

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 ***

3 KIRSTIN BLAISE LOBATO,

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.

) Case No. 58913

) Electronically Filed
) Oct 08 2012 04:11 p.m.
) Tracie K. Lindeman
) Clerk of Supreme Court
)

8 APPELLANT'S REPLY APPENDIX

9 VOLUME 1

10 APPEAL FROM NOTICE OF ENTRY OF DECISION AND ORDER

11 IN THE EIGHTH JUDICIAL DISTRICT COURT

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SUPPLEMENTAL APPENDIX INDEX

VOLUME	DOCUMENT NAME (FILE DATE)	PAGE NO.
1	REPORTERS TRANSCRIPT OF JURY TRIAL MAY 16, 2002 (8/7/02) (GEORGE SCHIRO TESTIMONY ONLY)	1-15

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff,

CASE NO. C177394

vs.

DEPT. NO. II

KIRSTIN BLAISE LOBATO,

Defendant.

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT JUDGE
THURSDAY, MAY 16, 2002

RECORDER'S TRANSCRIPT RE:
JURY TRIAL

VOLUME 7 - DAY 9

APPEARANCES:

For the State:

SANDRA DIGIACOMO, ESQ.
Deputy District Attorney

WILLIAM KEPHART, ESQ.
Deputy District Attorney

For the Defendant:

PHILIP KOHN, ESQ.
Special Public Defender

GLORIA NAVARRO, ESQ.
Special Public Defender

Recorded by: SHARLEEN NICHOLSON, Court Recorder

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1 A I had been over periodically. I don't remember what dates
2 what times but periodically throughout the week I had been there.
3 Q Okay. But you know you saw her on July 4th and you know
4 saw on July 8th?
5 A Yes.
6 Q Now, after the defendant was arrested there came a time
7 you discussed this case with her mom, Becky Lobato, didn't there?
8 A Yes.
9 Q And in discussing with Becky is when you realized the date
10 was when you called your mother at her house in the garage?
11 A Yes.
12 Q How many times have you talked to Becky Lobato about the
13 Not very often. There was just a few times if the newspaper
14 come out or something like that, but.
15 Q But you did discuss dates with her after the defendant was
16 arrested?
17 A Yes.
18 MS. DIGIACOMO: Nothing further.
19 MS. NAVARRO: I have no further questions for this witness, Ju
20 THE COURT: You may step down from the witness stand. And
21 may call your next witness.
22 MS. NAVARRO: Thank you, Judge.
23 The defense calls Mr. George Schiro.
24 **GEORGE SCHIRO**
25

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1 having been called as a witness by the Defense, being first duly sworn,
2 testified as follows:
3 THE CLERK: State your name, spelling it for the record, please.
4 THE WITNESS: Sorry.
5 THE COURT: Everything in this courthouse is put together with spit and
6 scotch tape right now because we're getting ready for the Regional Justice
7 Center to be completed.

THE WITNESS: My name is George Schiro, S-c-h-i-r-o.

DIRECT EXAMINATION

BY MS. NAVARRO:

Q Mr. Schiro, how are you employed?

A I'm employed as a forensic chemist DNA technical leader at the
Acadia Ana Criminalistic's Laboratory in New Iberia, Louisiana.

Q And what education have you received?

A I have a master of science degree in industrial chemistry forensic
science from the University of Central Florida. I have a bachelor of science
degree in microbiology from Louisiana State University.

Q And please tell the jury, briefly, some of your experience in the
field.

MR. KEPHART: Your Honor, for -- I've had an opportunity to review his
CV, the State would submit that he's an expert with regards to forensic
biology specimens.

THE COURT: You'd so offer him?

MS. NAVARRO: Yes. Offer him as an expert in forensic science.

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1 THE COURT: Motion granted.
2 Q (By Ms. Navarro) Mr. Schiro, ask you to explain briefly what areas
3 in forensic science have you been qualified as an expert in?
4 A I've been qualified in forensic DNA analysis, forensic serology,
5 which is the examination of blood and body fluids, crime scene investigation,
6 crime scene reconstruction, blood spatter analysis, shoe print identification,
7 latent fingerprint development and projectile trajectory reconstruction also.
8 Q And, sir, do you perform these services for free?
9 A No, I do not.
10 Q And how much are you receiving for your testimony here today?
11 A My hourly rate for doing this kind of work is \$125 an hour and I
12 receive \$1,000 a day for testimony.
13 Q And are you being paid for your services or your expert opinion?
14 A I'm being paid for my time and services.
15 Q Are you familiar with the case of State versus Kirstin Lobato?
16 A Yes.
17 Q And what have you reviewed in preparing for your opinion and
18 testimony today?
19 A I've reviewed numerous documents associated with the case, this
20 would include photographs, reports, diagrams, and I think that about covers all
21 the documentation.
22 Q I'm going to call your attention to the presumptive blood tests that
23 were performed in this case. Would you please explain to us what is involved
24 in blood examination?
25

