stop at 4 pm?

HIS HONOUR: We might stop at this point I think.

MR STRICKLAND: Then if that is convenient I'll stop.

HIS HONOUR: It's been a reasonably long day.

MR STRICKLAND: Thank you.

HIS HONOUR: All right, members of the jury, would you now retire for the day please and we will commence again tomorrow morning at 10 am.

JURY OUT

MR EDWARDSON: Your Honour, could I mention a housekeeping matter please, if I may?

HIS HONOUR: Yes.

MR EDWARDSON: I can't even remember, it's so long ago now, but I did a pre-recording in a trial that's yet to start in Tasmania. It was meant to start next week but with COVID the trials are now not starting until 28 March.

HIS HONOUR: Right.

MR EDWARDSON: Yesterday or this morning I received an email effectively saying that the judge, who is the trial judge allocated, wants to have a brief telephone conference at 3:00 - well, it will be 3.45 Northern Territory time, or 4:15 their time. I am told it is only going to be 10 minutes and it's just to work out whether it is possible for us to get started on the 28th and so on, which it is. It is pretty important, your Honour, that I be able to take that call.

HIS HONOUR: That's tomorrow?

MR EDWARDSON: Yes, it is.

HIS HONOUR: Yes.

MR EDWARDSON: And I don't know where we are going to be. I will obviously follow with my address immediately after Mr Strickland. Is your Honour contemplating starting your summing up tomorrow?

HER HONOUR: It depends on what time everyone else finishes.

MR EDWARDSON: If your Honour could accommodate me if at all possible for 15 minutes around that time, I mention it now.

HIS HONOUR: I am sure we can accommodate you.

MR EDWARDSON: I appreciate that, thank you, sir.

HIS HONOUR: Mr Crown, can you give me some assistance. You have submitted to the jury that the accused lied when he made the statement, "He was stabbing me, he was stabbing you".

MR STRICKLAND: Yes. Yes, your Honour.

HIS HONOUR: Now, do you suggest that that is an Edwards-type lie?

MR STRICKLAND: No, your Honour.

HIS HONOUR: All right.

MR STRICKLAND: Will your Honour excuse me one moment? Excuse me, your Honour. Your Honour, I think in light of what Ms Callan has said, can I - my submission is that Edwards has inherent potential problems.

HIS HONOUR: Yes.

MR STRICKLAND: So can I consider that overnight? I will advise my learned friend this evening if we are going to seek an Edwards-type lie direction but - - -

HIS HONOUR: Now, the other thing I was going to raise with you is this - and it is in relation to that same statement.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: That if the jury were not to accept the submission that you made that the accused had lied at that point, is that statement available as some evidence of the truth of the contents of the statement? In other words, is it first-hand hearsay for the purposes of the *Evidence Act*?

MR STRICKLAND: I understand, your Honour, I will - I understand.

HIS HONOUR: Will you look at that as well?

MR STRICKLAND: I will look at that as well.

HIS HONOUR: All right.

MS CALLAN: Your Honour, could I indicate that the Crown closing address has concluded as you will have observed with some slides. If it convenient I might hand up to have them marked for identification at the end of the Crown closing, a complete set of those slides.

HIS HONOUR: Yes, that will be fine.

All right, unless there is anything further I will adjourn.

MR STRICKLAND: Nothing further, your Honour.

HIS HONOUR: Thank you.

ADJOURNED 3.57 PM TO WEDNESDAY 9 MARCH 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY BRIAN ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON WEDNESDAY 9 MARCH 2022 AT 10:11 AM

(Continued from 08/03/2022)

Transcribed by: EPIQ



HIS HONOUR: Yes.

MS CALLAN SC: Your Honour, can I provide some transcript corrections.

HIS HONOUR: Thank you.

MS CALLAN: Which relate to 3 March, 4 March, and yesterday, 7 March (sic).

MR EDWARDSON QC: They're all agreed, your Honour.

HIS HONOUR: Thank you. Well, I direct that those amendments be made to the transcript.

Yes?

MR EDWARDSON: Your Honour, I have considered overnight, your Honour, two observations about the statement, "He was lying. He was stabbing me. He was stabbing you."

HIS HONOUR: Yes.

MS EDWARDSON: It is our submission that does warrant an Edwards' direction because the statement is clearly specific to the event that has just occurred.

HIS HONOUR: Yes.

MR EDWARDSON: Now, if the jury were not to accept that as a lie, the statement clearly is admissible as evidence of the truth; i.e. it's firsthand hearsay.

HIS HONOUR: Thank you.

MR EDWARDSON: Court pleases.

MR STRICKLAND SC: And we agree, your Honour.

HIS HONOUR: All right.

Can we bring the jury in, please?

JURY IN

MR STRICKLAND: At the end of yesterday, I outlined to you what we say is the relevant context which informs your findings about the state of mind of the accused at the relevant time in House 511.

I'll just – I'm sorry, your Honour, we have just been caught a little on the hop. Could your Honour just excuse us for one moment, please?

HIS HONOUR: Yes.

MR STRICKLAND: And so, those matters are his preoccupation with the axe incident; his keenness to be deployed on the mission to track down Kumanjaya Walker; his insistence when he left Yuendumu Police Station, that he should immediately track down Kumanjaya Walker and arrest him, rather than wait until the following morning; and, finally, the manner in which he went through House 577, in a state of readiness to draw his firearm, even though there was a young child there.

We say all those matters evidence his particular state of mind at that time, evidences his mentality; that is, if Kumanjaya Walker was to show any resistance, if he was to present with a weapon, then Kumanjaya Walker – then the accused would be prepared to draw his weapon and, if necessary, fire at Kumanjaya Walker.

So, we have now got to the stage where he just about – where the accused is just about to enter House 511 and I will just play to you again exhibit 26, which is the accused as he is about to go into the house.

HIS HONOUR: Is there any need to give a warning at this point?

MR STRICKLAND: Not at this stage, thank you, your Honour.

HIS HONOUR: Thank you.

#### DVD PLAYED

MR STRICKLAND: Now, as his Honour has warned you, it is really what you can hear from that body-worn video that counts. But – and the transcript that you have got is just there to assist you. So, he's asking – the accused is asking Rachel Lewis where – if she knows Kumanjaya Walker and if she knows where he is. "Is it this house or this house?" She says, "Who?" He says, "Arnold Walker. Where's Rakeisha." Now, it's difficult to hear the next bit, but I suggest she says, "Across there, over there." And he says, "Which, proper, proper?" And again, he is sceptical about whether members of the community have told him the truth.

But Rachel Lewis indicates House 511 and, actually, armed with that information and, of course, what Ethan Robertson has told him, he proceeds; he joins up with Adam Eberl. Now, Adam Eberl – and I won't play this again – has that conversation with Elizabeth Snape, where she says, "Why has he got a gun?" Now, she is referring there to Hawkings not to the accused, and he - and Constable Eberl says, "We don't have a holster for that one so we have to carry it. Someone probably

shouldn't run at police with an axe" and that my - you may think that may reflect on his thinking - that is Eberl's thinking at the time.

In any event, the accused then walks alongside the house of 511 and speaks to Leanne Oldfield.

Just play that little bit please?

DVD PLAYED

MR STRICKLAND: And so again you can hear what he - I think that's fairly clear, "It could be either of them" he says, "but I think it's 511.

DVD PLAYED

MR STRICKLAND: Now, again, some of that is hard to hear but the accused asks Leanne Oldfield some questions and you may hear that Leanne Oldfield talks about Margaret Brown and then says, "Ask her" but the accused says he can't hear that and given how quickly and softly she said that, that may well be right.

The accused then said, "Me and Adam are going to clear this red house". Now, that's important. That's an important line because as he said to you, that it was at that point in time when he'd heard Adam Eberl say "There's someone walking in the house" or "walking to the back of the house" and when he believed he'd had permission to enter the house it was at that point in time he decided to clear House 511.

And you will recall Mr Edwardson asked this question, your Honour, it's 1157, I believe - I will just check that.

HIS HONOUR: Yes.

MR STRICKLAND: No, I'm sorry, I can't remember the exact page, I'm sorry. 1069. Mr Edwardson said:

"Can I ask this - when you entered that house at that point in time" - that's House 511 - "did you have your hand on your Glock in the same way you had previously at House 577?"

And of course, because you can't - because Constable Eberl goes in first you can't see the accused to into the house because he's got the body-worn on himself.

Rolfe says: "No, I didn't."

Mr Edwardson says, "Why, what's the difference between the two houses and the accused says this:

"I don't think 511 was actually mentioned to my Julie Frost as a house of interest and basically walked into that house and seen this man who I didn't know was Kumanjaya, I didn't perceive a threat. I just believed we were going to just have a conversation."

And he said then - he was asked some questions in cross-examination he said:

"Look, you've just entered House 511 because you simply followed Constable Eberl into the house - Eberl went first."

You may think those answers again should be treated with scepticism or a large grain of salt because you know from what he said on the body-worn that he said he intended to clear House 511, "Me and Adam are going to clear House 511". He was going to go into that house whether he went first or Eberl went first and it's curious that he says, "I don't think 511 was actually mentioned to me by Julie" well, that is so, but Ethan Robertson - and he'd been told by two people where he was likely to be - and he was told by Eberl there was someone in the back of the house. So - and he admitted, eventually, that he did believe that the person - or he thought the person who was coming towards him could be Kumanjaya Walker. He said he didn't notice his hands in his pocket.

But to say "I didn't perceive a threat, I just believed we were going to just have a conversation." You may treat that with a good deal of scepticism.

You know from the training that he received about edged weapons that they can be secreted, you get no notice of them. He looked at the body-worn video many times. He surely perceived that there was a threat when he - the accused perceived a threat when he entered into House 511. He surely perceived a risk when he entered 511. So to say that, "I didn't perceive a threat, I just believed we were going to just have a conversation" is something you would have a great difficulty in accepting.

Also bearing in mind that in his - in the accused's mind - Kumanjaya Walker was an extremely violent man and he'd taken so much interest in those body-worn videos of the axe incident. So he knew that - that is, "he" being the accused - knew that he had not discussed any action plan with Constable Eberl or any other IRT officers what would happen if he came across Kumanjaya Walker - what would happen if he came across Kumanjaya Walker with an edged weapon. Nevertheless, he was trained to maintain that reactive distance between himself and the subject. So why did he go into House 511? Why did he close that reaction - that reactive distance when the risk must have been obvious to him? It's hardly an answer to say, "Well, Constable Eberl went in there first". He knew that if he asked for Kumanjaya Walker's identity - that is, "Who are you?" when he was outside the house, that would've given him cover in case Kumanjaya Walker deployed a weapon. It would've been much easier outside the house, to have that 10 – 21-foot gap which was necessary to avert immediate danger.

The Crown says the answer to that question, "Why did he go into the house despite the obvious risk is because he wanted to arrest Kumanjaya Walker there and then. He did not want to cordon and contain. He didn't want to negotiate a surrender. His mind-set was, at that time, if there was to be any resistance by Kumanjaya Walker, any presentation of a weapon by Kumanjaya Walker he would draw his firearm and be prepared to use it.

Now, you know from the evidence in this case that the accused was trained - and I quote the words of exhibit 62, the manual - Defensive Tactics manual - an unplanned response or approach may precipitate a confrontation.

Now, his failure to follow his training about not planning a response was not merely a tactical error as Mr McDevitt said - Mr McDevitt said it was a tactical error - but it wasn't merely a tactical error. It shows that the accused was not focused on avoiding a confrontation with Kumanjaya Walker. His mindset was, if presented with resistance or an edged weapon, he would draw his firearm, and if necessary, use lethal force.

Now I now want to go to the issue of the struggle that occurred. And in particular, shot 1. The accused says that after Kumanjaya Walker started resisting, he was struck twice on the top of his head in a hammer fist motion. Using the writers palm, what he described as this palm, edge of the palm, coming down on the top of his head. And he says that was the first time he identified a metal blade protruding.

Now, of course, you know that he didn't have any injuries to the top of his head, because he went to the Alice - sorry, he went to the Alice Springs Hospital and had a full check-up. Now he, the accused then says that, and the Crown accepts, that Kumanjaya Walker stabbed him on the shoulder. And for that reason, the Crown accepts there is a reasonable possibility, that when he fired the first shot, he believed it was necessary to defend himself. The accused was standing up, and he was confronted with an edged weapon. And he had just stabbed - he had just been stabbed in the shoulder. And Kumanjaya's right arm, which held the scissors, was unrestrained, for that very short period of time while he was standing up.

Now the wound, as you can see from the slide, if we can get it up, was undoubtedly, a superficial wound. Three by three millimetres. And you might think that's consistent, that the superficiality of that wound is consistent with Dr Tiemensma's opinion about the capacity of those scissors to penetrate the skin. And I'll say something more about the body-worn video before the first shot.

Now, it is true that you can't see on the body-worn video, Kumanjaya Walker stabbing the accused on his shoulder. And Dr McIntosh agreed that you cannot see that on the body-worn, how that wound was caused. But that does not mean that the body-worn is unreliable. There's a very specific reason for that. Now I would suggest to you that the report of Dr McIntosh is a helpful resource for you. It's exhibit 69. And if you want to - I just want to take you to part of that exhibit, for those who are interested, because even though what you see on the body-worn is all that counts. You can get assistance from whoever - whatever source you like in

terms of what can be seen. Now if you go to exhibit 69, par 93, Dr McIntosh outlines what he can see. And I remind you, it's what you can see that matters. But you recall, and I adopt what Mr McDevitt said, is that the body-worn does have substantial benefits in working out the sequence of events.

Now what – and par 93, what Dr McIntosh identifies is that there is a period of about three seconds when there is a bright light in the video. And I'm just going to play to you now, if that's convenient. And just while that's being set up – yes, now –

Could your Honour just give a warning please.

HIS HONOUR: Yes, the video which is now about to be played contains material that some people in the court may find distressing. If anybody who is present in the court that they may find this material distressing, they should leave now.

Just wait one moment please, before we play it. There are some people leaving. Yes.

MR STRICKLAND: So I'm just going to play just a few seconds, excuse me. So what I'll do, is I'll play this in real time, and then I'm going to slow it down. So just – what I – if you look at the – the Zulu time is (inaudible), I'm really just playing based upon what Dr McIntosh has suggested, the three seconds or the four seconds from 9.51.52 to 9.51.55.

Just play that in real time.

#### DVD PLAYED

MR STRICKLAND: You can see for those three seconds, there is this white light on a black background. And I think that's probably sufficient. You can see it on the slow motion yourself if you like. It goes for – remember there's 30 frames per second, and it goes for quite a few frames this – this white light. And Dr McIntosh suggests that that is plausible that the stabbing occurred during that time. And indeed, that is the time – that period is consistent with the time that the accused says the stabbing occurred, in terms of his sequence. But the critical period in this case, being the two to three seconds, or really the three seconds between the firing of shot 1 and the end of shot 3, you don't have the same problem on the body-worn video.

You can see more clearly, what is happening from the body-worn video in those three seconds. So don't say, well, you don't know where – when the stabbing occurred, so you can't see anything. There's a specific explanation for that, in those three seconds. Between 9.52 and 9.55.

Now I want to say something about what the accused says about this important issue of Kumanjaya Walker's hand on his Glock. Now the sequence of events that the accused gives is very clear. You see it, he gives it – his answer to Mr Edwardson's questions, at page 1072. And again, you can ask for the transcript, if you want. And it's this, and I'll just – this – this is the sequence.

The hammer fist motion on the top of the head, step one. Step two, he sees the blade. Three, he puts the shoulder up, the accused puts his shoulder up and arm out to protect himself. He's stabbed in the left shoulder. The accused then jabs Kumanjaya Walker with his left fist. The accused then puts his hand, instinctively, on his Glock.

And he says this, and I quote, "At which point I realised his left hand was already on my Glock." Next step, he then immediately twists his hips back with speed, and steps back. Now we know from that body-worn video when he steps back. And that's the benefit of the body-worn video. If you go again to exhibit 69, par 93, over the page at point six. Dr McIntosh identifies that. But I'm going to play it for you, because what you see that counts. But it's at 9:51:58. 9:51:58. That is when the accused begins to step back, because he's about to draw his firearm. So the hand on the Glock occurs immediately before that, immediately before it, on the accused's version.

Now, I'm going read you what the accused said about this precise moment and I'm going to compare it with what Constable Eberl says at the same moment. This is at 1170, and this is what the accused says. The accused has played the slow motion of the body-worn video. And I said:

"I've paused this at 9:51:58." That is the time he's backing away. "I've paused it at frame 252."

Can we just go to that frame? You'll see – you've got those still in exhibit 25, tab 8. I say:

"I've paused it at frame 252; but, before that, could you see your hand, your arm?---Yeah, and this is the point where his hand is on my Glock, which might be helpful. You see his left arm."

"Okay, we'll slow – I'll rewind it just a bit. I've paused it at 266; 9:51:58. I want to suggest to you that you can't see in that slow motion body-worn, Walker's hand on your Glock?---Well, correct, you can't see his hand or my Glock in that body-worn video."

"We rely on your say so, that that is what occurred, don't we?---Correct."

And so, then, a bit more of a body-worn was played. Can we just go up to 266, please?

DVD PLAYED

MR STRICKLAND: Pausing. So, again, we're still on 9:51:58.

"Do you see at frame 266 your left arm?---Yes."

"And is that the time you struck him?---I can't tell from this frame viewing what happened in that order."

But, what he does say is at 9:51:58, this is what the accused says:

"This is the point where his hand is on my Glock."

Now, Constable Eberl is also asked the same series of questions, or similar – sorry, not about the Glock, but about the time period. I just want to remind you of this, what the accused says, and I'll just read it again, is that:

"He puts his hand on his Glock, at which point I realised his left hand, his left hand was already on my Glock."

Well, that may make sense because his right hand - Kumanjayi Walker's right hand has the scissors.

"Left hand is on my Glock."

Well, this is what Constable Eberl says about the same period – I'm now reading from page 700. Again, pausing at the same time, 9:51:58; and this time, just two frames ahead. So, each frame is a thirtieth of second approximately; so, we have paused just two thirtieths of a second after – just go to 254, please.

#### DVD PLAYED

MR STRICKLAND: Okay. I'm going to pause it – this is Eberl:

"I'm going to pause at frame 254."

And I pointed out to him, and you have that, that frame you have in your folders, exhibit 25, tab 8.

"Can you see yourself there?---I can." "You're behind Mr Walker?---Correct."

"What are you doing there?---I'm trying to move in behind him."

"What are you doing with each of your arms?"

And this is the critical thing:

"It looks like I've trapped his left arm."

The same time; 9:51:58:

"It looks like I've trapped his left arm with my left arm."



Now, members of the jury, a matter for you, but what Eberl says he's doing is what is captured on the body-worn video.

"And my right arm is across his shoulder."

Again, you can see that yourself.

"Is that called something, a particular hold?---It's similar to the seatbelt hold that's taught in defensive tactics."

"What's a seatbelt hold?---It's a particular hold that's taught that's used to take down a person to the ground."

"A seatbelt, like a seatbelt of a car, similar to that?---Correct."

You see, that is a major problem for the accused's evidence because, at the time when – the same second, 9:51:58, which, in real time, is 7:21:58, two or three seconds before shot 1, at the same time that the accused says Kumanjayi Walker's left hand is on the Glock. You can see his left arm is trapped by Constable Eberl. It can't be; that left hand cannot be on his Glock. And that evidence, that his left hand - that Kumanjayi Walker's left hand is on the Glock, is a lie.

And, of course, the accused never shouts, "Gun"; never shouts, "He's got my gun." What does the accused say about that? He says this, comparatively; in this circumstance, the accused's hand on his Glock was one of the least serious things that happened. Well, you know, and it's common sense, that police training is – when someone tries to seize your gun, as a police officer, you should, "Gun." You can see that on the Facebook message, the Facebook posting.

You remember what Mr McDevitt said yesterday about this very topic. He said this, at 1267:

"You are aware, aren't you, that it is potentially extremely dangerous for an assailant to grab a police officer's gun?---That's correct."

"It is regarded as one of the most dangerous things that can happen in a combat situation, isn't it?---Yes."

"And that is one of the reasons that a Glock, for example, has a retention safety device or a retention device?---Yes."

"To prevent an assailant from immediately grabbing the gun?---Yes."

"One of the reasons why a police officer is trained to yell out, "Gun", is to warn anyone else in the vicinity of that fact?---That's correct."

And someone in the vicinity in House 511 was Adam Eberl. The circumstances did allow the accused to at least say, "Gun", or "He's going for my gun."

And it wasn't just on that split second that he doesn't say, "Gun." He never says "Gun" at House 511; not once, even when he's trying to, in his words, "Deal with the tunnel vision of Constable Eberl and give him the comforting words, 'It's all good. He's stabbing me. He's stabbing you.'" He doesn't mention gun then.

Members of the jury, he goes back to the police station, never tells Frost that Kumanjayi Walker went for his gun or had his hand on his gun; doesn't tell Hawkings; doesn't tell Eberl; doesn't tell Kirstenfeldt; doesn't tell any other officer. And there is an obvious explanation why he doesn't say gun at the time, why he doesn't say it to the IRT officers. And that is because that never happened. He made it up. And if you accept that, that is extremely damaging to your assessment of whether you believe his evidence, that he saw Kumanjayi Walker stabbing Constable Eberl in the neck area and in the chest area, while he's on the mattress.

Excuse me, your Honour.

And it's extremely damaging to your assessment of his credibility, that he believed that Constable Eberl's life was in immediate danger, at the time he fired shots 2 and 3.

Now the accused says that Kumanjayi Walker stabbed Eberl in the chest and neck area, whilst they're standing up. That's what he says. And he was asked, by Mr Edwardson:

"When you say he started stabbing him, were you able to see whether the blade physically came in contact – contact with him, or was that just the impression that you got?---That's the impression I got."

But he was asked about that in cross-examination. And he confirmed that what he was describing was what he actually saw. It's at 1172. Now you recall that at 9.51.58, he begins to step back. And that's when he – in the terms of the sequence of events, he says that it was after he stepped back that Kumanjayi Walker focused on Eberl. Well, again, if you could – I'm just going to get you to do the slow motion from frame 254.

So in other words what he's – what the – what the accused says is the stabbing – what he claims is seeing the stabbing on the chest and neck area, happens after he steps back. That's after or – at or after Zulu time 9.51.58.

DVD PLAYED

MR STRICKLAND: Just pausing at 454.

So that's the point we got to last time. And what I want to suggest to you is that you can see, at that point in time, that – again, it's a matter for you, that Walker was not in a position to be able to stab Constable Eberl in the neck area, or the chest area. And what I want to suggest to you is for the next, at least one and a half

seconds, Constable Eberl has him in a similar hold. It's moving, undoubtedly. But as it was put to the accused, the accused – I'm sorry, Kumanjaya Walker is facing the accused at this point in time.

So if we just fast forward it a bit.

DVD PLAYED

MR STRICKLAND: And look at the position of Kumanjaya Walker's right arm.

DVD PLAYED

MR STRICKLAND: So certainly – just pausing it there. So we're now at 9.51.59. And they're essentially in, although there is movement, Eberl still has him in the same modified seat-belt hold. So during that time, it's just not possible, the Crown says, for Kumanjaya Walker's right arm to reach around Eberl and stab him in the chest and neck area. You certainly can't see anything like that in the body-worn. Now the next part is they begin to fall on the mattress. So we're now at frame 397, and they begin to fall on the mattress in less than a second. At about frame 316.

DVD PLAYED

MR STRICKLAND: And you can see now is when they start to fall. So what we say is that you can't see anything like stabbing motions on the body-worn at the chest and neck area. And of course, even if you disregard all of what I've said, and say well I see something different, or the – the accused – Eberl was not stabbed on the neck, or on the chest area.

Now I want to now come to what the evidence is about Constable Eberl's – what is said about Constable Eberl. Now you have before you, this is exhibit 21, photo 7 – sorry I beg your pardon, my mistake. Exhibit 1, tab 21, you've got the – this scratch on what's called the left axilla, and I'll just call it, it's the – that part of the – close to the underarm. Now we say that when you look at all the evidence on this topic, you would not be satisfied that that scratch was sustained, or was caused by Kumanjaya Walker deploying the scissors at this time. And this is – these are the different bodies of evidence.

First, Eberl's evidence is that he did not see or feel whether Kumanjaya Walker struck him with a pointy object. That's at 706. He only noticed that scratch a day or so after the shooting. Now Dr Botterill says, because he was retained to look at these injuries, that and Constable Rolfe's injuries. He said that when he looked at the photos, this photo and that this photo is taken on 13 November, that's four days later. He said that he can't state with certainty what implement caused the injury. Might be common sense. It was something sharp or pointed, passing across the skin surface. In terms of when that was sustained, he believed it was likely to be more than a day old, but unlikely to be many days old. Unlikely to be two weeks old.

Now importantly, Mr Simpson thoroughly examined Constable Eberl's shirt. And there is no damage on that shirt, corresponding to the location where that scratch is.

And then you heard the evidence of Dr Lee. Now she said that there was no evidence of blood on Eberl's shirt, corresponding to the location of the scratch. And Dr Botterill said, when you look at the close-up of that wound, he suggests because of the healing and the scabbing, he suggest that bleeding within a day the injury was likely. Or bleeding from a brushing or – I withdraw that. So Dr Lee examined and tested the inside left sleeve. Can I just ask you to have a look at exhibit 75?

You can see the first photograph, which has the little 25A marking. I'll just wait until you've got it. So that's the site, that little 25A that she examined. She said there were no visual indications of blood. There was a negative reaction for blood but there was a DNA profile which matched Constable Eberl - well that's obvious - it's his shirt. But Dr Lee's evidence - and this wasn't challenged - is that there was no evidence on the police shirt of a bleeding injury being present and she said that much like a tissue, a bleeding injury will soak into the fabric. She said you might expect it on the shirt but there was no indications of bleeding indeed on Eberl's left shirt sleeve - that is site 25A so the DNA results are most likely to have come from skin cells. That's her evidence 802.

