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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

Nov 23 10 21 AM '10

*Ann L. Blum*  
CLERK OF THE COURT

THE STATE OF NEVADA,	.	CASE NO. C-250630
Plaintiff,	.	
vs.	.	DEPT. NO. 17
BRIAN KERRY O'KEEFE,	.	
Defendant.	.	Transcript of
.....	.	Proceedings

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

ROUGH DRAFT TRANSCRIPT OF  
JURY TRIAL - DAY 3

WEDNESDAY, AUGUST 25, 2010

APPEARANCES:

FOR THE PLAINTIFF:

CHRISTOPHER LALLI, ESQ.  
Assistant District Attorney

STEPHANIE GRAHAM, ESQ.  
Deputy District Attorney

FOR THE DEFENDANT:

PATRICIA PALM, ESQ.  
Special Deputy Public Defender

COURT RECORDER:

MICHELLE RAMSEY  
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC  
Littleton, CO 80120  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

001136

1 LAS VEGAS, NEVADA, WEDNESDAY, AUGUST 25, 2010, 9:43 A.M.

2 (Outside the presence of the jury).

3 THE COURT: We're on the record. Someone had a issue  
4 outside the presence of the jury panel.

5 MR. LALLI: Well, I guess two issues, your Honor.  
6 One, Ms. Palm had some scheduling issues with her witnesses.  
7 Mr. DeSalvio needs to testify tomorrow morning, I guess,  
8 sometime around 10:30, and we're certainly able to accommodate  
9 that. He's a very short witness.

10 The other witness is Dr. Grey from Utah. He needs to  
11 testify tomorrow at about 1:00 o'clock. We'll certainly still  
12 be in our case at that time, but I think I don't believe that  
13 is going to be a problem for us to accommodate and allow her to  
14 call that witness out of -- out of order.

15 The other piece is Mr. Schiro, I think, does he need  
16 -- I'm not sure if he needs to testify Friday morning?

17 MS. PALM: Yeah, he would need to testify Friday  
18 morning. I did tell him I thought -- I thought I only had him  
19 yesterday, but he was able to accommodate me so he could stay  
20 for Friday morning, but then he has to leave in the afternoon.  
21 So -- and he's going back to Louisiana. So he'll stay the  
22 extra day to do it on Friday so we're not interrupting their  
23 case too much. But he does need to get on Friday morning.

24 MR. LALLI: We -- we may still be in our case, but  
25 just -- I mean, we'll do everything we can to accommodate them.

1 THE COURT: All right, I appreciate that.

2 MR. LALLI: I don't --

3 THE COURT: I don't have any objection to that as  
4 long as you make sure everyone's schedules are accommodated.  
5 I'm assuming Ms. Palm you'll accommodate the State's schedule  
6 as well?

7 MS. PALM: Certainly. Thank you.

8 MR. LALLI: Your Honor, one other issue, and it  
9 pertains to the redaction of the video of the defendant's  
10 statement to the police. The court will certainly recall we  
11 litigated all of the redactions and we did that last week to  
12 give us sufficient time to create a video of that, which we  
13 have done. I mean, all the redactions that the court has  
14 ordered have been made.

15 And I -- I wanted -- during the course -- I'm not  
16 sure if it was over the weekend or if it was Friday, but there  
17 was some discussion via e-mail between Ms. Palm and myself  
18 about where the tape would start and where the tape would stop.  
19 And our original discussion was to stop at the very beginning  
20 -- to start at the very beginning of the video and run through  
21 taking the redactions out, including the -- the approximate one  
22 hour in between the first part of the interview and the second  
23 part.

24 And then a question was where would we stop the video  
25 at the end because the video goes on for quite some time

1 afterwards. After the investigators leave, once their  
2 interview has been concluded, the defendant is photographed by  
3 crime scene analysts, things of that nature. He's making  
4 statements or make some statements throughout that part.

5           And sorting it all out, having concern for potential  
6 objection that we would deprive the defense of the complete  
7 story of the statement, what I did is not start at the very  
8 beginning of the video, but start at the point in time when law  
9 enforcement enters the room and stop just shortly after they  
10 leave for the break, and then it picks up again when they  
11 return and ends upon their release. These are defendant  
12 statements. They're hearsay to the defense. They can't admit  
13 them. Only I have the right to admit those and -- and that is  
14 admitting a fair portion of the tape, but still not depriving  
15 the defense in any way of the complete story of -- of that  
16 interview.

17           And I informed Ms. Palm this morning that the tape  
18 starts -- the video portion start at 1:35:47 a.m. and concludes  
19 at 3:28:34 a.m., but there is an issue -- now, I guess, if I  
20 understand Ms. Palm correctly, she wants more of the -- of the  
21 front part of the interview redacted, and she wants other  
22 portions after the police leave on the video.

23           And so I wanted to resolve that as soon as possible  
24 because I edit my own video, and it's extremely time consuming  
25 and it's not something that can just be done on the fly when

ROUGH DRAFT TRANSCRIPT

001139

1 we're here in court. I mean, it's something that is -- that is  
2 going to take me several hours to do and has taken me many  
3 hours to do up to this point. So I'd like some clarification  
4 of that.

5 MS. PALM: And if I could respond to that. Last week  
6 after the court's ruling on what had to be redacted out of the  
7 video, Chris and I had a discussion, and then he asked me what  
8 -- where do you propose we start and stop, and I told him where  
9 I wanted to start and where I wanted to stop. And where I want  
10 to start is a little bit before the Miranda, but not entirely  
11 before the Miranda, and he's not Mirandized at that point, so  
12 the State can't admit that part.

13 And if they admit his statement, we get to admit  
14 other parts to show for --

15 THE COURT: How much --

16 MS. PALM: -- under the rule of completion.

17 THE COURT: -- more time do you want --

18 MS. PALM: I --

19 THE COURT: -- of the defendant?

20 MS. PALM: -- I wanted it to start at 1 -- well,  
21 here's what happened. I said I wanted to start at 1:38, and I  
22 want it to go -- include the crime scene analyst, when Dan Ford  
23 comes in and they start talking to him there because there's  
24 some more statements there that are exculpatory. And -- and  
25 then I wanted it to end when he starts undressing because the

1 jury doesn't need to see him get naked and take his DNA and  
2 stuff. We can do that another way.

3           So I wanted it to go from Dan Ford entering the room  
4 after the interview until 4:05, and I want it to start at 1:38  
5 and then -- and so we couldn't agree on that, and so Chris said  
6 go ahead and make your own -- your own video, which I did,  
7 which took me hours to do. And then he comes in this morning  
8 and tells me that he wants to include some of that that he  
9 didn't want to include before.

10           So it's not that, you know, there hasn't been some  
11 discussion, but the part that I want in is 1:38 forward. I've  
12 made a video of the portions that I want in that could not  
13 include the part of the video that's on the transcript. If you  
14 understand what I'm saying that the transcript does not reflect  
15 the entire encounter. But I wanted 1:38 until the start of the  
16 interview because --

17           THE COURT: Well, you thought Mr. Lalli said it  
18 starts at 1:35:47.

19           MS. PALM: No, it starts much earlier than that.  
20 He's not Mirandized during that entire period --

21           THE COURT: All right.

22           MS. PALM: -- up until the interview starts at 1:43.  
23 So what my video is is about a six minute little clip. It's --  
24 it's from 1:38 to 1:43 and then afterwards when Dan Ford enters  
25 the room until 4:05. That -- and -- and I have gone to the

ROUGH DRAFT TRANSCRIPT

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1 trouble to make a video that includes that, based on our  
2 discussions.

3 THE COURT: Maybe I misunderstood Mr. Lalli said that  
4 his video starts at 1:35 and 47.

5 MS. PALM: Right and there -- there's some things in  
6 there that I would be objecting to, then, and it's not  
7 Mirandized, so --

8 MR. LALLI: And I -- it's our position that he starts  
9 off as soon as the police enter the room making spontaneous  
10 statements. Not -- they're not the product of my  
11 interrogation. So, you know, I was certainly concerned that  
12 now they were going to be requesting more redactions. So it's  
13 just something that we're going to have to resolve, your Honor,  
14 before -- before that video is played.

15 I don't intend to play the video in my opening  
16 statement, and I don't anticipate using it until Detective  
17 Wildemann testifies. So we'll have some time, but I'm not sure  
18 --

19 THE COURT: Is there a transcript that someone can  
20 highlight for me the sections --

21 MS. PALM: No, your Honor, because the part that I  
22 want in is not on the transcript --

23 THE COURT: Okay.

24 MS. PALM: -- because the transcript only has the  
25 Mirandized portion on it.

1 THE COURT: Right.

2 MS. PALM: And the part that he wants in is not on  
3 the transcript either, but he wants more than I do.

4 MR. LALLI: Well, I have it on my computer.

5 MS. PALM: And less than I did in some ways. Less  
6 than I do at the end of the interview and, you know, after he's  
7 been Mirandized, which is -- is fine with me if it comes in.  
8 But the -- the before part, he wants more than I do. I want it  
9 to not start until 1:38.

10 THE COURT: You want three minutes later --

11 MS. PALM: That's correct.

12 THE COURT: -- basically. And what's going on there  
13 in those three minutes?

14 MS. PALM: He's just -- he's going off about various  
15 subjects, Dr. Buchanan, those kind of things. And so that's  
16 why I started it where I did because I felt the rest of it was  
17 just too prejudicial and he hadn't been Mirandized yet, and the  
18 police officers were talking to him and asking him questions or  
19 having interaction with him.

20 THE COURT: Well, if it's only three minutes, I can  
21 review that in one of the breaks.

22 MS. PALM: And if the court wants to look at the --  
23 the video that I made --

24 MR. LALLI: Well, it's a little -- it's -- you're not  
25 going to see the portions that I want in.

ROUGH DRAFT TRANSCRIPT

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1 THE COURT: Right, so --

2 MR. LALLI: And -- and what's -- what's telling is,  
3 you know, this man is claiming that someone was -- was --  
4 someone had died accidentally or via suicide who he loved. And  
5 it's incredibly telling to see his demeanor and affect when he  
6 first encounters the police. And they're not interrogating  
7 him. He's making spontaneous statements.

8 THE COURT: Right. Well, let me just review the --  
9 the beginning of the -- the three minutes that's in dispute.

10 MR. LALLI: From the very start until Miranda?

11 THE COURT: Right, because Ms. Palm says she's okay  
12 with 1:38 on.

13 MS. PALM: And where I've edited it, it starts right  
14 after the Bucky comment --

15 THE COURT: Okay.

16 MS. PALM: -- if that goes -- if that helps the  
17 court.

18 THE COURT: All right. And then Mr. Lalli starts at  
19 basically three minutes -- it shouldn't take me long to review  
20 three minutes. And on the -- on the tail end, Ms. Palm, you  
21 wanted -- Mr. Lalli wants to stop at 3:28:34. When do you want  
22 yours to stop?

23 MS. PALM: Well, I -- I actually cut out some and so  
24 I don't have a start time on here, but I want it to stop --

25 THE COURT: Isn't there a counter on the --

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1 MS. PALM: Yeah, you can -- you -- well, if the court  
2 wants to look at the counter on this one, it start -- mine  
3 starts when Dan Ford enters the room and they have more  
4 interaction with him because he's sitting alone for a while.

5 Dan Ford enters the room and then goes number 4:05.  
6 It's not very long.

7 THE COURT: Okay, but what I'm saying is the State  
8 wants to stop at 3:28. You want to stop at 4:05?

9 MS. PALM: Basically, but cut out the part where he's  
10 sitting by himself.

11 THE COURT: Okay. Well, it doesn't seem like it's  
12 that much time. I mean, I can review that hopefully this  
13 afternoon or tonight.

14 MR. LALLI: We'd be interposing objections to it.  
15 It's hearsay, any statements that are made. We're not offering  
16 them. What happens there has nothing to do -- it's not taking  
17 my of the previous interview out of context or putting it more  
18 in the context. There's no -- there's no complete --  
19 completeness argument and so it's our position that it is -- is  
20 --

21 THE COURT: Okay.

22 MR. LALLI: -- hearsay.

23 THE COURT: Well, I'll be more than happy to listen  
24 to argument. I've got to review it.

25 MS. PALM: Right.

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1 MR. LALLI: Right, so --

2 THE COURT: I appreciate you bringing that to my  
3 attention.

4 MR. LALLI: Okay, thank you.

5 THE COURT: Is that it? Let's call the jury in.

6 (In the presence of the jury).

7 THE COURT: All right, ladies and gentlemen, those of  
8 you in the gallery, I'd like to give you my thanks for -- for  
9 going through this process and your willingness to serve as a  
10 juror in this particular matter. At this time the clerk will  
11 now issue the oath of your office as a juror.

12 (Swearing in the jury panel).

13 THE COURT: All right, have a seat, please. Ladies  
14 and gentlemen, as I had mentioned before and at the beginning  
15 of this case, we expect this trial to last through the week and  
16 perhaps Monday or Tuesday. The attorneys have advised me that  
17 they believe they should be able to complete the evidentiary  
18 portion of this case by Monday.

19 I don't know if there's an outside chance of Friday,  
20 but we will stay on track as far as our expect the ending time.  
21 I just want to advise you that each day we hope to start around  
22 9:30 or 10:00, we'll take our breaks typically around noon. If  
23 we're right in the middle of a witness, we'll probably wait  
24 until the examination of that witness has been completed and  
25 then we would take a lunch break.

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1           Typically between 3:00 and 3:30 in the afternoon  
2 we'll take a mid afternoon break and we'll try to adjourn  
3 around at 5:00 o'clock. Again, if we're in the middle a  
4 witness, we may go a little longer.

5           Each day the marshal will check with you to see if  
6 you can stay later. If we can get more witnesses in on any  
7 give day, we can make sure that we do end on time. So that  
8 will be up to all of you each day. The marshal will check with  
9 you to see if perhaps you can stay 5:30 one day or 6:00 o'clock  
10 one day. If someone has a doctor's appointment and you need to  
11 leave at 5:00, we'll accommodate you.

12           And at this time I'm going to read to you some  
13 preliminary instructions. At the end of the trial you'll be  
14 give more detailed instructions which is the law of this  
15 particular case. After I read you the general instructions at  
16 this time we'll have a quick recess, the attorneys will prepare  
17 their -- their Power Points and -- and everything and the court  
18 -- courtroom here will be prepared for their opening  
19 statements.

20           After the opening statements are given we will start  
21 calling witnesses this afternoon.

22                       (Pause in the proceedings).

23           THE COURT: Everybody okay? All right, good. Ladies  
24 and gentlemen, this is a criminal case brought by the State of  
25 Nevada against the defendant. This case is based on an

1 information. The clerk will now read the information and state  
2 the plea of the defendant.

3 (Clerk reads Information; not transcribed)

4 THE COURT: Ladies and gentlemen, as we had mentioned  
5 earlier, you should understand that the Information just read  
6 to you is simply a description of the charge made by the State  
7 against the Defendant. It is not evidence of anything. It  
8 does not prove anything. Therefore, a defendant starts out  
9 with a clean slate. The defendant has pled not guilty and is  
10 presumed innocent.

11 This is a criminal case. There are -- and there are  
12 two basic rules you must keep in mind. First, the defendant is  
13 presumed innocent unless and until proved guilty beyond a  
14 reasonable doubt. The defendant is not required to present any  
15 evidence or prove his innocence. The law never imposed upon a  
16 defendant in a criminal case, the burden of calling any  
17 witnesses or introducing any evidence.

18 Second, to convict the State must prove beyond a  
19 reasonable doubt that the crime was committed and the defendant  
20 is the person who committed it.

21 It will be your duty to decide from the evidence to  
22 be presented whether or not the defendant is guilty or not  
23 guilty. You are the sole judges of the facts. You will decide  
24 what the facts are from the evidence which will be presented.  
25 The evidence will consist of testimony of witnesses and

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1 documents and other things received into evidence as exhibits.  
2 You must apply the facts to the law which I shall give you, and  
3 in that way reach your verdict.

4           It is important that you perform your duty of  
5 determining the facts diligently and conscientiously, for  
6 ordinarily there is no way of correcting an erroneous  
7 determination of the facts by the jury. You should not take  
8 anything I may say or do during the trial as indicating my  
9 opinion as to how you should decide the case, or to influence  
10 you in any way in your determination of the facts. At times, I  
11 may even ask questions of witnesses. If I do so, it is for the  
12 purpose of bringing out matters which should be brought out and  
13 not in any way to indicate my opinion about the facts, or to  
14 indicate the weight or value you should give the testimony of a  
15 witness.

16           In deciding the facts of this case you may have to  
17 decide which witnesses to believe and which witnesses not to  
18 believe. You may believe everything a witness says, or only  
19 part of it, or none of it. In considering the weight or value  
20 of the testimony of any witness, you may consider the  
21 appearance, attitude and behavior of the witness when  
22 testifying, and a number of other things, including the  
23 witness's ability to see, or hear, or know of the things the  
24 witness testifies to, the quality of the witness's memory, the  
25 inclination of the witness to speak truthfully, whether or not



1 the witness has any interest in the outcome of the case, or any  
2 motive, bias or prejudice. Whether the witness is contradicted  
3 by anything the witness said or wrote before the trial, and how  
4 reasonable is the witness's testimony when considered with  
5 other evidence which you believe.

6 In decide whether or not to believe a witness, keep  
7 in mind people sometimes forget things. You need to consider  
8 whether a contradiction is an innocent lapse of memory or an  
9 intentional falsehood, and that may depend on whether it has to  
10 do with an important fact or only a small detail.