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1 A Whenever we do examination for blood, one of the first things we
2 do is we'll look at an object and see, well, is there anything on there that looks
3 like blood. And we do this because blood has a fairly characteristic
4 appearance, it's that reddish brown color.

5 And, also, whenever we're looking for bloodstains, blood is very
6 difficult to eradicate. Very difficult to clean up. It has a tendency to seep into
7 things. To get into carpet padding. Into threads. Into various things. So, we
8 do a visual examination first.

9 Then, if we see something that appears to be blood, we'll go
10 ahead and we'll do what's called a presumptive test. Okay. A presumptive
11 test is just a test. It's a screening tool. It's an inexpensive test that we can
12 use to determine if a substance might be blood.

13 The problem with the presumptive tests are that they also are
14 associated with what we call false positives, meaning that things other than
15 blood will react with these tests that we do.

16 In cases where we can't visualize a bloodstain, luminol may be
17 used in order to attempt to see if there were any areas that could potentially
18 be blood.

19 Once we've gotten an area that we've determined this might be
20 blood, we go ahead and as I said we do our presumptive tests. And the
21 presumptive tests, whether it's luminol or phenolphthalin work on the same
22 scientific principles. And a lot of you've probably experienced this if you even
23 gotten a cut on your hand, you've put hydrogen peroxide on it and the
24 hydrogen peroxide bubbles and fizzes. Well, that reaction with the hydrogen
25

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1 peroxide is part of the process that we use in our presumptive tests. And
2 some tests are more sensitive than others. And some are a little more specific
3 than others.

4 After we've gotten an object that could be potentially blood, the
5 next thing that we'll do is we'll run a confirmatory test on it. And we usually
6 do this by seeing if there's any human hemoglobin present in the stain. And
7 human -- well, hemoglobin itself is what gives blood its red color.

8 So, that's -- once we've determined that it might be blood, we'll
9 go ahead and run this confirmatory test on it. If that comes up positive for
10 blood, we'll be able to call it human blood. And at that point we would then
11 go ahead and do identification tests, such as DNA analysis on it.

12 Q Okay. Are you familiar with the presumptive tests that were done
13 in this case, the luminol and the phenolphthalin?

14 A Yes.

15 Q And tell us a little bit about your experience with those two.

16 A Well, luminol is a very sensitive chemical. It can detect very
17 minute traces of blood. It's -- the problem with it, though, is that it's so
18 sensitive that it will give a lot of false positives.

19 Phenolphthalin will also give false positives. However, it won't
20 give -- it won't detect the lower levels that luminol will, but they'll both detect
21 the same types of false positives. And these false positives usually include
22 chemical oxidants such as bleach, rust, copper salts, these sort of things.
23 Also, some certain types of plant products will also give false positives. These
24 items are call plant peroxidases and they can also give a false positive. Also,
25

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1 bacteria can cause false positives, as well as certain animal products.

2 So, again, we just use these as an inexpensive screening tool to
3 determine what needs further testing.

4 Q When you refer to the plant peroxidases?

5 A Yes.

6 Q What would be an example of that?

7 A Plant peroxidases are found throughout the plant kingdom. And
8 literature has shown that certain vegetable materials will give these false
9 positives, I believe apples, apricots, beans, Jerusalem artichokes, carrots,
10 onions, horseradish, turnips and I think dandelion root and onions will also give
11 -- could give these false positives. That's what's been documented in the
12 literature.

13 Q And when you talk about the animal material, what are you
14 specifically talking about there?

15 A Other animal -- animals have -- also have blood that could give a
16 reaction. They also have -- you may also find it in pus, in spinal fluid, brain
17 matter from different animals also -- could also give a false positive for blood.

18 Q And could animals have blood in their stool or in their urine?

19 A Yes.

20 Q Could animals have blood in their vomit?

21 A Yes.

22 Q Could humans have blood in their vomit?

23 A Yes.

24 Q Are you aware what the results were in this case of the
25

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1 presumptive tests for human blood?