Now, of course, Mr Simpson examined that shirt as well and I will just take you - if you can go to exhibit 65, photograph 17. Now, what you can see in that photograph is the back of his shirt - of Eberl's shirt. That's that small 2-millimetre diameter hole which he described as being, "puncture type damage which could have been caused by a pointed object with a blunt tip" and you will see that on the following page at page 19, photograph 19. But what is important is Simpson doesn't see any tearing on the part of the shirt that corresponds with the scratching. So when you look at - when you look at the lack of damage to Eberl's front part of the shirt where the scratch injury is - and the lack of blood - or the - I should say the absence of any presence of blood, then that's why the Crown says - and that you wouldn't be satisfied that that scratch was caused during the incident at House 511.

Now, of course, Mr Simpson does say that in relation to this - I am now looking at the fabric wound on the back of the shirt, he says that was - he describes that as a puncture type damage caused by a pointed object with a blunt tip. Now, he did not do a simulation experiment, now a simulated experiment with the scissors closed. He didn't do a simulation experiment with the sheep's foot (sic) that's that the blunter of the blades. He did do so with the simulation with the pointy blade which I think is called the Wharncliffe blade, but he used pork belly as the base for the substrate, and you may think that's not a comparable base to the actual shoulder and whether you think that simulation experiment is useful or not is entirely a matter for you. But Mr Simpson concludes that he cannot exclude that the blade caused the damage - that is the scissors - caused the damage to the rear of Constable Eberl's shirt but that does not support - and this is the key point - that does not support the accused's version of seeing Kumanjaya Walker stabbing Constable Eberl to the neck or chest area.

Then of course there's blood - then there's the issue of the scissors. Now, Kate Cheong-Wing identifies staining which tested positive to presumptive tests for blood. Prima facie it's not clear whose blood it was. It could easily have been Kumanjayi Walker's blood. She then took - I'm now talking about the photos in exhibit 40 and you can see - if you go to exhibit 40 what we're talking about is on the second page - the staining on that blunt part of the scissors.

So Kate Cheong-Wing took a DNA sample at that location on the scissors and the result was a mixed DNA sample from Kumanjayi Walker, the accused and Adam Eberl. Now, she said that you can't - it's just not possible to say what was the substance that produced that DNA and you get DNA from either blood or skin cells. You couldn't rule out that it was Eberl's blood but you couldn't rule out it was skin cell. She accepted it was possible that Eberl's blood transferred from the sharper blade to the blunter blade and, of course, you will remember when you look at exhibit 26 when Rolfe and Eberl are handcuffing Walker and they're trying to remove the scissors from his right hand, that could easily explain how, for instance, Eberl's DNA came to be on the scissors.

The Crown has to prove the elements of the case beyond reasonable doubt but doesn't need to prove every fact beyond reasonable doubt. We don't need to exclude beyond reasonable doubt that Constable Eberl was injured by the scissors but, we say, what is important about all of this evidence, is you would not be satisfied based upon the absence of textile damage on the left underarm of Eberl's shirt and the absence of blood on that location, you would not be satisfied that the accused saw Eberl being stabbed on the chest or neck area.

I will now go to shots 2 and 3. As I said at the beginning of these remarks, I suggest the first thing you need to consider in relation to shots 2 and 3 is the evidence as to whether, in fact, Constable Eberl had effectively restrained Kumanjayi Walker on the mattress such that Walker posed a low risk to Constable Eberl.

Now, the evidence relating to that issue about whether, in fact there was a low threat is based on the evidence of Eberl himself, Constable Hawkings, the body-worn videos of the accused Eberl and Hawkings and the expert evidence of Dr McIntosh, Dr Tiemensma, Dr Botterill, Dr Towsey, Barram, Mr McDevitt - Senior Sergeant Barram.

But the expert evidence related to two subjects. First, the capacity of the scissors to cause lethal harm. And secondly, the capacity of Kumanjayi Walker to inflict that lethal harm - or serious harm - in the position that Kumanjayi Walker was actually in. And, we say when you look at those matters, that will help you in deciding what the accused actually believed or perceived - that is, the injected evidence will assist you, in working out what did the accused actually see or believe.

Now, let me just turn briefly to Dr Tiemensma. She was an extremely experienced pathologist. She'd conducted about 2800 autopsies. She was so concerned with even the appearance of impartiality or not being biased that she suggested in her email to Wayne Newell that an independent expert provide an

opinion on the injuries to Eberl and Rolfe - and that's why Dr Botterill was engaged, as Kirk Pennuto explained. So Dr Tiemensma had seen hundreds of stab wounds in the course of her career and she'd observed hundreds more that were examined by other pathologists. Fatal stabbing injuries, she says, by scissors, are not common.

Her opinion was that it would be very difficult for Kumanjayi Walker to have deployed the scissors against any part of Constable Eberl's body which would cause any significant or fatal injury and her opinion was based on a number of things. The first was the position of Kumanjayi Walker's body.

Now if you go – can I just ask you if you – if you'd like to, to go to exhibit 57, because that shows the photo of the – well it's a rather disturbing –

I wonder if I just get it on the screen in that case. The photo of the deceased's body - - -

HIS HONOUR: Just one moment then.

MR STRICKLAND: I'm sorry, your Honour, I beg your pardon, yes.

HIS HONOUR: Look, we might at this point in any event, take the morning adjournment - - -

MR STRICKLAND: Yes, your Honour, certainly.

HIS HONOUR: - - - and then we come back we'll deal with that.

Members of the jury, would you retire.

JURY OUT

HIS HONOUR: Adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Yes, could we bring the jury in, please?

JURY IN



HIS HONOUR: Mr Crown, do you intend playing that video now?

MR STRICKLAND: It's just a photograph, exhibit 57.

HIS HONOUR: You intend showing that photograph now, all right.

The prosecutor intends to now display a photograph which may be distressing to some people who are present in the public area of the court. If they feel that this material may be distressing to them, those present in the public area of the court may now leave.

Yes?

MR STRICKLAND: So, what I was saying before the break was that, in Dr Tiemensma's opinion, it would have been very difficult for Kumanjaya Walker, in the circumstances that you are confronted with here, to deploy the scissors, those scissors against any part of Adam Eberl's body which would cause significant or fatal injuries.

Now, that opinion is based on a number of things. First is just the position of the bullet wounds themselves; B1 and C1, because those positions indicate what you can see in the body-worn video, which is he's lying generally on his right side, with the position – with the front of his body angled slightly downwards. That is the first point.

You can take that off now. Thank you.

The second is that Kumanjaya Walker's right arm was pressed – was pinned beneath – between his body and the mattress. Now, no doubt, it will be put to you a number of times, that Dr Tiemensma couldn't see that, and Dr McIntosh couldn't see that, and so it's true that's an assumption upon which their opinion is based. But I remind you of what Adam Eberl said in his evidence. Because if anyone can see the position of Kumanjaya Walker's right arm, it would be him. He is the closest person, obviously. And he was asked this at 703, last line, about the position of his right arm during these critical three seconds. From the time they fall onto the mattress, until shot 3.

"Could you see where his right arm was?---I believe it was sort of underneath his body."

So you may think that the assumption of Dr Tiemensma is borne out.

She also referred to the fact that Eberl was weighing down on top of him. And again, you may think that's common sense. He's not lifting himself off. He's doing his best to ground stabilise him. He's doing his best to – don't forget Eberl knows, or he's seen the sharp object already, and he's doing his best to get on top of him, and press – pressing down on his body. So Dr Tiemensma's opinion is that Kumanjaya Walker would not have enough force to cause a sustained movement with those

scissors, through the clothing, through the skin and the muscles, to reach any vital structure, such as a large blood vessel or any other organ. She was asked about whether there was a – could be a possible penetrating or serious penetrating injury to the subclavian artery. That's the artery just below the collar-bone. And again she said – she said that would be unlikely. Again, because Constable Eberl was on top of Mr Walker.

So for Walker to reach the subclavian and stab him in a downward motion, which – that's what gives the force, would mean his arm would have to come from the top. And she just thought that was not possible. Not likely. And that he wouldn't have, that is Walker, wouldn't have the range of movement to access the collar-bone. And of course, she also factored in the resistance. Constable Eberl is resisting. And there's what he's wearing. And so all of those feed into her opinion that there wasn't enough force to penetrate or injury – or injure either the carotid artery, or the subclavian artery. And her opinion was essentially the same, whether the scissors were a single blade, or whether they were open. And you remember she said, look if they were open they would be more difficult to control than an individual blade, and she didn't see any injuries on Kumanjaya Walker's hands. That, you might think, might have occurred if they were open.

And ultimately, you might think that the actual injury that was caused to Constable Rolfe, that is the superficial wound, does demonstrate the validity of her opinion about the extent to which it could cause damage, in those circumstances. And of course, that's when he has the full range of movement.

Now you also heard from Dr McIntosh, the experienced biomechanic or – his expertise is the use of force on the human body, and the application of that force. He had a lot of experience giving opinions based upon videos and body-worn videos. And he looked at that body-worn video in real time, and in slow motion. Now the key opinions he expresses are in that report I've taken you to, exhibit 69. Two key paragraphs, 132 and 133. 132 is that he didn't think at the time of the second and third shots Kumanjaya Walker was likely to be a direct threat to the accused, because of the distance.

And you'll recall that the accused was asked that himself. Did he consider he was at risk when he fired the second and third shots. And the accused said he was not. But more importantly, at par 133, Dr McIntosh gave evidence that he believed that Walker was likely a low threat to Eberl at the time of the second and third shots. And again, there are a number of basis to that opinion.

The first again, was his assumption, that the right arm was likely pinned under his own body. Mr Edwardson, again quite properly said, well you can't see that. Dr McIntosh said well we know from standard anatomy where the right arm was. It's attached to the right side of the chest. So he's inferring from what he can see from the body-worn video, and his knowledge of standard anatomy. Now what he said, Dr McIntosh, and this is really echoed by Barram and Mr McDevitt - is if the entirety of the right arm is pinned between his body, Walker's body, and the mattress, there

is – you couldn't deploy much force, or you couldn't deploy the scissors at all. That's fairly obvious.

Even if the upper right arm was pinned, that is between the shoulder and the elbow, if that was pinned, then obviously the range of movement is far greater. The ability – his force is greater. You don't have that kind of motion. And therefore, the threat is accordingly significantly diminished. And I think there is no difference – real difference of opinion between Dr McIntosh, Senior Sergeant Barram, and Mr McDevitt, assuming that fact be so. And that's a fact that you have to determine. That is, to what – was the right arm pinned entirely under the body? Or was it partially pinned? Or not at all pinned? That's classically a matter of fact for you.

Now Eberl's – the second factor that Dr McIntosh relied upon was the force used by Constable Eberl on top of Kumanjaya Walker's upper body. Now I'm just going to play the slow motion video, Mr Sorrel, from just those critical three seconds.

Can we start at 366, Zulu time, 9.52.02?

And I'm sorry, could you give a warning please, your Honour.

HIS HONOUR: Yes.

The video that the Crown now proposes to play will contain material that may be distressing to some members of the public who are present in the court. If any member of the public believes that they may find this material distressing, they should now leave the courtroom.

MR STRICKLAND: So I'm playing from - - -

HIS HONOUR: Just one moment. Yes.

MR STRICKLAND: Thank you, your Honour.

DVD PLAYED

MR STRICKLAND: So that's those – that's ready for playing from 365 through to 433, those frames, ending on Zulu 9.52.04.

Now Constable Eberl's evidence was that he was putting his weight on Kumanjaya Walker's left arm, with both of his arms. He said that Kumanjaya Walker was on his side, facing my direction. And he was putting his weight, that is the weight of both of his arms on Kumanjaya Walker's left arm, to prevent Walker from turning towards Eberl. And he said his right arm was sort of underneath his body.

And you remember Dr McIntosh gave evidence about the kind of force that therefore would be applied. Just looking at the upper body alone. And you remember also that Dr McIntosh said, well there's also the weight and the force applied by the use of the lower legs. Now again, this entirely a matter for you. And

you've seen these three seconds played time and time again. Dr McIntosh was asked, and playing these – this period of time –

In fact, can you just go through to 443 please. This is just shortly after the – thank you, just there.

#### DVD PLAYED

MR STRICKLAND: So Dr McIntosh was asked, look, I played you 365 to 443, that is two and a half seconds.

“Do you see any noticeable change in the position of Kumanjaya Walker's upper body during that period?---No.”

Now it matters what you see. But I would suggest that you cannot see any change, or any significant change in the movement of Kumanjaya Walker's upper body during that period and that is part of Dr McIntosh's opinion as to why there was only a low threat at that time to Constable Eberl.

You cannot see, during those critical two and-a-half seconds, Kumanjaya Walker stabbing Eberl on the chest. You cannot see him stabbing Constable Eberl on the neck. It's the Crown's case that if that was in fact occurring you would see some movement on the upper body - but you don't.

Now, I want to remind you of something else - another piece of evidence - which is the evidence of Constable Hawkings. Now, you remember that he saw - he cut - he goes to the front door twice, relevantly and the second time is just after shot 3, in fact he sees shots 2 and 3 and then his body-worn captures just literally the second after. Now, he told police - he gave some evidence - or statements to the police on 13 November. He didn't go into the house at that critical time because he was carrying a long rifle. He said, "I didn't want to get into a wrestle with a rifle and they" - being Eberl and Kumanjaya Walker - sorry - being Eberl and Constable Rolfe - "they looked like they had contained the guy or were containing the guy." That's what he said four days later - and that is the impression that you may get when you watch that body-worn - that Eberl was containing - or had contained Kumanjaya Walker when he was pressing his weight down on Kumanjaya Walker.

Now, there's another factor that Dr McIntosh relied upon and that is that this 95 kilogram man, Eberl, was pressing down - was pressing down on Kumanjaya Walker on a particular surface and the surface is important. The surface was a soft mattress, a soft foam mattress. Dr McIntosh had inspected that mattress. And the doctor said that because Kumanjaya Walker's arm was pushed onto that soft surface - that soft mattress, the mattress would deform - was his words - around Kumanjaya Walker's right arm and that created additional resistance - that is the additional resistance was Kumanjaya Walker had to push against the resistance of the mattress to move his right arm out of that position.

And again, Dr McIntosh said that to injure someone with a weapon with those scissors, which he described as fairly blunt, you had to exert force in terms of the thrusting motion. That's very hard to do in the position he was in. And then, of course, he referred to the nature of the scissors themselves which didn't protrude much from Kumanjaya Walker's hand and he described them as being blunt when closed.

Now, you remember a lot of his opinions were couched with, "on balance this" and, "on balance that" and in cross-examination he said the standard he was on balance meant about 95 percent likely. And of course, he accepted, as everyone has, the limitations of the body-worn video, but he did say this - and this is important when we're dealing with these three seconds - he said - and this is at page 844 that:

"If the accused was looking at the same area as the body-worn then you should see something similar -"

- and of course, the accused was looking in the same direction during those three seconds, as he himself admits. So again, the body-worn limitations are important but it's also extremely useful for your consideration as to what actually happened.

Now, then you heard from Senior Sergeant Barram. And you know about his expertise. You know that he had current - he was the person that trained Northern Territory Police Officers during the relevant - not like Mr McDevitt - that's no disrespect to him, Mr McDevitt, but Senior Sergeant Barram was the person who did the training of those officers and you would accept his evidence about what actual training was delivered. He reaches opinions based upon watching the body-worn video in real time, that's what he said. He obviously watched it slow motion as well but his critical opinion is included in his report that is now before you is, based upon the real time video and his opinion, the second and third shots were neither reasonable nor necessary. And that is because that things had changed substantially from when the first shot was fired.

And you may think that is a statement of absolute common sense. It's not simply that in the first shot Kumanjaya Walker was standing up, but he had the full use of his arm. Did he have the full use of his arm when he is pinned on the mattress by Constable Eberl? That's what you have to consider. But that opinion by Senior Sergeant Barram about that substantial change in position, you may think is obvious, it's self-evident. And it's clear when you look at those images that in fact Constable Eberl was, at the very least, partially on top of a significant part of Kumanjaya Walker's body.

Now, Senior Sergeant Barram said the same thing as Dr McIntosh about assuming the position of the right, it's either totally under the body or upper arm - only the upper arm is on top of the body - that would significantly restrict his ability to deploy the scissors and again, Mr McDevitt didn't seem to disagree with that.

Senior Sergeant Barram said in his opinion the accused had other non-lethal options, in particular defensive tactics - which really was helping Eberl with his hands control Kumanjayi Walker and that's exactly what he did after firing the second and third shots.

You heard Senior Sergeant Barram say that the accused could have said:

"Drop the knife". "Police - don't move."

To give Walker the opportunity to drop the knife - and what he said importantly is that he believed the firing of shots 2 and 3 made little or no difference to what he called the, "tactical situation".

Now, what he meant by that was this. The Northern Territory Police are authorised to fire only if there is a threat of serious harm or death to either themselves or another person. He didn't think with that limited ability for the arm to move that that threat was present. In other words, he said the accused could've grabbed Kumanjayi Walker's right arm from underneath his own body without having to shoot him twice. This is what is described as, "empty hand tactics".

Let me turn to the accused's evidence. The accused said that after he fired the first shot Kumanjayi Walker and Constable Eberl fell to the ground and they began fighting on the ground and he said he could see Kumanjayi Walker's right arm with the blade in it still moving and stabbing Constable Eberl on the ground. And he was - and he still feared for Constable Eberl's life. He said:

"I believe he still had a lethal weapon and was utilising it against Eberl."

Mr Edwardson asked:

"In which direction?"

He then said:

"He would have been stabbing again in this area here."

And he pointed to the neck, the chest and the shoulder, and said he still feared for Eberl's life.

He moved towards both of them because he was in fear of his partner's life and he needed to incapacitate the threat immediately by the use of the firearm:

"I needed to make use of the firearm as safe as possible for Eberl."

And I point to the curious expression:

"He would have been stabbing again in this area here."

But, ladies and gentlemen, let me make this clear. If you believe, as a reasonable possibility, that that evidence is true, you must find him not guilty on all three counts. No question about it.

But, we would say that you would be satisfied beyond reasonable doubt that what he said was a lie. It was a lie to justify the unjustifiable. When he said the words, "He's stabbing me", or "It's all good. He's stabbing me, he's stabbing you", he was saying that to justify what he had done. He was saying it because he knew he'd gone too far. He knew he had been too gung ho.

But, if you don't accept that you don't think it was a lie, then you can use that evidence about the truth of the statement. And what you then have to work out is when he said, "He's stabbing me, he's stabbing you", is he referring to what he saw when he was standing up, or what he saw when he was on the mattress, or both?

There is no doubt at all that the accused was looking at Constable Eberl and Kumanjayi Walker during those two and a half to three seconds. He says so himself. He claims; that is, the accused claims that he could see Kumanjayi Walker's upper body moving in those two and a half to three seconds, whereas the Crown says you just can't see that at all.

Eberl says that he does not remember if he saw or felt Kumanjayi Walker's upper body moving in those two and a half to three seconds, but he does say that he believed his right arm was underneath – Walker's right arm was underneath his body.

The Crown case is that you would reject what the accused says about seeing Eberl being stabbed on the neck and on the chest because that is not remotely what you can see in the body-worn video. There is nothing remotely like a stabbing motion by the accused towards the chest, or towards the neck – I'm sorry, you can't see from the body-worn anything remotely like a stabbing motion by Walker towards the chest or the neck or any part of his bod. And you did not hear Eberl – you did not hear the accused say, "Knife, knife, knife", which he would have said, because, we say, you couldn't see the knife at the relevant time.

So, finally, members of the jury, let me go to why we say you would be satisfied beyond reasonable doubt that the shots 2 and 3 were not legally justified. And, broadly speaking, there are two ways in which you can reach that conclusion. The first is that the accused knew or believed that Eberl had been effectively restrained – I'm sorry, I'm sorry, I'll start again.

The accused knew or believed that Eberl had effectively restrained Kumanjayi Walker. He knew or believed that Walker posed a low level of risk to Eberl. Even if he believed that Kumanjayi Walker some level of risk, it was not a risk of death or serious injury, such as to justify the two lethal shots. That is the first part.

And what we say about those things, about what he believed, what the accused believed, was, one, the accused was obviously paying very close attention to what

was happening on the mattress. You can see that, in particular, on Mr Hawkings' image when he comes in the second time.

I'll just play that and show it to you.

No, that's not it, no. That's okay, don't worry about it. Thank you.

You have it in your – it's Constable Hawkings' image when he comes in and you can see the accused crouching over both men. You can see, at the two moments when shots 2 and 3 are fired, that the accused has one hand on Constable Eberl and the other hand on his Glock, and he's looking at the mattress. And the accused puts his left arm out, to steady himself against Constable Eberl's back.

He is trained not to fire his Glock if there is a risk of endangering Constable Eberl and the Crown case is he would not have fired the second and third shots if there was a risk of accidentally shooting Eberl, because you've heard evidence, even from Mr McDevitt, that there can be a sudden flip, in a split second, someone who's on top can then be on the bottom, and vice versa.

So, he would not have taken those two shots if he believed there was a risk of accidentally shooting Eberl, and because he was confident that Eberl would not move. He was confident that there wouldn't be this split-second flipping of positions and he had that confidence because he knew that Constable Eberl was effectively restraining Kumanjaya Walker on the mattress.

You would accept the evidence of Dr McIntosh, that for those critical three seconds before the firing of shots 2 and 3, because the accused was looking in the same direction as the body-worn, what he sees is similar to what is captured on the body-worn. What is captured is Constable Eberl, partially on top of Walker.

You will be told repeatedly you can't see the position of the right arm, but the person who can see it is Constable Eberl and the right arm is sort of underneath his body. So, the accused, who was very close at that time either didn't see Kumanjaya Walker's right arm, or he did see it underneath Kumanjaya Walker's own body.

The Crown says he did not see Kumanjaya Walker stabbing Eberl. He did not see Kumanjaya Walker's upper body move in those three seconds. He knew that, at that stage, there was no longer an imminent threat to Constable Eberl's life. There was no longer an imminent threat to serious harm.

Now, you have heard Senior Sergeant Barram say that officers are trained to account for every bullet they fire. You've heard the accused say that his training was to continue shooting until the threat was eliminated or removed. The Crown case is, at that time, he believed it had been removed. But, nevertheless, he kept shooting, regardless.

No doubt, Mr Edwardson will emphasise that there was only 2.6 seconds between the first and the second shot, and 0.5 seconds between the second and the



third shot. But, the reason for that very short time period is that it was the accused and only the accused who decided to shoot a second and third time, in quick succession, two and a half seconds after the first shot. The speed with which he acted was not necessary or reasonable, nor was it in compliance with his own training. He did not, as he was required to do, reassess the risk when he saw Constable Eberl on top of Kumanjayi Walker. And having assessed that there was no imminent threat to life, or serious harm, the accused did not have a justification for firing the second and third shots. He was trained to use less lethal options, and he did not do so. He knew that he could use empty hand tactics, in particular, that he knew that he could assist Eberl in getting Kumanjayi Walker's right arm, from underneath his body, and removing the scissors. And that's exactly what he did after firing the second and third shots. And indeed, Constable Eberl was successfully deployed empty hand tactics, even though he knew that Kumanjayi Walker had the scissors.

And he was doing so effectively. And you would accept Senior Sergeant Barram's evidence that that was appropriate. And you'd reject Mr McDevitt's evidence, that it was against his training. Mr McDevitt, of course, assumed, that there was no effective restraint by Constable Eberl on Mr – he assumed there was no effective restraint by Eberl on Kumanjayi Walker. Now that's the first part of reasoning.

The second part is that the accused in fact did not know, or did not believe that Constable Eberl was at risk. Now you know again that you are only trained to shoot when you believe – or an officer believes that the immediate – there is immediate risk of death or serious harm. And in those two and a half – 2.6 seconds, he completely failed to reassess the situation. He didn't give himself time to think about the issue of whether Kumanjayi Walker posed an imminent threat to Eberl's life, or serious harm. And you recall right at the beginning, I reminded you of what he said when asked some of the questions about whether he knew that he would cause Kumanjayi Walker harm, indeed death or serious harm or harm if he fired shots 2 and 3.

And he said, on one of his sets of answers, "I didn't think that." Wasn't thinking about that. If he wasn't thinking about whether any harm was caused to Kumanjayi Walker, was he thinking at all about whether Constable Eberl was at serious risk or death. Did he simply fail to assess the risk at all? And if you find that, that he didn't assess the risk at all, then you would not find that he actually had a belief that Constable Eberl was at risk of serious harm or death. And you would not find that his response in firing those two fatal shots, at point blank range, was a reasonable response as he perceived it.

The Crown case is this. He did not honestly believe that Eberl was at risk of serious harm or death when he fired shots 2 and 3. The accused's response in firing those two fatal shots, at point blank range, was not a reasonable response as he perceived it. And the accused did not honestly believe that those two shots were reasonably necessary to perform any duty, or any function he had, at that time, as a police officer.

On either of those parts, there is no reasonable possibility that the accused believed that it was necessary to shoot Kumanjayi Walker on those second and third shots.

Thank you, your Honour, they're my – that's my address.

MR EDWARDSON: Your Honour, mercifully, I'll be considerably shorter. But I wonder whether perhaps it might be better to have lunch now. It's a matter for the jury really, and your Honour, but half past 12:00. I think's normally the start time. And I'd rather complete it in one go if I can.

HIS HONOUR: All right.

Then we will take the lunch adjournment at this point. But we'll resume, rather than at 2 o'clock maybe at 1.45 if that's convenient?

MR EDWARDSON: Certainly, your Honour.

HIS HONOUR: My Associate reminds me I have another matter at two o'clock which was only going to take a couple of minutes, but I'm just asking whether he can arrange to bring that forward a bit.

MR EDWARDSON: So shall we say for a 1.45 - - -

HIS HONOUR: 1.45.

So members of the jury, would you retire please.

JURY OUT

HIS HONOUR: Now Mr Edwardson, do you know approximately how long you're likely to be?

MR EDWARDSON: At the most an hour and a half.