11 The weight or value of the evidence does not  
12 necessarily depend on the number of witnesses testifying for  
13 one side. You must consider all the evidence, and you may  
14 decide the testimony of a smaller number of witnesses on one  
15 side, has more weight or value than that presented by a larger  
16 number of witnesses on the other side.

17 There are two kinds of evidence, direct and  
18 circumstantial. Direct evidence is testimony about what the  
19 witness personally saw, heard, or did. Circumstantial evidence  
20 is indirect evidence. It is proof of one or more facts from  
21 which you can find another fact.

22 By way of example, if you wake up in the morning and  
23 see the ground, the sidewalk and the streets are all wet and  
24 water is running down the gutters, you may find from those  
25 facts that it rained during the night. It is proof of one or

1 more facts from which you can find another fact.

2           If you were awake during the night and saw the rain  
3 fall, tht would be direct evidence, which is something you  
4 personally saw. You may consider both direct and  
5 circumstantial evidence in deciding this case. The law permits  
6 you to give equal weight or value to both. But it's for you to  
7 decide how much consideration to give any evidence.

8           Certain things are not evidence and you must not  
9 consider them as evidence in deciding the facts of this case.  
10 Statements and arguments by the attorneys, questions and  
11 objections of the attorneys, testimony I instruct you to  
12 disregard, and anything you may see or hear if Court is not in  
13 session, even if what you see or hear is done or said by one of  
14 the parties, or by one of the witnesses.

15           Remember, evidence is sworn testimony by a witness  
16 while Court is in session, and documents and other things  
17 received into evidence as exhibits.

18           You will be given the opportunity to ask written  
19 questions of any of the witnesses called to testify in this  
20 case. You are not encouraged to ask a large number of  
21 questions, because that is the primary responsibility of  
22 counsel. Questions may be asked only in the following manner:  
23 After both lawyers have finished questioning the witness, and  
24 before I excuse the witnesses, and only at that time, if there  
25 are additional questions you would like to ask the witness, you

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1 may then seek permission to ask the witness a written question.

2           Should you desire to ask a question, write your  
3 question down and your juror number on a piece of paper and  
4 raise your hand. All questions from jurors must be factual in  
5 nature and designed to clarify information already presented.

6           In addition, jurors must not place any undue weight  
7 on the responses to their questions. The Marshal will pick up  
8 your question and give it to me. All questions must be  
9 directed to the witness and not to the lawyers or to the Judge.  
10 After I consult with counsel, I will determine if your question  
11 is legal proper. If I determine that your question may be  
12 properly asked, I will ask the question.

13           No adverse inference should be drawn if the Court  
14 does not allow a particular question.

15           There are rules of law which control what can be  
16 received into evidence. When the lawyer asks a question, or  
17 offers an exhibit into evidence, and the lawyer on the other  
18 side thinks that it is not permitted by the rules, that lawyer  
19 may object. If I overrule the objection, the question may be  
20 answered or the exhibit received. If I sustain the objection,  
21 the question cannot be answered and the exhibit cannot be  
22 received.

23           Whenever I sustain an objection to a question, ignore  
24 the question and do not guess what the answer might have been.  
25 Sometimes I may order evidence stricken from the record and

1 tell you to disregard or ignore such evidence. This means when  
2 you are decide the case, you must not consider the evidence  
3 which I have told you to disregard.

4 It is the duty of a lawyer to object to evidence  
5 which the lawyer believes may not be permitted by the rules.  
6 You should not be prejudiced in any way against a lawyer who  
7 makes objections on behalf of the party the lawyer represents.

8 Also, I may find it necessary to admonish a lawyer.  
9 If I do, you should not be prejudice towards the lawyer or  
10 client because I have found it necessary to admonish the the  
11 lawyer.

12 Until this case is submitted to you, do not talk to  
13 each other about it, or about anyone who has anything to do  
14 with it until the end of the case when you go to the jury room  
15 to decide your verdict. Do not talk with anyone else about  
16 this case or anyone who has anything to do with it until the  
17 trial has ended and you have been discharged as jurors.

18 Anyone else includes members of your family and your  
19 friends. You may tell them that you're a juror in a criminal  
20 case, but don't tell them anything else about it until after  
21 you have been discharged by me. Do not let anyone talk to you  
22 about the case, or about anyone who has anything to do with it.  
23 If someone should try to talk to you, please report it  
24 immediately to me by contacting the Marshal.

25 Do not read any news stories, listen to any radio

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1 broadcasts, watch any television or do any internet research  
2 about the case, or about anyone who has anything to do with it.

3           You may be tempted to visit a particular location.  
4 Please do not do so. In view of the time that has elapsed  
5 since this case has come to trial, substantial changes may have  
6 occurred at a particular location.

7           Also if you make an unauthorized visit without the  
8 benefit of explanation you may get an erroneous interpretation  
9 or impression, excuse me. Therefore, please avoid going near  
10 or past the location until after this case has been completed.

11           At the end of the trial, you will have to make your  
12 decision based upon what you recall of the evidence. You will  
13 not have a written transcript to consult and it is difficult  
14 and time-consuming for the court recorder to play back lengthy  
15 testimony. I urge you to pay close attention to the testimony  
16 as it is given.

17           If you wish, you may take notes to help you remember  
18 what a witness said. If you do take notes, please keep them to  
19 yourself until you and your fellow jurors go to the jury room  
20 to decide the case. Do not let note-taking distract you so  
21 that you do not hear other answers by the witnesses. You  
22 should rely upon your own memory or what was said and not be  
23 overly influenced by the notes of other jurors.

24           Do not make up your mind about what the verdict  
25 should be until after you have gone to the jury room to decide

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1 the case and you and your fellow jurors have discussed the  
2 evidence. It is important that you keep an open mind  
3 throughout the trial.

4 A juror may not declare to a fellow juror any fact  
5 relating to this case of which the juror has knowledge. If any  
6 juror discovers during the trial, or after the jury has  
7 retired, that the juror or any other juror has personal  
8 knowledge of any fact in controversy in the case, that juror  
9 shall disclose such situation to me in the absence of the other  
10 jurors.

11 This means, if you learn during the course of the  
12 trial that you have personal knowledge of any fact which is not  
13 presented by the evidence in this case, you must declare that  
14 fact to me. You communicate to me through the Marshal.

15 During the course of this trial, the attorneys for  
16 both sides and all court personnel, other than the Marshal, are  
17 not permitted to converse with members of the jury. These  
18 individuals are not being anti-social, they are bound by ethics  
19 and the law not to talk to do, for to do so might contaminate  
20 your verdict.

21 The trial will proceed in the following manner. One  
22 of the Deputy District Attorneys will make an opening  
23 statement, which is an outline to help you understand what the  
24 State expects to prove. Next, the defense attorney may, but  
25 does not have to, make an opening statement. Opening

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1 statements serve as an introduction to the evidence which the  
2 party making the statement intends to prove.

3           The State will then present its evidence and counsel  
4 for the defendant may cross-examine the witnesses. Following  
5 the State's case, the defendant may present evidence and the  
6 deputy district attorneys may cross-examine the witnesses.  
7 However, as I have said, the defendant is not obligated to  
8 present any evidence.

9           After all the evidence has been presented I will  
10 instruct you on the law. After the instructions of the law have  
11 been read to you, each side has the opportunity to present oral  
12 argument. What is said in closing argument is not evidence.  
13 The arguments are designed to summarize and interpret the  
14 evidence.

15           Since the State has the burden of providing the  
16 defendant guilty beyond a reasonable doubt, the State has the  
17 right to open and close the arguments. After the arguments  
18 have been completed, you will retire to deliberate your  
19 verdict.

20           Ladies and gentlemen, we're going to take a quick  
21 recess so the parties can arrange their notes and prepare for  
22 the opening and then we will start calling witnesses this  
23 afternoon.

24           You may be aware that in a criminal case we have 12  
25 jurors deliberate in the jury room. There are 14 of you seated

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1 in the jury box. Jurors No. 13 and 14 are not necessarily the  
2 alternates. We will have two alternates in this case. Those  
3 alternates will be randomly selected. So it's important that  
4 all of you pay attention to the evidence.

5 It's important that we have alternates because if  
6 during the trial one of the jurors becomes disqualified for  
7 some reason, we will need to have an alternate deliberate when  
8 this case is over. If we didn't have an alternate, we would  
9 have to start the entire process over and pick a whole new jury  
10 So you can understand why it's important that we have an  
11 alternate.

12 So, ladies and gentlemen, let's take a recess while  
13 the parties prepare for their opening, which should just be  
14 five to ten minutes.

15 During this recess, it is your duty not to converse  
16 among yourselves or with anyone else on any subject connected  
17 with this case, or to read, watch, or listen to any report of  
18 or commentary in the trial by any person connected with the  
19 trial, or by any medium of information, including without  
20 limitation, newspaper, television, the radio or the internet.

21 You are not to form or express an opinion on any  
22 subject connected with this case until this matter is submitted  
23 to you. I think most of you have this admonishment memorized,  
24 but I am required by law to read it to you every time we take a  
25 break.



1           So we'll see you back in five to ten minutes.

2           (Court recessed at 2:45 p.m. until 2:59 p.m.).

3           (In the presence of the jury).

4           THE MARSHAL: All right, you may be seated, ladies  
5 and gentlemen. Let's make sure all cell phones are turned off,  
6 please.

7           THE COURT: State ready to proceed?

8           MR. LALLI: Yes, your Honor.

9           THE COURT: And defense ready?

10          MS. PALM: Yes, your Honor, thank you.

11          THE COURT: All right, State, your opening.

12                       STATE'S OPENING STATEMENT

13          MR. LALLI: Thank you. May it please the court,  
14 Brian O'Keefe was found guilty by a jury of felony battery  
15 constituting domestic violence in 2006. The victim in that  
16 case, Victoria Whitmarsh is the same woman he murdered on  
17 November 5th, 2008.

18               The evidence will show that he stabbed her, that she  
19 suffered a fatal stab wound under her arm and that she died as  
20 a result of essentially bleeding out. Her death was by no  
21 means instantaneous. And really, the murder should come as no  
22 surprise. You will learn that the defendant never really got  
23 over the fact that Victoria was responsible for putting him in  
24 prison.

25               He would say that he wanted to kill the bitch. After

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1 the defendant went to prison, his relationship with Victoria  
2 came to an end, at least for a time. Shortly after his  
3 release, he began a romantic relationship with a woman by the  
4 name of Cheryl Morris. And there was a somewhat eery  
5 resemblance between Victoria and Cheryl.

6           You will learn that like Victoria, Cheryl is a small  
7 Asian woman. The defendant's girlfriend Cheryl, the two of  
8 them became very close, and it was in this context that the  
9 defendant shared with Cheryl his feelings about Victoria. And  
10 he shared with her his ability to kill.

11           You will learn that the defendant would boast about  
12 being in the military. He bragged about knowing how to kill  
13 people. And whenever he talked about doing this, he only  
14 talked about doing it with a knife.

15           While his relationship with Cheryl was ongoing, the  
16 defendant began to secretly see Victoria again. Like most  
17 domestic violence relationships, there was a fatal attraction  
18 between the two. At one point the defendant even tried to move  
19 Victoria into the apartment in which he was living with Cheryl,  
20 while Cheryl was still living there. And Cheryl would have  
21 nothing to do with it. And she eventually moved out.

22           After a time the defendant took up a relationship in  
23 that apartment, 5001, El Parque, Unit 35, along with Victoria.  
24 In many ways Victoria Whitmarsh led a tortured life. She  
25 suffered from depression. Like many people who suffer from

1 that disease, she would cut herself at times to cope with her  
2 emotions.

3           You will learn that she had attempted suicide before.  
4 She took medication to help her deal with her depression. You  
5 will learn that at autopsy she had a drug called Effexor in her  
6 system, which is an anti-depressant. Victoria had been  
7 infected with Hepatitis C, she was estranged from her husband  
8 and from her daughter. By all accounts, the evidence will show  
9 that she was vulnerable, at times even pathetic.

10           At the time of her death she weighed just 108 pounds.  
11 Just the sort of woman the defendant could control. As I told  
12 you, the defendant lived in this apartment complex located at  
13 5001 El Parque. His unit was the upstairs unit. And you'll  
14 learn that many of the neighbors in the apartment complex knew  
15 each other, they were somewhat close, somewhat friendly,  
16 certainly good neighbors.

17           You will learn about the Tolivers. Charles Toliver,  
18 who's known to his friends as Cooky, as well as his wife,  
19 Joyce. And the Tolivers lived just below the defendant. Well,  
20 back on November 5th of 2008, you will hear from the Tolivers  
21 that it was about 10:00 o'clock at night. And Mrs. Toliver is  
22 fairly certain of the time because she will tell you that  
23 something she did at this period was watched the Soap Opera  
24 Network. Night time was kind of her opportunity to catch up on  
25 the soaps.

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1           And at about 10:00 o'clock was a soap opera that she  
2 would usually watch. Well, on this particular evening at that  
3 time she began to hear a disturbance upstairs directly above  
4 her apartment. And it continued for some 30 minute, getting  
5 louder and louder. Mr. Toliver, Cooky Toliver, is an early  
6 riser, he goes to bed early at night. He heard the  
7 disturbance. It woke him from a sleep.

8           And in an attempt to let whatever was going on  
9 upstairs become aware that they were being bothered, they took  
10 a broom and they began to bang the -- the ceiling to make a  
11 noise to let the people up above, you know, to cool it, but the  
12 noise didn't stop. At one point Mrs. Toliver will tell you  
13 that she actually heard a woman crying. And over the course of  
14 about ten minutes that crying turned to moaning and then fell  
15 silent.

16           Mr. Toliver was quite angry at being awakened and  
17 actually ascended those stairs to confront the defendant about  
18 making all the noise. When he gets to the front door, he sees  
19 the defendant and the defendant tells him come in here and get  
20 her. Mr. Toliver walks into the back bedroom and this is what  
21 he sees. He sees Victoria's legs on the floor. They are  
22 obstructed by the bed. She is naked from the waist down, and  
23 there is a great deal of blood in the room.

24           He looks at the defendant and he says man, what the  
25 hell have you done? He runs out in an attempt to get help. He

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1 runs to the unit of an individual named Tom Armbruster. Both  
2 Todd and Cooky ultimately return to this apartment. They go up  
3 the stairs and into the room. Todd enters the room with Cooky  
4 just behind him. He sees Victoria's body.

5 The defendant is standing over or close to Victoria  
6 and saying words to the effect of come on, get up, come on, get  
7 up. Out of nowhere once the defendant realizes that Todd is in  
8 the room, he stands up and actually takes a swing at him. And  
9 then tells him to get the hell out of here.

10 The evidence will show that the defendant never  
11 called the paramedics. He never called for a firefighter. He  
12 never called the police. He never called anybody to try to  
13 help Victoria Whitmarsh on that evening. But 911 is called.  
14 Calls are placed to the authorities. Not by the defendant, but  
15 by among other people, Todd Armbruster, and you will hear that  
16 911 call.

17 The police begin to arrive almost immediately. They  
18 make their way up to the apartment. They enter the living room  
19 area of the apartment and they are naturally very cautious.  
20 They have received information that there is a woman down who  
21 has been stabbed. There's blood in the area, the -- they don't  
22 know exactly what to make of the situation. They know that  
23 there is a male in the room where the female is at.

24 They enter, they attempt to talk to the defendant.  
25 They tell him he needs to come out so that they can help

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1 Victoria. He refuses to come out. He tells them get in here.  
2 You will learn what a CIT officer is. A crisis intervention  
3 team officer. Metro has a group of officers who are trained in  
4 deescalating situations like this. It just so happened that a  
5 crisis intervention team or a CIT officer was very close by who  
6 makes his way on scene almost immediately.

7           And he begins to explain to the defendant his need to  
8 come out of the back room so that officers and paramedics can  
9 come in to help Victoria. The police feel as though they're  
10 being baited. At one point the defendant says she's alive,  
11 come in here and help her or words to that effect. Then he's  
12 saying no, she's dead, it's too late. They have no idea what  
13 they're dealing with.

14           Eventually, they make the decision that they must  
15 enter the back bedroom to remove him so that they can assess  
16 Victoria and give her help if she needs it. So you'll learn  
17 that officers in a very methodical manner enter the room. As  
18 they're entering the room, they see Victoria's body naked from  
19 the waist down and the defendant almost laying on her.

20           And what does the defendant do when the police  
21 officers enter? He says don't look at her. He's putting her  
22 hands out. Don't look at her as though this is my woman and I  
23 don't want anybody else to see her in the nude. Eventually, he  
24 struggles with the police officers. He refuses to leave. They  
25 try to cuff him, he is fighting with them. They have to deploy

1 to tazer.

2           Eventually, they're able to actually pick him up and  
3 move him out of that room. Paramedics are very close by, but  
4 unfortunately it's too late. When the first police officer,  
5 Sergeant Dan Newberry, reaches Victoria's body, he attempts to  
6 find a pulse and he's up able to do so. Paramedics come in,  
7 they look for any signs of life, and unfortunately there are  
8 none.

9           Now, the defendant is taken out of the immediate area  
10 and eventually taken to a police car, he's put in the back seat  
11 of a patrol car. And he starts making statements that are  
12 spontaneous statements. So in other words, statements that are  
13 not in response to any questions that anybody had asked him.

14           And what he says at one point is I swear to God, V --  
15 and he would refer to Victoria as V -- I swear to God, V, I  
16 didn't mean to hurt you. What I -- what did I do wrong? Let's  
17 go do the ten years. Homicide detectives respond to the scene,  
18 along with other members of law enforcement. Crime scene  
19 analysts, the CSI people that we see on TV sometimes, they  
20 respond to the scene.