2 A Yes.

3 Q I show you what's been marked as State's Exhibit 112 through
4 115. Have you seen this picture before (indicating)?

5 A Yes.

6 Q And is that the picture of the baseball bat?

7 A Yes.

8 Q Do you know what test was performed on that?

9 A I believe a phenolphthalin test was performed on that.

10 Q And the results of that test?

11 A It was negative for blood.

12 Q Have you seen this photograph before (indicating), this is State's
13 Exhibit Number 114?

14 A Yes.

15 Q And what is that?

16 A It looks like a car door that is showing a positive luminol reaction.

17 Q Is this a typical luminol reaction that you would see?

18 A Yes.

19 Q Showing you State's Exhibit 113 (indicating).

20 A Yes, I've seen that photo before.

21 Q And is that the car seat --

22 A It appears to be the car seat. It appears to have luminol on it.

23 And the luminol appears to be reacting all over the seat, parts of the seat.

24 Q Is that a typical reaction that you would see with luminol?
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1 A You would see this reaction but luminol has a very short shelf life,
2 it lasts about 20 minutes and, after awhile, it will begin making lots of thing
3 fluoresce when you start applying it. And that could be what this possibly is.

4 Q So, this indicates to you a possibility of it reacting because of the
5 shelf life being expired?

6 A Yes.

7 Q Showing you Exhibit 112 and that's the red and white car seat
8 cover. You seen this picture before (indicating)?

9 A Yes.

10 Q And is that a typical luminol reaction there?

11 A Yes.

12 Q Having seen the materials and read the reports in this case and
13 looked at the photographs with your experience, have you reached any
14 conclusions in this case about the results of those luminol tests?

15 A Yes, based on the documentation that I reviewed in my opinion
16 it's not human blood.

17 Q And why do you think that?

18 A Well, one of the tests that were used as a confirmatory test was
19 what they call a Hema Trace test. And the Hema Trace test in validation
20 studies that we did when I was with the Louisiana State Police Crime Lab, we
21 found that the Hema Trace tests were 100 times more sensitive than the
22 phenolphthalin test.

23 And if you get a positive phenolphthalin, if it was human blood
24 you would expect a positive Hema Trace also, because of the greater
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1 sensitivity of the test.

2 Q So, you're saying the Hema Trace, is that also a presumptive test?

3 A No, that's a confirmatory test for blood. The other thing is -- in
4 the reports that I read -- is that they did a DNA quantitation (sic) on the stains
5 that were tested. And one of the things that we do when we do a DNA
6 quantitation is we try and determine how much human DNA is present. And
7 from what I reviewed, no human DNA was detected in those -- from those
8 stains.

9 Q So, the two confirmatory tests that Mr. Wahl used, Mr. Tom Wahl
10 used, were the Hema Trace and the DNA quantitation test and they were both
11 negative and that is significant to you in your opinion?

12 A That's correct.

13 Q How do you know that the Hema Trace is more sensitive than the
14 phenolphthalin?

15 A Well, as I said when I was with the Louisiana State Police, we did
16 an internal validation test of the -- compared the Hema Trace and the
17 phenolphthalin test. And our findings, within our laboratory and using our
18 reagents was that the Hema Trace was a hundred times more sensitive than
19 the phenolphthalin.

20 Q Now, you said your opinion is that in this case these results were
21 not indicative of human blood, correct?

22 A Correct.

23 Q Are you aware that my client had been attacked back in May and
24 had gotten some blood on her?
25

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1 A Yes.

2 Q And received blood on her while she was in her car even?

3 MR. KEPHART: Your Honor, I'm going to object to the term --

4 THE COURT: Sustained.

5 MR. KEPHART: Thank you. I'd ask that the answer be stricken as to the
6 question: Are you aware that my client was attacked in May.

7 THE COURT: Sustained.

8 MS. NAVARRO: Okay. I'll rephrase it.

9 THE COURT: So stricken.

10 Q (By Ms. Navarro) Are you aware that there is testimony in this
11 case that my client alleges that she was attacked back in May and then
12 received some blood on her person, on her clothing, as well as possibly in the
13 car?

14 A Yes.

15 Q And would that make any difference to you in your conclusion?

16 A No.

17 Q You still do not believe that it's human blood?

18 A That's correct.

19 Q If it was human blood, as the State insists, could you tell how old
20 the blood was?

21 A No, there's no way to age bloodstains.

22 MR. KEPHART: Your Honor, I'm going to object as well to Miss
23 Navarro's dissertation that the State insists that it's human blood.