HIS HONOUR: All right. I don't believe that I will start this afternoon, because I want an opportunity to make some additions and changes to what I was going to say, based upon the final addresses that have been made by counsel. But I'll certainly be in a position to start first thing tomorrow morning.

MR EDWARDSON: If your Honour pleases.

HIS HONOUR: All right.

MR STRICKLAND: Your Honour, could I just make one enquiry. Does your Honour have a practise in relation to when the jury should stop their deliberations on a Friday? Different judges have different practices.

HIS HONOUR: Well I normally leave it up to the jury. And indeed it's not just simply on the Friday. I would usually call them in at around 4.30 in the afternoon at any day, and ask them whether they want to continue deliberating, and if they do, they can deliberate for as long as they like. Or alternatively, whether they want to go home and come back the next day.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Now I don't know whether that should extend in the circumstances of this case, to asking whether they want to continue their deliberations over the weekend. But I guess that's a possibility. It's not what I'd turn my mind to, but it's something that I might raise with them.

MR STRICKLAND: Thank you, your Honour.

MR EDWARDSON: Yes, your Honour.

HIS HONOUR: All right, I'll adjourn.

LUNCHEON ADJOURNMENT

## RESUMED

HIS HONOUR: Yes.

MR EDWARDSON: Just before the jury come in, can I just remind your Honour that I have got that quick appearance in Tasmania at 1:45. So, when we get to about 1:40 – sorry, 2:45. So, when we get to about 2:40, I'll be asking if we can have the afternoon break, and I'll finish comfortably then my address after that.

HIS HONOUR: All right, thank you.

Bring the jury in, please.

## JURY IN

HIS HONOUR: Now, members of the jury, I'm just about to call upon Mr Edwardson for his closing address. We will proceed now until 2:40, at which point I'll take a short adjournment; and, after that, we will continue with Mr Edwardson's address until he finishes.

MR EDWARDSON: Your Honour pleases.

Ladies and gentlemen, on 9 November 2019, Constable Zachary Rolfe discharged his firearm three times into the body of Kumanjayi Walker. Each time he pulled the trigger, he was acting in good faith. He was acting in the reasonable performance of his duties and he was acting in self-defence; the self-defence of himself and his partner, Constable First Class Adam Eberl, and the evidence in this case, I suggest, does not say otherwise.

Zachary Rolfe was taught, trained and drilled as a member of the Northern Territory Police Force that an edged weapon equals gun. When Kumanjayi Walker deliberately, and I suggest, viciously, tried to stab both officers with potentially fatal consequences, the only appropriate response was to draw his firearm and pull the trigger, discharging each bullet into the seen body mass of Walker until the threat was removed.

It is for the prosecution to prove that Constable Zachary Rolfe's response to the aggression and potentially fatal actions of Kumanjayi Walker in deploying those scissors was not legally justified. Put another way, it is for the prosecution to negate each of the three defendants beyond reasonable doubt and they simply have not.

The Crown has had the benefit of the resources of two silks or senior counsel, a senior junior barrister, the Northern Territory DPP office, and the Northern Territory Police Force. Zachary Rolfe was arrested within four days of this tragic shooting, without, you might think, any meaningful investigation.

This case is tragic. A young man lost his life and a young, courageous police officer has been charged with the most serious charge known to the criminal law; as I said, without any proper investigation, and that, you might think, is a disgrace. The executive of the Northern Territory Police Force and those they deployed to justify these charges, you might think, have thrown everything at Zachary Rolfe because of a decision that should never have been made. In truth, this prosecution, is, you might think, all about the executive of the Northern Territory Police Force attempting to justify what was the unjustifiable.

As of Wednesday last week, when the Crown closed their case, they had 841-plus days, since the decision was made to charge Zachary Rolfe, to actually produce a case. The Crown produced 40 witnesses to support the narrative that Rolfe, a police officer, is guilty of murder. We say, they have not come close. In fact, with the exception of Senior Sergeant Barram, each police witness only confirmed the truth of the matter. What Zachary Rolfe did was, not only what he was trained to do, but his response by firing all three shots was reasonable and proportionate in the circumstances.

At the commencement of this trial, I said that this is a case in which the intellect has to rule the heart. It is a case where proper scientific evidence needs to inform the calm and rational assessment of the evidence. This approach is critical now that you are close to deliberating to determine Zachary Rolfe's fate.

Zachary Rolfe chose to give evidence in his defence, a course which he did not have to take. By stepping into the witness box, he exposed himself to cross-examination by Mr Strickland SC, on behalf of the Crown. Can I suggest that he conducted himself in an exemplary fashion? He was appropriately responsive to each question and, at all times, he remained courteous and polite, as he was with Kumanjayi Walker, until the scissors were deployed against him. Mr Strickland, with the greatest of respect, did not lay a glove on him.

Before we turn to the facts of the case, and the arguments that we wish to advance on behalf of Zachary Rolfe, there are some preliminary observations that need to be made and some corrections to issues and arguments ventilated yesterday by Mr Strickland SC in his final address.

The first point I want to make is this. What this trial is not about is an alleged breach of general orders, some form of non-compliance with training, or poor tactical decisions. This trial is about whether the prosecution have proved any of these most serious of charges, having regard to the circumstances that confronted Zachary Rolfe on 9 November 2019, when Kumanjayi Walker chose to deploy a lethal weapon against Rolfe and his partner. In other words, it is what Zachary Rolfe saw, heard, felt and perceived when he made that critical decision to fire two or more times in a split-second decision.

When you listen to the prosecution case; and, in particular, their determination to put Senior Sergeant Barram into play, you might well ask yourselves how helpful are many of these alleged training, tactical or module failures in making your decision about these charges. There are, of course, aspects of training that are obviously important. For example, the notion that knife equals gun. The training, that if the gun is fired, the target should be the seen centre body mass. The fact that a police officer is trained to continue to shoot until the threat is removed, to use the description of Ben McDevitt.

Whether other tactical options might or could have been deployed, with the benefit of hindsight, really, is not to the point. That is why Ben McDevitt explained that criticisms he made in his report were with the benefit of information which Zachary Rolfe did not have; namely, a positive identification of Kumanjayi Walker and the fact that Walker was armed with a lethal weapon. So, right at the outset, I want to make it clear to you that you should not be distracted by the prosecution's attempt to constantly try and fight this case on the best basis of alleged training and tactical errors.

I want to turn briefly to correcting some things that were said by Mr Strickland yesterday. On more than one occasion, transcript 1273 to 1274, Mr Strickland tried

to paint the picture that the struggle on the mattress was three seconds. And therefore, reflective of the time in which Zachary Rolfe had time to make his decision. Indeed, he said to you in his address, at T19 – sorry, 1292, by reference to Dr McIntosh being clear about the body-worn video, “The three seconds, when they go to the mattress, and before shots 2 and 3 and that he believes that what the accused would have seen is something similar to the body-worn video.” That is, with respect, we suggest, misleading.

The timing in this case is critical because Zachary Rolfe had to make a split-second decision about his perception, about the threat to Constable Eberl when he fired shots 2 and 3. When Mr Strickland opened, he said that once – that happened one second after the first shot. Eberl and Kumanjaya Walker fell to the mattress, which means that shot 2 was in truth, 1.6 seconds after they fall to the mattress, and when we know that the third shot was 0.53 seconds thereafter. What I’m trying to suggest to you is this.

The extension of time by Mr Strickland is an attempt to try and increase the time Rolfe had to make an assessment that suits their case, before firing. Which we suggest is unfair, and does not accurately reflect the split-second timing that in truth, occurred on this occasion. Mr Strickland has tried to argue by reference to some misconceived notion that Zachary Rolfe had a pre-occupation with Walker. That should events – in relation to the events leading up to his attendance at House 511, as somehow informing you, as to his state of mind when he fired shots 2 and 3.

We disagree. We say he is no different from other officers, and for that matter, his superior, Evan Kelly, all of whom were deeply concerned at the prospect of Walker being at large, following the axe incident, and without sufficient information being conveyed to members, as to the potential risk that he posed. Members of the jury, do not get distracted by the prosecution in this regard.

This brings me to the question of what Zachary Rolfe intended when he pulled the trigger on the second and third occasion. There is, we suggest, a very big difference between the concession made by Zachary Rolfe as to the potential outcome of shooting into the centre body mass, and the formation of the actual intention for that outcome to occur, in a split second. We say, he had no time to form any intent at all. And that what he did was to instinctively respond to the very real threat of the scissors, which were deployed against both officers by Kumanjaya Walker.

The response of Rolfe was entirely consistent with the very training that the prosecution are now seeking to put against him. In truth, all he was doing, was firing shots 2 and 3, to remove the threat. We remind you, ladies and gentlemen, that at no stage in cross-examination, did Mr Strickland SC, expressly put to Zachary Rolfe, that when he pulled the trigger on the second and third occasion, he intended to kill Kumanjaya Walker. Nor that he intended to cause serious harm to Kumanjaya Walker. And in the context of manslaughter, nor did he grapple or deal with the notion of negligence, or recklessness, as he put to you in his address. There was a complete failure by him to distinguish between Zachary Rolfe’s actual state of mind,

as opposed to what knowledge he may have had as a consequence of pulling the trigger. The two are entirely different.

The prosecution have developed a theme, at which at transcript 1301, they asserted that Rolfe intended to draw his firearm if he came across Kumanjayi Walker. Again, that we suggest, misrepresents the evidence. There is no question, even at House 577, that Zachary Rolfe was prepared to draw his firearm, if he was confronted with an edged weapon at the hand of Kumanjayi Walker. The same can be said about any of the other members of the IRT, who no doubt would have had a similar response. They had all had the benefit of the confronting images of the axe attack three days before. They have the same training as Zachary Rolfe. You would expect, in these circumstances, any police officer, armed with all of this information, to have had exactly the same response.

The next thing is that Mr Strickland told you that the accused said in evidence that:

“The way I was trained, was that if someone was threatening us with an edged weapon, our first response was to go for our firearm unless that was impossible.”

He contrasted that with the evidence of Senior Sergeant Barram, and the evidence of Robert Kent. The evidence that Zachary Rolfe gave on that issue was plainly in the context of the situation that confronted him on 9 November 2019. Barram and Kent were clearly qualifying their answer about when a firearm should be drawn, by reference to the circumstances that confront a police officer, with an assailant, armed with an edged weapon. As is plain from all of the evidence that you’ve heard, it all depends upon the circumstances. Some circumstances permit other options to be available. The circumstances that confronted Zachary Rolfe did not permit that to occur. In any event, you will remember the evidence of Ben McDevitt yesterday, when he told you that police are taught around the country, that if you are confronted with an edged weapon, the default response or option, is the firearm, transcript T1247.

Finally, before I turn to the narrative and the facts of this case, I want to make one further important observation. You might well be asking yourselves why do the prosecution appear to be pandering to the notion that police, specifically Zachary Rolfe, should have somehow treated Kumanjayi Walker on 9 November 2019, with kid gloves. Let’s be brutally frank about this young man. The truth of the matter is that he had a lengthy and violent criminal record. Three days before 9 November 2019, he had deployed an axe in an extraordinarily dangerous and confronting manner, which of itself, would have justified him being shot on that occasion. In other words, those officers could have, in those circumstances, have taken a different response. And legitimately so.

Worse still, on 9 November 2019, he deployed a lethal weapon, namely the scissors. But this time, he stabbed Zachary Rolfe, before turning his attention to Constable Eberl.



He might be a young man, and for that reason, if nothing else, this case is tragic. But nonetheless, he was dangerous. He was violent. And in many respects, he was the author of his own misfortune.

I now turn to the facts of the case. On 9 November 2019, Constable Zachary Rolfe and four fellow police officers were despatched from Alice Springs to arrest Kumanjayi Walker. Four of the five were trained to deal with dangerous arrest targets, such as Kumanjayi Walker, and that he was, a very dangerous arrest target. That is the unchallenged evidence, right across the board in this case. The members of the Immediate Response Team were tasked to gather intelligence as to the whereabouts of Walker. Walker was to be arrested if the intelligence gathering activities were productive.

Constable Rolfe and his colleagues, commenced their enquiries at House 577 of the Yuendumu Township. The very location where the deceased attacked Police Officers Smith and Hand, with a hatchet, only three days before. The evidence is that upon attending at House 577, police were informed that the deceased had left that vicinity only three minutes prior to their attendance, and they were heading to House 511, or 518. Although Kirstenfeldt was informed by a young male occupant that Kumanjayi Walker might be sleeping there that night, Constable Rolfe told you that nonetheless, he still believed it was required of them to search that house, because he did not trust the word of a 10-year old, as what he called, "Actionable intelligence." Transcript 1065.

Having obtained permission to enter House 577, he and Kirstenfeldt set about clearing the house. In so doing, Constable Rolfe maintained his right hand on his Glock, in case he had to remove it from his holster. This was, after all, the very same house where the axe incident had taken place three days earlier. Zachary Rolfe was not going to leave anything to chance, in the case of Kumanjayi Walker. Or just in case Kumanjayi Walker presented himself armed with an edged weapon, inside that all too important reactionary gap.

The prosecution and Senior Sergeant Barram have been critical about Zachary Rolfe having his right hand on his Glock in the ready position. You've heard Zachary Rolfe on this topic and you have also now heard from the defence expert, Mr Ben McDevitt. At transcript 1301 yesterday Mr Strickland said this:

"Now, Senior Sergeant Barram gave evidence that police officers are trained not to disengage any of the safety devices on their holster unless they are going to actually draw their firearm."

The accused denied that that's how he was trained. The evidence of Senior Sergeant Barram on this topic is contradicted by the evidence of Ben McDevitt. Moreover, the prosecution have put into evidence all of the training by reference to all of the relevant modules that Zachary Rolfe received to become a police officer and then subsequently a member of the IRT. Nowhere in those documents will you

find any reference to training on this topic along the lines proffered by Senior Sergeant Barram.

Having regard to what happened three days before, what Zachary Rolfe did in this regard was not only appropriate but, quite frankly, just plain common sense. Likewise, the idea that they could or should have waited until Kumanjayi Walker returned to his house that evening is fanciful. The practical reality of the situation was that Walker was almost certainly going to be tipped off and escape yet again and accordingly, Constable Rolfe and his colleagues properly and rightly went to House 511 and 518 to try and track him down before that could happen.

When they arrived Officer Eberl saw a male inside. Constable Eberl and Constable Rolfe entered to make enquiries as to whether that male was, in fact, Kumanjayi Walker. The person you now know to be Kumanjayi Walker lied to police as to his true identity by claiming that his name was Vernon Dixon. As you have seen on the body-worn video once Constable Rolfe verified the true identity of the deceased, he then moved to arrest him in accordance with the command he was given by the warrant and in accordance with the requirement to arrest Walker as the perpetrator of the axe attack on his colleagues three days before.

At that very moment Kumanjayi Walker suddenly and without notice, deployed a previously hidden pair of scissors and stabbed Constable Rolfe, landing his blow to the shoulder, close to Constable Rolfe's neck. If Walker had hit his carotid artery Zachary Rolfe would be dead. The evidence of Doctors McIntosh, Towsey, Botterill and even Senior Sergeant Barram make it very clear that this edged weapon had the capacity to inflict a fatal wound.

In the face of this spontaneous ambush style attack with an edged weapon, Constable Rolfe was justified in drawing his police issue firearm and firing a shot into the seen centre body mass of Mr Walker. There is, ladies and gentlemen, no suggestion that this shot was anything other than lawful, reasonable and a proportionate defensive action. This response was exactly what the Northern Territory Police Force had trained him to do and as I said, it was an appropriate and lawful response and the prosecution do not say otherwise.

Even Senior Sergeant Barram said this, at transcript 995, and I quote:

"It appears to me that Rolfe fired shot 1 in defence of Eberl. In line with training to have drawn and fired his firearm, Rolfe must have formed the belief that death or serious harm would result to Eberl and that he had no other option than to shoot to protect Eberl who had been stabbed. In my opinion that would be a reasonable belief at that moment in time, given the following circumstances:

1. Prior knowledge that Walker had armed himself two days prior to resist arrest.
2. Rolfe had seen a bladed weapon in Walker's hand.

3. Rolfe had actually been stabbed by Walker with that improvised weapon a logical extension of which is that if Walker was prepared to stab Rolfe he was also prepared to stab Eberl.
4. Eberl was in close physical contact with Walker, who was still armed.
5. Police training around the potential lethality of edged weapons, particularly when in close proximity.
6. Such close proximity means there is no time and distance in which consider and deploy other tactical options."

Now, that's their expert explaining why shot 1 is, from his perspective, consistent entirely with his training and perfectly proportionate reasonable and rational.

Senior Sergeant Barram accepted in cross-examination that shot 1 did not incapacitate Kumanjayi Walker. That is at transcript 996. The body-worn video and the evidence of Ben McDevitt make it plain that Kumanjayi Walker was also not incapacitated after shots 2 and 3 but nonetheless he continued to violently resist the lawful arrest of him by both officers. He even expressed the desire to kill them.

To understand the limitations of Senior Sergeant Barram's evidence I need to remind you of some of the concessions that he made in cross-examination. He accepted that his perception, by reference to the body-worn video:

"Might be quite different from the person who is under attack."

Transcript 976.

"Whatever is captured on the body-worn video may not represent what the individual sees" –

Transcript 977.

"The lighting in side House 511 was poor".

He even accepted the notion that:

"Zachary Rolfe never had the luxury of pushing the pause button."

Transcript 977.

He acknowledged from his technical experience and training that dynamic situations such as the one we see in the various video footages can change in a split-second:

"A person might be on the bottom of - or underneath a police officer but those roles can reverse in a matter of seconds."

Transcript 979.

He unreservedly conceded and accepted that nowhere and I mean nowhere on the body-worn video was he able to see the right arm of Kumanjayi Walker, that is his upper arm, his forearm, his hand or the scissors at least until he was handcuffed. Transcript T978.

Perhaps the most significant concession was the one that he made in paragraph 19 of his report when he said this:

"Rolfe has not provided what his apprehensions and beliefs were at the time of firing the shots and has exercised his right to silence therefore I am unable to consider these mental elements in coming to an opinion about the necessity and proportionality of the force used in this situation."

Transcript 978.

By now, ladies and gentlemen, it will be obvious to you that ultimately the question for your consideration is the state of mind of the accused, Zachary Rolfe at the time that he fired shots 2 and 3. That is what he saw, heard, felt and perceived and how he accordingly responded. Not what Senior Sergeant Barram might think when he considered the body-worn video frame by frame.

I took Senior Sergeant Barram through each of the six circumstances he referenced in respect of shot 1 in the context of shots 2 and 3. He accepted that each one was still in play at the time of shots 2 and 3 but somehow sought to argue that there had been a change to such an extent that Rolfe's response was no longer reasonable. The primary difference being that Walker and Eberl were now on the ground.

Well, ladies and gentlemen, the evidence of Ben McDevitt in any event, merely confirms what we have been saying since the commencement of this trial, that shots 2 and 3 cannot be distinguished from shot 1. The notion that you can separate the shots into different incidents is again entirely misleading and does not represent what actually confronted Zachary Rolfe in those critical seconds.

Eberl's position with Walker on the ground was such that his situation was even more perilous and the suggestion that there is somehow a difference is artificial and it is disingenuous.

Ladies and gentlemen, this flawed prosecution rests on your findings on what happens if, what we say, is 1.6 seconds after they fall to the ground, being the first shot and 0.53 seconds after the second shot when Zachary Rolfe fires his Glock twice into the seen centre body mass of Kumanjayi Walker, Constable Rolfe, having been stabbed by a known violent offender and having lawfully shot him once, was

we maintain, lawfully justified in continuing to defend his mate, and fellow police officer, who like him, was just doing his job.

It is the defence case that he was trained to incapacitate, or put another way, to remove the threat. This offender posed, because he was armed with an edged blade, a lethal weapon, which he had already used to stab him. Kumanjayi Walker was now using that same blade against Constable Eberl when the second and third shots were fired.

His training required that the shots be aimed at his centre body mass, to remove the threat. Not as Mr Strickland would have you believe, to ensure maximum injury or death. As much as is self-evident from almost every witness called by the prosecution, attached to the Northern Territory Police Force. When I opened, I gave you a word of warning about the body-worn video. Mr Strickland said that the body-worn video can be played as many times as you like, and that that's exactly what he has done, frame by frame by frame, throughout this trial. As the evidence now clearly and unequivocally demonstrates, there are considerable and obvious limitations on the interpretation of this evidence. What matters in this case, as I've said, is what Zachary Rolfe saw, heard and perceived, when he fired shots 2 and 3. Not some armchair so-called expert, trying to interpret, frame by frame, the events captured on video.

It is the defence position that it is so important that the video, insofar as it is of assistance, is considered in real time, rather than frame by frame. The wholly unrealistic deconstruct by the prosecution, in trying to identify what happened in a frame by frame fashion, is dangerous, and again, utterly misleading. It will be a matter for you, members of the jury, but the body-worn video, at best, shows the violent struggle between Kumanjayi Walker, and the arresting police officers. But you cannot see exactly what was happening at all times. The scissors are not physically seen on the footage until after the three shots had been fired. Kumanjayi Walker's right hand cannot, and is not seen at any time on video. And that is why it is impossible for the prosecution to prove that Kumanjayi Walker's right arm was pinned beneath him, such as to effectively constrain him from deploying the scissors against Eberl.

When Mr Strickland opened, he said it would be Dr Andrew McIntosh's expert opinion, that Mr Walker's right arm was pinned under his own body, and compressed against the mattress, which therefore significantly restricted to move his right arm, and use the scissors as a weapon. He could not do, as he had been doing while standing, which was to swing his arm downwards and hit the accused. That's at transcript page 40.

When Dr McIntosh, however, gave evidence, and you'll remember that his Honour told you that an opening is not evidence, the evidence is what you actually hear from the relevant witnesses. But when Dr McIntosh was cross-examined however, he acknowledged, firstly the obvious limitations of the body-worn video, and specifically in this context, that by reference to the body-worn video, we have no way of knowing, by looking at the video, where the scissors came

from, how he accessed them, how he deployed them, or used them, during that timeframe, which is not visible on the video. Transcript 848.

Insofar as Dr McIntosh expressed in his report the opinion that, "Walker's right arm is likely pinned under his body." He accepted that he chose those words carefully, because the video does not permit or depict the right arm. This was a dynamic situation which occurred in a matter of seconds. He accepted that the perception, or perspective, of both officers Eberl and Rolfe may be quite different from his analysis, and that accordingly, any opinion he had expressed, had to be seen in that light. He was not, he told you, seeking for a minute, to impose his opinion about the extent of the threat or the perception of that threat on either of these two officers, that is, Constable Zachary Rolfe, and Constable Eberl. Transcript 850 to 851.

Of course, you will remember the evidence of Dr Towsey. At transcript 564 and Dr Botterill at transcript 865. None of the three shots, none of the three shots, contributed to any immobility of the deceased's right arm.

We know throughout this violent exchange between police and assailant, Kumanjayi Walker always maintains control of that lethal weapon in his right hand. We know that he had already deployed the weapon successfully stabbing Rolfe in the left shoulder. We know he deployed the scissors against the clothing of Constable Eberl, and we know that, because of the prosecution witness, Mr Tim Simpson, who is the textile expert. He was the officer who tried to replicate the damage he identified on Eberl's shirt with those same scissors, as a simulation experiment, using pork as an equivalent human medium. He managed to stab the pork with moderate depth of about three quarters of the blade. He replicated the damage to Eberl's shirt with, "Remarkable similarity."

In addition, we also know that the forensic scientist, Kate Cheong-Wing, could not exclude the possibility that Eberl's blood had transferred from the sharp to blunt blade tip of the scissors. She acknowledged the absence of evidence is not evidence of absence. Let's be clear about this, ladies and gentlemen. If Kumanjayi Walker had stabbed either officer in the neck, to that depth, death would almost certainly have been inevitable. It is little wonder in these circumstances, why Zachary Rolfe, in response to the question, asked by Mr Strickland:

"How was the situation all good?"

He responded:

"A violent offender had just been trying to murder two police officers and he no longer was."

Transcript 1180. The arrest of Kumanjayi Walker occurred in a confined space with poor lighting. And it was over in a matter of seconds. As we have been at pains to demonstrate, to break down the actions of Constable Rolfe via a frame by frame, fraction by fraction, second by second, distorts the reality of the situation. It is quite

frankly, unrealistic, inaccurate, and like so many other occasions, we say, completely disingenuous.

Constable Rolfe did not have the luxury of tactical options, frame by frame. He had been stabbed. His partner was locked in mortal combat with an armed assailant with a predisposition for violence. Kumanjayi Walker wanted to kill these men. That is exactly what he said, after he'd been shot three times. Zachary Rolfe, as we've said, could not push the pause button. He had to make a split-second, intuitive decision, based on his training. And ladies and gentlemen, it required, we suggest, only one course of action. Tragically, he had no choice. He had to pull the trigger, or risk the real possibility, that Constable Eberl would or could be, fatally stabbed. Who would you rather have watching your back in this volatile exchange? Constable Zachary Rolfe, or the armchair expert, Senior Sergeant Barram?

Now is probably an appropriate time to discuss the reliability and credibility of three of the key prosecution witnesses. Sergeant Frost, Senior Sergeant Barram, and Dr Tiemensma. I start with Sergeant Frost.

Whilst there are some plainly unsatisfactory aspects of her evidence, ultimately at the end of the cross-examination, she all but conceded the version put to her on the instructions of Zachary Rolfe, replicated in his evidence in trial. That is the exchange which took place between the two of them at the Yuendumu Police Station, before they were deployed at 7.06 pm on that day. In many respects, can we suggest, Sergeant Frost has also been thrown under the bus by the executive. And at one level, is also a victim of this appalling investigation. I think it's fair to say that the axe incident was terrifying for her. Particularly given her relationship with Officer Hand. She recognised the potential for a conflict of interest, but in truth, she probably should never have been put in the position of being officer-in-charge of the members of the IRT team, and the dog handler, when they were deployed on 9 November 2019.