21           The knife that was used to stab Victoria is located  
22 and impounded. It's photographed and packaged for forensic  
23 testing. They noticed that the defendant has received a cut on  
24 his hand. He has blood on his hand. And what you will learn  
25 is that in violent attacks it is not at all uncommon for the

1 stabber to actually suffer some injury on his hands while  
2 perpetrating the crime.

3           Now, the knife that was used to kill Victoria was  
4 processed by DNA scientists. And you will learn that they  
5 attempted to get fingerprints from the knife. And you will  
6 learn of the various techniques they employed, but they were  
7 unable to do so. The most they could do was get a partial  
8 print on the handle of the knife, but there was not sufficient  
9 information on that print to make a comparison.

10           You will learn that the blood on the knife and the  
11 knife itself was also processed by a DNA expert by the name of  
12 Jennifer Bas. And analyst Bas found just what one would  
13 expect. On the very end of the handle and the blood on the  
14 very top part of the blade, that blood was the defendant's  
15 blood.

16           Blood found in the middle of the blade was determined  
17 to be a mixture of Victoria's blood and the defendant's blood.  
18 And blood on the very end of the tip of the knife was  
19 Victoria's blood.

20           Now, an autopsy was conducted on Victoria's body just  
21 two days later on November 7th of 2008. And the autopsy was  
22 conducted by a medical doctor by the name of Jacqueline  
23 Benjamin. And she will tell you that Victoria died as a result  
24 of a stab wound to the right side of her chest.

25           However, there are many other things that Dr.

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001165



1 Benjamin was able to learn during the course of the autopsy.  
2 As part of that process, the blood is analyzed. And as I  
3 alluded to before, she found evidence of Effexor in Victoria's  
4 blood. She also found a large quantity of alcohol. Her blood  
5 alcohol was.24. Probably some of you have heard that the legal  
6 limit in the State of Nevada is.08. Well, Victoria's was.24,  
7 well over that limit.

8           There was also a great deal of blunt force trauma on  
9 Victoria's body. And that really is just a fancy way of saying  
10 that her body was badly bruised. Now, while it is true that  
11 Victoria suffered from the disease of Hepatitis C, which  
12 accentuates bruising in the body, in other words it makes it  
13 more visible, you will learn that each bruise on Victoria's  
14 body represents some form of trauma or hitting.

15           Many of the bruises will be described by Dr. Benjamin  
16 as acute or recent. But you will learn that Victoria suffered  
17 trauma on her head, both the front of her head and the back of  
18 her head. The head trauma was acute. She had trauma on her  
19 chest. She had trauma on her back. She had trauma on her  
20 buttocks. She had suffered trauma on her left arm, on her  
21 right arm, on her left leg, on the right leg.

22           So much bruising, in fact, on this woman's body that  
23 Dr. Jacqueline Benjamin listed blunt trauma as an other  
24 significant condition in her death. An anonymous domestic  
25 violence survivor once made this observation. If you can't be

1 thankful for what you have, be thankful for what you have  
2 escaped. Well, unfortunately Victoria was not able to escape  
3 from the defendant, and he murdered her in a brutal way.

4 At the conclusion of this trial we will ask you for  
5 justice for Victoria's murder. We will ask you to find the  
6 defendant guilty of murder of the second degree with use of a  
7 deadly weapon. Thank you.

8 THE COURT: Thank you, Mr. Lalli. Ms. Palm, do you  
9 wish to exercise your right for an opening at this time?

10 MS. PALM: I do, your Honor.

11 THE COURT: All right.

12 DEFENSE'S OPENING STATEMENT

13 MS. PALM: Thank you. Good afternoon again, ladies  
14 and gentlemen. This is where we get to give our road map of  
15 how the evidence -- how we expect the evidence to come in and  
16 what we would like you to pay attention to as it comes in, what  
17 we think is important about this case.

18 This -- the evidence is going to show you that this  
19 is not a murder case. This is not any kind of killing by my  
20 client, Brian O'Keefe. The only way you can get to murder in  
21 this case is by exaggerating, exaggerating what the bruises on  
22 Victoria's body mean. By that mean, I mean she had advanced  
23 cirrhosis. She had Hepatitis C. She was drinking that night.

24 She -- from Hepatitis C and cirrhosis, you bruise on  
25 slighter than normal contact. Some of those bruises on her

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001167

1 legs, you'll hear, were most likely from bumping into things.  
2 This woman was very drunk at the time that she was -- at the  
3 time that she died and at the time that they performed her  
4 autopsy. So you can't rule out that she got some of those  
5 bruises from just walking around.

6           The other thing you're going to find out is that  
7 bruise cannot be dated, not with any kind of scientific  
8 certainty. Some of the bruises they show you in those pictures  
9 had green on them. If -- if you talk about how bruises age,  
10 they start with red, they kind of go maroon, then they kind of  
11 lighten up, start getting green around the edges. Some of  
12 those bruises had those. None of them can be tied to the time  
13 of her death. And I think that doctor Benjamin will testify  
14 that way and certainly our medical examiner's going to testify  
15 that way.

16           So I think to -- to get where they want you to get,  
17 you have to rely on extreme exaggeration of the evidence, of  
18 the evidence of the bruising in the context of her entire body,  
19 and, you know, don't be fooled by multiple pictures of the same  
20 bruise or -- or bruises blown up. Look at the pictures of the  
21 entire body and see -- see how many bruises this woman had and  
22 if they look old and if the testimony comes in that they're --  
23 they can't be tied to the time of her death.

24           She could have gotten those bruises from accidentally  
25 stumbling around. And she could have gotten bruises from the

1 police bumping into her body, which is going to be another  
2 issue in this case. The -- the room that they were arrested in  
3 was -- or the -- that Brian was arrested in when the police  
4 came in was extremely small. And you will hear testimony from  
5 the police who tried very hard to avoid, admitting that they  
6 might have bumped into her.

7 But the fact is they had to go over her body to get  
8 to him. And there's only one report that even references the  
9 fact that the arrest involved her body at all. And that report  
10 is a private report called a use of force report. It's not in  
11 any of the regular police reports. But they did have to go  
12 over her body, and it's possible they bumped into her during  
13 that process.

14 And when they tazed Brian, he fell on top of her  
15 body, and there's four or five policemen there trying to get  
16 him into custody. So I think that the evidence is not going to  
17 convince you that these bruises are any reliable evidence of  
18 any kind of beating.

19 I want to go back and talk about Brian for a minute.  
20 Brian -- Brian has had a problem with alcohol for a very long  
21 time. He -- when he was 17 years old he went into the 82nd  
22 Airborne Army. When he was 18 years old he married his first  
23 wife, Pamela Sue. When he was 20 years old he got a bronze  
24 star for meritorious achievement in combat.

25 When he was 20, his first child was born. When he

1 was 21, he was promoted to sergeant. He had two more children  
2 at the age of 24 and 26. And then that marriage fell apart.  
3 Brian was drinking a lot. And that marriage ended when he was  
4 30. And then he met his second wife out here and got married  
5 when he was 34, and he had two more little girls by that wife.  
6 And because of his current alcoholism that marriage fell apart.

7 And in 2001, Brian was admitted to Monte Vista  
8 Hospital. And he was admitted for detox. He was trying to  
9 deal with his alcoholism. And so he's in there and that's  
10 where he meets Victoria Whitmarsh. And Victoria was in there  
11 herself getting treatment for psychological issues. She had  
12 tried to kill herself.

13 And she reported that what happened in that incident  
14 was that she got in an argument with her husband, she went  
15 beserk, and she tried to cut herself and she overdosed. And  
16 Victoria also admitted to a long history of self-mutilation.  
17 By the time of her death she had been self-mutilating for about  
18 15 years. And her problem, as she reported it, I cut myself  
19 when I'm angry. And she turned to knives and she turned to  
20 scissors.

21 So in 2001, Brian and Victoria meet and these two  
22 very flawed people cling onto each other. She start a  
23 relationship. And during that relationship he did go to prison  
24 for domestic violence. And he was in prison and they stopped  
25 contact, and he got out, and in early 2008, he's going on with

1 his life. He's done. He -- he served his time, he's out on  
2 parole, he wants to have a new life.

3 And he meets Cheryl Morris. And Cheryl Morris is who  
4 they want you to rely on for evidence that he made threats  
5 against Victoria whom he loved. Cheryl Morris is the person  
6 they want you to rely on for he demonstrated how he could  
7 (indiscernible) --

8 MR. LALLI: I'm sorry, your Honor. I'm sorry, Ms.  
9 Palm.

10 MS. PALM: -- kill people.

11 MR. LALLI: I'm going to object. This is  
12 argumentative.

13 THE COURT: Sustained. Just rephrase the statements.

14 MS. PALM: Cheryl Morris is the witness who's going  
15 to come forward and tell you these things. Cheryl Morris is  
16 girl friend when he gets out of prison. And he and Cheryl  
17 Morris are building somewhat of a future together. She's  
18 staying at his house, his little trailer, on and off, and --  
19 and she's putting up -- and he's -- he's drinking again. He's  
20 got a bad drinking problem, and she's putting up with his  
21 drinking problem.

22 And she's putting with sort of transiency issues and  
23 wasn't real stable where they were living. They went and lived  
24 with some friends. And she's putting up with him telling her  
25 from the beginning that he still loved Victoria. He was honest

1 with her about it and said I love this woman.

2 And so that goes on from January when their  
3 relationship starts until June of 2008. And Victoria seeks  
4 Brian. Brian did not seek Victoria. Victoria sought Brian  
5 out. And he went and met with her just after Father's Day, and  
6 as a result of that, he wanted to be back in that relationship.  
7 And he came back and -- and expressed it to Cheryl, you know,  
8 his feelings.

9 She was upset first he lied to her. And then he told  
10 her to the truth. I -- I can't lie, I was with -- with  
11 Victoria. She still puts up with it. She puts up with him  
12 still seeing Victoria. And throughout the course of the summer  
13 this is still going on and she's still staying with him. And  
14 they're doing things like buying a car together on her credit  
15 because he didn't have very good credit. And then they look  
16 for an apartment together, and they get an apartment together.

17 And about that same time she decides she's tired of  
18 it. Meanwhile, throughout the summer Victoria was calling  
19 Cheryl. Victoria's pursuing Brian and calling Cheryl. And  
20 they get had apartment together, and they decide what they're  
21 going to just go their separate ways and live together as  
22 friends and it works for a few days, and then Brian calls up  
23 Cheryl and he wants to come back to the apartment. But he  
24 wants to be with Victoria, too. They want to be together.

25 And Cheryl, of course, doesn't like that idea. And

ROUGH DRAFT TRANSCRIPT

001172

1 Victoria gets on the phone and she talks to Cheryl. And in the  
2 end Cheryl ends up leaving and Victoria and Brian live in that  
3 apartment together. And -- and that apartment was a cute  
4 little apartment. They made a cute little home together. I'm  
5 just going to show you some of the pictures of how that place  
6 looked. It's -- it's small, but it's nice, it's clean, and  
7 it's a home.

8           This is the kitchen area. Can't see that very well.  
9 And this is the living room area going into the bedroom and  
10 this is the master bedroom back here. And again, just another  
11 kitchen one. But you can see, they -- they made a nice little  
12 home together. They were living together there as a couple.  
13 And you're going to hear from our other witnesses as they were  
14 as a couple. And our other witnesses are going to tell you  
15 that they were very loving with each other. And that Brian lit  
16 up when Victoria walked in the room. And they did things as a  
17 couple together.

18           Brian tried to get help for his alcoholism again, and  
19 he goes to his union leader, and he says I need help. I -- I  
20 have this problem. I don't know what to do. And the union  
21 leader sends him into counseling. He goes to MINES (phonetic)  
22 counseling. First he goes through detox. He goes through  
23 several days of detox and then he gets put into an  
24 after-patient counseling program. And Victoria goes with him.  
25 And the counselor's going to come in here and talk to you and

ROUGH DRAFT TRANSCRIPT

001173



1 tell you that they were a loving couple. They were support of  
2 each other. They were talking about their future together.

3 And Victoria's still drinking at the time, but  
4 Brian's not. Brian's dry. And -- and he makes it through the  
5 entire program that way. And the other thing about it is Brian  
6 knew that he had cirrhosis or that -- that Victoria had  
7 cirrhosis. And he knew that she had Hepatitis C and he knew  
8 that that was communicable. And he didn't care because he  
9 wanted to be with Victoria.

10 He just wanted ten good years with her. She was a  
11 little older than him. When they met Brian was about 38 and  
12 she was about eight and a half years older than he was. And he  
13 didn't think she had much time left, but he wanted whatever  
14 time she had.

15 And he took her to meet his little girls by his  
16 second wife. And they went to -- and they did union activities  
17 together. They went to -- they worked on the presidential  
18 campaign in 2008 together for the union. And Victoria was a  
19 big part of that. They were a part of each other's lives in  
20 every way and a very loving couple. And the people at the  
21 apartment will tell you the same thing. They appeared to be a  
22 very loving couple.

23 And a couple of nights before the incident, and  
24 you're going to hear evidence of this from one of the police  
25 officers who -- who looked at the prescriptions that Victoria

ROUGH DRAFT TRANSCRIPT

001174

1 had at the apartment. She -- she had gone off -- she wasn't  
2 taking her meds like she was supposed to. And she was having  
3 some problems. She was having problems because she got denied  
4 on SSD. She was having problems because her unemployment had  
5 stopped. She was having emotional problems.

6           So a couple nights before the incident she's having  
7 issues and she wakes Brian pointing a knife at him and yelling  
8 at him and poking the knife at him. And he's sober at the  
9 point so he's able to calm her down. What are you doing? And  
10 he calms her down. And that settles down, and she's okay  
11 again. But she's still having problems because of these things  
12 going on in her life. And then Brian, who's been out of work  
13 since he went through the counseling, gets a call -- or calls  
14 somebody and finds out that, you know, he's got a good prospect  
15 of going back to work in the next week.

16           And he's happy, and he's an alcoholic and so he wants  
17 to reward himself in several ways. One for being sober for so  
18 long and one forgetting the job prospect and he wants to go  
19 drink. So he and Victoria go out and they go to can -- well,  
20 first they run and get a little vacuum part because they had a  
21 vacuum that they needed to fix at their house for things they  
22 wanted to do there. And then they go to the Paris. And they  
23 start drinking at the Paris.

24           And they get there I'd say roughly around 6:00, 6:30  
25 in the evening, I think it is, and -- and Brian is slamming

ROUGH DRAFT TRANSCRIPT

001175

1 them because drinking are free when you're gambling. And he  
2 takes about 20 shots and some mixed drinks in the course of  
3 several hours. And Victoria was drinking, obviously, from her  
4 blood alcohol content. And when -- they'd been there for long  
5 enough, and they decide it's time to go home.

6           They get in the car, and she is driving because he's  
7 too drunk to drive. And she's drunk, but he's more drunk than  
8 she is. So she's driving. And you'll see that from the  
9 photographs of the car. The passenger seat is pushed back,  
10 leaned back, reclined, because he fell asleep on the way home,  
11 and the driver's seat is pushed way up. And you see two  
12 glasses in there. Those are alcohol. And you'll hear that.

13           And so she drives home, and they get there. And  
14 there's a little argument because she's mad about several  
15 things. She's mad, she didn't want -- she has to cook. She  
16 didn't want to cook. She wanted to go out to eat, and he's  
17 passing out on the driver's seat. And so she ends up being  
18 angry and she goes upstairs and Brian stays down there and  
19 sleeps.

20           And you're going to hear then from the neighbors, who  
21 tell you that they start hearing banging noises or bawling  
22 noises or however the various neighbors describe it. They  
23 start hearing it from their reports anywhere between 9:00 and  
24 10:00 o'clock. And then they say it goes on until about 11:00  
25 o'clock. And that's when Mr. Toliver, Cooky Toliver, goes

ROUGH DRAFT TRANSCRIPT

001176

1 upstairs to see what the noise is.

2 Well, the problem with that time period is her body  
3 from the bruises could not have sustained a two hour beating,  
4 not with her condition. She would have been bruised head to  
5 toe, and she wasn't. So the evidence is going to show you that  
6 she -- she couldn't have been being beat, which is an  
7 implication from the evidence of we hear these bangs noises  
8 going on. That's the only guilty implication from it.

9 But given her history, the evidence is going to  
10 convince you that she was upstairs banging things around  
11 because she was mad. When you look at those photographs of the  
12 apartment, you don't see any disarray, except for in that  
13 bedroom. You can look in every room of that house, it's clean,  
14 it's neat, nothing's out of order. And then there's the  
15 bedroom.

16 And even the area where the knife is taken from, the  
17 corner of the kitchen where the knife is, when you look at a  
18 bigger shot of that, no disarray in that area. Nothing's  
19 bumped over. The knife wasn't grabbed out of there during some  
20 kind of altercation we're they're trying to go get a knife to  
21 have a fight. Somebody just took it out of there.

22 And so the evidence is going to show you that it was  
23 Victoria that took the knife, and she took the knife in the  
24 back room and she was in there with the knife. And Brian wakes  
25 up and he comes upstairs and he walks into the apartment and

ROUGH DRAFT TRANSCRIPT

001177

1 walks in toward the master bedroom and sees that she's in the  
2 bathroom. There's a bathroom in there.