24 MS. NAVARRO: I'll rephrase the question, Judge.
25

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1 THE COURT: All right.

2 MS. NAVARRO: Didn't mean anything by it.

3 MR. KEPHART: Your Honor, could I have a ruling with regards to that,
4 Your Honor?

5 THE COURT: She's withdrawing and she's going to restate it, so --

6 MR. KEPHART: Thank you.

7 THE COURT: -- the prior will be stricken.

8 MR. KEPHART: Thank you.

9 Q (By Ms. Navarro) If it was human blood that was found, could
10 you tell how old the blood was?

11 A No.

12 Q How about if there was a prior accident in the car, you still
13 couldn't tell how old it was?

14 A That's correct.

15 Q And your opinion that this is not human blood is based on the
16 results of the confirmatory test being negative?

17 MR. KEPHART: Your Honor, asked and answered.

18 THE COURT: Overrule.

19 Q (By Ms. Navarro) You can answer.

20 A Could you repeat the question, I'm sorry.

21 Q Yes. Your opinion -- well, I'll ask you, is your opinion that this is
22 not human blood based solely on the two confirmatory tests that were
23 performed in this case that showed negative results?

24 A That's correct.
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1 Q Now, Mr. Schiro, you also had mentioned that you are an expert
2 in latent fingerprints. What have you reviewed in this case in regards to the
3 fingerprint analysis performed?

4 A Let me clarify, I'm an expert in latent fingerprint development.

5 Q Thank you. And what materials have you reviewed in regard to
6 this case and the fingerprints taken?

7 A I've examined some photographs, as well as some reports.

8 Q And what is done when someone is processing a vehicle for
9 prints?

10 A Whenever we do -- whenever we process a vehicle for prints, the
11 first thing we do is photograph the vehicle before we print it. Photograph the
12 entire exterior. Then, depending on the case, we usually start with the exterior
13 of the vehicle and begin using powders to dust; dust around and just like
14 you've seen on television, you know, and we take a piece of tape --

15 MR. KEPHART: Your Honor, Your Honor -- excuse me, sir.

16 Could we approach?

17 THE COURT: Counsel may approach.

18 (Whereupon a bench conference
19 was held)

20 THE COURT: Ladies and gentlemen, you're going to have a ten minute
21 stretch break.

22 During the recess you're admonished not to talk or converse
23 among yourselves or with anyone else on any subject connected with the trial.
24 And you're not to read, watch or listen to any report of or any commentary on
25

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1 the trial or any person connected with the trial by any medium of information,
2 including without limitation newspaper, television, radio and internet. And,
3 you are not to form or express any opinion on any subject connected with the
4 trial until the case is finally submitted to you. If in ten minutes you'd please be
5 in the hallway outside the rear door. You may step down and exit at this time.

6 (Whereupon the following proceedings were held

7 outside the presence of the jury)

8 THE COURT: The record shall reflect that the jury has exited the court-
9 room.

10 During this witness' testimony, right at the beginning of it, Juror
11 Number 1, who is Mr. Goldberg, sent a note to the bailiff, who provided it to
12 the Court that the Court's had counsel review when we just did this sidebar
13 asking if there's been a violation of the exclusionary rule, basically.

14 And the witness has indicated that he was not in the courtroom
15 yesterday.

16 MR. KOHN: Let's make sure. I mean, Mr. Schiro, were you in here at all
17 with us?

18 THE WITNESS: No, I was out in the hall but I was not -- never in the
19 courtroom. Never stepped foot in the courtroom.

20 THE COURT: Okay.

21 MR. KOHN: What do we do, just answer no to him?

22 THE COURT: I'll bring him in first --

23 MR. KOHN: Okay.

24 THE COURT: -- before we bring the rest of the group in.
25

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1 The other discussion at sidebar had to do with the notice of this
2 particular expert and his testimony. The State's objecting. You may state
3 your objection.

4 MR. KEPHART: Your Honor, we were noticed, formally noticed last
5 week during the middle of the trial. We were in our case-in-chief already, the
6 case had started. And they chose to, I guess, endorse Mr. Schiro (pronounces
7 name).