The so-called Frost plan has all but vaporised, having regard to the fact that whatever she might have contemplated as being a preference; namely, that Walker be arrested in the early hours of the morning on 10 November 2019, the fact of the matter is that no one knew where Kumanjayi Walker was when they left the Yuendumu Police Station at 7:06 pm. And you remember that the Frost plan contemplated deployment at 11 pm, not 7:06 pm. So, the reality is that that plan could never have been achieved in any circumstance.

Senior Sergeant Frost admits that the IRT members were told that they were to gather intelligence as to Kumanjayi Walker's whereabouts; and, if they came upon him, he was to be arrested, and that is exactly what happened. Although there seems to be some vague suggestion that the IRT members were to be deployed in support of general duties officers attached to the Yuendumu Police Station, as you now know in evidence, that simply did not happen. They were on their own, with no other support, apart from the dog handler, Mr Donaldson.

When you go to the top of the chain of command in this case; relevantly, Commander Wurst, it must be said that he had absolutely no idea what he was doing or what was involved. After all, he has told you that he didn't even know what IRT were capable of doing; he didn't know what IRT stood for; and what capacity they had at the time of their deployment on 9 November 2019. That's at transcript page 487. What does that tell you about the executive?

I turn to Senior Sergeant Barram. He is, undoubtedly, the most controversial witness that the prosecution have chosen to call in justification of these charges. He is the only person on the prosecution case who purports to speak to the extent to which he argues that Zachary Rolfe did not comply with his training in respect of shots 2 and 3. He accepts, unreservedly, that shot 1 was reasonable and proportionate in defence of both officers. He stands alone in challenging the response of Zachary Rolfe in the case of shots 2 and 3.

We have already made the observation of him being, what we call, an armchair expert. He expresses his opinion, after having the benefit of pushing the pause button, to try and identify in 1.6 seconds, whether there had been such a change of circumstance that there was non-compliant training and an unjustifiable response. That is the cornerstone of the prosecution case.

We say, that Senior Sergeant Barram is neither credible, nor reliable. He is simply a mouthpiece for the executive and has, no doubt, been wheeled in here in justification for this investigation, which took place after Zachary Rolfe had been arrested, you might think, in dubious circumstances, where no proper investigation, or meaningful investigation, had occurred. Senior Sergeant Barram presented poorly in the witness box and was prepared to try and justify his opinion by reference to speculation, rather than to facts.

An obvious example is the extent to which Kumanjaya Walker's right arm was in any way constrained by Constable Eberl when shots 2 and 3 were fired. As we now know, a viewing of the body-worn video, even frame by frame, does not permit that to happen. Once you understand the limitation of the body-worn video and the circumstances, he; that is, Senior Sergeant Barram, perfectly well knows that he cannot say whether Kumanjaya Walker's right arm was or was not constrained, or whether he had the capacity to deploy the scissors against Constable Eberl. He well knows that to say otherwise is no more than a lame attempt to justify the opinions expressed in his reports.

The facts that underpin his opinion, in respects of shots 2 and 3, were completely, I suggest, exposed in cross-examination. And, accordingly, you should have little or no regard for his testimony, let alone his asserted expertise. The way he presented in evidence is to be contrasted, can I suggest, with the way in which Zachary Rolfe gave his testimony; and likewise, the defence expert, Mr Ben McDevitt. In short, we say Senior Sergeant Barram takes this prosecution case nowhere. He is aptly described as a barracker.



Dr Tiemensma, like Senior Sergeant Barram, we suggest you should have grave reservations about her impartiality, in respect of her testimony as to the extent to which the scissors had lethal capacity. You will remember that Detective Senior Sergeant Newell was responsible for engaging both doctors, Dr Towsey, who was the trauma surgeon with extensive military experience, and Dr Botterill, who was the experienced forensic pathologist from Queensland; and then, finally, Dr Tiemensma.

What emerged in evidence is this. It now appears that Detective Newell contacted Dr Towsey after his initial report and asked him to provide an opinion as to the lethal capacity of the scissors. An oral opinion was provided, but that did not find its way into writing or disclosure. We do know, however, that Dr Towsey told Detective Newell of the lethal capacity of this edged weapon.

Detective Newell then approached Dr Botterill, seeking a similar opinion on this topic. That was provided in writing and confirmed much the same thing as that which had been expressed already, orally at least, by Dr Towsey. And so it would seem, at the very least, that there were two separate expert opinions in the hands of police about the lethal capacity of this edged weapon.

That wasn't enough, it would seem, for Detective Newell because a further report was requested from Dr Tiemensma, who made it clear by email that it was not appropriate for her to provide such a report because she had conducted the post-mortem of Kumanjaya Walker and that there would be, or could be, a suggestion of bias. Despite the obvious perception of bias, nonetheless, it would seem, this doctor did come to court and did express the opinion which you heard in evidence.

It will, of course, be entirely a matter for you, but you might well think that her reliability and credibility is a far cry from the way in which Drs Towsey and Botterill presented before you. In her case, on this topic, she seemed to do no more than regurgitate sourced reports about the deployment of edged blade weapons without any context. This was done, in conjunction with her interrogation of the body-worn video, frame by frame.

Like Dr McIntosh, and indeed, Senior Sergeant Barram, she was constrained by the fact that the video does not show any of Kumanjaya Walker's right arm, nor the scissors when shots 2 and 3 were fired. She was unable to meaningfully quantify the force required for a penetrating wound and, from her perspective, she acknowledged in cross-examination, that would require conducting tests which she did not do.

It seems that she had not been advised about the simulations conducted by the AFP witness, Simpson. She was unaware of the opinions expressed by Drs Towsey and Botterill as well. In these circumstances, ladies and gentlemen, it is difficult to see how one can have any regard to her opinion in respect of the scissors and her testimony should really be confined to the post-mortem, which she conducted, full-stop.

Your Honour, is that a convenient time?

HIS HONOUR: Yes, it is.

Members of the jury, would you retire, please?

JURY OUT

HIS HONOUR: Now, I believe, Mr Edwardson, it may be necessary for the court to be clearer for your purpose?

MR EDWARDSON: If you wouldn't mind, yes, please, your Honour.

HIS HONOUR: Then I will have the Sheriff's Officers clear the court after I adjourn.

ADJOURNED

RESUMED

HIS HONOUR: Bring the jury in please.

JURY IN

HIS HONOUR: Yes.

MR EDWARDSON: You'll be pleased to hear members of the jury, that I'm getting near the end. I am turning now to what has now become an extremely important, if not telling point in the address. I want to start with the prosecution opening. The prosecution opening and the case thereafter, in relation to those infamous words, "He was stabbing me, he was stabbing you" have loomed large. And for obvious reasons.

When Mr Strickland opened the case for the prosecution at the commencement of this trial, he said this, transcript page 40.

"Eberl says to the accused, 'Did you, fuck', which is a matter for you, may be a reference to the shooting that just occurred," he said to you. "The accused response is important, 'it's all good, he was stabbing me, he was stabbing you', and Eberl says, 'okay bro'."

When Eberl was examined by Mr Strickland, he attempted to develop the theme that the words, "It's all good, he was stabbing me, he was stabbing you" were in truth a lie, made out of a consciousness of guilt, because he, that is the Crown suggest, that my client knew he had gone too far, and that there was never an attempt by Kumanjayi Walker to stab Eberl.

The cross-examination however, can I suggest, puts things into proper perspective. At page 721, I was cross-examining Mr Eberl, and it went like this.

"You're trying to control this man who is resisting police?---Correct."

"He's completely and utterly non-compliant?---Correct."

"And indeed, it's the case is it not now, that as we saw on the video, when Zachary Rolfe said 'he was stabbing me, he was stabbing you', and he takes hold of the scissors, he's got scissors in his hand, and we saw that on the video footage?"

Mr Eberl said, "Correct."

"He was still non-compliant then wasn't he?---Correct."

"Despite the fact that he'd been shot three times?---Correct." "In other words, even then, from the way in which he presented, he did not appear to be totally incapacitated?---Correct."

When Zachary Rolfe gave evidence on this topic in examination in chief at transcript page 1077, his evidence went like this.

"We hear on various body-worn videos officers saying 'let go of the scissors' or 'drop the scissors' or something like that?---Mm mm."

“Did you utter those words, or words to that effect at any stage?---Yes, I did.”

“When?---When I – so I pulled his hands out from under him, at that point, I ID’d that he had a pair of scissors in his hands, and around the same point in time, Eberl said words to the effect of I think, ‘fuck did you’, and I took that to mean, did you shoot him, yes. At this point I believed that Eberl and myself had just been involved in a potentially lethal fight and he was at a heightened state. And the symptoms of that include tunnel vision and auditory exclusion, where you – you focus on the specific thing in front of you, and you don’t hear everything that’s going on. I believe he was just suffering from auditory exclusion. So I needed to tell him – I needed to give him all the facts, so he could come down from that heightened state. And I told him that it was all good, Kumanjaya had – he had a scissors in his hand, and he was stabbing me, he was stabbing Eberl, just to explain to him the situation.”

So that was him in examination in chief, explaining the thought process behind the uttering of those words. And telling him specifically what had happened.

Mr Strickland cross-examined Mr Rolfe, at pages 1179 to 1180, as follows.

“You said all good?---Yes.”

“He was stabbing me he was stabbing you, to justify what you had just done, didn’t you?---Incorrect.”

“Because constable, you knew that you had gone too far?---Incorrect.”

“You knew you had been too gung ho?---Incorrect.”

“And you knew, didn’t you, that the shooting had been captured on your own body-worn video?---I knew that, yes.”

“And you felt you needed to justify what you had just done?---Incorrect.”

“On two occasions you said ‘all good’, correct?---Did I, when?”

“In the body-worn video?---Yeah.”

“Would you like me to replay it?”

He said:

“If I said it’s all good, it’s all good, I believe that.”

“Well?---If it’s the same occasion, saying it twice, yes.”

And then what happened was Mr Strickland then played the video.

I don't propose to play any videos, or put any photographs up. You'll have ample opportunity in due course, should you wish to, to replay all of these things. But for the record, Mr Strickland paused the video at 9.52.32. And then he continued to cross-examine Mr Rolfe as follows. He said:

"Did you hear yourself say" – sorry, I'll start again.

"Did you hear yourself twice say, 'it's all good'?---Yes."

"You weren't referring to Mr Walker, who was just shot three times, were you?---No, I wasn't."

"You weren't referring to yourself?---I was referring to the situation."

"How is the situation all good?"

And then we get this incredibly telling answer.

"A violent offender had just been trying to murder two police officers, and he no longer was."

Mr Strickland:

"I see. That's why it was all good?---Yes."

And so it is. The prosecution case is that when Zachary Rolfe uttered those infamous words, "He was stabbing me, he was stabbing you," he knew the shots were not reasonable or necessary. He knew that everything he'd done was captured on the body-worn video, and he said those words in order to justify what he had done.

At least, that is what was put by the prosecutor, both in opening, developed in cross-examination, and during the trial, and then finally, in his address to you yesterday and today. This, we suggest, is utter nonsense.

As is made plain by the very last question asked of Zachary Rolfe in re-examination, at transcript page 1189 and 1190. Before I get to the very last question, I will just put that into context, as follows:

"You were asked whether the body-worn video or you knew that the body-worn video on your person was recording all of this event as it unfolded and you said, yes?---Correct."

"And Mr Strickland put to you that you felt when you used the words, 'He was stabbing me, he was stabbing you', or 'It's all good, whatever', you – it was put to you that you felt that you needed to justify what you had done because you had gone too far. Do you remember that line of

cross-examination?---Correct.”

“And when you said the words, ‘It’s all good, he was stabbing me, he was stabbing you’, did that reflect what you had seen from your perception?---Correct.”

This the critical question:

“Did you have any reason to believe, at that point in time, that the body-worn video would not have captured, in fact, the stabbing motion of Kumanjayi Walker with his right hand against Constable Eberl?---No, I didn’t.”

So, ladies and gentlemen, those words were not words of self-justification. They were the words of a man who had just been stabbed; and, likewise, from Zachary Rolfe’s perspective, he believed that his partner had been stabbed as well. They were the words of reassurance, so that Constable Eberl would have some comprehension of what had happened, because you now know he did not hear any of the three shots that had been fired into the centre body mass of Kumanjayi Walker, even though he was actually there.

Those words are not, as the prosecution would have you believe, a lie made out of consciousness of guilt; but, rather, a graphic and clear description of exactly what Zachary Rolfe believed had happened to them both, at the hands of this high-risk, violent offender. As the re-examination makes plain, Zachary Rolfe had no reason to believe that the body-worn video would not have captured the attempts by Kumanjayi Walker to stab his partner.

The whole notion that Kumanjayi Walker was contained by Constable Eberl whilst on the mattress, such that he was never a danger, is nonsense and a gross distortion of the true evidence in this case. Likewise, the suggestion that Zachary Rolfe fabricated the response by Kumanjayi Walker to his partner is equally a gross distortion of the true evidence in this case, and also nonsense.

More absurdly, at transcript page 1292, Mr Strickland, in his final address, said this to you:

“The Crown case is that the evidence that the accused gave in court, that he did have those beliefs, was a lie and the accused lied to justify the unjustifiable; namely, the fatal shooting of Kumanjayi Walker.”

So, finally, the Crown have shown their true colours.

You must not forget that Zachary Rolfe did not know what his body-worn video would capture and what it would not capture; what it would hear or what it would not hear. He had deliberately activated it at all times. That’s the unchallenged evidence. He had no reason to think that it would not capture the right arm.



It would be nothing short of a remarkable coincidence that it is the right arm he sees brandishing the blade and attempting to stab Eberl; that Eberl himself says he did not have Kumanjaya Walker's right arm controlled; that, in fact, the forensic evidence confirms that the scissors in the open position could not be excluded as the cause of the damage to his clothing, not to mention that the DNA from Eberl cannot be excluded as having found its way to the tip of the scissors, nor that it was his blood.

Even more remarkable that he could contrive all of that in 1.6 seconds and 0.53 seconds respectively, after they fall to the ground. And then think, with all of that, to have the presence of mind to utter the words, "He's stabbing me, he's stabbing you", as a deliberate lie. Quite frankly, the suggestion that those words are a lie, made out of consciousness of guilt, is utter rubbish.

If you accept or cannot exclude as a reasonable possibility that those words are not a lie, but, in truth reflect Rolfe's perception at that critical time, then that is evidence that you can rely on as being the truth of what actually happened. If you cannot exclude that as a reasonable possibility, then we suggest, quite separate from the three defences that have been deployed, the result must be the same, and as much has all but been conceded today, and that is one of not guilty.

I will turn briefly to the evidence of Zachary Rolfe himself. When Zachary Rolfe gave evidence, he carefully explained to you his training and how he applied that training to all parts of the circumstances that confronted him and his colleagues on 9 November 2019. He explained his training, which included what he called the "shove and shoot" depicted in the photographs, exhibit 64, a training module which was explained in detail by Officer Bowens, who was Zachary Rolfe's commanding officer in the IRT, and similar sentiments were expressed by Ben McDevitt.

He explained to you his understanding of the expression, "edged weapon equals gun" and that that description was entirely consistent with the same or similar training received, almost without exception, by all police officers called in this case. The presentation of an edged weapon in close proximity to a police officer is the catalyst for the requirement to respond by the drawing of a firearm with an expectation and preparedness to pull the trigger.

In this case, between shot 1 and shots 2 and 3, Kumanjaya Walker always remained in control of the scissors in his right hand. The evidence does not prove otherwise. He was, at all times, non-compliant with violent resistance, even after three bullets had entered his centre body mass, the exact location where Zachary Rolfe had been trained to aim.

Zachary Rolfe told you that at all times he believed that there was an immediate threat to Constable Eberl's life, which is why he discharged the firearm on all three occasions in the way that he did. There can be no doubt, can I suggest, members of the jury, as you can see with your own eyes when you view that video, that even after the third shot, he was not incapacitated. He was certainly not incapacitated after the first shot, which is not in dispute by our learned friends.

And that is exactly what Zachary Rolfe did; that is, he recognised that, absent incapacitation, an officer was entitled and trained to continue to shoot until the threat is stopped or eliminated. He did that because he was lawfully entitled and justified to take that course.

The edged weapon awareness module, which is in exhibit 37, is the module which sets the training that every police officer in the Northern Territory receives, and its application in practice is exactly what Zachary Rolfe did on 9 November 2019. When he pulled the trigger twice, after the first shot, he was acting in good faith. He was acting in the reasonable performance of his duties; and finally, he was acting in self-defence of himself and his partner, Constable First Class Adam Eberl.

I want to conclude if I can, very briefly, with talking about Ben McDevitt. Ben McDevitt is an important witness, insofar as we, the defence, have been forced to try and put some perspective into the training and tactics issues deployed by the prosecution through Senior Sergeant Barram.

The starting point is, of course, that it was Ben McDevitt who created the tactical options model adopted by the Northern Territory Police and relied on by Senior Sergeant Barram. It was his creation. You might think, in those circumstances, and particularly given his extraordinary career, that he is the most qualified and impartial individual to talk to these issues. He is not on the Northern Territory Police Force payroll, nor is he engaged by the executive of the Northern Territory Police.

Mr Strickland tried to impugn him in his second question, by suggesting that he; that is, Mr McDevitt, had been retained for reward by the defence. Little did he know that Ben McDevitt has charged nothing and would not accept payment. Importantly, as a true expert in the relevant field, he was able to express his opinion that, in his view, once the struggle between Kumanjayi Walker and Constable Eberl went to ground, it became far more dangerous and dire a situation for Constable Eberl for a number of reasons.

These included the fact that he no longer had the use of his legs. He said that Constable Rolfe should never have reverted to empty-hand tactics after the third shot, and the suggestion by Senior Sergeant Barram to the contrary was, he said, a ludicrous statement.

He confirmed what so many others have already said, namely the police, are taught to fire as many shots as is necessary to remove the threat and, in his opinion, the threat posed by Kumanjayi Walker, armed with the scissors as he was, remained not only after the first shot but, indeed, after the second and third shots. In short, and having regard to what he suggested is the issue of relevant, rather than irrelevant training and tactical issues, Zachary Rolfe did everything in accordance with the way in which he was trained.

And so it is, ladies and gentlemen, no matter which way you look at this case and as tragic as it might be that a young man died as a consequence of his

behaviour, we say and maintain that all three defences apply equally to all three charged offences and none have been negated by the prosecution.

In these circumstances there can be only one verdict and that is one of not guilty to all charges.

If your Honour pleases.

HIS HONOUR: Members of the jury, I am going to commence my directions to you tomorrow morning at 10 o'clock. There are some matters that I need to deal with with counsel and then I have to make some changes to the document that I have prepared based upon the submissions that have been made or the addresses which you have heard.

So I won't be starting until 10 o'clock tomorrow morning. Now, I will be, I anticipate, about one and-a-half and no more than two hours tomorrow morning, so that you will certainly be in a position to retire to consider your verdicts before lunch time tomorrow.

Now, of course that means that there is tomorrow, there is Friday, you will not be put under any pressure but one of the things I wanted to raise was whether any of the jurors or whether you as a jury, would want to continue your deliberations over the weekend, either on one day or on both days. Now, if as a jury you don't want to do that then that's fine, we can bring it - you can take the weekend off, come back and continue deliberations on Monday if that is necessary. On the other hand, if you haven't reached verdicts by Friday evening and you want to continue on one or more days of the weekend, that's fine also.

I am raising it with you now so that you can just talk about it amongst yourselves tomorrow morning before we start again so that I can then ask you once I've finished giving my directions to you whether you have any consensus in that regard.

So would you now please retire and we will resume at 10 o'clock tomorrow.

JURY OUT

HIS HONOUR: Are these the PowerPoint slides? All right, we will have those marked for identification, if I can find my list. What are we up to AO.

MFI AO PowerPoint slides.

HIS HONOUR: The other thing is MFI C, which contains the majority of the Crown's body-worn video material, I understand that it is anticipated that although that is marked for identification it will be provided to the jury whilst they are deliberating. Do I understand correctly?

MS CALLAN: Yes, your Honour. In circumstances where that is a USB.

HIS HONOUR: Yes.

MS CALLAN: What is contained on that USB is all exhibits, so there is nothing on that USB that has not been tendered.

HIS HONOUR: All right. Are you in agreement with that?

MR EDWARDSON: I am indeed, your Honour, thank you.

MR STRICKLAND: If I could just raise very briefly?

HIS HONOUR: Yes.

MR STRICKLAND: Arising from the address of my learned friend. The first is my learned friend suggested in the address that we did not put to the accused that there was an intention to kill and I'll ask your Honour to read out - we say we did - at page 1097, can I just ask your Honour to go to that transcript.

HIS HONOUR: Yes. Just a moment. Whilst we are talking about transcripts, it's my practise - and has been for many years - to provide the jury with a copy of the transcript.

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: So that unless there is any objection that will take place.

MR STRICKLAND: No, there is not at all. I suppose we need to ensure that there's no legal argument in that.

HIS HONOUR: My associate has been preparing a clean copy of the jury transcript since the beginning of the trial, so.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: 1097?

MR STRICKLAND: 1097, the fourth-last question, there's a number of question but it's most clearly put in the fourth-last question:

"And you knew that he fired two shots in quick succession" et cetera.

But that, in my submission, it doesn't use the word "intent" but intent means pursuing a result and - - -

HIS HONOUR: I think that the point made by Mr Edwardson was a legitimate one, at least one for the jury to consider - and that is that there may well be a distinction between knowledge and intention.

MR STRICKLAND: Well, your Honour, intention - and - - -

HIS HONOUR: Intention may be based upon knowledge.

MR STRICKLAND: Well - intention as defined in ordinary dictionaries, is an action where one is pursuing a result.

HIS HONOUR: Yes.

MR STRICKLAND: So what was put is:

"You knew that if you did X it would cause Y" - that's really - that's the essence of that question. That is a question about intent.

Your Honour, all I wish your Honour to do is to read out that question and answer because that is - we - in my submission that would be a sufficient response because - now, what the jury does with that is a matter for them, but given my learned friend said we didn't put it, we say we did. It's a semantic issue. In my submission that is clearly a question about intent but I would ask your Honour to read that question and answer out to the jury and that's all I wish to do about - on that matter.

HIS HONOUR: All right, thank you

MR STRICKLAND: That's the first thing.

HIS HONOUR: There more to come?

MR EDWARDSON: Need to respond to each one, your Honour.

MR STRICKLAND: Yes.

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour, we oppose that course. Firstly, that particular passage is exactly the passage that my learned friend read to the jury in the course of his final address.

HIS HONOUR: Yes.

MR EDWARDSON: Secondly, we maintain the position that there is a fundamental distinction between a particular state of mind, that is knowledge on the one hand and an intent for a result - and that was never fairly or squarely put by my learned friends and what we put to the jury is absolutely consistent with the transcript. So we oppose that course.

HIS HONOUR: All right, thank you.

MR STRICKLAND: Your Honour, I will just ask your Honour to - it really turns on this issue of what does the meaning of intent - is it there's a legal meaning - there's an ordinary meaning of that word - the meaning of intent is a determination to do an act or to pursue a particular result, "You knew that doing X would cause Y" is tantamount to - it is the same as saying "You intended to pursue a particular result." Now, I have put what I wanted to put about that.

HIS HONOUR: It comes very close though, to saying that a person intends the natural consequences of their acts.

MR STRICKLAND: Well, your Honour, in the context of this case, where we have put that precise question, that "If you fired the shots in those circumstances, you knew that would cause or likely cause his death." We say that really is - it is putting it in different words that "You intended that action."

In any event, I'm not asking your Honour to enter the debate between my learned friend and I about what was put but simply to remind the jury, in relation to the elements of the offence, we've gone to the jury but that is evidence that the jury can - from which it can infer intent to kill or cause serious bodily harm - I mean particularly the answers, "I knew it would likely cause serious harm". Now the fact that - - -

HIS HONOUR: I agree with you on that point.

MR STRICKLAND: So - - -

HIS HONOUR: That it is evidence upon which the jury could make an inference or draw an inference but the point that you are addressing is that Mr Edwardson, in his final address, said that it was never fairly and squarely put to the accused that at the time that he fired the second and third shots he either had the specific intention to kill the deceased at that point or to cause him serious harm.

MR STRICKLAND: Your Honour, I put what I need to - what I need to put which is, in my submission, that is, in effect - that is effectively the same question, based upon what the word "intent" means.

HIS HONOUR: All right, well - - -

MR STRICKLAND: I am satisfied if your Honour simply reminds the jury of his answer.

HIS HONOUR: All right, thank you.

MR STRICKLAND: That's the first point. The second point is, my learned friend said at the beginning of his address, the charge or the charges should never have been bought.

MR EDWARDSON: Without investigation.

MR STRICKLAND: Well that's the note I have. I'm happy to look at the transcript. That, in my submission, is not a matter that is relevant for this jury to consider. Of course, the accused was committed for trial after debate, or after submissions that he ought not to be committed for trial. No questions were put to the officer-in-charge as to the circumstances in which charges were bought or were not bought. I would simply ask your Honour to remind, or to say to the jury, that the question as to whether charges should have been bought, or should never have been bought, are irrelevant.

HIS HONOUR: Mm mm.

MR STRICKLAND: That's the second point.

HIS HONOUR: Yes.

MR EDWARDSON: I'll just respond to that, your Honour. What I actually said was:

"This case is tragic. A young man lost his life, and a young, courageous police officer has been charged with the most serious charge known to the criminal law. As I said, without any proper investigation, and that is a disgrace. That is, at the time that he was charged, there was no investigation."

Now I'm happy to say – happy if it assists, I'd have no difficulty with your Honour saying that, of course, why charges are laid, when they're laid, that's really not for the jury's consideration. Ultimately, it's the evidence in this trial, that's so.

HIS HONOUR: All right, thank you.

MR STRICKLAND: Your Honour, the third point is, really, it's just a matter of fact, and I accept entirely if your Honour accepts what I'm saying, it's inadvertent by my

learned friend, but my learned friend reminded the jury of what he – of what was put in cross-examination to Mr Simpson. Which is that it was put to Mr Simpson, or was suggested, sorry in address, that Mr Simpson had replicated – demonstrated a remarkable similarity between the simulation to the striking of Eberl's shirt and the damage to Eberl's shirt.