3           The master bedroom does not have an overhead light.  
4 They use the bathroom light to light it up. The door is  
5 closed. She's in there. He knows she's mad. He still wants  
6 to smoke. He goes, he uses the bathroom. He comes outside to  
7 stand there and smoke.

8           I missed a part. On the way up when he was walking  
9 up, he bangs the rail and Cooky Toliver hears the bang on the  
10 -- not Cooky. Jimmy Hatchcox hears the bang, comes out, sees  
11 Brian going into his apartment. That is about 15 minutes  
12 before the police were called. He sees Brian walking in.

13           So it just doesn't match up time frame wise that  
14 Brian's in that apartment. The other thing that doesn't match  
15 up is nobody hears any yelling, nobody hears any screaming,  
16 there's no kind of -- of domestic going on that involves any  
17 kind of yelling or talking even that anybody hears. The most  
18 you'll hear of the noise of voices is that perhaps there was  
19 some crying going on, but that was not even explained in the  
20 first statement by Joyce Toliver. Joyce Toliver's first  
21 statement doesn't mention any crying. She doesn't mention  
22 crying until she testified in March of 2009 that there was  
23 crying.

24           So the evidence will show you that there's just no  
25 kind of noise going on other than some banging around a little

ROUGH DRAFT TRANSCRIPT

001178

1 bit during the course of one or two hours. And then there's a  
2 lot of noise because what happens is Brian walks back in, he's  
3 getting too hot. He drank a lot, he was wearing his coat.  
4 He's getting too hot and he walks back into the house, he's  
5 going to go hang up his jacket.

6 And as he's going to hang up his jacket, Victoria  
7 comes at him. She comes out of the bathroom and he is -- he is  
8 drunk and in a fog and in a haze and she's coming at him with a  
9 knife. And what does he do? He takes his jacket and he waves  
10 it at her to get the knife away from him. The jacket flies  
11 into the blinds, which is supported by the physical evidence.  
12 This is the jacket and those are the blinds in the bedroom, and  
13 you'll see other pictures of it, too. But it flies across the  
14 room into the blinds.

15 And this is the layout of this bedroom. You can't  
16 see what very well. So this here by -- by the feet of the body  
17 is a dresser. Where you see that number ten over there is  
18 where the jacket was found. And so he's not able to ward her  
19 off with the jacket and she is still coming at him and he tries  
20 to grab the blade of the knife and he gets cut.

21 And you'll see paragraphs of the injury on his hand.  
22 And you will hear from our expert who says that that is a  
23 defensive wound. This is the cut on his hand, on the inside of  
24 his hand. He's trying to grab the knife and he gets cut. He's  
25 unsuccessful and he lets go because he's bleeding.

ROUGH DRAFT TRANSCRIPT

001179

1           So he's hurt and she's still coming at him. And  
2 facing each other he's able to grab her hands. Finally he gets  
3 both of their hands and they're struggle back and forth and she  
4 is holding the knife in her right hand. She's right handed and  
5 my client's also right handed. She's holding the knife in her  
6 right hand and holding onto her wrist facing her and they're  
7 struggle in that bedroom because he's trying to get out of  
8 there and they fall backwards onto the bed.

9           And when they fall backwards onto the bed, he starts  
10 to get his bearings again and then he realizes that she's not  
11 moving very much. She's laying too still. And he's sitting  
12 there, and then he realizes the bed's getting wet. He knows  
13 something is wrong, and he doesn't know what happened, but he  
14 knows what she's done before, and he's thinking that maybe she  
15 did something to herself.

16           He doesn't know for sure if she got stabbed when they  
17 fell. And nobody was in the room, so nobody else knows either.  
18 But our experts are going to tell you that her wound was  
19 consistent with either an accidental stabbing, which cannot be  
20 ruled out, or an intentional suicidal stabbing. Even though  
21 it's in a weird funny place, it could have still been a suicide  
22 attempt. So Brian doesn't know what's going on and he's  
23 looking for the blood and -- and she's bleeding fast because of  
24 her blood clotting problem because the cirrhosis is a little  
25 bit like -- like having hemophilia disorder where you just

ROUGH DRAFT TRANSCRIPT

001180

1 bleed really easily and -- and so he's -- he's trying to figure  
2 out what's going on and he can't see where it is.

3           So he pulls her off the bed and he's very drunk and  
4 he drops her on the floor and that's when the neighbors are  
5 hearing the commotion and they come upstairs. And when they  
6 come upstairs, Cooky Toliver comes in and Brian's Cooky, come  
7 here, come in here, come get her because Brian wants to get her  
8 out to the living room where there's some light.

9           In the meantime, Brian had pulled her pants up, and  
10 you'll see that in the photographs or in the -- in the DNA  
11 report that his blood is on the ankle of her little jogging  
12 suit which is covered with blood on the side. And he's pulling  
13 them up because they're drenched with blood. He wants to see  
14 if she cut herself somewhere.

15           So he's trying to figure out where on her body the  
16 injuries are. And he's kind of in automatic mode trying to  
17 stop what he can find as an injury. But it's kind of dark in  
18 there and he's really, really drunk.

19           So he's in there trying to aid her and Cooky comes in  
20 and he sees what's happening and no -- he runs out. And -- and  
21 when he runs out, he calls 911. And so the police response is  
22 on the way. But then he comes back upstairs with Todd  
23 Armbruster who was not what Brian expected and Brian was  
24 protective of his girlfriend. He didn't want Todd to see her  
25 laying there naked, so Brian comes in. And when Brian walks in



1 -- or when -- when Todd walks in, Brian's trying to pick her up  
2 by the waist and he's dropping her because he's drunk. He's  
3 trying to pick her up, he's saying come on baby, come on baby,  
4 get up, don't do this to me, come on, get up, get up. That's  
5 what Todd sees.

6 Brian sees Todd and his girlfriend's naked and he  
7 takes a swing at him and he almost falls over because he  
8 doesn't want somebody coming in there just to look at her.

9 Then the police come. And, I mean, you're going to  
10 hear words like baiting and stand off and -- and really what  
11 this was was never baiting, it was never a stand off. Brian  
12 was acting erratic because he was so drunk. But when the  
13 police get there, what they find is him laying on the floor  
14 right here, right on the side of Victoria between her and the  
15 closet, which is a couple feet. He's laying right there, he's  
16 stroking her head, he's staring at her, he's talking to her.  
17 That's all he's doing.

18 He doesn't have a weapon near him. He's not doing  
19 anything else. He just won't get away from Victoria. And so  
20 the police come, and they're rightly concerned about baiting.  
21 I mean, they don't know what they're walking into, and they  
22 hear downstairs from management that she's got AIDS and  
23 Hepatitis C, and they're worried about that blood. She didn't  
24 have AIDS, but that's the rumor that was going around there.

25 But they're worried about and rightly so. And so

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001182

1 they're careful going into it. But it turns out there's no big  
2 deal about baiting. He wasn't baiting anybody. He was just a  
3 drunk man who was laying there and wouldn't get up. And they  
4 come in, and it's about, I think, they said that they were in  
5 the bedroom for seconds once they get in there, seconds before  
6 they arrest him.

7           And they stack up right outside the door there, and  
8 then he's not listening and they're warning him we're going to  
9 taze you, get away from her, we're going to taze you. And he  
10 still won't stop looking at her and he's petting her head, and  
11 he won't pay attention to their commands get away from her.  
12 And so they taze him.

13           And one taze doesn't really bring him under control.  
14 During that taze one officer at least goes to the other side of  
15 his body where you see those numbers five and six, sort of.  
16 And they're trying to get him into custody, but the taze isn't  
17 really effective on him and he falls on his arm and he's not  
18 complying with their efforts to get him in cuffs.

19           And so they decide to taze him again. Each of those  
20 tazes is about 50,000 volts of electricity. And they taze him  
21 again and then they're -- they're able to -- to get control of  
22 him. And the officer's testimony varies widely an how many  
23 officers were over there. It's somewhere between four and five  
24 or maybe between two and five. I can't tell. And none of them  
25 really remember exactly. And you'll see a lot of

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1 inconsistencies there.

2           And they were so -- but, you know, when these kind of  
3 things happen, they're shocking and adrenaline causing and  
4 there's a lot of -- it's a dynamic situation.

5           MR. LALLI: I'm sorry, your Honor, and I'm sorry,  
6 again, Ms. Palm. I'm going to interpose another argumentative  
7 objection, your Honor.

8           MS. PALM: Well, the -- the evidence will show --

9           THE COURT: I'm going to overrule the objection.

10          MS. PALM: -- that that was the kind of situation it  
11 is. And they do not remember all the details. And so their  
12 stories don't match up about what was where in the bedroom.  
13 But very consistently they all deny that they saw anybody going  
14 onto the bed. However, there are apparent footprints on that  
15 bed. There's one right here. And this what you see -- that's  
16 not very clear. When you see the pillowcase that is up on top  
17 of that knife -- I'm not sure how to make this (indiscernible).  
18 I don't know if it's going to get any clearer. Oh, okay.

19          There's an apparent footprint right there on that  
20 pillowcase. And you'll be able to see that again because it's  
21 going to come in other ways. That's the pillowcase that's  
22 laying on top of the knife blade. And if that pillowcase is  
23 stepped on, and we think the evidence is going to show that it  
24 was, then you can't trust the results of DNA that they got off  
25 the knife blade. Even if you can trust them, it's going to

1 show you it's not inculpatory with Brian, but if they're up  
2 there stepping on it, a bloody pillowcase that's laying on top  
3 of the blade, it's going to get contaminated, and we think that  
4 the evidence is going to show you that it did.

5           And they have -- they have Brian's footprints from  
6 the bathroom where he went in and he was trying to get things  
7 to stop the bleeding. So they know what his footprints were  
8 like. But it was never compared to the prints on the bed. So  
9 we think the evidence is going to show you that the officers  
10 did go up over that bed and possibly contaminated the crime  
11 scene. And the officers did bump into Victoria's body.

12           And that accounts for a possibility of bruising that  
13 can't be linked to Brian. And with this whole situation, the  
14 evidence that they're relying onto show you culpability is just  
15 not that reliable. If this case is based on -- the evidence  
16 will show you this case is based on exaggeration and innuendos,  
17 and I don't think that they're going to be able to prove guilt  
18 beyond a reasonable doubt.

19           Plain and simple story is that Brian acted badly. He  
20 acted very badly. He should have (indiscernible), but the  
21 evidence will show you that he just didn't want to leave  
22 Victoria. And he was so intoxicated that he wasn't in his rite  
23 mind. And that the entire scenario from the first call until  
24 he's taken custody is 12 minutes, but it's seconds in the  
25 bedroom.

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1           And then after -- after Brian is taken into custody,  
2 after being tazed a couple times, he's dropped on his head in  
3 the bedroom or in the living room. Although, different  
4 officers say different places and different officers say  
5 different officers were carrying him at the time. He know he  
6 fell on his face somewhere. We know he was dropped somewhere.  
7 But we don't know where, bedroom, living room, which officers  
8 were carrying him. None of that stuff was consistent in the  
9 State's evidence.

10           And then so after all of that they take him down to  
11 the homicide offices to interview him. He sits in a room for  
12 awhile, and the interview starts and he is erratic and he's  
13 emotional and he's not making sense. And the interview  
14 continues, and he's not giving them what they want, so they  
15 take an hour long break because the evidence is that it's  
16 frustrating, but they take an hour long break and they come  
17 back and he's still not giving them what they want.

18           But what he is -- he is telling them some things. He  
19 is telling them how he hurt his hand, trying to grab a knife.  
20 He's telling them that. And it's going to show you it's  
21 consistent with somebody that thought his girlfriend was alive  
22 and didn't it want to get her in trouble because they told him  
23 she was alive.

24           They take advantage of his drunken stupor. They know  
25 how drunk he is when they're trying to talk to him, and they

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1 tell him, she's still alive. Yeah, they're going to tell you  
2 when things change and they're trying to talk to him about  
3 that. And so he's vague and he's dancing around and, you no,  
4 that goes on for awhile until almost the end of the interview.  
5 And when they tell him she's dead, he asks for a cup of coffee  
6 and when the female detective leaves the room, he starts  
7 balling. He starts crying.

8           He's begging them to tell him that's not true. Tell  
9 me that's not true. And you'll see when you watch the -- the  
10 video of the interview, these detectives are very skilled and  
11 -- and how they're framing questions and they're very  
12 frustrated. But they also know it's being videotaped and they  
13 know it's going to be used for evidence and something if  
14 charges are brought.

15           And you'll notice things like at one point Brian's  
16 been saying do this, do that, please get this evidence, please  
17 go to the Paris and get the tapes from Paris, you'll see where  
18 we were, you'll see, please do this for me. And then when he  
19 asks the female detective to do something he says, where I this  
20 down, write this down, and the male detectives go don't order  
21 her around.

22           The evidence is going to show you that's partly for  
23 show. That's partly for this is how he treats women, he order  
24 them around. That's the inference you should make from that  
25 evidence or take from that evidence.

1           When the detectives don't get what they want and they  
2 end the interview, they do not attempt to preserve my client's  
3 blood alcohol level. They can do it. It's possible to do it  
4 there. In fact, we'll show you Metro's department manual which  
5 says you can do this. And for example, in a situation of a  
6 homicide suspect that appears to be slightly intoxicated. Can  
7 preserve it because it might be important to the defense. They  
8 didn't to that for us.

9           We'll never be able to show exactly how intoxicated  
10 he was. And yet, the evidence of him being belligerent and not  
11 cooperative and all of those things that are due to him being  
12 intoxicated is being relied on as evidence of his guilt.

13           There's other problems with the investigation in this  
14 case, and we'll have an expert that talks to you about those  
15 things too. But when the interview ends and they -- and the  
16 detectives leave and they come back in with the CSA Dan Ford to  
17 take DNA samples from my client, he's completely cooperative.  
18 And they're having to steady him to help dress him and they're  
19 having to steady him to put his booties on when he has to  
20 change his clothes.

21           And he's trying to tell them again, I just -- look at  
22 my hand, look at my hands. Just -- and what you'll see how  
23 he's talking. It's disjointed and it's weird, but he is trying  
24 to tell a story. He just is very, I guess, circumspect about  
25 it. But at this point he doesn't believe what they're telling

1 him. He doesn't know if Victoria's alive or Victoria's dead  
2 because they told him she was alive and then they told him  
3 she's dead, and now he doesn't know what to think.

4           If there's one thing that guessing to resound  
5 throughout this case is that a tragedy occurred. This case is  
6 a tragedy. But at the time of this offense Brian and Victoria  
7 were in love, they were having a loving relationship.  
8 Everybody says it. Everybody who saw him knows it. They were  
9 doing couple things. He loved her. He didn't think he had  
10 much time left with her. The last thing he wanted was for her  
11 to leave him. He thought he had whatever time she had left.  
12 He hoped it was ten years.

13           And he didn't know what happened. And he wasn't able  
14 to explain what happened because he was so drunk and because of  
15 her history, he didn't know, had she done something to herself.  
16 And you'll see that in his questions. He thought she'd done  
17 something to herself, he didn't know. He couldn't figure it  
18 out, and he certainly couldn't figure it out in those hours  
19 when they were trying to talk to him and he was still trying to  
20 process it.

21           This was either an accident which occurred when Brian  
22 was defending himself from an attack by Victoria, or it was a  
23 suicide in which she stabbed herself just prior to coming at  
24 him. Either way it's a tragedy, but neither way does it  
25 indicate that might client is guilty of anything. Thank you.

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1 THE COURT: All right, thank you, Ms. Palm. State,  
2 are you ready with your first witness?

3 MR. LALLI: We, your Honor. I just want to preserve  
4 the fact that I need to make a record regarding Ms. Palm's  
5 opening --

6 THE COURT: All right.

7 MR. LALLI: -- statement at some point.

8 THE COURT: Okay.

9 MR. LALLI: Thank you. Your Honor, State calls Dr.  
10 Jacqueline Benjamin.

11 THE MARSHAL: Dr. Benjamin, if you'll remain  
12 standing. Please raise your right hand and face the clerk.

13 JACQUELINE BENJAMIN, STATE'S WITNESS, SWORN.

14 THE MARSHAL: Please be seated, Ma'am. Slide up to  
15 the microphone, state and spell your name for the record.

16 THE WITNESS: Jacqueline Benjamin,  
17 J-a-c-q-u-e-l-i-n-e. Last name is B-e-n-j-a-m-i-n.

18 THE COURT: Go ahead, Counsel.

19 MR. LALLI: May I proceed, thank you. Your Honor,  
20 may I just move the podium out of the way?

21 THE COURT: Yes.

22 MR. LALLI: Can I just ask the clerk for the photos.  
23 Okay.

24 DIRECT EXAMINATION

25 BY MR. LALLI:

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1 Q Can you tell us how you're employed?

2 A I'm currently employed as a neuropathology fellow at  
3 Los Angeles County USC Medical Center.

4 Q And what is that?

5 A Neuropathology fellowship is a post-doctoral training  
6 program in diagnosing diseases of the brain.

7 Q I want to direct your attention to November of 2008.  
8 What was your profession at that point?

9 A I was a forensic pathologist with the Clark County  
10 Coroner's Office.

11 Q For how long?

12 A At that time, I believe, it was over a year.

13 Q And can you explain what you did at the Clark County  
14 Coroner's Office?

15 A I performed autopsies to determine the cause and  
16 manner of death.

17 Q Did you work as a forensic pathologist there?

18 A Yes.

19 Q Can you tell us about your formal education that  
20 qualified you to be a forensic pathologist Coroner's Office?

21 A Certainly. I obtained a medical degree from the  
22 University of California at Irvine. After graduation from  
23 medical school I spent a year internship with Kaiser Oakland in  
24 internal medicine and three years of pathology residency  
25 program in anatomic pathology. After that I did a one year

1 fellowship in forensic pathology.