8 MR. KOHN: Schiro (pronounces name).

9 MR. KEPHART: Schiro as an expert witness in the field of biological
10 specimens involving the luminol test specifically. And there was a great deal
11 of discussion about that on the record with our objection at that time because
12 the defense had, I guess, mistakenly read the reports or weren't aware that
13 there was two tests done, luminol and phenolphthalin in this case. And with
14 that, they said they may need to call Mr. Schiro and we objected because the
15 statute requires that they notify us 21 days prior to trial.

16 They know that this case involved these two tests or at least the
17 luminol test. And it was my understanding from Mr. Kohn's representation last
18 week is that he was only aware of the luminol. Since then, I've spoken to Eric
19 Jorgenson. And Eric had indicated that he spoke to Mr. Kohn and that they
20 discussed the two tests. So, regardless of that. They didn't notice us properly
21 before and the Court made a decision to allow Mr. Schiro to testify, provided
22 that we were able to contact him and have a discussion with him.

23 Now, I -- that day, I made a phone call to the number that was on
24 his CV and I believe I reached an associate. I thought it might have been his
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1 wife or something. And she gave me his cell phone. And I called him and we
2 talked for a little while, while he was driving in his cell about the luminol.

3 THE COURT: While he was driving in his cell?

4 MR. KEPHART: He was driving, using his cell phone.

5 THE COURT: In his -- okay.

6 MR. KEPHART: Okay. And then we still weren't aware until, I guess
7 until yesterday that they were, in fact, be calling him and they did. And they
8 put him on today. And the first portion of the testimony had to do solely and
9 exclusively with the tests conducted by the lab, involving the luminol test and
10 the test conducted by Tom Wahl, the phenolphthalin test.

11 Then, they went into additional information involving fingerprints.
12 I don't know what else they're going to go into. And that's when I asked to
13 approach the bench because we were not noticed of his intention or their
14 intention to use him for anything other than the chemical tests involving the
15 luminol or the phenolphthalin.

16 And at this point in time I'm objecting to any further testimony by
17 this witness involving anything beyond the luminol or the phenolphthalin, as
18 that they did not notice us of that. We were not able to question him prior to
19 him taking the stand with regards to that. And that we are in trial now and
20 this is the end of the trial and, now, they're just trying to get additional
21 information that they're not entitled to by statute. And I'd ask the Court to
22 restrict his testimony to reflect just the luminol and phenolphthalin

23 MR. KOHN: Your Honor, we had this discussion last Monday when --
24 the day the trial started about this phenolphthalin, as soon as counsel made his
25

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004

1 opening statement. And I'll reiterate how I recall it.
2 MR. KEPHART: It was Wednesday.
3 MR. KOHN: Wednesday, when counsel made his opening statement.
4 I did know that luminol tests were made, those are in Miss
5 Renhard's report. I also know that Miss Renhard tested phenolphthalin and it
6 came up negative. She testified to that.
7 MR. KEPHART: Your Honor, on other things, not on this.
8 THE COURT: Not on the car?
9 MR. KEPHART: Not on these items here.
10 MR. KOHN: Right.
11 THE COURT: Okay.
12 MR. KEPHART: I just want to make sure it's clear.
13 MR. KOHN: Right.
14 But the only reference to phenolphthalin it was a negative result.
15 There was no reaction.
16 MR. KEPHART: Your Honor, not on these items, that's my concern.
17 THE COURT: From --
18 MR. KOHN: Counsel, can I just finish and then you can, you can --
19 MR. KEPHART: Well, I just want to make sure the record is clear, Your
20 Honor. That's what I'm trying to do.
21 THE COURT: From Miss Renhard's report?
22 MR. KOHN: I'll start over again.
23 THE COURT: Okay.
24 MR. KOHN: I found out on Wednesday that they were going to put in
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1 some positive phenolphthalin reports. My knowledge of the case at that time
2 was that Miss Renhard had run some items and found luminol to be positive.
3 She'd run some other items on phenolphthalin and the results were negative,
4 period. There is no other reference to phenolphthalin in any of the reports. I
5 went back and looked. And if counsel has different ones let me see them.
6 I spoke to Tom Wahl on at least two occasions in preparation for
7 trial back in November. He indicated that there were no tests that confirmed
8 blood. He never mentioned to me anything that he ran phenolphthalin. Nor, is
9 there anything in his reports that indicate it. Now, if I was dumb for not
10 asking every possible question, so be it. But he knew I was asking about
11 questions, questions about tests and he didn't volunteer.
12 Be that as it may, who knows who forgot what but until opening
13 statement I did not know there were any positive phenolphthalin tests. That's
14 when we got ahold of Mr. Schiro. You know; what's going on here? We
15 talked to him about this things. What is this? We called him. We let them
16 know about that.
17 He comes to town yesterday and we tell him about where our
18 case is. He has pointed out we told him about evidence that's come out.
19 About fingerprints, about the crime scene, about the shoes. About what they
20 did not do with the shoes.
21 He's going to testify to that now. We did not notice that. We
22 had no intention before to put that in our case-in-chief. But now that we've
23 talked to him, now that we've seen the evidence, now that the DA gave us a
24 clear theory of his case when he was cross-examining my client yesterday, we
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1 went back and interviewed him last night and we have now formed other areas
2 of inquiry.
3 I agree that this has come up today, but the fact is it's because of
4 the way Mr. Kephart cross-examined my client yesterday. That's the way
5 trials are. Trials are not scripts. At least I hope they're not.
6 THE COURT: You mean we don't know when people are going to have
7 teeth problems and stuff like that?
8 MR. KOHN: We don't, Your Honor.
9 Trials are human experience. Trials are fluid. They're not
10 stagnant. And things came up and now we want to ask some questions.
11 Now, a number of years ago the legislature in an effort to avoid
12 surprise and avoid people holding back from other had a reciprocal discovery
13 bill. They did not say that whenever something comes up in trial it cannot be
14 brought up. There are a number of remedies.
15 The least -- the most strict remedy, the least preferred remedy is
16 exclusion. We have a right under thousands of case laws, case law decisions
17 in this country and in this state under the Fifth Amendment, under due
18 process, under the Fourteenth Amendment, under the Nevada Constitution, to
19 get our case before the defense.
20 There may well be another witness that we're going to tell the
21 Court about after lunch, after we interview him and that's going to be a
22 surprise to the DA too. It's not based on anything other than what he brought
23 out in cross-examination yesterday. I'm telling the Court now we have not
24 interviewed the people, they're coming to see us and then we'll put that
25