Now Ms Callan, in re-examination, by reference to photos 14 and 24, clarified that what in fact Mr Simpson had done, or what he said, was that there was a remarkable similarity between simulations of damage to Mr Rolfe's shirt. And that was clarified in re-examination. And that was clarified at page 811 and 812. Perhaps my learned friend could look at that overnight. It's – I'm not suggesting a matter of great moment.

HIS HONOUR: Yes.

MR STRICKLAND: But it's a – perhaps what might be described as a minor factual error. But, in my submission, should nevertheless be clarified.

HIS HONOUR: All right.

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: Unless there are any further matters, I'll adjourn.

ADJOURNED 3.33 PM TO THURSDAY 10 MARCH 2022



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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY BRIAN ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 10 MARCH 2022 AT 10:03 AM

(Continued from 09/03/2022)

Transcribed by: EPIQ

HIS HONOUR: Yes.

MR STRICKLAND SC: Your Honour, if I could just raise one matter, and that's one of the exhibits. If the jury in the course of their deliberation wants to view the Glock, then one of the OIC's will need to get it from a locked box and provide it to your Honour's Associate.

HIS HONOUR: All right.

Now there was a matter raised yesterday afternoon by you, Mr Strickland, relating to a suggested error of fact in Mr Edwardson's final address?

MR STRICKLAND: That's right, your Honour. I don't have anything to add to what I put, which was – and it was this, that Mr Edwardson raised some – that there was a substantial similarity - - -

HIS HONOUR: This was in the evidence of?

MR EDWARDSON QC: It's page 811 of the transcript, your Honour. And what I think my learned friend was referring to was when at that page I said to Mr Simpson:

“Do you agree with this, the damage observed in Mr Eberl's clothing versus the simulation is remarkably similar?” He said “I would agree.”

And then that was re-examined by Ms Callan on the same page. And I think all my learned friend wanted to do was to make sure that that was put in context. I have no difficulty with that.

HIS HONOUR: All right.

MR STRICKLAND: So that is – I'm indebted to my learned friend. That is that the shirt that was examined in terms of the simulation was Mr Rolfe's shirt, not Mr Eberl's.

HIS HONOUR: So it was remarkable similarity between the simulation conducted by Mr Simpson.?

MR STRICKLAND: Correct. And Mr Rolfe's shirt, not Mr Eberl's.

HIS HONOUR: And - - -

MR STRICKLAND: That is – that is the fabric damage.

HIS HONOUR: Well in cross-examination, the witness said Mr Eberl's shirt, agreed with Mr Eberl – sorry - - -

MR STRICKLAND: No, he didn't. Because what he didn't – what – he was taken to some photographs.

HIS HONOUR: Yes.

MR STRICKLAND: And my learned friend said in his address that that's what – that related to Mr Eberl's shirt, but - - -

MR EDWARDSON: I don't think that's quite right. What he got wrong was the photos.

HIS HONOUR: Yes.

MR EDWARDSON: I mean quite frankly, your Honour, for what it's worth, I wonder whether we're actually getting bogged down in something that really in the main issue of things is - - -

HIS HONOUR: Well that's my thought, but - - -

MR EDWARDSON: - - - it's going to overly complicate things. I think personally, my simple submission is, let it go.

HIS HONOUR: Mm mm.

MR STRICKLAND: Well, your Honour - - -

HIS HONOUR: I'll simply tell the jury that there may be an issue as to what Mr Simpson was referring to in that regard, and they can consult the transcript.

MR STRICKLAND: Well your Honour, that – we would say that it's clear, when you look at the photographs themselves, that what he was referring to at all times was Mr Rolfe's shirt. I'd ask that them that they simply – if your Honour remind them of that evidence, that's sufficient for our purposes.

HIS HONOUR: I'll simply – I'm going to simply draw their attention to the fact that there is some dispute as to whether he was referring to the shirt which was worn by Mr Eberl or that worn by the accused.

MR STRICKLAND: Your Honour, there is no dispute in evidence - - -

HIS HONOUR: There is a dispute, obviously, between you.

MR STRICKLAND: No, your Honour, there is not a dispute. It is clear from – and I can take your Honour to the precise transcript. It's based upon the photographs.

HIS HONOUR: Yes.

MR STRICKLAND: There is no dispute that the similarity in terms of simulation, that he's referring to - - -

HIS HONOUR: Well you'd better take me to the transcript, because otherwise - - -

MR STRICKLAND: Yes, your Honour, I'll do that. Excuse me. You go to page 811, your Honour.

HIS HONOUR: Yes.

MR STRICKLAND: It's really the passage from 811.4, 812, third - - -

HIS HONOUR: Let me see.

MR STRICKLAND: - - - the fourth question.

HIS HONOUR: All right, so the images that were referred to are 14 and 24.

MR STRICKLAND: Correct, that's correct.

HIS HONOUR: And is it agreed to what images they refer to?

MR STRICKLAND: It is. I don't know if my learned friend agrees, but those two images, 14 and 24, do refer to Mr Rolfe's shirt, not Mr Eberl's shirt.

MR EDWARDSON: But your Honour, it does not detract from the fact that nonetheless, there was damage on Mr Eberl's shirt, which was consistent with the deployment of the sharp edge of those scissors. Regardless of whether he was able to replicate in striking similarity. That's why I think the whole thing, quite frankly, just more complicated than it's worth.

HIS HONOUR: I will say something in those circumstances, but it'll only be a very short - - -

MR STRICKLAND: Yes, your Honour.

HIS HONOUR: All right.

Can we bring the jury in please.

JURY IN

HIS HONOUR: Now, members of the jury, you have now heard all of the evidence and you have heard the closing addresses on behalf of counsel. It is now my obligation to sum up the trial for you before you retire to consider your verdicts.

It is not my intention, in the course of these directions, to give you any opinion which I might hold about the evidence that you have heard. Determining what happened is your function, not mine.

Inevitably, in the course of these directions, I will refer to parts of the evidence and the submissions made by counsel. The reason for my doing so, is to ensure that you understand the issues in the trial. If, however, anything I say leads you to believe that I hold a view about the evidence, you may feel free to ignore what I say.

Similarly, you may disregard anything that counsel has said to you about the facts if it does not accord with your own independent assessment of the facts. As I said to you at the beginning of the trial, you are the sole judges of the facts. I remind you, however, that any direction of law that I give you, you must accept and apply.

At the outset, I am going to simply sketch the essential factual and legal framework of this case and suggest to you those questions of fact that you may think are the most important for you to resolve.

The accused was a member of an immediate response team, or IRT, sent from Alice Springs to Yuendumu on 9 November 2019. There has been somewhat conflicting evidence to the basis upon which the IRT was sent to Yuendumu, but is is, I believe, clear on all accounts that part of their role was to arrest Kumanjayi Walker. Meaning no disrespect to that person, I will refer to Kumanjayi Walker as the deceased.

A warrant for the arrest of the deceased had been issued for breach of a suspended sentence of imprisonment. An attempt by police stationed at Yuendumu on 6 November 2019 to arrest the deceased had been unsuccessful because the deceased had attacked police and threatened them with a small axe. This has been referred to as the axe incident.

After the axe incident, the deceased was also an active arrest target for the assaults on police that occurred during that incident. Four IRT members and a dog handler travelled from Darwin to Yuendumu Police Station. The dog handler, Senior Constable Donaldson, arrived first. Some time later, the accused arrived with Constable Kirstenfeldt, and later still, Constables Eberl and Hawkings arrived.

The officer-in-charge of the Yuendumu Police Station was Sergeant Frost. She had prepared, what she called, an arrest plan for the arrest of the deceased. There was some contention about that plan, which I will return to in a moment.

The accused and the other IRT members left the Yuendumu Police Station just after 7 pm on 9 November 2019. They travelled in two cars to House 577, where the

axe incident had taken place and which was the last place the deceased had been seen.

The deceased was not located at House 577. The IRT members were, however, given particulars of other houses in Yuendumu where the deceased could be. One of those houses was House 511.

The IRT members travelled in the two cars to the area of House 511. With permission, Constable Eberl and the accused entered House 511. Constable Eberl led the way.

Inside the house, they encountered a man who turned out to be the deceased. The accused and Constable Eberl attempted to identify him as the deceased. He gave them a false name.

When they were satisfied that it was the deceased, they attempted to arrest and handcuff him using no more force than was reasonably necessary. The deceased responded by attacking the accused and Constable Eberl, using a pair of scissors. A struggle took place, in which the accused was stabbed in the shoulder by the deceased using the scissors.

The accused fired one shot into the back of the deceased as the deceased struggled with Constable Eberl while the two of them were a standing position. The deceased and Constable Eberl fell onto a mattress and the struggle continued.

The accused fired two more shots into the body of the deceased, while he was struggling with Constable Eberl on the mattress. One of the second or third shots caused fatal injuries to the deceased. It was not until after the third shot the deceased was restrained by handcuffs and relieved of the scissors.

As I said, that is not intended to be a detailed description of these events. You have heard evidence in considerable detail of these matters over the last three or four weeks.

As a result of these offences, the accused has been charged with three offences. The principal charge is count 1 on the indictment, a charge of murder. The first alternative charge is count 2, the charge of manslaughter. The second alternative charge is count 3, a charge of engaging in a violent act causing the death of another person.

Each of these charges requires you not only to be satisfied that the accused engaged in the conduct, being the firer of the fatal shot, but also that he had a particular state of mind when he did so.

From time to time, in these directions, I will refer to the elements of the offences with which the accused is charged. The elements of an offence are simply those essential matters which the Crown must prove, with regard to a particular charge.

For example, the elements of the charge of murder are:

1. The accused intentionally engaged in conduct;
2. That conduct caused the death of the deceased;
3. The accused intended to cause the death of the deceased, or intended to cause him serious harm when he engaged in that conduct.

In the present case, there are three other matters beyond the elements of a particular charge which the Crown must also prove before you can find the accused guilty of any charge. When I refer in these directions to the other matters, it is these three matters to which I am referring.

The Crown must prove, to the standard of beyond reasonable doubt, the following three other matters, in addition to the elements of the offence, before the accused can be convicted of any offence:

1. The Crown must prove that the accused was not acting in self-defence. Self-defence, in this context, also means the defence of another person and, in this context, means Constable Eberl.
2. The Crown must prove that the accused's conduct was not reasonable, in the circumstances, for the performance of the accused's duty as a police officer.
3. The Crown must prove that the accused was not acting in good faith in exercising a duty or performing a function as a police officer.

With regard to the first of these three matters, self-defence, everyone, whether a police officer or not, is entitled to defend themselves or to defend others who are under attack. Indeed, a police officer has a duty to defend others who are under attack.

The point I am presently making is that, in acting in defence of another, a police officer is doing no more than any member of the community is entitled to do and is entitled to the same legal protections as any other member of the community.

The second and third other matters to which I have referred; the necessity for the Crown to prove that the accused's conduct was not reasonable in the circumstances for the performance of these duties as a police officer, and the need for the Crown to prove that the accused was not acting in good faith in exercising a duty or performing a function as a police officer are matters which specifically relate to the accused holding an appointment as a member of the Northern Territory Police on 9 November 2019. There is no dispute that he did, in fact, hold such an appointment.

The legislature of this Territory has provided that the Crown must prove the second and third matters when prosecuting a police officer in recognition of the fact

that the police officers are frequently called upon to make split-second decisions in the course of their duties. They frequently do not have the luxury of time to reflect, particularly when confronted by violent offenders. It would be contrary to the public interest if police officers were deterred from making these often crucial decisions by the threat of criminal prosecution. For this reason they are provided with a measure of legal protection when acting in the course of their duties as police officers.

In assessing whether the Crown has proven the elements of any offence and has proven the three matters to which I have referred, you will need to carefully consider two aspects of the evidence. First, what actually happened on 9 November 2019. Secondly, what was the accused's perception of what was happening as it happened.

It is, of course, important for you to try to work out what, in fact, happened in House 511 when the accused and Constable Eberl were confronted with an attack by the deceased. The elements of the charges are concerned with proof of what, in fact, happened on 9 November 2019. That is why you were taken, at length, to the body-worn video of the police who were present that evening. But each of the three matters to which I have just referred and which the Crown must prove before you can convict the accused in relation to any charge also requires you to consider the accused's perception of what was occurring as the events occurred.

In the present case the accused's perception of what was occurring is every bit as important as determining in hindsight what actually happened. For example, if you were to find, based upon a review of the body-worn video that the deceased was not, in fact, in a position to bring the scissors to bear as a lethal weapon when the accused fired the second and third shots, that finding is not determinative of the charges. If the accused believed in that moment that the deceased was able to bring to bear the scissors as a lethal weapon and was attempting to do so, you will determine whether the Crown has proven the three matters to which I have referred, on the basis of the accused's honestly held belief.

Now, I will give you a brief example to try to assist you in understanding the importance of the distinction between a perception of events and the reality looked at in hindsight.

A police officer sees a man threaten a bank teller by pointing a gun at the teller and the police officer uses his gun to shoot the offender. It turns out that the gun used by the offender was a replica and could not have been fired by the offender. The police officer however, at the time that he shot the offender, did not know that the gun was a replica. The reasonableness of the police officer's action is not measured against the fact that the offender was, in fact, essentially unarmed but by reference to the police officer's perception that the offender was armed with a potentially lethal weapon.

Having given that brief overview I will now remind you of some of the things that I said to you at the commencement of the trial. I told you that trial by jury is an ancient right designed to protect individuals from abuse of power. You each took an



oath to give a true verdict according to the evidence. I remind you that the evidence is what you have seen and heard in this courtroom. The evidence consists of the oral evidence given by the witnesses, together with documents and other things which have been admitted into evidence as exhibits. Questions asked by counsel are not evidence. It is what was said by the witnesses in response to the questions that constitutes evidence. The addresses of counsel and my addresses to you are not evidence. Transcripts of the audio tracks of the body-worn videos that were tendered as exhibits were provided to you. I remind you that these transcripts are not part of the evidence in this trial. They were provided to you so that you could better follow what was being said in the body-worn videos. The evidence is what you saw and heard when the body-worn videos were played, to the extent that you may have heard something which differs from what is written on the transcript you proceed on the basis of what you heard.

When you retire to consider your verdicts, you will be provided with a transcript of the oral evidence given by the witnesses during the trial. The purpose of providing you with this transcript is to remind you of the evidence given by the witnesses. The transcript itself is not evidence. It is what you saw and heard when the witnesses were giving their testimony that constitutes the evidence. If you believe that you heard the witness say something different to what is shown in the transcript you proceed on the basis of your recollection of the oral testimony of the witness. If the matter is of significance we have the capacity to check the recording of the evidence if required.

Multiple witnesses in this trial gave evidence by audiovisual link. This was simply a matter of convenience. You are to assess the evidence of these witnesses in the same way that you assess the evidence of any other witness in the trial. You are not to give the evidence any greater or lesser weight because it was given in this way. You are not to draw any inference against the accused because of the way in which the evidence was given.

Remember also that anything you may have seen or heard about this trial or the subject matter of this trial outside of this courtroom must be ignored when you come to consider your verdicts. There has been a lot of media reporting about this trial and the events with which the trial is concerned. If you have read, seen or heard any of those reports you must now put that material out of your mind and focus on the evidence.

I told you at the outset of the trial that there are two very important principles that you must keep at the forefront of your minds when you consider your verdicts. The first is that it is fundamental to our system of criminal justice that the accused is presumed to be innocent of any charge until such time as he is proven guilty.

The second principle is that it is for the Crown to prove the guilt of the accused with respect to any charge to the standard of beyond reasonable doubt. This requires the Crown to prove each of the elements or essential parts of the charge, to that standard of beyond reasonable doubt. The Crown must also prove the three other matters to which I have referred to that standard of beyond reasonable doubt.

That standard of beyond reasonable doubt is the highest standard known to the criminal law. I remind you that the accused does not have to prove himself innocent of the charges against him. He is presumed by law to be innocent of any charge until such time as the Crown convinces you that he is guilty.

The crimes with which the accused are charged all alleged that he engaged in particular conduct, being the firing of the second and third shots, using his police issued firearm. There is no dispute that the accused engaged in that conduct. It is not disputed that the accused discharged his firearm three times, wounding the deceased on each occasion. It is accepted by the Crown that the accused was justified in firing the first shot. In the context of the brief, violent nature of the events in House 511 on the evening of 9 November 2019 you may think that that is an important concession. That is for you.

The evidence, you may think, does not allow you to determine which of the second and third shots caused the fatal injury to the deceased. This does not matter unless you are satisfied that there was a change in the accused's state of mind or in the relevant circumstances in the half second between firing the second shot and the third shot, such that the accused would be guilty of one of those shots if that shot caused death, but not the other.

I note that neither the Crown nor the accused has suggested that you should draw any such distinction between the second and third shots, but ultimately that is a matter for you. If you were to find that the accused had a state of mind consistent with guilt with regard to only one of the second and third shots, then you would have to be satisfied beyond reasonable doubt, that that shot caused the death of the deceased. But as I have said, it has not been suggested by counsel that any distinction should be drawn between the second and third shots.

In summary, the Crown must prove the elements of the offence in the indictment. Even if you are satisfied to the standard of beyond reasonable doubt that the Crown has proven the elements of any offence, you cannot find the accused guilty, unless you are also satisfied of the three other matters to which I have referred, also to that standard of beyond reasonable doubt.

Now I will return to that issue a bit later in my directions. During the course of this trial, you have seen and heard evidence of a confronting nature about the death of the deceased. Such evidence has the potential to provoke strong emotions. This is something that you must guard against when you consider your verdicts. Outside the court, there may be those who express views about the conduct of the accused, and there may be those who express views about the conduct of the deceased. You cannot become involved in that exercise. You have sworn to give true verdicts, according to the evidence. You must approach your task as jurors dispassionately, but also fearlessly. You must not let emotion or sympathy affect your verdicts. I told you at the beginning of the trial that you are the sole judges of the facts. I reminded you of that a moment ago. I said to you at the beginning of the trial, that if there was

going to be any dispute about what happened, it would be for you to resolve that dispute, and not for me.

In determining whether you are satisfied that the accused is guilty or not guilty of any charge, you will of course consider the evidence of the Crown witnesses relating to that charge, together with the exhibits that have been tendered during the trial. You will also bear in mind the evidence given by the accused, and also by Mr McDevitt. You will bear in mind what counsel have submitted to you about the facts based upon the evidence. But you will also remember, as I have said, that what counsel has said to you is not evidence. In assessing the evidence, you are expected to use your individual qualities of reasoning, your experience, and your understanding of people and human affairs. In particular, you are expected to use your common sense, and your ability to judge your fellow citizens, so that you bring to the jury room, during the course of your deliberations, your own experience of human affairs, and of life.

In considering your verdicts, it is for you to decide what evidence you accept as being truthful and reliable, or what evidence you may reject as being untruthful or unreliable. You will note that I distinguish between truthful and reliable evidence. You will readily understand that sometimes a witness may believe that what they are saying is the truth. But an examination of the evidence may reveal that it is unreliable. It is for you to determine whether any particular witness is both truthful and reliable. In making this assessment you may rely on all manner of things. Including what the witness said, how they said it, and the general impression which they created while giving evidence. It is also for you to decide what weight you may give to any particular piece of evidence, or what inferences you may be prepared to draw from evidence.

It is no part of your role as a jury to consider whether charges should have been laid against the accused. Your function is to assess the evidence and determine whether the Crown has proven any charge, to that standard of beyond reasonable doubt. A moment ago I mentioned the drawing of inferences. You may, in your role as judges of the facts in this trial, draw inferences from the direct evidence. That is the evidence that you have seen and heard. There is nothing extraordinary about this. We each do it every day in our own lives. An inference is nothing more than a conclusion of fact, which is rationally drawn from a combination of other proven facts. I will give you an illustration. If you telephone a friend who you expect to be at home, and the phone rings and rings, and no one answers, you may infer that your friend is not at home. Similarly, if you telephone the same friend, and you get an engaged signal, you might infer that your friend is at home, but they are talking to somebody else.

In a criminal trial where you must be satisfied of the accused, beyond reasonable doubt, you should be very careful about drawing inferences. You should examine any possible inference to ensure that it is a justifiable one. In the illustrations of the telephone calls that I just gave you, when you think about it, you will realise that the possible inferences I suggested, could be quite questionable. In either case, for example, the phone may not have been working properly, or you may have dialled

the wrong number. In the example when nobody answered, your friend may have been at home, but might have been taking a shower. In the context of a criminal trial, you should not draw any inference from direct evidence, unless it is the only reasonable or rational inference that is available in the circumstances. Now this is an important principle in this case. As the Crown asks you to infer the state of mind of the accused at the time that he fired the shot which caused the death of the deceased.

The Crown says that you can infer from surrounding circumstances, that the accused had a state of mind consistent with the charges with which he has been charged, and inconsistent with the three matters, or at least consistent with the Crown having proved that the other three matters do not apply. I will return to this later, but for the moment, I repeat that you may only draw such an inference against the accused, if it is the only reasonable or rational inference that is available in the circumstances. Inference is different to speculation and assumption. Neither speculation nor assumption involves a rational or logical process of reasoning about the existence of a fact or facts, based on the proven existence of other facts. You must be vigilant to identify and avoid reasoning processes based on, or involving, speculation or assumption. In this trial there are only two verdicts which you can return on any particular charge.

If the Crown has proven beyond reasonable doubt the elements of a charge, and has proven that the other three matters to which I have referred, do not apply, then your verdict on that charge will be guilty. If the Crown has not proven the elements of the charge, or has not proven that all of the other three matters do not apply, then your verdict will be not guilty. Under the laws of this Territory, your verdict, whether it be guilty or not guilty, on any particular charge, must be unanimous. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence, or place a different emphasis on parts of the evidence. However, by whatever route you arrive at your decision, your final verdict in relation to any charge, must be unanimous.

I emphasise that you must decide this case based upon the evidence which has been placed before you in this court. You must not speculate about what evidence could have been placed before you, had different investigations been undertaken. While counsel has taken you to some of the evidence, you are obliged to consider all of the evidence in arriving at your verdicts. You are aware that the accused faces three charges. All of the charges relate to the same conduct by the accused, being the firing of the shot which caused the death of the deceased. The reason why there are three charges is that the intention, or mental state of the accused, which the Crown must prove, is different for each of the charges. The three matters to which I have referred, and which the Crown must prove above and beyond the elements of a particular charge, apply however, to all of the charges. Count one is the primary charge, and you must consider that first.

Counts 2 and 3 are alternative charges. You will only need to consider and return a verdict on count 2 if you return a verdict of not guilty on count 1. You will only need to consider and return a verdict on count 3, if you have returned a verdict

of not guilty on count 2. It is for that reason, that in your deliberations, you must start with count 1.

As I have said, the three matters which the Crown must prove beyond the elements of the particular charge apply to all charges. This means that if you were to find the accused not guilty on count 1 because the Crown had not proven one of the three matters to which I have referred, then you will return verdicts of not guilty on all charges because of the necessity for the Crown to prove those three matters applies to all charges.

Now, let me say something to you generally about witnesses, about how you may approach the evidence that you have heard from the witnesses in this trial. It is for you to assess the various witnesses that you have seen and heard, and to decide whether they are telling the truth and whether their evidence is reliable.

You have seen each of the witnesses as they gave their evidence. It is a matter for you entirely what evidence you accept and what evidence you reject. This decision about what evidence you accept or reject may be based on all matter of things.

You may consider, in addition, whether the witness has any reason or motive to give evidence, favourable or unfavourable, to the accused or to the Crown. You may accept all of the evidence of a witness if you think that it is appropriate to do so. You may also reject all of the evidence of a witness, if you think it is appropriate.

You may also accept some of the evidence of a witness and reject other parts of the evidence of the same witness. The fact that you do not accept part of the evidence of a witness does not mean that you have to reject all of their evidence. You may accept the remainder of their evidence, if you think that it is worthy of acceptance.

In assessing the weight to give to the evidence of a witness, you may also consider the extent to which they give evidence of what they personally saw and heard, as to what somebody else told them that they, the other person, had seen or heard. You should be careful to identify and ignore assumption or speculation by witnesses.

In this trial, a number of documents containing agreed facts were tendered by the Crown, and with the consent of the accused. This was done, so as to reduce the number of witnesses the Crown was obliged to call to give evidence and to ensure that time was not unnecessarily consumed in dealing with those matters which were not in dispute. You are to take those admitted facts as having been proved beyond reasonable doubt.

I now want to say something about body-worn video. During this trial, you have seen extensive footage of the events of 9 November 2019, taken from the body-worn video of the members of the IRT who were in Yuendumu. You have seen the body-worn video at normal speed, but also a greatly reduced speed.

You have also seen parts of the incident, frame by frame, by virtue of still images taken from the body-worn video. There are a number of very important warnings which I need to give you about the way in which you approach that material.

You heard evidence that the cameras which recorded the body-worn video were generally located on the chest area of the IRT members. This inevitably means that the camera picks up images on a different angle to that of the eyes of the person wearing the camera.

In addition, the camera faces out, away from the body of the person wearing the camera and does not move in the same way that a person's head or eyes may move. This means that the image captured by the camera may not always be an indication of where the person wearing the camera was looking.

In addition, Dr Sorell testified that the camera works in a different way to the human eye. What is captured on the camera is a series of still photographs which are then compressed into a digital form. This produces a different interpretation to what effectively comes through in the optics of the eye.

The cameras used to produce the body-worn video have wide-angle lenses. They captured images of a wider range of objects or actions than the human eye would. Dr Sorell told you that the human eye predominantly focuses its attention on what is happening in the centre of the field of vision. This means that what you see in the body-worn video may have fallen outside of the field of vision of the person wearing the camera.