2 Q Okay. Have you ever qualified as an expert in the  
3 area of forensic pathology of the courts of either Nevada or  
4 other states?

5 A Yes.

6 Q Approximately how many times?

7 A Six to seven.

8 MR. LALLI: Your Honor, at this point I'd ask that  
9 Dr. Benjamin be allowed to render opinions in the area forensic  
10 pathology.

11 THE COURT: Yes.

12 BY MR. LALLI:

13 Q Can you tell our jury what is forensic pathology?

14 A Forensic pathologists as opposed to just autopsy  
15 pathologists that work in a hospital, we deal with trauma. We  
16 are specialists in evaluating traumatic injury.

17 Q Okay. And what is -- what is the objective of  
18 forensic pathology? What do you ultimately trying to find or  
19 determine?

20 A The ultimate goal is to determine the cause of death  
21 and the manner of death.

22 Q Do you use a process to analyze your patient or  
23 descendant to arrive at those conclusions?

24 A Yes. The process actually starts with scene  
25 investigation, what occurs at the scene. We look -- in some

1 states the pathologist go to the crime scene or the scene of  
2 death. In this state the pathologist usually we do not go to  
3 the scene. But the process starts with investigation of the  
4 scene.

5 So it's looking at photographs, hearing what the  
6 police officers have to say, what witnesses have to say. Then  
7 the body is examined by the forensic pathologist. We do an  
8 external examination, also an internal examination. There's  
9 fluids, blood, urine --

10 Q I'm sorry, can you -- can you just wait just one  
11 moment.

12 (Pause in the proceedings).

13 THE COURT: Go ahead, Mr. Lalli.

14 MR. LALLI: Okay.

15 BY MR. LALLI:

16 Q Please continue.

17 A There's blood and urine, sometimes solid organs that  
18 are obtained at autopsy in order to test -- we test those  
19 specimens to find out what drugs are in the descendant's  
20 system. And after looking at all that data, we arrive at a  
21 cause of death and manner of death.

22 Q What do you mean by the -- the phrase cause of death?

23 A The cause of death is the disease or injury that  
24 resulted in that person's demise.

25 Q The actual thing that killed them?

1 A Correct.

2 Q And what is -- what do you mean by manner of death?

3 A Manner of death is how the cause arised. There's  
4 several different manners of death. It could be a natural  
5 death. For instance, atherosclerotic or coronary artery  
6 disease is a natural death. There's also suicide. Suicide is  
7 obviously self-inflicted injury. There can be homicide as  
8 another manner, where the injury is inflicted by someone else.  
9 There's also an accidental death, the most common of which is  
10 motor vehicle accidents.

11 And when we can't determine based on all the data  
12 that we have, we use a manner of undetermined.

13 Q I want to direct your attention to November 7th of  
14 2008. Did you conduct a pathologic exam on the body of  
15 Victoria Whitmarsh?

16 A I did.

17 Q Where was that conducted?

18 A At the Clark County Coroner's Office.

19 MS. PALM: Your Honor, I'd just like to note again my  
20 objection for the record of --

21 THE COURT: I'm sorry?

22 MS. PALM: I just wanted to note my objection that we  
23 previously discussed on the autopsy photographs.

24 THE COURT: All right. Okay.

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

1 THE COURT: Yes.

2 BY MR. LALLI:

3 Q Dr. Benjamin, if you could just take a moment and  
4 look through those. Doctor, for the record, have you looked at  
5 State's Proposed Exhibits 81 through 120?

6 A Yes.

7 Q Do they fairly and accurately depict the condition of  
8 Victoria Whitmarsh's body when you observed it at autopsy?

9 A Yes.

10 MR. LALLI: Your Honor, move or the admission of  
11 those proposed exhibits.

12 THE COURT: Ms. Palm.

13 MS. PALM: Objection, for the record, your Honor.

14 THE COURT: All right, they'll be admitted, 81  
15 through 120. You may publish.

16 (Exhibits 81 through 120 admitted).

17 MR. LALLI: Thank you.

18 BY MR. LALLI:

19 Q One other photo I'd like to show you, Dr. Benjamin,  
20 is State's Proposed 130.

21 A Okay.

22 Q Do you recognize that?

23 A Yes.

24 Q Is that also a photo from autopsy?

25 A Yes.

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1 MR. LALLI: Your Honor, move for the admission of  
2 State's Proposed 130 as well.

3 MS. PALM: No objection.

4 THE COURT: 130 will be admitted.

5 (Exhibit 130 admitted).

6 BY MR. LALLI:

7 Q Dr. Benjamin, can you explain for our jury the  
8 condition of Ms. Whitmarsh's body when you received it?

9 A When the seal was broken, the deceased was wrapped in  
10 a standard white sheet, hospital type sheet. After removal of  
11 the sheet, she was clothed in a -- it was a black jacket and  
12 black shirt.

13 Q Was there any clothing on the lower extremities of  
14 her body?

15 A From the waist down she was unclothed.

16 Q As part of the autopsy process, do you ascertain the  
17 weight and height of the descendant?

18 A Yes.

19 Q Did you do that in this case?

20 A Not personally, but the technician did, yes.

21 Q It -- that's done as part of the process?

22 A Correct.

23 Q What was Ms. Whitmarsh's weight?

24 A 108 pounds.

25 Q And what was her height?

1           A     Five feet, five inches.

2           Q     Did you observe any evidence of blunt force trauma on  
3 her body?

4           A     Yes.

5           Q     I'd like you to describe any blunt force trauma you  
6 observed on her head and/or neck area.

7           A     On the head in the middle of the forehead close to  
8 her hairline was hematoma, and basically a hematoma is blood  
9 underneath the skin, and it elevates the skin away from the  
10 bone so you actually see a bone.

11          Q     Okay. I'm going to show you State's Exhibit 86. Is  
12 that -- well, first of all, let me turn the photograph this way  
13 for just a moment. There appears to be a tag of some sort on  
14 the photo. Do you see that?

15          A     Yes.

16          Q     Can you describe for your jury what that is.

17          A     The tag is a case identification number. The first  
18 two numbers are the year, so it's 2008. And the autopsy number  
19 is 8747.

20          Q     Okay. So it identifies these photos to the pick  
21 autopsy that you performed?

22          A     Correct.

23          Q     Okay. Now, you were describing the injuries to the  
24 forehead?

25          A     Yes.

ROUGH DRAFT TRANSCRIPT

001197



1 Q In addition to looking at the injury externally, do  
2 you as a forensic pathologist look at the injury under the  
3 skin?

4 A Yes, we do.

5 Q How did you do that in this case?

6 A After the external examination is complete, the body  
7 is opened, and usually the -- we examine the head last for a  
8 number of reasons. An incision is made behind the ear and it  
9 goes across the crown of the head in ear to ear, and the skin  
10 is peeled forward and backward, and I look at the scalp at that  
11 time.

12 Q Okay. You wrote in your autopsy report that there is  
13 hemorrhage in the subcutaneous tissue under the forehead  
14 contusion scalp hematoma; is that correct?

15 A Yes.

16 Q Can you explain to us what that means and what, if  
17 any, significance you would attribute to that?

18 A Yes. The hemorrhage in the subcutaneous tissue means  
19 that there were broken blood vessels, that there is blood  
20 actually in the tissue and that's what causes the bruising and  
21 the contusion that you see on the skin. A contusion is  
22 basically a bruise, and that comes about from broken blood  
23 vessels.

24 So when you see a lot of blood with the naked eye, it  
25 usually indicates that this was an acute injury.

ROUGH DRAFT TRANSCRIPT

001198

1 Q What do you mean by the term acute?

2 A It's a -- we have general classifications for sort of  
3 dating and timing injury. It can be acute, subacute or chronic  
4 or old. So an acute means that it happened recently. How  
5 recent? It's difficult to say whether it was minutes or hours,  
6 but it's certainly not days or weeks.

7 Q What about chronic?

8 A Chronic is old. It means that it's weeks usually or  
9 -- yeah, days or weeks, typically.

10 Q Okay. So you classified the injury to Ms.  
11 Whitmarsh's forehead that we're seeing in this exhibit as  
12 acute?

13 A That's correct.

14 Q Or recent?

15 A Yes.

16 Q And did you say that your definition of acute was  
17 minutes to hours old?

18 A Roughly, yes.

19 Q Okay. Now, in addition to looking under the skin on  
20 the forehead, do you have the ability to look under the skin  
21 all around a person's head during the course of the autopsy?

22 A Yes, that's done, that's standard procedure.

23 Q Okay. In doing that with Ms. Whitmarsh, did you  
24 observe any other evidence of trauma to her head?

25 A Yes, there was hemorrhage or blood in the scalp

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001199

1 tissue towards the back of the head in the middle. This was  
2 not noted on the external exam because there's hair. She had  
3 very long thick black hair. And so the hair covered the injury  
4 in that area. Until the scalp was reflected, I did not see the  
5 injury.

6 Q Okay. Were you able to ascertain whether the injury  
7 to the back of the head was acute?

8 A It looked acute. There was also hemorrhage in the  
9 subcutaneous tissue.

10 Q Okay. Were -- in your autopsy report, you  
11 categorized these as areas of blunt force trauma?

12 A Yes.

13 Q What -- can you explain to our jury what you mean by  
14 blunt force trauma?

15 A Yes. Injury, we usually put it in several  
16 categories. It can be incised, meaning it was caused by a  
17 sharp object such as a knife, a bottle, and those types of  
18 injuries, like stab wounds or even a surgical incision is an  
19 incised wound. And there are missile wounds, such as gunshot  
20 wounds, projectile injuries. Or blunt trauma, which is a broad  
21 category of injury. And contusions or bruises are caused by  
22 blunt force trauma.

23 And there are a number of things that can cause blunt  
24 trauma. Someone punching you in the eye and giving you a black  
25 eye, that's blunt trauma. Someone hitting you with a baseball

1 bat is blunt trauma. Falling onto the concrete and bruising  
2 yourself, that's also blunt trauma.

3 Q So is it fair to say that blunt force trauma can be  
4 something kind of induced by others or induced by self or even  
5 induced by accident?

6 A Correct.

7 Q So if I were to fall down, I might get blunt force  
8 trauma on my body somewhere?

9 A Yes.

10 Q Now, does forensic science allow you to kind of  
11 categorize the amount of force necessary to create an injury  
12 such as the one on the -- the front of Ms. Whitmarsh's head?

13 A I could not tell you of any precision the amount of  
14 force that was required to cause that hematoma that we're  
15 looking at.

16 Q Okay. Now I want to move down in your report. You  
17 described blunt force trauma on the thorax, abdomen and back;  
18 is that correct?

19 A Yes.

20 Q I'm going to show you State's Exhibit No. 91. Can  
21 you describe that for us?

22 A Yes, that's the -- a photo of the left shoulder and  
23 looking at, looks like two contusions on the front of the left  
24 shoulder.

25 Q What is a contusion?

1 A A contusion, again, is -- is a medical term for a  
2 bruise.

3 Q I'm going to show you State's Exhibit 107.  
4 Specifically the area where my finger's indicating. Can you  
5 see anything there?

6 A There's redness of the skin, and I believe that's  
7 likely livor, if that's the back surface, which is what it  
8 looks like.

9 Q What is livor?

10 A Livor is the pooling of blood independent positions  
11 that occur after death.

12 Q Okay is livor injury?

13 A No.

14 Q It's just a condition, an artifact of death?

15 A It's one of the changes that occur with death.

16 Q I'm going to show you State's Proposed Exhibits --  
17 actually here admitted Exhibits 88 and 89. What are we seeing  
18 there?

19 A That's the left arm and there's a contusion.

20 Q And is State's Exhibit 89 another photograph of that  
21 same area of contusion, but the back part of it?

22 A It's the same arm with -- yes, it's the posterior  
23 back surface with three contusions.

24 Q Okay. And the same area shown in State's Proposed or  
25 actual Exhibit No. 90?

1 A Yes.

2 Q What are we seeing in State's Exhibit 92?

3 A It's the back of the right arm and there's a  
4 contusion there as well.

5 Q State's Exhibit 93?

6 A I believe that's the right arm. On the front there's  
7 a contusion.

8 Q State's Exhibit 95?

9 A That's the back or the dorsal of the right hand. And  
10 again, what we're looking at are contusions.

11 Q What are we seeing in State's Exhibit No. 96?

12 A It's the back of the left hand with an abrasion.

13 Q What's an abrasion?

14 A Abrasion is when the upper area of the skin is rubbed  
15 off, and what you are seeing is actually the underlayer of the  
16 skin or the dermis.

17 Q So this was a scrape of some sort?

18 A A scrape is a good way to describe that.

19 Q Okay. I'm going to show you State's Exhibit 98, the  
20 large red mark. What was that?

21 A That is a contusion.

22 Q I'm going to show you State's Exhibit 99. What is  
23 that?

24 A Those are two contusions on her abdomen on the rite  
25 side.

1           Q     Do you have any way of ascertaining either from the  
2 color or from any other manner approximately how old  
3 (indiscernible)?

4           A     There's literature that talks about dating bruises  
5 based on color. In the old literature it was thought that you  
6 actual decree do that. But subsequent studies have shown that  
7 you can have an injury -- two injuries that occurred at the  
8 same time in similar location and the colors are different,  
9 although they were sustained at the same time.

10                So we don't use colors to date injury. If I were to  
11 take a microscopic section -- if I were to take a section of  
12 that tissue, process it and look at it under a microscope, I  
13 can give you a general idea in terms of whether it's acute,  
14 subacute or chronic, and that would be based on certain cells  
15 that come in to an area of injury and start cleaning off the  
16 blood. When we see those cells, they're called macrophages,  
17 then that's a subacute injury.

18                When you have fibrous tissue, a little bit of  
19 macrophages and most of the blood is cleaned up, that's a older  
20 injury. When it's all fresh blood, then that's an acute  
21 injury.

22           Q     I'm going to show you State's Exhibit 100. What is  
23 that?

24           A     Those are two contusions on the left side of the  
25 body.

1 Q Now I want to show you State's Exhibit No. 106, and I  
2 want to direct your attention to the back area here. Did you  
3 -- well, what are we look at first of all?

4 A Again, as you mentioned, it is the -- the back right  
5 side and we're looking at a contusion near the top of the  
6 shoulder.

7 Q Okay. Now, on this particular injury, did you make  
8 an incision into it?

9 A Yes, I did.

10 Q And what -- what is your -- what is your purpose in  
11 doing that?

12 A When I make the incision, I am -- I'm looking for  
13 whether there's a lot of hemorrhage or no hemorrhage and a  
14 subcutaneous tissue to give me an idea of whether this is an  
15 acute or an older type of injury.

16 Q Okay. In your autopsy report you indicated that the  
17 incision through the skin reveals a small amount of hemorrhage  
18 in the subcutaneous tissue; is that correct?

19 A Yes.

20 Q What does that mean?

21 A That means that there wasn't a lot of blood. There  
22 was some, but not a lot.

23 Q What is that in terms of relating that injury to  
24 being acute or chronic?

25 A Again, it's difficult to say because a microscopic



1 section was not taken. There is blood there, but I don't know  
2 if there are macrophages that had cleaned up more blood that  
3 was there previously. So it's difficult to date.

4 Q Okay. Would you -- would it be your opinion that is  
5 not an old injury?

6 A It wouldn't be classified as a chronic injury. It's  
7 either acute or subacute.

8 Q And what's the difference between acute and subacute?

9 A Again, just for qualitative stand point, acute,  
10 there's lot of red blood cells. There -- there are no cells  
11 there that are cleaning up the red blood cells. Subacute,  
12 there's red cells and there's also the cells that are cleaning  
13 up the red cells. And in terms of time, acute is probably more  
14 minutes, hours. Subacute is on the order of days.

15 Q Okay. So the injury to -- that we're -- we're  
16 looking at now, you would classify that as acute or subacute,  
17 based upon what you observed?

18 A Correct.

19 Q All right. Now I want to show you State's Exhibit  
20 108. Can you tell us what we're seeing here?

21 A Yes, this is the lower back end buttocks, and there's  
22 a large contusion on the right buttock and there's also  
23 actually a contusion further up on the back area.

24 Q Okay. Now, with respect to the contusion in the --  
25 in the middle of the back, did you attempt to, I guess, dissect

1 that or open it up to have a look at the subcutaneous tissue?

2 A The one in the middle of the back I made an incision  
3 through to look at the subcutaneous tissue.

4 Q Okay. And what did you observe?

5 A I believe, I also observed there was hemorrhage in  
6 the subcutaneous tissue.

7 Q Okay. Is that inconsistent with being acute?

8 A Acute or subacute, yes.

9 Q All right. What about the large bruise on the  
10 buttocks, did you incise that as well?

11 A I did. When I incised that, there was no hemorrhage  
12 in the subcutaneous tissue.

13 Q And what is that indicative of?

14 A It's indicative that it's not an acute injury.

15 Q So it's older?

16 A It's older, yes.

17 Q All right. Showing you State's Exhibit 110,  
18 particularly the -- the lower back of the leg there. Can you  
19 explain to us what we're seeing? And if it's easy for me to  
20 show you the photo before I put this on the monitor, I'm happy  
21 to do that as well.

22 A Actually, I don't see a whole lot there.

23 Q Okay.

24 A So maybe -- it's a little blurry.

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

1 THE COURT: Yes.

2 THE WITNESS: There's some discoloration to the skin  
3 that -- that may be contusions.

4 BY MR. LALLI:

5 Q This is something that's more difficult to classify?

6 A Correct.

7 Q All right. What are with seeing on State's Exhibit  
8 111?

9 A We're looking at both legs, and on the side of the  
10 left leg we see a couple of contusions.

11 Q What are we seeing in State's Exhibit 113?

12 A There's a contusion just above the ankle on the  
13 right.

14 Q Okay, I'm going to show you State's Exhibit No. 114.  
15 Can you tell us what we're seeing there?

16 A Yes, there's -- this is the body face up, and there  
17 are some contusions on the left leg.

18 Q State's Exhibit 115.

19 A I believe, that's the medial aspect of the right leg  
20 showing a couple of contusions.

21 Q All right. What are we seeing in State's Exhibit  
22 116?

23 A That is the side of the right leg showing a contusion  
24 above the ankle.

25 Q How about Exhibit 117?

1           A     This is the top of the left foot showing some  
2 bruising.

3           Q     Now, you had indicated in your report that you  
4 observed an area of stab wound; is that correct?

5           A     Yes.

6           Q     I want to show you first State's Exhibit 101. Can  
7 you did -- I don't know if you can touch your screen and -- and  
8 kind of circle where the stab wound is.

9           A     Oops, sorry. I circled over it.

10          Q     Okay. Right. And where is that on Ms. Whitmarsh's  
11 body?

12          A     It's on the side of the body on the right.

13          Q     Okay. Under the armpit?

14          A     Yes.

15          Q     And I want to he show you State's Exhibit 102. What  
16 is that?

17          A     That is the stab wound again.

18          Q     Okay. Can -- in addition to looking at the wound  
19 externally, are you able, much as you did the head, look at it  
20 internally?

21          A     Yes, that's how I determined it was a stab wound.  
22 Just looking at it externally, it's difficult to tell whether  
23 it's an incised wound that's -- that's just a cut or a stab  
24 wound which is deeper into the body or longer into the body  
25 than it is on the surface. That's how you classify a stab

1 wound.

2 Q Okay. Can you tell us the -- and it's your opinion  
3 that this was a stab wound?

4 A Yes.

5 Q Can you tell us the path that the -- the -- the  
6 object that caused this injury took through the body?

7 A Yes. It entered the chest on the right side. The  
8 lung was not injured. It cut through the diaphragm, which  
9 separates the chest cavity from the abdominal cavity and it  
10 went from the front of the liver to the back of the liver.

11 Q Were any major blood vessels, arteries, things of  
12 that nature struck?

13 A No. There are smaller vessels, the intercostal  
14 arteries and veins, and of course, the liver is very vascular,  
15 but in terms of a major blood vessel like the aorta or the vena  
16 cava, no.

17 Q Okay. When you ascertained the path of the -- the  
18 stab into the body, do you also use a trajectory rod to make it  
19 more easy to discern or easier to discern the directionality of  
20 the stab wound in the body?

21 A The trajectory rod is -- I do use that because I  
22 think it makes it visually it's easier to understand with the  
23 trajectory rod in place. I don't actually need it to tell  
24 directionality.

25 Q But it's for the purposes of illustrating direction

1 to others?

2 A Correct.

3 Q Such as juries and lawyers?

4 A And law enforcement.

5 Q And law enforcement. Okay. I'm going to show you  
6 State's Exhibit No. 130. What is that?

7 A That's the trajectory rod.

8 Q So does this mean that a -- the knife entered  
9 Victoria's body in the direction of the rod into her body?

10 A That's the -- more than likely. It's the path of  
11 least resistance. So wherever the rod easily goes, it's an  
12 indication that's how -- whatever implement was used, that's  
13 how it went in.

14 Q Okay. I think you indicated at the beginning of your  
15 examination that toxicology samples are taken from descendants  
16 at autopsy?

17 A Yes.

18 Q With as that done in this case?

19 A Yes.

20 Q Was the blood analyzed?

21 A It was.

22 Q Was it analyzed specifically for Hepatitis C?

23 A Yes, we had indication that the deceased may have  
24 been Hepatitis C positive, so a test was sent for that. We  
25 don't routinely do that.

1 Q Did that test confirm that she was, in fact,  
2 Hepatitis C positive?

3 A Yes.

4 Q Can you explain for our jury what Hepatitis C is?

5 A Hepatitis C is a virus that's acquired usually by  
6 blood borne infection. And over time that virus can cause  
7 damage to the liver.

8 Q Okay. And -- and just in -- in -- in terminology  
9 that somebody like myself, a non-doctor could understand, what  
10 does -- how does Hepatitis C affect the body? What does it do  
11 as a practical matter?

12 A As a practical matter the virus causes inflammation.  
13 And that inflammation, if we're dealing -- it just as an  
14 example, the inflammation in the liver will result in damage to  
15 the normal liver cells. And after a certain point those cells  
16 stop regenerating, and what you have is not replacement with  
17 liver cells, which are called hepatocytes, but it's replaced  
18 with fibrous tissue which obviously does not function as a  
19 normal liver cell would function.

20 Q During the course of the autopsy, did you have the  
21 occasion to examine Victoria's liver?

22 A Yes, all organs are examined.

23 Q Can you explain the condition of her liver for our  
24 jury?

25 A Her liver was very hard and composed of multiple

1 large nodules, and that's appearance by the naked eye is called  
2 cirrhosis.

3 Q As part of this particular toxicology examination was  
4 her blood alcohol level tested?

5 A Yes.

6 Q What was her blood alcohol level?

7 A It was .24.

8 Q Now, with -- going back to this discussion of  
9 cirrhosis, does Hepatitis C contribute or create cirrhosis in  
10 the body?

11 A There are a number of causes of cirrhosis. Hepatitis  
12 C is one.

13 Q How about excessive alcohol use?

14 A Yes, that's the probably the most common in the  
15 forensic community that cirrhosis is caused by alcohol abuse  
16 over long periods of time.

17 Q Does cirrhosis affect bruising on the body?

18 A Yes.

19 Q How?

20 A Again, when the liver cells are replaced with fibrous  
21 tissue they -- the fibrous tissue does not function like a  
22 normal liver cell. Part of the function of the liver is to  
23 make, excuse me, clotting factors which cause your blood --  
24 cause you to stop bleeding when you're injured. So if you  
25 don't have the normal synthetic function of the liver, the



1 liver is not producing as much clotting factor as it normally  
2 would, so you would tend to bleed a little longer than most the  
3 individuals who don't have cirrhosis.

4 Q So is it fair to say that cirrhosis makes bruising  
5 more prominent or more visible than it otherwise would be?

6 A Yes.

7 Q Would you also agree that there has to still be some  
8 underlying trauma to cause the bruise, however?

9 A Correct.

10 Q So it would -- cirrhosis in effect makes it easier  
11 for us to see trauma that occurred on the body?

12 A Yes.

13 Q Okay. It doesn't make a person more likely to  
14 bruise, only the bruising more visible; would you agree with  
15 that?

16 A I would agree with that. You don't spontaneously  
17 bruise with cirrhosis, that I'm aware of.

18 Q Okay. Now, with respect to cirrhosis, if you take it  
19 to its end point, its ultimate stage of development within the  
20 body, can you die from it?

21 A Yes.

22 Q Was Victoria Whitmarsh in fear -- not in fear, but  
23 close to death as a result of the condition of her liver?

24 A I actually do not know that. I look at her liver  
25 gross and microscopically, and I -- it's a visual examination,

1 it's not a functional study. So in order to know that I would  
2 have had to be her treating physician. I would have seen a  
3 decline in the function of the liver. The -- the liver is  
4 responsible for many things, one of which is metabolism of  
5 drugs, production of clotting factors. And there are certain  
6 enzymes that a treating physician would follow to see if her  
7 liver function is declining.

8           And I -- I don't have that data, and I obviously was  
9 not her treating physician, so I wouldn't be able to answer  
10 that.

11       Q     Okay did her condition of cirrhosis contribute in any  
12 way to her death?

13       A     No.

14       Q     I want to talk more about her blood. Did you find  
15 any evidence of a drug called Venlafaxine,  
16 V-e-n-l-a-f-e-x-i-n-e?

17       A     Yes.

18       Q     Is there a, I guess, a brand name of that drug that  
19 perhaps more people would be familiar with?

20       A     Yes, it's called Effexor.

21       Q     What was the amount of Effexor in Victoria's blood?

22       A     It's 990 nanograms per ml.

23       Q     And excuse me question, but is that a lot?

24       A     No.

25       Q     What -- is that within therapeutic levels?

1 A Yes.

2 Q Now, did you reach an opinion with respect to the  
3 cause of death of Victoria Whitmarsh?

4 A I did.

5 Q What was that?

6 A A stab wound of the chest.

7 Q In your report you indicate that there was another  
8 significant condition; is that true?

9 A That is true.

10 Q What was the other significant condition?

11 A Cutaneous contusions or I'm sorry, it's cutaneous  
12 blunt trauma.

13 Q Are those the bruises on her body?

14 A Yes.

15 Q Why is that included in your report?

16 A I included it for two reasons. One, the actual  
17 mechanism of death. So there is cause of death, manner of  
18 death, and we also look at the mechanism of death. And the  
19 mechanism is something non-specific. In this case the  
20 mechanism is exsanguination or bleeding out. So you would get  
21 that same mechanism with a stab wound or a gunshot wound or if  
22 you're anti-coagulated.

23 So because her mechanism of death is bleeding out or  
24 exsanguination, I had contributed the cutaneous blunt trauma  
25 because any -- any injury that causes blood to be outside of

1 the blood vessels and outside of the vasculature system would  
2 contribute to the demise. And I didn't want to minimize the  
3 amount of external trauma that I saw. That's for those two  
4 reasons I included it as other significant conditions.

5 Q Okay. Now, exsanguination just means blood loss?

6 A Correct.

7 Q Is there any way for you to estimate how long it took  
8 for Victoria to die as a result of the stab wound?

9 A No.

10 Q Why -- why not? They do it on CSI on TV all the  
11 time. Why can't you do it?

12 A That's entertainment. This is real life.

13 Q Okay.

14 A There are a number of factors. In any biological  
15 system you can't expect things to work the same each time.  
16 There are conditions that would alter things, even under  
17 experimental conditions. Say for instance, we were to bleed  
18 rats and to see how long those rats would die. There's a  
19 range. It's never it takes them two hours to die.

20 So there's always a range. You know, it can take  
21 between five minutes and two hours. And -- and that depends  
22 on, for instance, we're using rats, so that depends on the  
23 individual rat factors.

24 In this case it's one of the factors that would alter  
25 my determination is the fact that she is cirrhotic. The

1 cirrhosis decreases her clotting factors. So she's going to  
2 continue to bleed. Whereas, someone else might start to clot  
3 and the process would be maybe a little quicker with her than  
4 with a normal individual. So that's one reason.

5           Also, if -- if her blood alcohol content is  
6 indicative of chronic alcohol abuse, alcohol also inhibits  
7 platelet function. And platelets are also involved in stopping  
8 bleedings. And so with her platelets perhaps being abnormal,  
9 she may have also bled out a little faster than a individual  
10 who didn't drink chronically or had cirrhosis of the liver.

11           Q     So are those unknowns in -- in the evaluation of this  
12 issue?

13           A     They're unknowns in the fact that it would alter.  
14 Even if we had experimental data, it would alter that data.

15           Q     Okay. When ascertaining how long it would take for  
16 one to die from this sort of an injury, do you take into  
17 account that no major blood vessel was severed?

18           A     Yes, that's considered. If she had a transsection,  
19 which is a complete cut across the aorta, which is the largest  
20 artery in your body, the aorta pumps blood to the rest of your  
21 body. So if that vessel was injured, I would be more  
22 comfortable saying that she passed away within seconds to less  
23 than -- seconds to minutes because there's still a variation.

24           Q     So not finding something like the aorta severed would  
25 it be your opinion that death in this case took minutes or

1 longer?

2 A That's reasonable, yes.

3 Q Probably not hours, but --

4 A No, not hours.

5 Q -- certainly minutes, a number of minutes?

6 A Yes.

7 Q Now, hypothetically if they were a neighbor

8 downstairs who had heard crying, which turned to moaning, and

9 that entire process took approximately ten minutes, is that

10 consistent with what you observed in terms of how long it would

11 take for this woman to die?

12 A Well, it's not -- it wouldn't be an observation,

13 obviously. It would be conjecturing. It is -- it would -- I

14 guess it could be consistent, yes.

15 Q Okay. Not your own observation --

16 A Correct.

17 Q -- but the -- the time is consistent with what a

18 woman might have heard?

19 A Yes.

20 Q Okay. And if there was a disturbance that was heard

21 which lasted the better part of an hour, certainly at least

22 with respect to the injuries that you observed on Ms. Whitmarsh

23 that you would categorize as acute, could those injuries have

24 been caused in that hour preceding her death?

25 A They could have been, yes.

1 Q And we've talked about manner of death or we've  
2 talked about cause of death, rather. Did you reach an opinion  
3 as to manner of death?

4 A Yes.

5 Q And what is the manner of death?

6 A Homicide.

7 Q What is a homicide? What is your definition of that?

8 A The forensic definition is death of the hands of  
9 another.

10 Q What is suicide?

11 A Suicide is self-inflicted injury or death.

12 Q Did you observe --

13 A Or of death, sorry.

14 Q -- anything on the body of Ms. Whitmarsh that was  
15 consistent with a suicide?

16 A No.

17 Q Can you -- is there anything about the directionality  
18 of her stab wound that helped you to rule out suicide?

19 A I did not use the directionality, per se. In looking  
20 at manner, again, circumstances are very important. Also, the  
21 nature of the injury is important. Location would be  
22 important. For instance, a stab wound in the middle of the  
23 back you wouldn't anticipate that an individual would be able  
24 to reasonably do that to themselves.

25 So location, type of injury and circumstances are

1 very important in determining manner.

2 Q Okay. Was the location of Ms. Whitmarsh's injury  
3 important in your determination?

4 A Yes.

5 Q Okay, how so?

6 A I thought it was an inconsistent location with  
7 someone who was trying to kill themselves.

8 Q Why?

9 A That is not usually what I've observed in suicides.  
10 Usually it's the wrists, I've seen self-inflicted injury that  
11 caused death, typically in men, slashing of the throat. Women  
12 it's usually the wrists. Even abdominal wounds. But this --  
13 the location is a little awkward. And so if you were trying to  
14 harm yourself why make it more difficult to do that?

15 MR. LALLI: Thank you, your Honor. That concludes  
16 direct examination.

17 THE COURT: Is the jury okay? Do we need a break at  
18 this time? You're okay?

19 MS. PALM: I need to get some exhibits marked.

20 THE COURT: We'll take a very quick -- I'm sorry?

21 MS. PALM: I need to get some exhibits marked.

22 THE COURT: All right, we're going to take a break, a  
23 short recess. Ladies and gentlemen of the jury, during this  
24 recess, it is your duty not to converse among yourselves or  
25 with anyone else on any subject connected with this case or to



1 read, watch or listen to any report of or commentary on the  
2 trial by any person connected with the trial or by any medium  
3 of information, including without limitation, newspaper,  
4 television, radio or the Internet.

5           You are not to form or express an opinion on any  
6 subject connected with the case until this matter is submitted  
7 to you. We'll see you back in approximately five minutes. Mr.  
8 Lalli, if you could speak with the (indiscernible) about the  
9 (indiscernible).

10           (Court recessed at 4:45 p.m. until 4:58 p.m.).

11           (In the presence of the jury).

12           THE MARSHAL: You may be seated, ladies and  
13 gentlemen. Let's make sure our cell phones are turned off,  
14 please. Please remain seated and come to order. Department 17  
15 of the Eighth Judicial District is again in session. The  
16 Honorable Judge Michael P. Villani presiding. Let's make sure  
17 our cell phones are turned off, please.

18           THE COURT: Dr. Benjamin, you understand you're still  
19 under oath?

20           THE WITNESS: Yes.

21           THE COURT: All right, go ahead, Ms. Palm.

22                           CROSS-EXAMINATION

23 BY MS. PALM:

24           Q     Good afternoon, Dr. Benjamin.

25           A     Good afternoon.

1 Q I just want to run through some of the bruising noted  
2 on your autopsy report that you just testified about.

3 MS. PALM: May I approach the witness, your Honor?

4 THE COURT: Yes.

5 MS. PALM: Thank you.

6 BY MS. PALM:

7 Q Showing you what's been marked as Defendant's  
8 Proposed Exhibit C. Do you recognize that?

9 A Yes.

10 Q And is that the same bruise that you were just  
11 testifying about, the contusion on the forehead?

12 A Yes.

13 MS. PALM: Your Honor, I would move to admit.

14 THE COURT: Any objection to C.

15 MR. LALLI: No, your Honor, I don't object to the  
16 admission of any of the photos, I'm sorry, that Ms. Palm showed  
17 me. I don't object to any of them.

18 THE COURT: All right. Ms. Palm, why don't you  
19 identify all of them, and we can admit them right now to speed  
20 it up.

21 MS. PALM: Those would be Defense C, B, D, E, F, G,  
22 H, I, J, and A.

23 THE COURT: Okay, those will be admitted.

24 (Exhibits A, B, C, D, E, F, G, H, I and J admitted).