In addition, Dr Sorell told you that the camera lenses, or even the camera itself, can adjust the brightness level of the images captured. This means that in conditions of poor lighting, such as inside House 511, the body-worn video may give an entirely misleading impression about the level of ambient light and what could be seen by the accused and Constable Eberl.

Dr Sorell told you that the body-worn camera effectively takes 30 photographs per second. But, each photograph is not of a full one-thirtieth of second. It is important that you remember when you look at the stills produced from the body-worn video, as we have done sometimes at length throughout this trial, that you are examining an image with the accused had less than one-thirtieth of second to perceive.

The way in which this case has been conducted, and I mean not criticism of the Crown, carries with it the risk that you, as a jury, may view the events in House 511 on 9 November 2019 in terms of tens or even hundreds of separate opportunities for observation and reflection by the accused, instead of a single, extremely brief and violent incident. That is something that you should guard against.

In this trial, a number of expert witnesses gave evidence. Witnesses who gave expert evidence for the Crown included Dr Sorell, Dr Tiemensma, Dr Reade, Dr Towsey, Dr McIntosh, Mr Simpson, Dr Botterill, and Detective Barram. On behalf of the accused, Ben McDevitt gave evidence in response to that of Detective Barram.

I now want to give you some general directions about how you may approach the evidence of expert witnesses. An expert witness is a person who has specialised knowledge based on that person's training, study or experience. Unlike other witnesses, a witness with such specialised knowledge may express an opinion on matters within his or her particular area of expertise.

Other witnesses may speak only as to facts; that is, what they saw and heard, and are not permitted to express opinions.

Of course, the value of any expert opinion is very much dependent on the reliability and accuracy of the material, which the expert used to reach his or her opinion. It is also dependent upon the degree to which the expert analysed the material upon which the opinion was based, and the skill and experience brought to bear in formulating the opinion.

Experts can differ in their level and degree of experience, training and study; and yet still can be an expert qualified to give an opinion, where that opinion is based on the witness' specialised knowledge.

You do not have to accept the opinion or evidence of an expert witness. If, having given the matter careful consideration, you do not accept the evidence of an expert you do not have to act upon it. This is particularly so where the facts upon which the opinion is based, or assumptions upon which the opinion is based, do not accord with the facts as you find them to be.

You are also, to a degree, entitled to take into account your common sense and your own experiences, if they are relevant to the issue upon which the expert evidence relates. You must also, however, bear in mind your oath or affirmation to give a true verdict, according to the evidence.

You should not reject expert evidence unless you are satisfied that there is a cogent reason to do so, particularly where that evidence is essentially unchallenged by other expert evidence. Where expert evidence is based upon assumptions, if the evidence does not allow you to find that those assumptions are proven, then the expert opinion has no value.

One of the issues which were the subject of expert testimony was whether the scissors used by the deceased on 9 November 2019 were capable of causing lethal injuries. Of those witnesses, I would suggest to you that only the pathologist, Dr Tiemensma perhaps suggested that the scissors were not capable of inflicting a lethal injury. I say perhaps because you may think that her evidence was not that the scissors were incapable of being used to inflict a lethal injury in any

circumstances; but, rather, that she did not believe that the deceased could have used them in such a way when he was on the mattress, based on her assessment of the positions of the deceased and Constable Eberl when they were on the mattress. That is a matter for you.

In any event, I would suggest that the actual capacity of the scissors to inflict the lethal injury is not a particularly important matter for you to determine. No one has suggested that the accused had the time or opportunity to inspect the scissors and to form a view of their capacity to inflict a lethal injury before he fired the second and third shots.

You might think that the important question is what was the perception of the accused at that time, and I hark back to the example that I gave you at the very outset about the police officer shooting somebody who appears to be wielding a firearm but it was, in fact, a replica firearm. The important question may well turn out to be what was the perception rather than the reality.

In any event, as I've said, there was differing - or perhaps differing - expert testimony on that issue as to the capacity of those scissors to cause a lethal injury. If you think it is important for you to resolve that matter it is a matter for you as to how you resolve it and in the way in which I have suggested.

Dr Tiemensma is a forensic pathologist employed with Royal Darwin Hospital. I now want to say something about her evidence relating to the cause of death. Her qualifications as a forensic pathologist and her experience in that field were not challenged by the accused. She conducted an autopsy on the body of the deceased on 12 November 2019. She described finding three gunshot wounds to the body of the deceased. One of those wounds, which we know was caused by the first shot discharged by the accused because it was a wound to his back, she described, for the purposes of description, as A1. This was a wound, as I've said, to the right lower aspect of the back of the deceased. That bullet did not travel very far into the body of the deceased, becoming stuck in a large muscle group adjacent to the spinal cord. This shot caused some damage to the right eleventh rib and the right diaphragm. It would not, in the opinion of Dr Tiemensma, have been fatal to the deceased.

Dr Tiemensma described the other entry wounds caused by the second and third shots discharged by the accused as B1 and C1, again for the purposes of description. She was not able to distinguish between the two so as to determine which wound was caused by the second discharge of the gun and which by the third.

The entry wound which was described as B1 by Dr Tiemensma was on the left side of the torso of the deceased. The bullet which caused that wound travelled from the left side of the torso to the right side. It caused a number of injuries including perforation of the left eighth rib, the left hemidiaphragm, the spleen, the left kidney and the anterior aspect of the lumbar vertebral spine. In Dr Tiemensma's opinion these were fatal injuries.



The entry wound, which was described as C1 by Dr Tiemensma were also situated on the left side of the deceased's chest about half a centimetre below entry wound B1. The bullet that caused this wound tracked from the left of the deceased's body obliquely towards the back. It penetrated the chest cavity and caused injury to the chest wall but it didn't cause any injury to the left lung or any major vascular structures. Dr Tiemensma did not believe that this gunshot wound by itself would have been fatal. In Dr Tiemensma's opinion, the cause of death was gunshot injury to the torso and the mechanism of death was a combination of respiratory failure and blood loss caused by the gunshot injuries. Dr Tiemensma's opinion as to the cause of the death of the deceased has not been challenged.

I now want to say something about some of the other experts who gave evidence. Dr Botterill is a forensic pathologist practising in Northern Queensland. He was called as a witness by the Crown. He was provided with photographs of the scissors taken from the deceased on 9 November 2019 together with photographs of injuries sustained by the accused and Constable Eberl and the accused's body-worn video.

Dr Botterill expressed the opinion that the puncture injury to the accused's left shoulder was likely to be the result of the movement of a sharp or pointed projecting surface into the skin surface. This was consistent with the accused having been stabbed with scissors. Dr Botterill expressed the opinion that the wound to the accused's shoulder was likely to have occurred within a day of the photograph of the wound being taken. This is consistent with the wound being sustained in the struggle with the deceased. There were no indicia that the wound was self-inflicted.

You heard, in his closing address, the Crown Prosecutor accept that the accused was, in fact, stabbed to the shoulder using the scissors employed by the deceased.

With regard to the photographs of Constable Eberl which are located exhibit 1, tab 21, Dr Botterill identified a wound to the front of Constable Eberl's left shoulder. Dr Botterill said that the wound was likely due to something either sharp or with a pointed edge passing across that skin surface. He was unable to identify the precise object. He believed that the wound may be older than a day - that is a day before the photograph was taken - but he could not place a figure on how much older it could be, although he believed that it was unlikely to be many days old. This can be consistent with the wound having been sustained by Constable Eberl in the altercation with the deceased on 9 November 2019.

In answer to questions from Mr Strickland, Dr Botterill expressed the opinion that the scissors used by the deceased in the struggle on 9 November 2019 had the capacity to inflict a serious or potentially fatal wound. Whether the scissors would inflict a serious or fatal wound in any particular case would depend upon the circumstances.

Dr Botterill could see no reason why the three gunshot wounds sustained by the deceased would have caused immobility of the deceased's right arm. He expressed the opinion that the greater the limitation of movement of the deceased's right arm

when he was on the mattress struggling with Constable Eberl, the less likely it was that the scissors could have been used to inflict a serious or lethal injury. If the deceased's right arm was completely immobilised it was very unlikely that the scissors could have inflicted such an injury.

After reviewing the accused's body-worn video, Dr Botterill was unable to make an assessment of whether the deceased's arm was, in fact, to any extent immobilised in the struggle with Constable Eberl on the mattress.

In cross-examination Dr Botterill stated that penetration of the skin is not a precondition to a lethal injury. If sufficient force is transmitted to the deeper tissues beneath the area where the skin is struck, lethal injuries may still be sustained.

With regard to the depth of penetration required for a lethal injury, Dr Botterill stated that it depended upon the area of the body in question. With regard to the chest wall a penetration of merely two centimetres would have the potential to breach the lining of the chest cavity and result in a collapsed lung. In the neck a depth of penetration of less than a centimetre over the carotid artery or jugular vein could result in a lethal injury.

I will now turn to the evidence of Dr Towsey. Dr Towsey is a visiting burns and trauma surgeon at the Royal Brisbane and Women's Hospital and a visiting surgeon at St Andrews War Memorial Hospital. After completing his medical studies, he spent two years as a full-time serving officer in the Australian Regular Army. He has subsequently provided services to the army as a regimental medical officer. He has been deployed to the Solomon Islands and to Afghanistan. He has skills in the management of major penetrating trauma and blast injuries.

In about March 2022 Dr Towsey was asked by police investigating the death of the deceased to provide opinions in respect of certain matters based on his training and experience. He was provided with the body-worn video footage from both the accused and Constable Eberl. He also had the benefit of Dr Tiemensma's autopsy report and photographs taken during the autopsy. Dr Towsey used the same descriptions for each of the bullet wounds to the body of the deceased that were used by Dr Tiemensma.

The wound to the back of the deceased was described as wound A1, and the two wounds to the left side of the deceased's body were described as wounds B1 and C1. Dr Towsey classified wound B1, which had traversed the major organs, as being the one that caused the death. While the other two wounds would have warranted serious hospital treatment, he did not believe that they would have caused death. Dr Towsey could not detect any evidence that the wounds sustained by the deceased would have contributed to any immobility of the deceased's right arm.

Dr Towsey gave evidence that he would expect any member of the defence forces, or of the police force, to be trained to aim for a target's centre of mass, so as to incapacitate the target immediately. Dr Towsey accepted there were many forms of edged weapons. Including credit cards, shop bought pens, screwdrivers, broken

bottles, smashed glass, pieces of plastic, disposable knives, household keys, and stationary scissors. Any one of those items could cause a fatal wound, depending on how it was used, and where on the body the wound was inflicted. Dr Towsey stated that a pair of scissors, such as those used by the deceased, have the potential to be lethal. With regard to those scissors, what Dr Towsey described as the upper blade, was more tapering, and could potentially cause a deeper penetrating injury, compared to the lower blade, with the same amount of force being applied.

But if one struck hard enough, either of those blades could penetrate the skin. Both Mr McDevitt and Detective Barram accepted that the scissors were capable of being a lethal weapon. The real point of disagreement between Mr McDevitt and Detective Barram, I would suggest, was whether it was reasonable or necessary for the accused to have fired the second and third shots in defence of Constable Eberl. Mr McDevitt expressed the opinion that the accused was justified in firing all three shots, because it was not until after the third shot that the deceased was able to be controlled, handcuffed, and relieved of the scissors. It was not until that point, that the threat posed by the deceased was nullified.

Detective Barram accepted that the first shot fired by the accused was justified. As at that time, the deceased was on his feet, and still had possession of the scissors. He believed that the situation changed when the deceased fell onto the mattress with Constable Eberl. He believed that, based upon his lengthy examination of the body-worn video, the deceased's right arm was to some extent, trapped between the deceased's body and the mattress, while he was struggling with Constable Eberl. This would have made it either impossible for the deceased to bring to bear the scissors as a lethal weapon, or would have considerably hindered him in doing so.

You will recall that in order to give his opinion about the ability of the deceased to bring to bear the scissors as a lethal weapon in the struggle on the mattress, Detective Barram was asked to assume that the right arm of the deceased was either wholly or substantially, pinned between the body of the deceased, and the mattress, at the time the accused fired the second and third shots.

This was because Detective Barram gave evidence that he could not see the right arm, or right hand of the deceased, in the body-worn video, at the crucial time. The prosecutor went through the same exercise with Mr McDevitt, asking him to make the same assumptions. The value of the opinions expressed by Detective Barram, and Mr McDevitt, based upon those assumptions, depends upon you being satisfied that those assumptions are proven by the evidence. Neither witness gave evidence that they were able to see the right arm of the deceased in any of the body-worn video.

No other witness purported to be able to observe the position of the deceased's right arm, or right hand, carrying the scissors, from the body-worn video. If you are not satisfied that the evidence establishes that the right arm, either upper or lower, or both, of the deceased, was wholly or substantially pinned between his body and the

mattress, when the accused fired the second and third shots, then you must ignore the evidence given by the witnesses, based upon that assumption.

As I have said, there is a clear disagreement between Detective Senior Sergeant Barram and Mr McDevitt regarding whether the second and third shots fired by the accused were reasonable and necessary in the circumstances.

I have also pointed out to you that there is potentially a disagreement between the experts relating to the capacity of the scissors to be used as a lethal weapon. It is a matter for you how to determine and resolve any conflict between the opinions expressed by the expert witnesses. Bearing in mind, that the onus of proof is on the Crown, and that the Crown must prove the charges to the standard of beyond reasonable doubt. It is not a matter of simply choosing between their evidence, as a matter of simple preference. You must approach the resolution of any conflict between the experts, bearing in mind, the onus and standard of proof placed on the Crown.

It is for you to decide whose evidence, and whose opinion you accept in whole or in part. Or whose evidence you reject in whole or in part. In determining which expert evidence you accept, you may bear in mind whether a particular opinion expressed is expressed by the – sorry, I withdraw that - by the preponderance of experts, or a single expert. You should also bear in mind whether an expert, or experts, have greater knowledge and experience in a particular field than other experts who have expressed a different opinion.

I now want to say something about the evidence of the accused. As you are aware, the accused gave evidence during this trial. He was not obliged to do so, because as I have told you, he is not obliged to prove anything in this trial. Having given evidence however, you assess his evidence in exactly the same way you assess the evidence of any other witness in the trial.

You do not discount the accused's evidence, simply because he is the accused. You may reject all of the evidence given by the accused. You may reject – I withdraw that. You may reject all of the evidence given by the accused. You may accept all of the evidence given by the accused. Or you may accept some of his evidence, and reject other parts of his evidence. It is entirely a matter for you.

However, if you were to reject the evidence given by the accused, and I am not suggesting in one way or another whether you will, the fact that you do not accept his evidence is not itself evidence that he is guilty of any offence. If you find that you cannot accept his evidence, or part of his evidence, you simply put his evidence, or that part of it that you do not accept to one side, and determine the case based upon the evidence that you do accept. Now this is subject to one exception, and I will come to that in a moment.

In addition, you have before you evidence of statements made by the accused, nearly contemporaneous with the shooting of the deceased. These statements are shown on the body-worn videos, which have been tendered as exhibits. These

statements are available for you to use both for and against the accused. It is a matter for you what weight you may give to those statements. Immediately after the shooting, the accused said to Constable Eberl, words to the effect of, "It's all good, he was stabbing me, he was stabbing you." The Crown submits this statement, made by the accused, immediately after the shooting was an attempt by the accused to justify his actions, in circumstances where he knew that he had used excessive force in firing the second and third shots.

I told you a moment ago that if you do not accept the evidence of the accused, you simply put that evidence to one side. And decide the case on the evidence you do accept. I said that that was subject to one exception. I will now tell you about that exception.

The Crown submitted that the accused's statement made immediately after the shooting, "It's all good, he was stabbing me, he was stabbing you" was a lie. The Crown submitted that the accused told this lie was because he was conscious of the fact that he had used excessive force in firing shots 2 and 3. The Crown says that this was a lie because the deceased had not in fact been stabbing Constable Eberl, and the accused knew that the deceased had not been stabbing Constable Eberl when they were both on the mattress struggling.

First, you must be clear about what a lie is. A lie is to say something untrue, knowing at the time of making the statement that it is untrue. If a person says something which is untrue, but does not realise at the time that it is untrue, that is not a lie. The person is simply mistaken or perhaps confused.

Even if the person later comes to realise that what they saw is incorrect, that does not transform the statement into a lie. To be a lie, the person must say something that the person knows at the time of making the statement it is untrue.

There is no dispute that the accused made the statement, "It's all good. He was stabbing me; he was stabbing you." If you find that that statement was a lie, then I must give you directions about the care with which you must approach the task of deciding what significance, if any, it has.

You may take this lie into account as evidence of the accused's guilt, but you can only do so if you find two further things proven, to which I will refer in a moment. When I say you can take it into account as evidence of the accused's guilt, I am not suggesting that it could prove his guilt on its own. What I mean is that it can be considered, along with all of the other facts which you find established on the evidence in considering whether the Crown has proven its case beyond reasonable doubt. The Crown has not suggested to you that if you found the accused lied, that this finding can prove the guilt of the accused by itself.

Apart from the fact that the accused made the statement and that it amounted to a lie, before you can use the lie as some evidence of the accused's guilt, you must be satisfied of two other matters.

First, you must find that what the accused said that amounts to a lie relates to an issue that is relevant to the offence the Crown alleges the accused committed. It must relate to some significant circumstance or event connected with that alleged offence. The Crown says, in the present case, that it is relevant because it reveals that the accused was aware when he told the lie that he had used excessive force in firing the second and third shots.

Secondly, you must find that the reason the accused told this lie is because he feared that telling the truth might reveal his guilt, in respect of the charges that he now faces. In other words, he feared that telling the truth would implicate him in the commission of the offences for which he is now on trial.

The Crown says that the accused told the lie because he knew that if he admitted that the deceased had not been able to bring to bear the scissors as a lethal weapon at the time that the accused fired the second and third shots. This would implicate him in the present charges.

You must remember, however, that people do not always act rationally and conduct of this sort; that is, telling a lie, may sometimes be explained in other ways. A person may have a reason for lying quite apart from trying to conceal their guilt. For example, a lie may be told out of panic, to escape an unjust accusation, or to avoid a consequence unrelated to the offence.

If you think that the lie may have been told for some reason other than to avoid being implicated in the commission of the offences for which the accused is now on trial, then it cannot be used as evidence of the accused's guilt. If that is the case, you should put it to one side and focus your deliberations on the other evidence in the case.

Let me summarise what I have just said.

Before you can use what the accused said as something which points towards his guilt, you must be satisfied that he lied deliberately. You must find that the lie related to some significant circumstance or event connected with the alleged offences. You must find that the reason the accused told the lie was because he feared that the truth would implicate him in relation to the commission of the offences for which he is now on trial.

I remind you that the accused denied that he had lied in making the statement. His evidence was that his perception in the period of a little over a second between the deceased and Constable Eberl falling onto the mattress and before he fired the second shot was that the deceased was stabbing or attempting to stab Constable Eberl with the scissors.

The accused testified that the reason he made the statement was because he believed Constable Eberl was in a heightened state by reason of the struggle and he wanted to explain to Constable Eberl what had happened and why. It is a matter for

you whether you think that the accused was likely to have had the presence of mind suggested by the Crown to have made the statement up in the circumstances.

You should also bear in mind that the accused, at the time that he made the statement, could not know that the position of the deceased's right arm and right hand holding the scissors, at about the time the second and third shots were fired, would not be clearly visible on the body-worn video.

If the Crown has not satisfied you that this statement by the accused was a lie, there is another way in which you can use it; that is, the statement made by the accused. You may use the statement as some evidence of the truth of what the accused said at that time.

At the time the accused made the statement to Constable Eberl, the events of the struggle with the deceased and surrounding firing the second and third shots were clearly fresh in his memory.

Because of this, if you do not accept the Crown submission that this comment was a lie by the accused to attempt to justify his actions, you are entitled to use the accused's statement as some evidence, separate from the evidence given by the accused in the trial, that the deceased had, in fact, used the scissors to stab the accused and to stab, or attempt to stab, Constable Eberl.

Even if you are not satisfied that the deceased did, in fact, stab or attempt to stab Constable Eberl when they were struggling on the mattress, you may use the accused's statement as evidence of his state of mind; that is, the accused's state of mind, that he believed that the deceased had done so.

I now want to turn to the evidence relating to the accused's training. A great deal of evidence about the accused's training as a police officer and a member of the IRT has been put before you. You would be forgiven for thinking that the outcome of this case depends upon your assessment of whether the accused did or did not follow his training on 9 November 2019. That is simply not the case.

I propose to now tell you how you may and may not use evidence of the accused's training and any failure by the accused to follow his training on 9 November 2019. As part of these directions, I will also give you directions regarding the evidence, that there was an arrest plan formulated by Sergeant Frost and the Crown's submission that the accused effectively ignored that arrest plan on 9 November 2019.

It is the Crown's case theory that, after seeing the body-worn video of the axe incident, the accused became obsessed with the incident, and was seeking out and arresting the deceased.

It is the Crown's case theory that the accused had determined in advance of confronting the deceased that, despite his training, he would resort to the use of his police-issued firearm and, potentially, to use of lethal force as a first resort if the

deceased resisted arrest by producing a bladed weapon. The Crown submits that this was the state of mind that the accused had when he approached and entered House 511 on 9 November 2019, and it remained his state of mind until he first the second and third shots.

The accused gave evidence that he was not obsessed with the axe incident, or with seeking out and arresting the deceased. The accused gave evidence that his state of mind at the time of firing the second and third shots was that he was concerned for the life of Constable Eberl.

Before you can draw the inference suggested by the Crown, as to the accused's state on 9 November 2019, you must be positively satisfied that the accused's evidence is untrue. In other words, you be positively able to reject his evidence.

The question you must ask yourself is: Is there a cogent reason for rejecting that evidence? As I have said, you cannot reason in the way in which the Crown has asked you to reason if you do not reject the accused's evidence.

The Crown submitted that there were other circumstances which supported the suggested inference about the accused's state of mind. The Crown referred to the accused's keenness to be employed on the mission to Yuendumu, the actions of the accused and other members of the IRT in immediately seeking out the deceased after leaving Yuendumu Police Station on 9 November 2019. And the manner in which the accused conducted the search of House 577. And specifically, his disengagement of the retention devices on his Glock pistol, and placing his hand on the handle of that gun. It also relied upon an alleged failure by the accused to follow his training, and his ignoring the arrest plan, as other circumstances supporting the submission as to the accused's state of mind on 9 November 2019.

The Crown's case in support of its submission, said that you should draw the suggested inference of the accused's state of mind on 9 November 2019, is what we lawyers refer to as a circumstantial case. The Crown relies upon the circumstances to which it referred, and asks you to infer from those circumstances that the accused had the suggested state of mind. Where the Crown relies upon circumstantial evidence to prove a fact, the jury is asked to reason in a staged process. The jury – excuse – I will withdraw that. The Crown asks you to find certain basic facts established by the evidence. Those facts do not have to be proved beyond reasonable doubt. The jury is then asked to infer, from a combination of those established facts, that a further fact exists. In this case, the Crown asks you to infer that the accused had the state of mind alleged by the Crown on 9 November 2019.

A case based upon circumstantial evidence is not necessarily weak. The strength of a circumstantial evidence case depends upon the number and the nature of the basic facts relied upon by the Crown, when considered as a whole. Not individually, or in isolation. The Crown circumstantial evidence case relating to the accused's state of mind on 9 November 2019, depends upon whether all of the evidence leads to an unavoidable conclusion that the accused had that state of mind. If there is any other reasonable conclusion arising from the proven facts that



is inconsistent with the accused having the state of mind alleged by the Crown, the circumstantial case fails. While the strength of a circumstantial case is assessed by considering all of the proven circumstances together, you are not precluded from considering the cogency of individual circumstances in order to assess the weight to be given to all of the circumstances when considered together.

In that regard, you will have to carefully consider a number of issues. These issues include, did the accused watch the body-worn video of the axe incident on multiple occasions because he was fixated on the incident, and the deceased, or because he believed that the deceased may come to Alice Springs, and there was a present danger, and may present as a danger to police? Is there any evidence that the accused was keen to be deployed on the IRT mission to Yuendumu? Did the accused have a role in selecting the members of the IRT who were sent on the mission? If, as appears to be the case, it was part of the IRT mission to Yuendumu to assist in the arrest of the deceased, and they were asked by Sergeant Frost to gather intelligence of the whereabouts of the deceased, is it surprising that the accused, and other IRT members began trying to locate the deceased after they left the police station.

Was the action of the accused in disengaging the retention device on his Glock holster, at House 577, an indication that the accused was preparing to use his firearm as a last resort, or was it an indication of readiness to meet a possible attack in the place where the deceased had carried out an axe attack on police? Did the accused depart from his police training in the use of lethal force? Was such a departure intentional, or was it based upon the accused's belief that he was acting in accordance with his training, or the requirements of the situation that the accused was in, as he saw it? Did Sergeant Frost make clear to the accused, and other IRT members, the expectations regarding the arrest of the deceased? Was the arrest plan reasonably practicable, if the IRT were not able to locate the deceased?

Now having considered those matters, you are entitled, if you think it is appropriate, to draw the inference suggested by the Crown, as to the accused's state of mind on 9 November 2019. But remember that you may only do so if the evidence which you accept permits no other inference to be drawn.

In considering whether any departure by the accused from his training, as a member of the Northern Territory Police, about the use of force when confronted with an offender wielding an edged weapon. You may also consider whether the training material, which has been tendered, is clear and unambiguous on the appropriate response by police to the presentation of an edged weapon by an offender.

In summary, the Crown submits that the first way in which you may use proof that the accused did not follow his police training, and did not comply with the arrest plan, if indeed you are satisfied that that is the case, is as circumstantial evidence, which together with other evidence, enables you to draw the inference suggested by the Crown as to the accused's state of mind on 9 November 2019.

So in other words, the first way in which the Crown says that you can use any departure by the accused, if you are satisfied that it is the case, from his training, or from the arrest plan, is inferring what the accused's state of mind was in House 511, and up and until the time that he fired the second and third shots.