25 MS. PALM: Thank you.

1 BY MS. PALM:

2 Q Looking at -- this -- this writing is really weird.

3 I'm going to see if I can (indiscernible) make this clearer.

4 Is -- can you see that bruising there on the forehead?

5 A Yes.

6 Q That's what you were talking about, the contusion on  
7 the forehead?

8 A Yes, it contusion and hematoma.

9 Q Okay. And that one you said was acute because it had  
10 bleeding under the -- underneath it, hemorrhaging?

11 A Yeah, there was hemorrhage in the subcutaneous  
12 tissue.

13 Q Okay. And how many of the contusions that you  
14 checked had hemorrhaging or -- do you recall?

15 A I would have to refer to my autopsy notes.

16 Q (Indiscernible).

17 A There were three with hemorrhage in the subcutaneous  
18 tissue, but not all of the -- all of the contusions were  
19 examined.

20 Q Okay. And -- and of those three, were those ones the  
21 ones that you determined were acute?

22 A They were either acute or subacute.

23 Q Okay. What does subacute mean?

24 A The subacute again, is very broad ranges. Acute,  
25 minutes to hours or so. The subacute, likely days. And again

1 a more precise dating would be easier to be -- to determine  
2 with microscopic examination.

3 Q Okay. And so the three that were either acute or  
4 subacute, what -- one acute is in front of the head. Was the  
5 other acute in the back of the head?

6 A Yes.

7 Q Okay.

8 A That's correct.

9 Q And the then the third one was subacute?

10 A The -- both on the -- on the head, the forehead and  
11 the back of the head were described as acute. There were  
12 others that were incised that I thought were either acute or  
13 subacute, it was difficult to tell.

14 Q Okay. This injury on her forehead was the only  
15 injury in her facial area?

16 A Yes.

17 Q And then showing you Defense H. And from -- from  
18 that photograph were any of these bruises determined to be  
19 acute?

20 A Those bruises were not incised, so I did not look at  
21 the subcutaneous tissue.

22 Q Okay. Did you notice any of those looking green?

23 A If I did, it would be described in the autopsy  
24 report.

25 Q Okay. You can refer to your autopsy report, Doctor.

1 If you want to start with the -- the first green I see is the  
2 thorax (indiscernible).

3 A Okay.

4 Q Okay. And can you point out on the body where that  
5 green one is?

6 A This is not a good photograph for thorax, abdomen and  
7 back.

8 Q Okay.

9 A This is a better photograph for, of course, the left  
10 arm. So if you had another one, that would be good.

11 Q (Indiscernible) another photograph. What -- what  
12 area is the thorax?

13 A The thorax is the chest area.

14 Q The chest area?

15 A Yeah.

16 Q So something in the chest area was green?

17 A Correct.

18 Q And how about the -- you can see these little bruises  
19 here on the right side of her abdomen.

20 A Uh-huh.

21 Q Was one of those greenish?

22 A No, they're not described as green.

23 Q Okay. If you could look at the second paragraph  
24 under the thorax, abdomen and back. Is there one described as  
25 green or maroon?

1 A Green, maroon and the other predominantly maroon.

2 Q Okay. And then on the right side of the back, some  
3 of those ones were green also; is that correct?

4 A Yes.

5 Q And then the -- the one that you incised above the  
6 buttock, and I'm showing you Defense J, is this large one here?  
7 That's the one you're talking about that you incised?

8 A Yes.

9 Q Okay. And that one you determined was not acute  
10 because -- can you explain that again?

11 A It was not acute because I did not see any hemorrhage  
12 in the subcutaneous tissue.

13 Q Okay, so you determined that this -- this one here  
14 was an older bruise?

15 A Correct.

16 Q Okay. And then she had another green bruise on one  
17 of the bruises on the right arm was green? The lateral aspect?

18 A Yes.

19 Q Okay. And then there's a puncture mark also on the  
20 right arm.

21 A It's described as a possible puncture.

22 Q Okay. And the -- the one -- going back to the one on  
23 the buttock, that is -- that is a -- a red bruise, but it is  
24 not acute?

25 A Correct.

1 Q And then the -- the right hand you talked about the  
2 injury, showing you Defense F. Looking at that injury, did  
3 that determine -- did that appear to be a fresh injury to you?

4 A It's an abrasion, and there's dried blood at the  
5 base. It looks more acute than old.

6 Q Would it help you to look at the hand injury, if I  
7 can show you a picture up close?

8 A No, I can see it. I can see it on the screen, yeah.

9 Q You saw it well enough? Okay. So -- so you thought  
10 that was a newer injury?

11 A It looks -- if I had to date I'd say it's more acute  
12 than old because there's still blood in the dermis.

13 Q And then going to the shins, you described some of  
14 these bruises on the shins as green; is that correct?

15 A I believe that was a dorsum of the foot and yes.  
16 Yes.

17 Q And -- and also green on the dorsum of the foot? And  
18 so the way cirrhosis scars the liver -- it affects the clotting  
19 factor so that somebody bruises more easily; is that correct?

20 A The force necessary to cause a bruise may be a little  
21 different. You would see the bruise being more prominent than  
22 with someone who is not cirrhotic.

23 Q Okay. So you would have a bigger bruise on a  
24 slighter contact?

25 A Yes, that's fair.

1 Q Right? And -- and blunt force trauma, as you  
2 explained, can be something that somebody does to themselves or  
3 something that happens to them?

4 A Yes.

5 Q And none of the bruises in this case are life  
6 threatening on their own, were they?

7 A No, they are not.

8 Q And -- and you testified that there's no really  
9 scientifically accepted theory that you can really gauge  
10 bruises by color?

11 A That's correct.

12 Q Okay. Do bruises generally change color in a  
13 predictable fashion, though?

14 A Yes.

15 Q And what -- what colors do they go through?

16 A Red, red, maroon or blue to -- to green to  
17 yellow/brown. And that's basically the color is changing  
18 because the heme pigment and red blood cells, the hemoglobin is  
19 being broken down.

20 Q Okay. So -- so as -- as the colors change, would  
21 that vary depending on the person?

22 A That can vary depending on the person, the person's  
23 state of health, other factors such as whether they're  
24 cirrhotics. There are variables.

25 Q Okay. So for instance, in Ms. Whitmarsh we have the



1 one older bruise that's still a red bruise. Does that mean  
2 that it takes her much longer for bruising to turn through the  
3 colors number it gets to green?

4 A No.

5 Q Why not?

6 A The colors change in a predictable fashion, but I  
7 can't tell you if she had two bruises at the same time that one  
8 is going to change faster than the other, if that's what you're  
9 asking.

10 Q Okay. So it's -- it's different depending on the  
11 area she's bruised or what's -- what's the variable?

12 A The -- there's variability by the particular  
13 individual. There's variability if you are a diabetic, for  
14 instance, and you have poor circulation to your extremities.  
15 Your bruises may stay red longer because your circulatory  
16 system doesn't work very well in that region.

17 Q Do you recall how old Ms. Whitmarsh was at the time  
18 of her autopsy?

19 A I believe she was 54.

20 Q Okay. Does -- does aging affect bruising at all?

21 A It can if you have a peripheral vascular disease,  
22 yes.

23 Q Okay. Would you have seen evidence of that on the  
24 autopsy?

25 A We typically don't dissect legs, so I wouldn't know

1 if she had peripheral vascular disease.

2 Q Bruises don't tend to change color post-mortem,  
3 though, do they?

4 A No, they do not.

5 Q So it stops at the time of death? That's the color  
6 it's going to stay?

7 A That's correct.

8 Q Do -- do hematomas continue to grow. Would a bump  
9 continue to grow after death?

10 A It depends on if there's blood leakage continuing in  
11 that area or if the person is dependent. If they were face  
12 down and you have blood pooling, the hematoma may have gotten a  
13 little larger.

14 Q The liver in Ms. Whitmarsh was on her back area?

15 A The liver is on the front on the right.

16 Q On the front right?

17 A Are you saying livor or liver?

18 Q Livor, I'm sorry?

19 A Livor. I'm sorry.

20 Q I don't know how to pronounce it.

21 A Livor is on the back.

22 Q Okay.

23 A It was on the back.

24 Q And -- and how does the alcohol affect bruising  
25 differently than the cirrhosis does?

1           A     Alcohol is known to inhibit platelet function, and  
2 platelets are also part of the, what we call the clotting  
3 cascade.

4           Q     So if somebody has a clotting problem because of the  
5 liver and you combine it with the alcohol, does that make a  
6 greater clotting problem because it's two different kinds?

7           A     It would be expected to be additive, yes.

8           Q     And you noted when you did the autopsy on Ms.  
9 Whitmarsh that her spleen was also enlarged?

10          A     Yes.

11          Q     What did you attribute that to?

12          A     To her cirrhosis of the liver.

13          Q     Okay. And I want to talk a little bit about the --  
14 the drugs that were found in her system on the toxicology  
15 report. You testified about the Effexor, that it was a 990, is  
16 that milligrams?

17          A     It's nanograms per ml.

18          Q     Nanograms per ml? Showing you what's Defense Exhibit  
19 B. Did you consider her other medications which she was  
20 taking? Can you see those?

21          A     Not really, sorry.

22          Q     Would it help if I approach and show you?

23          A     I can't make out what it says.

24          Q     Is that helpful to you? What other medications was  
25 she on besides the Effexor?

1 A The Trazodone and Spironolactone.

2 Q And what are those medications?

3 A Trazodone is sometimes used for sleep. I believe it  
4 was also used as an anti-depressant. And Spironolactone, I  
5 believe, is a diuretic sort of medication, if I recall  
6 correctly.

7 Q And do you recall finding either of those in her  
8 system?

9 A Those were not listed on the toxicology report.  
10 However, they would have had to -- in some cases unless we  
11 specifically ask for a drug to be looked for, it won't be  
12 tested for it. There are thousands of drugs and our drug  
13 screening won't pick up all of them.

14 Q Are those some of the drugs that might not pick up?

15 A I am not sure at this point. I would have to check  
16 with our toxicology lab.

17 Q Okay. And the prescription for her Effexor, do you  
18 agree it was 150, is it nanograms? I'm not sure how you say  
19 that.

20 A The Effexor says 75 milligrams.

21 Q Twice a day?

22 A I -- I can't see that on this -- it says take to  
23 capsules, yes, so 150.

24 Q So 150 a day?

25 A Correct.

1 Q And Effexor's broken down in the liver?

2 A It's metabolized in the liver, yes.

3 Q Okay. And then there were also Effexor metabolites  
4 in her blood; is that correct?

5 A That's correct.

6 Q And what was the level of the Effexor metabolites?

7 A The metabolite O-desmethylvenlafaxine was 870  
8 nanograms per ml.

9 Q Okay. And are -- are those the levels you would  
10 expect to see on somebody that was taking 75 milligram capsules  
11 twice a day?

12 A I actually would not evaluate the levels in that  
13 context because that -- what you're seeing here on this tox  
14 report where it gives you the milligrams and it what is the  
15 reference ranges refers to steady state. And steady state  
16 means that you have the same amount of drug being absorbed as  
17 is being eliminated. So it's steady state in the blood.

18 And that occurs, according to this report, I believe,  
19 it's two hours after taking the drug. Having not known when  
20 she took the drug, I couldn't say that I would expect this to  
21 be her steady state level. I don't know that.

22 Q Okay. So she -- does that seem like a high level, if  
23 it was her steady state level?

24 A If it was her steady state, according to these  
25 reference ranges, it would be high, yes.

1 Q Cirrhosis can also cause impaired cognition; is that  
2 correct?

3 A It can if it results in hyporeninemia, meaning that  
4 the liver is failing to breakdown ammonia, it will cause  
5 confusion, yes.

6 Q And is that something that you tested for in the  
7 autopsy?

8 A No, we don't test for ammonia levels.

9 Q And alcohol also impairs cognition; is that correct?

10 A That is correct.

11 Q I want to talk to you a little bit about the wound  
12 path because I'm a little confused when I look at the  
13 photograph. Showing you State's 130. And do you recall on the  
14 autopsy report indicating a wound path?

15 A Do I --

16 Q In your autopsy report?

17 A Yes, a wound path is stated in here.

18 Q Okay. I -- I thought you just testified that it was  
19 right to left, front to back and downward. I mean, I thought  
20 you just testified it was back to front (indiscernible).

21 A I don't -- I don't recall what the testimony was, but  
22 it is in the report what I thought the path was.

23 Q Okay. And the report says right to -- right to left,  
24 front to back and downwards; is that correct?

25 A That's correct.

1 Q And is that what is indicated on this photograph?

2 A What's indicated with the trajectory rod is you can  
3 barely make out that it's right to left. What it's trying to  
4 show is that it's downward.

5 Q Okay. How about the front to back?

6 A The front to back is better seen internally because  
7 it's going from like the front of the -- well, it's more the  
8 side, but it's better described as front and to the back of the  
9 liver. So it would be more toward from the front of the body  
10 surface to the back.

11 Q Okay. So you're not talking about from the front of  
12 the body to the back of the body when you're describing that?

13 A When I'm describing the wound path, that is what I'm  
14 trying to do here, but it's not as clear cut as let's say it  
15 was on the front here and it went to the back of the liver.  
16 It's -- it's actually from side to back, but it was described  
17 as front to -- to back, if that makes sense.

18 Q Showing you Defense A, looking at this photograph,  
19 can you describe how -- how the wound is in relationship to a  
20 knife, and I guess my question is the top of the knife and I  
21 forget what you call it, the non-sharp part of the knife, can  
22 you indicate where that is in the picture?

23 MR. LALLI: Your Honor, I object to the question as  
24 vague and ambiguous.

25 MS. PALM: I know this question's badly phrased

1 (indiscernible).

2 THE COURT: Sustain the objection.

3 MS. PALM: Okay.

4 BY MS. PALM:

5 Q Can you -- is there one part of that wound that is  
6 wider than the other part?

7 A Is there one -- I'm sorry, can you rephrase?

8 Q On both ends of the wound from sharp cutting?

9 A The wound is described one end is sharp or pointed,  
10 the other end is square.

11 Q Okay. And what end is the square end?

12 A Let's see, the square end is more towards the front  
13 and lower part of the body. So if you'd like me to point it  
14 would be --

15 Q Sure.

16 A -- like right -- or like right here.

17 Q Okay. So the sharp end is facing the back of the  
18 body?

19 A I can't say that. I don't know which end of the  
20 knife was where, but I'm -- I'm describing what the skin injury  
21 looks like.

22 Q Okay.

23 A That's what that description is.

24 Q Okay. And the -- how -- how deep does the wound go?

25 A There's an estimate in my report of approximately

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1 four and a quarter inches.

2 Q All right. And were there any boney structures along  
3 the path of that wound?

4 A There were -- there obviously are boney structures.  
5 The ribs are there.

6 Q Well, could you tell if an object hit any boney  
7 structures going in?

8 A There was no boney structures that was hit.

9 Q And I believe you testified that she would have bled  
10 out rather quickly give her physical condition?

11 A I believe my testimony was that I couldn't tell  
12 exactly how quickly, but that's -- yeah, given her medical  
13 conditions probably more quickly than someone who did not have  
14 cirrhosis.

15 Q Okay. When you determine the manner of death,  
16 whether it's homicide or some other manner of death, you don't  
17 go to the scene yourself; you just said that, right?

18 A Correct.

19 Q And you're relying on, you said, the circumstances  
20 and who did you get your information from regarding the  
21 circumstances of the scene?

22 A The information regarding the circumstances comes  
23 from our -- the coroner investigator and also law enforcement  
24 officials who are usually at the table at the autopsy, and I  
25 get to ask them questions at that time.

1 Q Okay. So you rely on some of the homicide  
2 detectives?

3 A Yes.

4 Q Do you ever look at police reports?

5 A Occasionally, yes.

6 Q Okay. It sounded to me from your testimony like  
7 other than the odd location of the wound there's nothing that  
8 you could say from the body that rules out suicide?

9 A That's correct.

10 Q Okay. So it's physically possible to stab yourself  
11 in that location or a person stabs themselves there?

12 A It is -- I believe it's physically possible, just  
13 very awkward.

14 Q Can you -- could you determine whether the injury to  
15 her head would have rendered her unconscious?

16 A I can't tell that just from the examine, but just  
17 from personal experience it seems unlikely.

18 Q It wasn't that significant of a head injury?

19 A Correct.

20 Q Can you determine whether Ms. Whitmarsh would have  
21 been capable of purposeful activity after getting that stab  
22 wound?

23 A It seems likely that she would have been. Typically,  
24 again, her aorta was not severed, so it wouldn't have been  
25 immediately incapacitating.

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1 Q Okay. Would that depend on how quickly she bled out?

2 A Yeah, it -- for instance, if you hit an artery,  
3 you're going to bleed out faster than if you hit a vein or a  
4 smaller vessels. And so while you're losing blood pressure, of  
5 course, you're still capable of purposeful action until your  
6 blood pressure drops to where you become unconscious and then  
7 clearly you're not capable of purposeful action at that point.

8 Q And would it depend on how much activity she was  
9 engaging in after the stab wound? How quickly she would have  
10 not been capable of purposeful action? Does the level of her  
11 activity decrease the amount of time she had that she'd be  
12 moving around?

13 A Theoretically, yes.

14 Q When -- when you're considering bruising in  
15 connection with the cause of death as an ME, do you consider  
16 the fact that a person operating on high alcohol level might  
17 have been bumping into things?

18 A Yes.

19 Q All right. And you can't rule out that any of the  
20 bruises were from bumping into things, can you?

21 A Some of the bruising I thought were unlikely to be  
22 from bumping into things. Usually, and folks who are chronic  
23 habitual alcohol users do bump into things and we typically see  
24 that on more extensor surfaces. You don't see that on the  
25 inner surface of the arm, per se. And I typically don't see

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1 buttock bruising on alcoholics.

2 Q On the inner surface of the arm there was a little  
3 grouping of bruises; is that correct?

4 A Yes, I believe that was the left arm.

5 Q Showing you Defense I. These bruises right here what  
6 you were talking about?

7 A Yes, there's one there.

8 Q Okay. And are those bruises consistent with somebody  
9 grabbing on arm?

10 A They could be, yes.

11 Q Okay. But you can't say from looking at those  
12 bruises whether they were caused by somebody grabbing an arm to  
13 assist somebody or grabbing an arm to hurt somebody?

14 A Correct.

15 Q And from considering just the body in this case and  
16 not the evidence from homicide detectives or anything else,  
17 considering just the body, can you rule out an accidental wound  
18 sustained during struggle over a knife?

19 A Given those circumstances I probably still would not  
20 have called that an accident. It would have either been  
21 homicide or undetermined.

22 Q Okay. But with that scenario you can't rule that out  
23 a hundred percent, could you?

24 A No.

25 MR. LALLI: I object to 100 percent, your Honor.

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1 THE COURT: Sustained.

2 MS. PALM: She said probably. I'm trying to clarify  
3 what's the range of probability.

4 THE COURT: Well, you can ask it in medical terms,  
5 you know.

6 MS. PALM: Okay.

7 BY MS. PALM:

8 Q Well, again, from looking at the body, you can't  
9 completely rule out whether this injury was sustained or in an  
10 accidental struggle over -- is that correct?

11 A That's correct.

12 Q Is it possible to say how long she would have been  
13 conscious after receiving the injury?

14 A I have no objective way of determining that.

15 MS. PALM: That's all the questions, I have. Thank  
16 you, Doctor.

17 THE COURT: Any redirect by State?

18 MR. LALLI: Very brief, your Honor.

19 REDIRECT EXAMINATION

20 BY MR. LALLI:

21 Q Doctor, I think you described the process of healing  
22 of a bruise as starting with red, maroon and then moving to  
23 green and then moving to yellow/brown; is that correct?

24 A Correct. Yes.

25 Q And you can't tell us how long that process takes,

1 but you can tell us that it -- a bruise goes through that  
2 process of healing?

3 A That is correct.

4 Q All right. And there were red and maroon bruises on  
5 Victoria's body?

6 A Yes.

7 Q There were green bruises on her body?

8 A Yes.

9 Q So there were bruises in various stages of healing?

10 A Yes.

11 Q Is that consistent with somebody being roughly  
12 handled in an ongoing manner?

13 A It could be consistent with that scenario, yes.

14 Q Okay. You indicated that there was this awkwardly  
15 position stab wound to the side of the body. I think you  
16 referred to it as awkwardly positioned?

17 A If that's how I referred to it, I --

18 Q Okay. Would you refer to it that way?

19 A Well, it's awkward for a suicide, yes.

20 Q Okay. So if somebody's going to commit suicide  
21 they're not going to make it that difficult for themselves; is  
22 that what you're saying?

23 A In general. In my experience, no.

24 Q Okay. You did not call this an accident, correct?

25 A Correct.

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1 Q You could have if you wanted to?

2 A I could have if the circumstances were of such that I  
3 thought it was an accident, yes.

4 Q You didn't call it a -- a suicide?

5 A No.

6 Q You could have if you wanted to?

7 A Again, if the circumstances and the examination  
8 supported that, yes.

9 Q As part of your determination of whether the case was  
10 homicide or something else, you look beyond the body; is at  
11 that true?

12 A Yes.

13 Q You look to the circumstances of how the injuries  
14 were obtained, if you know them?

15 A Yes.

16 Q Would you also look at perhaps things that a  
17 perpetrator had said?

18 A Yes, if I had those statements from the police, yes.

19 Q Okay. So if you had known, for example, that the  
20 defendant had threatened to kill or wanted the victim dead, for  
21 example, would that put you more in the camp of homicide?

22 A Well, certainly that would be considered, but I'd  
23 also have to look at the whole totality of the scene and the --  
24 and the autopsy findings as well.

25 Q But that would help you?

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1 A It would be a factor, yes.

2 Q If you had known that the defendant said I didn't  
3 mean to hurt you in describing what had occurred, would that  
4 help you categorize this more firmly into the homicide  
5 category?

6 A Yes, the -- the implication in that state would have  
7 been that I hurt you, but I didn't mean to, so yes, I --

8 Q You did, in fact, call this a homicide, correct?

9 A Yes.

10 Q Death at the hands of another person?

11 A Correct.

12 MR. LALLI: Nothing further.

13 THE COURT: Ms. Palm.

14 MS. PALM: No redirect, your Honor. I mean, no?

15 THE COURT: I'm sorry, Ma'am?

16 MS. PALM: Nothing.

17 THE COURT: Okay. Any questions from any of the  
18 jurors? No questions. Dr. Benjamin, thank you for your  
19 testimony. You are excused.

20 THE WITNESS: Thank you.

21 THE COURT: Thank you very much.

22 MR. LALLI: Your Honor, we have another witness. She  
23 -- my guess is she she's going to be anywhere from, well, at  
24 least an hour or longer. Whatever the court's pleasure, we can  
25 start, we can --



1 THE COURT: We're going to -- it's been a --

2 MR. LALLI: -- come back tomorrow.

3 THE COURT: -- a long day for the jury, and --

4 MR. LALLI: Okay.

5 THE COURT: -- like I said, I think we're adjourn for  
6 the day. I do appreciate the jury willing to stay a little  
7 later today. Thank you very much. We're going to come back  
8 tomorrow at 10:00 o'clock, and we'll resume the testimony of  
9 the various witnesses.

10 During this evening recess, it is your duty not to  
11 converse among yourselves or with anyone else on any subject  
12 connected with this case or to read, watch or listen to any  
13 report of or commentary on the trial by any person connected  
14 with the trial or by any medium of information, including  
15 without limitation, newspaper, television, radio or the  
16 Internet. You are not to form or express an opinion on any  
17 subject connected with the case until this matter is submitted  
18 to you. Ladies and gentlemen, please have a good evening.  
19 We'll see you back at 10:00 a.m.

20 (Court recessed at 5:34 p.m. until 5:37 p.m.).

21 (Outside the presence of the jury).

22 THE COURT: All right. Mr. Lalli, you had something  
23 on the -- you wanted to put on the record.

24 MR. LALLI: Yes, your Honor. I just wanted to make a  
25 note of multiple references during Ms. Palm's opening

1 statement. She indicated that the defendant and the descendant  
2 were a very loving couple. I counted at least five -- or at  
3 least three times, rather, when she made that statement.

4 In truth, there is a long history of police  
5 responding to domestic disputes between the two of them. There  
6 are at least five occasions when the police had responded  
7 outside of what the court has already allowed into evidence.  
8 And it's my position that in giving her opening statement in  
9 the manner in which she did, she has opened the door to that  
10 information.

11 THE COURT: Ms. Palm.

12 MS. PALM: Your Honor, the court's ruling that was  
13 that as long as we stayed in the parameters of the time frame  
14 when he got out of prison forward, we could talk about the  
15 relationship. We did that last time. That's always been the  
16 ruling. And that 's what I did again. And it was my  
17 understanding that that's the court's ruling.

18 MR. LALLI: I've read the court's ruling many times  
19 because I wasn't here last time, and I wanted to be sure that I  
20 was obedient to it, and I'm not seeing that anywhere in the  
21 ruling. So maybe -- maybe -- you know, I'll have a look again  
22 or maybe somebody can point it out to me, but it is -- it is  
23 certainly disingenuous for -- for -- if terms of the  
24 presentation of the evidence to portray this as a -- as a  
25 loving couple when, in fact, the police had responded multiple

1 times to incidents between them.

2 MS. PALM: And, your Honor, I brought it up against  
3 yesterday that that was my understanding of the court's ruling.  
4 I think it was yesterday during argument on something. That's  
5 always been my understanding of what we were doing as long as  
6 we stayed prison forward we were okay.

7 THE COURT: I don't recall the specifics of that.  
8 But, Mr. Lalli, you were free to object at the time and also  
9 the jury will be advised that what's stated in opening and  
10 closing arguments is not evidence, and, you know, if -- if that  
11 evidence doesn't come out, Mr. Lalli, you know, you can -- I'm  
12 sure you'll know how to attack that during closing.

13 MR. LALLI: So -- okay, so if a witness -- if -- if  
14 -- if this issue comes up about -- I certainly won't be  
15 bringing it up, but if it is brought up by the -- by the  
16 defense, I can certainly attack that evidence the way I would  
17 any other opinion with respect to whether they were a loving  
18 couple?

19 THE COURT: Well, it really depends -- I mean, it's  
20 going to be very question specific --

21 MR. LALLI: Okay.

22 THE COURT: -- on behalf of the defense. I can't  
23 give you an advance ruling on --

24 MR. LALLI: I understand.

25 THE COURT: -- how --

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1 MS. PALM: Well --

2 THE COURT: -- that may or may not come out, I have  
3 no idea.

4 MS. PALM: Well, your Honor, I can tell you that I  
5 had planned to present the same evidence we presented last  
6 time. Under the ruling that we've always been under is the  
7 people to talk about their relationship and how they treated  
8 each other when they got back together, period. And that has  
9 never opened the door in his prior offenses.

10 The court considered all of that. We -- the court  
11 ruled what prior offenses were going to be admissible and they  
12 got to have the felony conviction.

13 MR. LALLI: Well, it --

14 MS. PALM: So I -- I need to know if I can call my  
15 witnesses or not because that's what they're coming for, to  
16 talk about what they saw of their relationship.

17 THE COURT: I -- I think if you tailor it to the last  
18 year they were together or whenever they -- they became  
19 reacquainted as boyfriend and girlfriend, you know, what did  
20 you -- you know, what did you observe, then that's fine. If  
21 you ask have they always been a loving -- in a loving  
22 relationship, have they always acted that way, has he always  
23 treated her appropriately, then you've opened the door, I would  
24 think.

25 MS. PALM: And I -- I won't to that, and I -- I was

1 careful to limit my discussion to how they -- how they were  
2 (indiscernible).

3 THE COURT: And it's going to be (indiscernible) -- I  
4 mean, I can't anticipate all your questions, and I'm sure the  
5 State will object on the appropriate occasion. But I'm sure  
6 both sides will be aware of not to open inappropriate door.

7 MS. PALM: Thank you, your Honor.

8 THE COURT: I need the disk of the -- the statement.

9 MS. PALM: Okay. Well, I have my edited version with  
10 me.

11 THE COURT: And can you give me -- I can't -- I wrote  
12 down the -- the time frame, and I can't find that note. If you  
13 can give that to me again of what the State is showing and what  
14 you request.

15 MS. PALM: Well, can I just show you my disk because  
16 it's time stamped on there.

17 THE COURT: Okay.

18 MS. PALM: I don't have a start time, but if you open  
19 it, this is exactly what I'm requesting.

20 THE COURT: Okay. And Mr. Lalli, can you give me the  
21 time frame that you're saying is appropriate?

22 MR. LALLI: Yes.

23 THE COURT: I had -- like I said, you gave it to me  
24 before and I -- I cannot find my note.

25 MR. LALLI: Oh, the court has the entire -- actually,

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1 the court has the entire video that was admitted at the last  
2 trial. All of this -- well, at least the -- the portion that I  
3 am seeking admission of is on that. All of it is on that.

4 MS. PALM: I don't think the full thing was admitted.  
5 They redacted some of it.

6 MS. GRAHAM: They only redacted the break, that's it.  
7 That's all that was redacted.

8 MS. PALM: Okay.

9 THE COURT: Okay, so it says starts at 1:38 and goes  
10 to 1:43. So you want all that section, correct?

11 MS. PALM: Yes, and I put the two (indiscernible)  
12 after the end of the interview is also on there from the end of  
13 the -- or the -- the interview ends, then there's a little  
14 break, and it starts back up when Dan Ford comes in the room.  
15 And I want that on there until the end at 4:05. What's on  
16 there is exactly what I want. And it's time stamped the time  
17 frame it is.

18 THE COURT: I think your note on this is confusing  
19 me. It said the -- it starts at 1:38 and it goes to 1:43.

20 MS. PALM: Right.

21 THE COURT: That's the pre-interview time frame?

22 MS. PALM: Yes.

23 THE COURT: Okay. And then we have the interview.

24 MS. PALM: I don't have a start up time again for the  
25 post-interview time frame because that was just my note. I

1 didn't know we were going to be doing this today.

2 THE COURT: Okay. I mean, do I -- do I need to do  
3 this tonight?

4 MR. LALLI: Your Honor, my --

5 MS. PALM: I can admit it -- I might want to do it  
6 through the detective, though, when this is.

7 THE COURT: I -- I just don't understand your note  
8 here because I understood it better when I -- when we spoke  
9 about it this morning.

10 MS. PALM: Okay, my -- my note was just for my own  
11 personal, but if you watch the video, it's got the time stamps  
12 on there from the times that I want, but it basically includes  
13 that first pre-interview part until 1:43 when the actual  
14 interview starts. And then it picks up again when Dan Ford  
15 comes in the room after the interview is over. But I don't  
16 have a time on that note.

17 THE COURT: Okay. Mr. Lalli, we gotta work  
18 backwards. What portion do you want to play for the jury?

19 MR. LALLI: What I written down here, your Honor, is  
20 starting the interview at 1:35:47, which is the time that the  
21 detectives enter the room, and concluding the interview at  
22 3:28:34, which is the time that the detectives leave the room.

23 THE COURT: Okay.

24 MR. LALLI: With all of the edits that the court has  
25 ordered me to make, including the hour break in the middle.

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1 And it's my position that any statements that the defendant  
2 made when crime scene analysts or detectives were in the room  
3 much later are not within the scope of this interview and  
4 they're hearsay if they're being offered by the defense.

5           They cannot offer his self-serving statements. He's  
6 probably going to testify and he'll be able to explain things  
7 that he might have said. But they're not entitled to admit his  
8 statements or for that matter, the other statements of the  
9 investigators and police officers that were in the room. It's  
10 hearsay.

11           THE COURT: Okay, so Ms. Palm, on your -- on your --  
12 posted it stays start at 1:38. Mr. Lalli's saying that his  
13 interview's going to start at 1:35, so it actually starting  
14 before your requesting time.

15           MS. PALM: Yeah, and that part of the interview is  
16 not Mirandized, so, you know, Mr. Lalli couldn't admit those  
17 additional three minutes anyway.

18           MR. LALLI: Well, I certainly can because what  
19 happens is the detectives walk in and the defendant starts  
20 giving them the business. So he starts making spontaneous  
21 statements, not in response to any interrogation. So that's  
22 certainly admissible evidence.

23           THE COURT: Okay, Ms. Palm, again, you're saying  
24 anything prior to 1:38 should be excluded; is that correct?

25           MS. PALM: Yes, because I think it's -- it's --

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1 unfairly prejudicial to him and, you know, he's talking about  
2 Bucky and those kind of things and that's where I cut it -- you  
3 know, where I started from it when -- when they start talking  
4 about the incident.

5 THE COURT: And then you want to go from 3:28 to  
6 4:05, basically another half hour?

7 MS. PALM: Well, not -- no, not really because  
8 there's a big break before Dan Ford comes in the room. And  
9 that's -- that's -- the interview ends at 3:28, then they have  
10 a break where he sits there by himself. I cut all of that out.  
11 So I pick it back up when Dan Ford comes in the room. And I  
12 don't have that time on that note. But you can see the time if  
13 you look at the video.

14 THE COURT: Okay, so I have to scroll through this  
15 from 3:28 to 4:05 and find out when he comes into the room?

16 MS. PALM: It's -- no, no. That video only has what  
17 I want.

18 THE COURT: Okay.

19 MS. PALM: It's about a six minute video.

20 THE COURT: Okay.

21 MS. PALM: That's what I'm saying, I -- I -- I clip  
22 it had to together.

23 THE COURT: I think I understand. I'll --

24 MS. PALM: Okay.

25 THE COURT: -- try to review it tonight.

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1 MS. PALM: Thank you.

2 THE COURT: Okay.

3 MS. PALM: And then your clerk asked for us to e-mail  
4 him jury instructions.

5 THE COURT: We have the State's. They're on my desk.  
6 With and without citations.

7 MS. PALM: I filed mine the first day.

8 THE COURT: Okay. So then we have -- if you could  
9 e-mail them to us, we'd appreciate it.

10 MS. PALM: Okay.

11 THE COURT: All right. Anything else?

12 MR. LALLI: I don't think so, your Honor.

13 THE COURT: Okay. And like I said, we'll check with  
14 the jurors in the morning or --

15 THE MARSHAL: 5:30.

16 THE COURT: 5:30 tomorrow.

17 THE MARSHAL: No later than 5:30.

18 THE COURT: All right.

19 MS. GRAHAM: For purposes of lining up witnesses they  
20 can stay until 5:30?

21 THE MARSHAL: 5:30.

22 MS. GRAHAM: And we start at 10:00, Judge?

23 THE COURT: 10:00.

24 MR. LALLI: Great.

25 THE COURT: All right. Actually, counsel can be here

1 at 9:45 just in case any issues pop up over the evening hours  
2 that you want to bring to my attention.

3 MS. PALM: Okay. Thank you.

4 THE COURT: Thank you.

5 THE MARSHAL: We'll have the defendant here at 9:45?

6 THE COURT: Yes, 9:45.

7 (Court recessed at 5:47 p.m., until Thursday,  
8 August 26, 2010).

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ACKNOWLEDGMENT

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