There is a second way in which the Crown says that proof that the accused deviated from his training on 9 November 2019 is relevant. The Crown submits that proof that the accused deviated from his training regarding the use of lethal force, is relevant to you determining whether the accused's action in firing the second and third shots was reasonable, and whether the accused believed firing those shots was necessary in defence of Constable Eberl. Each of those three other matters, which the Crown has to prove, requires the Crown to prove either that the accused's conduct in firing the second and third shots was not reasonable, or that the accused did not honestly believe that it was reasonably necessary to fire the shots, in defence of Constable Eberl.

The fact that the Crown accepts that the first shot fired by the accused was justified, carries with it, you might think, the logical consequence that the accused's decision to draw his gun, in House 511, was justified. So the question you must confront is not whether the accused's training regarding the response to an edged weapon was breached by drawing his firearm, but by firing the second and third shots. The Crown's case is that it was not reasonably necessary for the accused to fire the second and third shots, and that firing those shots was contrary to the accused's training. Because he had been trained to only use lethal force where it was necessary to do so. The Crown submits that you can infer that the accused's state of mind, when firing those shots, was not that it was necessary to do so in defence of Constable Eberl.

The Crown submits that the second and third shots were not justified, because the situation had changed after the first shot was fired. Circumstances had changed, the Crown said, because the deceased had been shot once. The deceased and Constable Eberl had fallen onto the mattress. And the right arm, and/or hand of the deceased, was pinned between the deceased's body and the mattress, such that the deceased could not bring to bear the scissors as a lethal weapon. It is the Crown's submission that if the accused had followed his training, he would have used less than lethal force, perhaps including empty hand tactics, to enforce compliance from the deceased at that point. The issues that you have to grapple with are these.

Was there a deliberate failure by the accused to follow his training in firing shots 2 and 3? Did the accused's training require him to exercise judgement, as to the appropriate level of response to be made to an attack with an edged weapon, depending upon the circumstances, as he saw them to be? If so, was his judgement in firing the second and third shots, so erroneous in the circumstances as to convince you that his actions were deliberately excessive, or not made in good faith.

I will now tell you about how you cannot use the evidence of the accused's training and proof, if you are satisfied that that is the case, that the accused deliberately did not comply with his training or did not follow the arrest plan.

The first thing that you must understand is that the accused is not charged with some police regulatory offence of failing to follow orders or to act in conformity with his training. He is charged with the offences on the indictment and it is your duty to determine whether he is guilty or not guilty of those offences and not of some other misdemeanour.

If you were to be satisfied that the accused intentionally deviated in some significant way from the directions given to him by Sergeant Frost or intentionally deviated from his training in the course of locating and attempting to apprehend the deceased, that in itself cannot establish that the accused is guilty of the charges laid against him.

If you were to be satisfied that the accused intentionally deviated in some significant way from the directions given to him by Sergeant Frost or intentionally deviated from his training in the course of locating and attempting to apprehend the deceased you cannot reason that the accused is a person of bad character or is a bad police officer and accordingly is likely to have committed the offences with which he is charged. The evidence which has been led by the Crown is not directed towards the character of the accused. You cannot reason that the accused is a person of bad character because of any failure to comply with the directions of Sergeant Frost or the terms of his training. This case is not about character.

I want to emphasise to you that the terms of the accused's training does not define what was a reasonable response by the accused to the situation as he perceived it to be. In other words, the question whether the accused's response by way of firing the second and third shots was unreasonable in the circumstances is not simply answered by determining whether what the accused did was consistent with his training.

Now, I will go back and say that again because I made a couple of errors in going through it.

The question whether the accused's response by way of firing the second and third shots was unreasonable in the circumstances is not simply answered by determining whether what the accused did was consistent with his training. It is for you to determine whether the accused's conduct was unreasonable or unjustified. You may or may not receive some assistance in forming that judgement by reference to the evidence given by the expert witnesses and the other witnesses and the written training material which has been tendered.

But at the end of the day it is for you to make a judgement whether the Crown has proven that the accused's conduct was unreasonable or unjustified, so I make it clear that while any proven failure by the accused to comply with the terms of his training or the terms of directions given to him by Sergeant Frost may be relevant to you forming a judgement about the reasonableness of the accused's conduct. It is not determinative of that issue.

Police officers are human beings. You may think - and it is a matter for you - that perfect adherence to training cannot always be expected in the heat of the moment. You may think that this is particularly so in circumstances of a surprise attack followed by a very brief but violent struggle with an offender wielding an edged weapon. You have heard a lot of evidence about bladed weapon equals gun in this trial. You heard many witnesses say that when confronted by a person wielding an edged weapon they understood their training as a police officer to be that a police officer should draw their firearm. Of course this would depend upon the circumstances such as whether the officer had the time and space to tactically withdraw or adopt less lethal tactics. Whether this was an option for the accused is a matter for you.

You also heard evidence that if a police officer decides that it is necessary to fire their gun they are trained to aim at the centre of seen mass. They are trained in this way not with the intention that they should attempt to kill or seriously harm an assailant attacking him or some other person with a bladed weapon, but to incapacitate the assailant as quickly as possible. You might also think that police are trained to act instinctively in their own defence and the defence of others when threatened by an assailant with a bladed weapon.

You should take all of these matters into account in determining the accused's intention in firing the second and third shots and in determining whether the accused failed to comply with his training in some material way and the significance of any such failure.

I emphasise that the entry into House 511 by Constable Eberl and the accused was lawful. The attempt by the accused and Constable Eberl to arrest the deceased was lawful and in compliance with their duty under the Warrant of Apprehension against the deceased. This is relevant to the other matters which the Crown has to prove and to which I have referred.

In addition, you cannot rely upon any failure by the accused to carry out Sergeant Frost's arrest plan or any failure by the accused to comply with his police training, before he was attacked by the deceased, in determining the reasonableness of the accused's response at the time that he is attacked by the deceased. It would, for example, be quite wrong to reason that the accused should not have gone into House 511 or gone in without a specific plan for dealing with the deceased in deciding whether the accused's response to the deceased's attack was unreasonable.

The accused testified that he was not made aware of any arrest plan prepared by Sergeant Frost until well after the confrontation with the deceased in House 511. He also denied that he deviated in his training in the search for and attempted apprehension of the deceased. His case that the first shot which he fired did not incapacitate the deceased. You will no doubt recall the medical evidence that the first bullet lodged in the muscles of the deceased's back. There is also clear evidence that the deceased continued to struggle with Constable Eberl while still in

possession of the scissors after the accused fired the first shot and as I have said, the Crown accepts that the accused was justified in firing the first shot.

As I have said to you, the Crown says that after the first shot the right arm of the deceased, which was holding the scissors, was incapacitated to some extent by virtue of it being pinned between his body and the mattress while he was struggling with Constable Eberl, so that the deceased could not bring to bear the scissors as a lethal weapon against Constable Eberl. The Crown case is that in this circumstance, in particular the incapacitation of the deceased's right arm, that it is this circumstance in particular, being the incapacitation of the deceased's right arm, which distinguishes the first shot from the second and third shots in terms of justification.

You will therefore understand that the question whether the deceased's arm was pinned under him is a very important issue in this trial. If it were to be the case that a combination of Constable Eberl's weight and the position of the deceased's right arm while he was struggling with Constable Eberl on the mattress was such that at the time the accused fired the second and third shots, the deceased's right arm was incapacitated such that he could not bring to bear the scissors as a weapon against Constable Eberl or the accused, that of course would be a fact relevant to your consideration of both limbs of self-defence.

It would also be relevant to your consideration of whether the Crown has proven that the accused's conduct was not reasonable in the performance of his duty as a police officer. It would also be relevant to your consideration of whether the Crown has proven that the accused was acting in good faith in the exercise of a power or performance of a function as a police officer at the time that he fired the last shot.

Proof that the right arm of the deceased was to some degree incapacitated such that he could not, as a question of fact, bring to bear the scissors as a lethal weapon against Constable Eberl is, as I have said, relevant to those issues, but it is not decisive. You must consider what the accused knew or believed about the incapacitation of the deceased's right arm at the time that he fired the fatal shot. Did the accused know that the deceased's right arm was incapacitated?

Of course, the evidence given by the accused is that he saw the right arm of the deceased and that it was his impression or perception that the deceased was stabbing Constable Eberl with that weapon. Before you can find that the deceased's arm was substantially impeded at the time of the second and third shots, such that the deceased could not bring to bear the scissors as a lethal weapon, you must positively reject that evidence from the accused.

Mr Edwardson submits that there is evidence consistent with the accused's evidence on this issue, that is relating to the attempt by, or actual use of the scissors, as a weapon towards Constable Eberl by the deceased, while they are on the mattress. He points to the evidence of the injury observed on the body of Constable Eberl, and to the DNA evidence. You will recall the submission that he made to you yesterday, about that evidence supporting the accused's evidence.

I will not now repeat that submission. But you should carefully consider the evidence to which he referred to. The Crown also referred you to expert evidence in relation to that issue. And in particular, to the fact that there was no apparent damage, or hole in the shirt worn by Constable Eberl in the area of the – sorry, in the area where the injury on the body of Constable Eberl was located.

Now again, that is also a matter which you must take into account. In his submissions to you yesterday, as part of the material which he said supported the accused's evidence on this point Mr Edwardson took you to the evidence of Mr Simpson about the simulation engaged in by Mr Simpson, with regard to creating a hole in the fabric using an underlay of pork belly. And it was suggested to you – I will withdraw that. The evidence which was referred to was in cross-examination of Mr Simpson, where Mr Simpson was taken to damage to a shirt, depicted in photographs 14 and 24 as I understand it, in exhibit 1. And behind one of the tabs to exhibit 1. And it was suggested that if we compare and contrast image 14 and number 24, the images – the features that are observed in both the evidential damage in image number 14, versus the features of the damage observed in the simulation experiments of image 24, are remarkably similar.

Now it was, as I understand it, the submission that was put to you yesterday by Mr Edwardson, that that related to a simulation used in, or comparing the shirt of the accused, but in fact, I think that it was now agreed that it was a simulation comparing the shirt – sorry. It was a simulation comparing the shirt of Constable Eberl, but in fact it was a simulation using the shirt of the accused.

So I do not want to labour that point. But it is something that you may wish to look at, in terms of your consideration of those matters that were put forward yesterday by Mr Edwardson, in support of that proposition, that there was support of the evidence given by the accused, relating to his perception of how the deceased was using the scissors whilst the deceased and Constable Eberl were on the mat or the mattress.

I want to say now something to you about the charge of manslaughter. Count 2 is a charge of manslaughter. It is an alternative to count 1. You will only consider count 2, if you return a verdict of not guilty on count 1. Manslaughter is the unlawful killing of another person, or another human being. It is a less serious offence than murder, because it does not require proof that the accused acted with the intention of killing the deceased, or causing the deceased serious harm. In this Territory, the offence of manslaughter requires proof that the accused intentionally engaged in the conduct; that this conduct caused the death of the deceased; and that the accused was reckless or negligent as to causing the death of the deceased by this conduct. Now I will come back to that in a moment.

But there are therefore two pathways available to you to find the accused guilty of manslaughter. The first of these pathways is through finding that the accused acted recklessly. The second pathway is through finding that the accused acted negligently. The Crown need only prove one of the pathways. It does not need to

prove both. You as a jury do not have to agree on a pathway. It is sufficient if you all agree that one or other pathway has been proved by the Crown.

I will now tell you what recklessness and negligence means in this context. I will start with recklessness. The accused would be reckless as to causing the death of the deceased if at the time that he fired the fatal shot, he was aware of a substantial risk that the shot would cause the death of the deceased, and having regard to the circumstances known to the accused, it was unjustifiable to take that risk. The first part of this test is only concerned with the accused's state of mind that he fired the fatal shot.

You must be satisfied, beyond reasonable doubt, that in that instance, he was consciously aware that there was a substantial risk that the shot would cause the death of the deceased. The second part of the test for recklessness, whether having regard to the circumstances known to the accused, it was unjustifiable to take that risk – that the risk that firing the shot would cause the death of the deceased - is a matter for your judgement. This part of the test for recklessness is not concerned with whether the accused believed that his actions were justifiable. It is a matter for you to form a judgement, whether or not his action in firing the fatal shot was justified.

But in forming that judgement, you must take into account, the circumstances that existed at the time the accused fired the shot, as known to him. So your task is to determine what the circumstances were as known to the accused, and then to determine whether his actions were justifiable, based on those circumstances.

Even if in truth, the circumstances as the accused believed them to be, were not the fact. If the Crown has not convinced you to the standard of beyond reasonable doubt, that the accused was reckless as to causing the death of the deceased when he fired the shot, which caused the deceased, then you will need to consider the second pathway to proving manslaughter, being negligence.

The accused would be negligent, as to causing the death of the deceased, if his conduct in firing the shot which caused the death involved such a great falling short of the standard of care that a reasonable person would exercise in the circumstances, and such a high risk that the death of the deceased would occur, that the conduct merits criminal punishment. It is not disputed that the accused, as a police officer, acting in the course of his duties, had a duty to use only reasonable force in either effecting the arrest of the deceased, or in defending Constable Eberl from an attack by the deceased.

For the Crown to prove the crime of manslaughter, by way of the second pathway, it must prove that the accused breached his duty to the deceased. The Crown alleges that the accused breached his duty to the deceased, by using unreasonable force in firing the shot which caused the death of the deceased. It is for you, as a jury, to determine the standard of care required to be exercised by a reasonable person, that is, an ordinary member of the community, in the situation in which the accused was placed. If the accused failed to do what a reasonable person

would have done, in terms of the level of force used against the deceased, in the situation in which the accused found himself, then you find that the accused breached the duty he owed to the deceased. Unless you are satisfied, beyond reasonable doubt that the accused's conduct in firing the fatal shot, fell short of the standard of care a reasonable person would have exercised in the circumstances in which the accused found himself, then the accused cannot be guilty of manslaughter.

In deciding whether the accused's conduct fell short of the standard of care that a reasonable person would have exercised in the circumstances, you have to consider what a reasonable person would have done, in the situation in which the accused was placed. A reasonable person is one who has some, but not all of the personal attributes of the accused. A reasonable person is a person who is generally the same age as the accused, with his experience and training, and with his knowledge of the facts. The reasonable person is a person of normal courage and resolve. So, you have to put this reasonable person into the accused's shoes at the time of the incident in House 511 and attribute to that person the accused's knowledge of the circumstances at the time that he fired the shot which caused the death of the deceased.

You will observe that such a hypothetical reasonable person would have the same training, regarding the use of force that the accused received in the police force. If the accused failed to act as a reasonable person would have done in that situation, then the accused's conduct has fallen short of the standard of care that a reasonable person would exercise in the circumstances. It does not matter whether the accused knew that his conduct was falling short of that standard, or believed that he had acted appropriately in the circumstances that he faced.

Not every failure, however, to reach the standard of care that a reasonable person would exercise in the circumstances, will be sufficient to amount to the crime of manslaughter. The accused's conduct must be so gravely in error, and carry with it such a risk that the deceased would die, that the conduct deserves to be punished as a serious criminal offence. That, again, is a matter for you.

To summarise, if you are satisfied that the accused's conduct fell short of the standard of care that a reasonable person would exercise in the circumstances before you, you may convict the accused of the crime of manslaughter based upon negligence. You must be satisfied that his conduct fell so short of the standard of care that a reasonable person would have exercised and that the accused's conduct involved such a high risk that the death of the deceased would occur, that his conduct merits criminal punishment.

Often, the level of failure to reach the standard of care required for the offence of manslaughter to be proven is described as gross or wicked. If the accused's failure to meet the standard of care that a reasonable person would have exercised in the circumstances meets this level of seriousness and carries with it a high risk of death to the deceased, it does not matter that the accused did not intend or did not appreciate that his actions may harm the deceased.



It will be apparent from what I have said that in deciding what happened when the accused's conduct in firing the shot which caused the death of the deceased fell short of the standard of care that a reasonable person would exercise in the circumstances, you are entitled to take into account the accused's training as a police officer.

You must, however, approach the matter from the perspective of the facts that the accused understood them to be at the time, and bear in mind the circumstances which the accused found himself when deciding whether to fire the second and third shots.

I now want to say something about self-defence. The laws of this Territory, in common with the laws of every other State and Territory in this country, recognise that the right of a person to act in self-defence, or in defence of another person from an attack or threatened attack, even to the point of killing an assailant.

This right arises where two circumstances exist. The first circumstance is that the accused believes that his conduct is necessary to defend himself or another person. The second circumstance is that the conduct engaged in by the accused in defending himself or another person is a reasonable response in the circumstances as the accused perceived them to be.

I will refer to these circumstances as the first and second limb of self-defence, respectively. Although self-defence is referred to as a defence, it is for the Crown to prove that the accused was not acting in self-defence.

In this particular case, it means that the Crown must prove, to the standard of beyond reasonable doubt that the accused was not acting in defence of Constable Eberl at the time that he fired the shot which caused the death of the deceased. The Crown may do this by proving beyond reasonable doubt, with regard to the first limb of self-defence, that the accused did not hold a belief at the time that he fired the shot which caused the death of the deceased, that it was necessary for him to fire that shot in order to defend Constable Eberl.

The Crown may also disprove self-defence by proving beyond reasonable doubt, with regard to the second limb of self-defence, that the accused's conduct in firing the shot which caused the death of the deceased was not a reasonable response in defence of Constable Eberl in the circumstances as the accused perceived them to be at the time that he fired the shot.

For the Crown to eliminate self-defence as an issue, it must prove, beyond reasonable doubt, one or the other of these matters. It does not have to prove both of them. If you decide that the Crown has failed to prove both of them, then the appropriate verdict, with regard to all charges, is not guilty.

I will just turn to the first limb of what I have referred to as the defence of

self-defence. You will see that the first limb of self-defence is entirely concerned with what the accused was thinking at the time that he fired the fatal shot.

You have heard evidence from the accused that his state of mind was that he believed the deceased to be armed with a potentially lethal weapon, and was stabbing or attempting to stab Constable Eberl with that weapon while they were struggling on the mattress.

In considering whether you are satisfied that the accused did, in fact, believe that it was necessary in defence of Constable Eberl, for him to fire the shot which caused the death of the deceased, you must consider the circumstances as the accused perceived them to be at the time that he fired that shot. In that regard, you may take into account in assessing the accused's state of mind at that time, the accused's police training with regard to the use of lethal force when confronted with an edged weapon as he understood that training to be.

In considering the first limb of self-defence, it is the accused's perception which must be considered, and not what someone else might have perceived. The matter should not be looked at with the benefit of hindsight, but in the realisation that calm reflection could not be expected in the situation that the accused found himself in.

Even if you were to be satisfied, in hindsight - and I am not suggesting one way or another, whether this would be the case - that the accused was mistaken in believing that what he did was necessary to Constable Eberl; that does not matter. The Crown must establish that the accused did not actually hold a belief that it was necessary for him to do what he did in order to protect himself or Constable Eberl.

If the Crown has failed to prove this beyond reasonable doubt, then you must consider the second limb of self-defence. If the Crown, however, has succeeded in proving that the accused did not, in fact, believe that it was necessary for him to do what he did in defence of himself or Constable Eberl, then it has negated self-defence.

I will now turn to the second limb of self-defence. I remind you that, in order to negative self-defence, the Crown must prove, to the standard of beyond reasonable doubt regarding the second limb, that the accused's conduct in firing the shot which caused the death of the deceased, was not a reasonable response in defence of Constable Eberl in the circumstances that the accused perceived them to be at the time that he fired the shot.

The issue for you to decide or consider, with regard to the second limb of self-defence, is whether the Crown has proven beyond reasonable doubt that the accused's conduct in firing the shot which caused the death of the deceased was unreasonable or excessive in the circumstances as the accused perceived them to be. Whether or not it was a reasonable response in the circumstances as the accused perceived them to be is a matter for your judgement.

The second limb of self-defence is not about whether the accused believed that his response was reasonable. It is a matter for you to consider whether it was or was not. In considering this question, you should consider all aspects of the accused's response, including the nature, degree and means by which force was used by him.

In considering whether the Crown has proven that the accused's response was not a reasonable response, you may take into account the accused's training, regarding to the use of lethal force when confronted by an edged weapon. But, in considering whether the Crown has proven that the accused's response was not a reasonable response, you do so having regard to the circumstances, as perceived by the accused.

You will also remember that the accused's police training does not determine what is or is not a reasonable response in particular circumstances. The circumstances, as the accused perceived them to be may be quite different from how you, in hindsight, may perceive them to be. For example, it was suggested that the scissors deployed by the deceased were not a particularly lethal weapon and you were to agree with that suggestion after having examined the scissors, your assessment of the threat presented to Constable Eberl or to the accused while the deceased was armed with those scissors is not determinative of whether the Crown has proven that the accused's response was unreasonable.

The question must be looked at from the perspective of the accused's perception of the circumstances that existed when he fired the fatal shot. What opportunity did the deceased have to inspect the weapon being held by the deceased? If his perception was that the – I'll withdraw that. If his perception was that the weapon held by the deceased was a potentially lethal weapon being wielded by an assailant who had the opportunity and will to use that weapon against Constable Eberl, you must consider whether his conduct was unreasonable in that light.

To summarise, there are two parts to self-defence which I have referred to as the first and second limbs and in relation to both of them the Crown holds the onus of proof. It is not for the accused to prove that he was acting in self-defence. It is for the Crown to prove that he was not. This involves two questions.

Has the Crown proved beyond reasonable doubt that the accused did not believe, at the time of firing the shot which caused the death of the deceased, that it was necessary to do what he did in order to defend Constable Eberl?

Secondly, has the Crown proved beyond reasonable doubt that the accused's conduct in firing the shot which caused the death of the deceased was not a reasonable response in the circumstances as he perceived them to be?

If your answer to either question is yes, then the Crown has proven that the accused was not acting in defence of Constable Eberl. You will then need to

consider each of the other matters which the Crown must prove before the accused can be convicted of any particular charge.

If your answer to both questions is no, then the Crown has failed to prove that the accused was not acting in – in defence of Constable Eberl. Your verdicts will then be not guilty on all charges.

Now, I am going to now have handed to you some documents which I have prepared.

Can I just confirm that each of you has three documents? The first document is count 1, murder. The second document is count 2, manslaughter and the third document is count 3, violent act causing death.

Do each of you have those documents? All right, thank you.

Undoubtedly everything that I have said to you today requires you to remember quite a lot. For that purpose, I have prepared these documents and hope that these documents will remind you of some of the essential parts of what I have said this morning but also perhaps help you in providing a structured way in which you can go about your deliberations. I will talk about that again in a moment.

Let's go to the first document. Count 1, murder. At the top of that document you will see that I have set out the elements of the offence of murder. To prove the elements of the offence of murder the Crown must prove to the standard of beyond reasonable doubt:

- a) That the accused intentionally engaged in conduct, in this case, firing his gun.
- b) That the conduct caused the death of the deceased.
- c) That at the time he engaged in the conduct the accused intended to either kill the deceased or cause him serious harm.

Now, underneath that I have set out the matters which the Crown must prove - the other matters that the Crown must prove beyond the elements of the offence, before you could return a verdict of guilty to the charge of murder. The first of those is self-defence which, of course includes the defence of Constable Eberl. So you must be satisfied that the accused was not acting in self-defence.

To be satisfied of that, as I have just said to you a moment ago, you must be satisfied to the standard of beyond reasonable doubt either that the accused did not hold an honest belief that it was necessary for him to fire the shot which caused the death of the deceased in order to protect himself or to protect Constable Eberl. That's the first limb of self-defence - or that the conduct of the accused in firing the shot which caused the death of the deceased was not a reasonable response in the circumstances as the accused perceived them to be. That's the second limb of self-defence to which I took you to earlier.

The second matter which the Crown must prove beyond the elements of the offence is that you must be satisfied beyond reasonable doubt that the conduct of the accused in firing the shot which caused the death of the deceased was unreasonable in the circumstances as the accused perceived them to be for the performance of his duty as a police officer.

The third matter which the Crown must prove is that you must be satisfied beyond reasonable doubt that the accused did not honestly believe he was acting in the performance of a duty or exercising a function as a police officer when he fired the shot which caused the death of the deceased.

Therefore, in order to return a verdict of guilty to count 1 you must be satisfied beyond reasonable doubt that the Crown has proven all of the elements of the offence and that the Crown has also proven all of the other matters, one, two and three as set out in that document.

If you turn to the second page of the document I have set out some notes for your assistance. Serious harm in relation to the elements of the offence of murder means any harm including the combined effect of more than one harm that endangers or is likely to endanger a person's life or that is or is likely to be significant and longstanding.

Regarding self-defence. In the second limb of self-defence it is for the jury to determine whether the conduct of the accused was a reasonable response in the circumstances as the accused perceived them to be. The second limb of self-defence is not concerned with whether the accused believed his conduct was a reasonable response, but in deciding whether you are satisfied that his conduct was not a reasonable response you must judge that according to the circumstances as the accused perceived them to be.

Regarding the second of the other matters, the accused had a duty as a police officer to arrest the deceased. He had the power to use reasonable force in effecting that arrest. The accused also had duties to keep the peace, to prevent crime, to detect crime and to bring offenders to justice. The accused had the power to use reasonable force in performing those duties.

The requirement that the Crown prove that the conduct of the accused was unreasonable is not concerned with whether the accused believed his conduct was unreasonable, but in deciding whether you are satisfied his conduct was unreasonable to the performance of his duties as a police officer. You must judge that according to the circumstances that the accused perceived them to be.

Regarding the third other matter, to which I have referred. The accused had a duty and function as a police officer to arrest the deceased. He also had duties to keep the peace, to prevent crime, to detect crime, to bring offenders to justice. The accused had the power to use reasonable force in performing those duties. It is not enough in regard to other matter three, for you to be satisfied that the accused used

more force than was reasonably necessary in a performance of a duty as a police officer, when he fired the shot which caused the death of the deceased.

You must be satisfied, beyond a reasonable doubt, that the accused did not honestly believe, at the time that he fired the shot which caused the death of the deceased, that firing that shot was reasonably necessary to perform his duty or function. So that is an issue which is focused on what was in the mind of the accused, at that time.

I want to now turn to the next page. You will see that the next two pages are what I referred to as a question tree. Now this is provided to you as a suggested means by which you may structure your consideration of the issues that you have to consider. You do not have to use this. It is entirely a matter for you. It is only a suggestion. I will go through the question tree on count one, murder, to illustrate how it works. But, and I will not do this with regard to the other counts, because that would be mere repetition.

So question one, dealing with the elements of the offence. Are you satisfied, beyond reasonable doubt, that the accused intentionally engaged in conduct, firing his gun with the second and third shots? If your answer as an individual juror is yes, you proceed to question two. If your answer as an individual juror is no, the Crown has not proved the charge of murder, and you will return a verdict of not guilty on count 1.

You will then proceed to consider count 2. Question two. Are you satisfied beyond reasonable doubt that the accused's conduct, that is firing the second and third shots which caused the death of the deceased – sorry, caused the death of the deceased. If your – I will withdraw that. I will start that again. Are you satisfied beyond reasonable doubt that the accused's conduct, in firing the second and third shots caused the death of the deceased?

If your answer as an individual juror is yes, proceed to question three. If your answer as an individual juror is no, the Crown has not proven the charge of murder, and you will return a verdict of not guilty on count one. You must then proceed to consider count 2.

Question three, are you satisfied beyond reasonable doubt that when the accused fired the shot, which caused the death of the deceased, that he either intended to kill the deceased, or intended to cause serious harm to the deceased? If your answer as an individual juror is yes, proceed to question four. If your answer as an individual juror is no, the Crown has not proven the charge of murder, and you will return a verdict of not guilty on count 1.

You must then proceed to consider count 2. Question four. Are you satisfied beyond reasonable doubt, that when the accused fired the shot, which caused the death of the deceased, the accused did not believe that it was necessary to fire that shot in order to protect himself or Adam Eberl? You will see this is the first limb of self-defence. If your answer as an individual juror is yes, the Crown has proved that

the accused was not acting in self-defence when he fired the shot, which caused the death of the deceased, and you must proceed to question six. If your answer as an individual juror is no, you proceed to question five.

Question five, of course, deals with the second limb of self-defence. Are you satisfied, beyond reasonable doubt, that when the accused fired the shot which caused the death of the deceased, his conduct was not a reasonable response in the circumstances, as he perceived them to be? If your answer as an individual juror is yes, the Crown has proven that the accused was not acting in self-defence when he fired the shot which caused the death of the deceased, and you must proceed to question six. If your answer as an individual juror is no, the Crown has not proven that the accused was not acting in self-defence when he fired the second and third shots, and you will return verdicts of not guilty to all charges. You proceed no further.

Question six. Are you satisfied beyond reasonable doubt, that the conduct of the accused in firing the shot which caused the death of the deceased was unreasonable in the circumstances as the accused perceived them to be, for the performance of the accused's duty as a police officer? If your answer as an individual juror is yes, proceed to question seven. If your answer as an individual juror is no, then you will return verdicts of not guilty on all charges, and you will proceed no further.

Question seven, are you satisfied beyond reasonable doubt at the time the accused fired the shot that caused the death of the deceased, that he did not honestly believe that firing that shot was reasonably necessary to perform his duty as a police officer? If your answer as an individual juror is yes, you will return a verdict of guilty to count 1. You will proceed no further. If your answer as an individual juror is no, you will return verdicts of not guilty to all charges, and you will proceed no further.

So you will see that the structure of the question tree is to direct your attention towards the elements of the offences, and through cascading questions onto each of the other matters that you need to consider. And providing what verdicts should be returned, depending upon what answers you provide to those questions. As I have said, you do not need to structure your consideration of the case in that way. It is provided to you for your assistance, if you find it of assistance.

I will now turn to the second document, manslaughter. To prove the elements of the charge of manslaughter, the Crown must prove to the standard of beyond reasonable doubt, that the accused intentionally engaged in conduct, being firing his gun. That the conduct caused the death of the deceased, and that when he engaged in that conduct, the accused was reckless or negligent as to causing the death of the deceased.

Now again, you will see in the other matters, underneath the elements of the offence, that I have made reference to the three other matters that I made reference to with regard to count 1.

I am not going to read those to you again. So if you turn to page two. We have the notes for count 2. I have set out regarding the elements of manslaughter, what you need to be satisfied of, in order to be satisfied that the accused was reckless as to causing the death of the deceased. Or whether he was negligent as to causing the death of the deceased.

Now I have been through that at some length with you, only a moment ago, so I will not now read it again. Now the other notes are the same as the notes that were provided with regard to count 1. So I will not read those to you again. Again you will see that there is a question tree for count 2. It is structured in the same way as the question tree for count 1. As I have explained to you the way in which the question tree is intended to assist you, I will not read through it again.

Turn now to the third document, violent act causing death. To prove the elements of the offence of engaging in a violent act causing death, the Crown must prove to the standard of beyond reasonable doubt, that the accused intentionally engaged in conduct, firing the shot which caused the death of the deceased.

Secondly, that this conduct involved a violent act to the deceased by the accused.

Thirdly, that this conduct caused the death of the deceased.

Fourthly, that this conduct was either not part of a socially acceptable function, or unreasonable, having regard to that function.

Now again, underneath the elements you will see that I have set out the particulars relating to the three other matters that the Crown must prove.

I will now turn on the second page to the notes for count 3. Regarding the elements of that offence, conduct involving a violent act, means conduct involving the direct application of force of a violent nature to a person.

The word, "violent" has its ordinary English language meaning an, "Act involving the application of rough or strong physical force." I see I have left a note in there relating to lawyers, you can ignore that. "An act may be a violent act, even if it is a lawful act." It is not necessary for the Crown to prove that the accused intended to cause the death of the deceased. A socially acceptable function is not defined, but may include the performance of duties as a police officer. Those duties would include the duty to arrest the deceased, imposed by the warrant of apprehension, as well as duties to keep the peace, to prevent crime, to detect crime, and/or to bring offenders to justice.

Now, the other notes on pages 2 and 3 are the same as the notes referring to the earlier charges and I will not repeat them. Now, you will see, on pages 4 and 5 of the document, the question tree for count 3. Again, it is structured in the same



way as the question three is for counts 1 and 2 and I will not now read through that with you.

Now, I want you to remember that any verdicts you return must be unanimous, either guilty or not guilty. Remember to keep at the forefront of your minds that the prosecution holds the onus of proving any charge to that standard of beyond reasonable doubt.

You will have with you in the jury room the transcripts of the evidence, together with the exhibits that have been tendered during the trial. The exhibits, of course, are part of the evidence in the trial.

The transcripts, as I have already told you, are not part of the evidence. If you have any doubt about the accuracy of the transcript, and it is a matter of some significance, then, if you provide a note to the Sheriff's officer, we can provide you with some assistance in checking the accuracy of the transcript.

Now, I strongly suggest that you do not remove the scissors or clothing exhibits from their protective packaging. The items are packaged so that we may avoid the possibility of transmission of disease. If, for some reason, you feel that it is imperative to examine one of those items outside of its packaging, the Sheriff's officer will provide you with protective gloves.

Now, you must not conduct experiments with the exhibits. If, at any stage of your deliberations, you would like me to repeat or seek to elaborate upon any direction of law I have given you, please do not hesitate to ask. It is fundamental that you should understand the principles which you are being asked to apply and if you have any doubt in that regard, not only can you ask for assistance, but you should ask for assistance.

The procedure in that regard is for you to indicate to one of the Sheriff's Officers that you would like further assistance and if you provide a note to the Sheriff's Officer, indicating what assistance you require, the note will be given to me and, after I have discussed the matter with counsel, the court will reassemble, for the purposes of assisting you.

You have heard a lot of evidence in this trial and there will be a considerable amount of material for you to consider in the jury room. Please do not feel under any pressure in your deliberations. You may take as long as necessary.

I will just tell you what will happen when you reach your verdicts. You will be brought back into the court and take your places in the jury box. Your foreperson will be asked to stand and my associate will ask whether you have agreed upon your verdicts. Your foreperson will say yes, because, hopefully, that will be the case.

My Associate will then ask you if the accused is guilty or not guilty of the first charge on the indictment, reading that charge out in full. Your foreperson will either

guilty or not guilty. If your verdict is guilty, no verdicts will be taken on counts 2 and 3.

If your verdict is not guilty, my associate will then read count 2 and will ask for your verdict. If your verdict on count 2 is guilty, no verdict will be taken on count 3. If your verdict is not guilty, my Associate will then read count 3 and ask you for your verdict on that count.

At the end of that process, my associate will ask you whether the verdict is the verdict according to all of you. Now, that is important because, as I have said, your verdict must be unanimous. After you have rendered your verdicts, your role in this trial will be completed.

After you retire to consider your verdicts, I will raise with counsel whether they have any submissions to make to me, with respect to my directions to you. If, in the light of those submissions, it is necessary for me to provide you with further directions, the court will reassemble.

If it does not become necessary for the court to reassemble, I will request the Sheriff's officers to inform you accordingly. Thus, you should not reach any final verdict until you have been informed that you may do so.

Now, yesterday, before I released you, I said that when I asked you to retire to consider your verdict, I would ask that you indicate whether the jury had some form of consensus, as to whether it wanted to sit either on one or both days of the weekend, if that was required.

Is there any such consensus at this time?

A JUROR: We have decided on Monday.

HIS HONOUR: I am sorry, I cannot hear you.

A JUROR: Sorry, we have decided if we are here past Friday, we will resume on Monday.

HIS HONOUR: Thank you. All right, you may now retire then to consider your verdicts.

MR STRICKLAND: Your Honour, before the jury retire, there are a couple of matters of law I wish to raise.

HIS HONOUR: Is that in relation to the firearm?

MR STRICKLAND: No, your Honour, In relation to your Honour's summing up.

HIS HONOUR: Yes.

MR EDWARDSON: Your Honour, that should be done in the absence of the jury, obviously.

MR STRICKLAND: Exactly.

MR EDWARDSON: Sorry.

MR STRICKLAND: I agree with that, your Honour. That is why I'm asking your Honour not to – could your Honour ask the jury not to deliberate until those matters have been raised?

HIS HONOUR: I just did that.

MR EDWARDSON: He did.

HIS HONOUR: I said to them, "If it does not become necessary for the court to reassemble, I will request the Sheriff's officers to inform you accordingly. Thus, you should not reach any final verdict until you have been informed that you may do so."

MR STRICKLAND: Thank you, your Honour.

HIS HONOUR: All right, thank you.

Would you now retire?

JURY OUT

HIS HONOUR: Mr Crown?

MR STRICKLAND: Sorry, I didn't hear your Honour's direction.

Your Honour, there are two matters of substance and two minor matters.

HIS HONOUR: Yes.

MR STRICKLAND: I'll just deal with the minor matters first.

Your Honour, in relation to the issue of Mr Simpson and the photographs, your Honour mentioned the photographs being part of exhibit 1. They're part of exhibit 65.

HIS HONOUR: (Inaudible).

MR STRICKLAND: The second minor matter, your Honour, is when your Honour referred to House 577 and the search of - - -

HIS HONOUR: House 577.

MR STRICKLAND: Your Honour referred to the Crown submission or the evidence in relation to the drawing of the firearm.

HIS HONOUR: Did I say drawing?

MR STRICKLAND: I believe your Honour did. I'm not a hundred per cent sure.

HIS HONOUR: I certainly didn't mean to say that if I did.

MR STRICKLAND: I think your Honour said that at - - -

HIS HONOUR: I only meant to refer to the disengaging of the retention device and placing his hand on the handle of the gun.

MR STRICKLAND: I don't think your Honour said the release of the retention device. I can't be certain, I just don't recall your Honour - - -

HIS HONOUR: I know that's what written - - -

MR STRICKLAND: Yes, I understand. Again, I can't be certain. But they're two matters - - -

HIS HONOUR: Yes, those are the - - -

MR STRICKLAND: They're the two minor matters.

Your Honour, the two matters of substance; first, related to your Honour's directions in relation to the body-worn video.

HIS HONOUR: Yes.

MR STRICKLAND: Right at the beginning, or towards the beginning of your Honour's summing up, your Honour directed the jury by saying there are a number of very important warnings in relation to the body-worn.

HIS HONOUR: Yes.

MR STRICKLAND: And, your Honour, in my submission, I say with respect, accurately summarised the evidence in relation to those warnings. But, in my submission, that summary lacked balance, in that it did not refer at all to the evidence about the substantial benefits of the body-worn video.

Now, there were two witnesses who gave evidence about that; Dr McIntosh at page 844, and he, in my submission, was qualified to give an opinion about the value of the body-worn, given his vast experience in relation to that, and that vast experience is captured at page 826.

In particular, Dr McIntosh was asked about the body-worn, in relation to the critical time, between when they fall on the mattress and shots 2 and 3. And Dr McIntosh said, he was asked – this is at 844:

"So what they see might be different from the image that is captured on video?"

And he said:

"If they were looking at the same area it should be similar but if they were looking somewhere else it would be different."

In my submission, Dr McIntosh's opinions are based upon his - the value he obtained from the body-worn video captured in that evidence. Furthermore, Mr McDevitt, at page 1278 also outlined the benefits of the body-worn video in terms of - perhaps self-evidently - ascertaining timings and sequences of movements as seen on the screen and those matters, timings and sequences of movements were an important part of the Crown case.

So to simply refer to the warnings and the difficulties of the body-worn without also reminding the jury of the benefits of the body-worn, in my submission, creates a lack of balance.

The second related matter - and again, what your Honour said followed immediately on from the warnings about the body-worn, was your Honour said this - and again, I haven't captured it word for word but approximately - or words to the effect of:

"The way in which this trial has been conducted - and I mean no criticism of the Crown, may mean that you view the events in terms of one-tenth or one-hundredth of a second of separate opportunities for reflection by the accused instead of a single and brief, extremely violent incident. That is something you should guard against."

HIS HONOUR: Yes?

MR STRICKLAND: Well, your Honour, the Crown, in my submission the Crown has not conducted the hearing based solely on looking at matters frame by frame of one-tenth or one-hundredth of a second. The Crown, through its - as my learned friend says - critical expert, Senior Sergeant Barram, as well as the conduct of the trial generally, has looked at the events in real time.

Indeed, at page 929.2 - I will take your Honour to that, in relation to - at 928 Senior Sergeant Barram was asked;

"In your opinion was it reasonable or necessary for Constable Rolfe to have fired other shots 2 and 3?---No."

"Why do you say that?---Because things changed substantially from when the first shot was fired."

He is asked:

"What had changed substantially?"

And he gave this position:

"In reaching that conclusion did you consider the body-worn video played in real time, just as we did?"

And he answered, "Yes".

And indeed, that is how the Crown conducted its case, both by looking at it frame by frame but also by looking at it in real time and your Honour said that is the way the Crown has conducted its case. Your Honour, in my submission gave imprimatur from the weight of your Honour's position to the defence argument that we only looked at it frame by frame, whereas our case is that we looked at it in both senses and Sergeant Barram's evidence is an illustration of that, when important evidence of that.

And then your Honour went on to say:

"Instead of a single and brief extremely violent incident. That is something you should guard against."

Well, again, in my submission, that is given judicial imprimatur to the defence's position that there was - "you should look at the - you should look at the events as a single brief, extremely violent incident."

Our case, of course is that there were two separate phases for the reasons Senior Sergeant Barram's evidence is given. So my submission is that whole part of the summing up, in my submission, with respect, your Honour, lacked balance and does not accurately reflect either the evidence in the case or indeed the way the Crown conducted its case. That's what I wanted to say about the first matter.

Shall I go on to the second matter, which is - - -

HIS HONOUR: I thought that was the second matter.

MR STRICKLAND: That is what - that's compendiously the first matter.

HIS HONOUR: I see.

MR STRICKLAND: Now, the second matter, your Honour, is much briefer and I raised it yesterday. The second matter is what my learned friend said yesterday about the issue of charging.

HIS HONOUR: Issue of - sorry?

MR STRICKLAND: Charging.

HIS HONOUR: Charging - yes?

MR STRICKLAND: And my learned friend said this at page 1335:

"The executive of the Northern Territory Police Force and those they deployed to justify these charges, you might think have thrown everything at Zachary Rolfe because of a decision that should never have been made."

And there were some further comments and submissions relating to that. Now, your Honour, if the jury gives the same prominence to that powerful statement, as the newspapers have - or the media have - they will - they may well take that into account.

HIS HONOUR: I did address it.

MR STRICKLAND: Beg your pardon?

HIS HONOUR: I did address it.

MR STRICKLAND: Your Honour did address it?

HIS HONOUR: I did.

MR STRICKLAND: I withdraw that. I withdraw that. Excuse me just one moment.

Thank you, your Honour, I don't wish to be heard on that. So I simply rely - there's the two minor matters and then there's simply that first substantial matter.

MR EDWARDSON: Your Honour, firstly, in relation to the last matter, your Honour expressly told them that they were not to take into account the circumstances in which he may or may not have been charged, so - - -

MR STRICKLAND: I withdraw that.

HIS HONOUR: yes.

MR EDWARDSON: Your Honour, insofar as my learned friend's first point, that is the wrong exhibit, exhibit 65, that should be corrected.

HIS HONOUR: Yes.

MR EDWARDSON: As far as the balance of the submissions that have been put, with the greatest of respect, my learned friend simply has a glass jaw.

Honestly, your Honour, really, Blind Freddie would know from the committal right through that I have been running this case on the basis that you cannot possibly look at what went through Zachary Rolfe's mind by reference to frame by frame. That is the theme that has started with the opening, it's rippled through the case and, your Honour, in my respectful submission, has quite properly and fairly put the limitations - and it's not about re-arguing the prosecution case again, which I am quite sure my learned friend with the benefit of hindsight, would like to do. But that's not going to happen.

Your Honour, the only criticism I have - when I say, "criticism" - the only thing I ask your Honour to direct the jury on which is a separate issue altogether, but I don't think your Honour addressed, is the concession that my learned friend made at pages 1328 and specifically at the top of 1329 of the transcript, your Honour will remember that we had the debate initially about whether or not the words, "He was stabbing me - he was stabbing you" were a lie made out of a consciousness of guilt.

HIS HONOUR: Yes.

MR EDWARDSON: My learned friend then made the concession, quite properly, that the Crown case was that it was an Edwards lie.

HIS HONOUR: Yes.

MR EDWARDSON: But importantly, he said, at the top of page 1329 that:



"Ladies and gentlemen, let me make this clear, if you believe as a reasonable possibility that the evidence is true, you must find him not guilty of all three counts, no question about that."

I don't think - - -

HIS HONOUR: What was that page again?

MR EDWARDSON: That's at the top of page 1329.

HIS HONOUR: I do remember that.

MR EDWARDSON: I don't think, with respect, your Honour specifically directed the jury at all - - -

HIS HONOUR: I don't think - I didn't.

MR EDWARDSON: - - - in those terms and it seems to me, with respect, it's such an absolutely critical and proper concession made by my learned friend that - and it's a complete answer to all three charges, that the jury must be directed - and reminded specifically of the concession that was made by my learned friend in express terms.

HIS HONOUR: I am sorry, what page number?

MR EDWARDSON: 1329, the very top of the page.

"But ladies and gentlemen, let me make this clear, if you believe as a reasonable possibility that that evidence - that is, 'He was stabbing me - he was stabbing you' is true, you must find him not guilty of all three counts, no question about it."

Now, that is an extraordinary - but perfectly proper concession made by my learned friend and it is, with respect, a complete answer to all charges beyond the three defences that are set out in the relevant documents and in my submission the jury should be expressly told in those terms.

If your Honour pleases.

HIS HONOUR: (Inaudible).

MR STRICKLAND: Your Honour, that in effect is giving a Liberato direction, I have no problem with that. I have no problem with that at all.

HIS HONOUR: All right.

MR STRICKLAND: Your Honour, just in response to the first major matter. It's got nothing to do whether counsel has a glass jaw. I represent the community.

MR EDWARDSON: I take it back. I withdraw it.

MR STRICKLAND: I accept - and I accept it. I represent the community and if the community has an interest in there being some balance on this critical issue and if your Honour accepts that - and I'm talking about reminding them of the evidence and the way the Crown conducted its case- then that's all I ask your Honour to do.

HIS HONOUR: Thank you.

MR EDWARDSON: Your Honour, I was really being very cynical. I apologise and I withdraw the flippant remark I made.

MR STRICKLAND: Accepted.

HIS HONOUR: I propose to give the jury further directions in relation to the two minor matters raised by the Crown, and the matter raised by Mr Edwardson. I do not propose to say anything further in relation to the body-worn video. In my opinion, it will be clear to the jury that I was not talking about, or not indeed addressing the benefits of the body-worn video. Those would be immediately apparent to any member of the jury. And in that regard, the Crown only yesterday, made very clear to them, the evidence in relation to that. I think that the jury would understand clearly, that I was only addressing at that point, the potential dangers, with respect to the body-worn video.

With regard to the second part of the matter raised by the Crown, concerning my directions to the jury relating to the body-worn video. What I said to the jury was this:

"The way in which the case has been conducted, and I mean no criticism of the Crown, carries with it the risk that you, as a jury, may view the evidence in House 511 - " et cetera."

So I was bringing home to the jury the risk that multiple viewings of stills taken from the body-worn video, carried with it. I do not believe that the jury would have understood it in any different way. For that reason, I will not give any further directions in relation to the body-worn video, but I will deal with the other matters that have been raised.

MR STRICKLAND: If the court pleases.

HIS HONOUR: So can he jury be bought back in please.

JURY IN

HIS HONOUR: There are a couple of brief matters that I need to add to what I said. Now, you may recall that I talked about the address that was given yesterday by Mr Edwardson, relating to his submission that there was evidence which supported the accused's evidence, that he had seen the deceased stabbing, or attempting to stab Constable Eberl whilst the deceased and Constable Eberl were on the mattress. I made some reference in doing so, to the evidence of Mr Simpson. And I referred you to certain photographs, which had been referred to by Mr Simpson. And I said that those were photographs found in exhibit 1. I was in error. They are in fact found in exhibit 65. So I will correct that.

The Crown believes that when I was talking about the accused searching House 577, before he went to House 511, that I may have put it that part of the evidence upon which the Crown was asking you to draw an inference as to the accused's state of mind, was that the accused had drawn his gun in House 577. If I said that, I did not mean to do so. Because that is not in fact the evidence. What I believe I said, and certainly what I intended to say, was that the Crown relied upon the disengagement of the retention device by Constable – by the accused, and placing his hand on the handle of the gun. The final matter that I want to draw your attention to is the concession that was made by Mr Strickland, and properly made by him, as the Crown, yesterday, when he was addressing you.

And this again, relates to the evidence given by the accused about the deceased stabbing Constable Eberl whilst they are on the ground, on the mattress, or his perception of that. You may remember that Mr Strickland said, but ladies and gentlemen, let me make this clear, if you believe as a reasonable possibility that that evidence is true, you must find him, that is the accused, not guilty on all three counts. No question about it. Now those are the matters that I wanted to draw your attention to, so you may now retire to consider your verdicts.

JURY RETIRED 2:45 PM  
JURY RETURNED 4:35 PM

JURY OUT

ADJOURNED 4:38 PM TO FRIDAY 11 MARCH 2022

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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 21942050

THE QUEEN

and

ZACHARY BRIAN ROLFE

BURNS J

AND A JURY OF TWELVE

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 11 MARCH 2022 AT 9:00 AM

(Continued from 10/03/2022)

Transcribed by: EPIQ

JURY RETURNED 9:00 AM  
JURY RETIRED 9:01 AM

JURY RETURNED 12:31 PM

THE ASSOCIATE: Madam Foreperson, please stand.

Ladies and gentlemen of the jury, are you unanimously agreed upon your verdict.

THE FOREPERSON: Yes.

THE ASSOCIATE: On the first count that the accused, Zachary Rolfe, on 9 November 2019 at Yuendumu in the Northern Territory of Australia murdered Charles Arnold Walker.

Do you find the accused: guilty or not guilty?

THE FOREPERSON: Not guilty.

THE ASSOCIATE: And is that the verdict of all of you?

THE FOREPERSON: Yes.

THE ASSOCIATE: In the alternative, on the second count that the accused, Zachary Rolfe on 9 November 2019 at Yuendumu in the Northern Territory of Australia, engaged in conduct that caused the death of Charles Arnold Walker, being reckless or negligent as to causing the death of Charles Arnold Walker.

Do you find the accused: guilty or not guilty?

THE FOREPERSON: Not guilty.

THE ASSOCIATE: And is that the verdict of all of you?

THE FOREPERSON: Yes.

THE ASSOCIATE: In the further alternative, on Count 3 that the accused, Zachary Rolfe on 9 November 2019 at Yuendumu in the Northern Territory of Australia, engaged in conduct involving a violent act to Charles Arnold Walker, namely discharging a firearm and that conduct caused the death of Charles Arnold Walker.

Do you find the accused: guilty or not guilty?

THE FOREPERSON: Not guilty.

THE ASSOCIATE: And is that the verdict of all of you?

THE FOREPERSON: Yes.

THE ASSOCIATE: I now confirm your verdict as follows; on Count 1 you found the accused, Zachary Rolfe, by unanimous verdict, not guilty?

THE FOREPERSON: Yes.

THE ASSOCIATE: On Count 2 you found the accused, Zachary Rolfe, by unanimous verdict, not guilty?

THE FOREPERSON: Yes.

THE ASSOCIATE: And on Count 3 you found the accused, Zachary Rolfe, by a unanimous verdict, not guilty?

THE ASSOCIATE: Yes.

THE ASSOCIATE: You may be seated.

HIS HONOUR: Members of the jury. What I say to you now would be the same, no matter what verdicts you had returned.

I want to thank you for your participation in this trial. This has been a very difficult trial because of the subject matter and the scrutiny under which the proceedings have been placed.

It has been very clear to me throughout the trial that you have paid very close attention to the evidence.

Again, on behalf of the community I want to thank you. Your part is now over and you may now go.

JURY OUT

ADJOURNED 12:38 PM INDEFINITELY