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1 before. It wasn't an effort to hide anything from this Court or from the DA's
2 office. But as the trial progresses, things come out and we get to react to
3 them.
4 If we -- we did not plan on putting George Schiro in our case-in-
5 chief as of two weeks ago. But when all of a sudden the phenolphthalin
6 comes up, whoever screwed that up -- excuse me, whoever messed that up, if
7 it was me or Wahl, whatever happened, we had to react to it.
8 There is a discovery statute, it is statutory and it is there for a
9 good purpose. But there are many remedies. There are continuances. There's
10 a chance of the DA to put on rebuttal.
11 The crime lab has all the people available that have already
12 testified or could testify that -- and rebut Mr. Schiro.
13 MR. KEPHART: Schiro.
14 MR. KOHN: Thank you.
15 It is not a matter of all of a sudden something new coming out of
16 the woodwork. He is reacting to things that they have put forth. We didn't
17 hide the ball on anyone. I suspect -- I maintain something was hidden on me
18 on the phenolphthalin but, okay, I assume that was just a good faith mistake.
19 But we are reacting to the case. This is the way the case has
20 gone. We want to put on our defense. I believe that if the Court were to keep
21 him from testifying to the areas that we're going to now, the Court will be
22 denying Miss Lobato a fair trial and a right to put on her defense. And, the
23 right to attack the State's case.
24 That's what we're doing. We are not coming up with new
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005

1 evidence. We are attacking the State's case. We have a right to do that. And
2 when we didn't notice them 20 days in advance it's because of something
3 they happened -- because of the phenolphthalin not being disclosed.

4 And there would be, from that, other things came up in this trial
5 and we spoke with him last night after trial. He's from Louisiana. He didn't
6 get here till yesterday afternoon.

7 But, Your Honor, this was not in an effort to hide anything from
8 the DA's office. We need this to attack what the District Attorney has put
9 forward. We need to attack the State's case. And to not let us get into these
10 areas will deprive Miss Lobato of a fair trial under the Nevada and the US
11 Constitution.

12 MR. KEPHART: Your Honor, we asking that the Court recognizes that
13 both the State and the defendant are entitled to a fair trial.

14 Mr. Kohn stands here this morning and tells you that I wasn't
15 hiding anything. He didn't even tell us this morning that he intended to call
16 Mr. Schiro for the purposes beyond what he was -- we understood he was
17 coming in to testify for. He didn't even tell us that this morning, so we could
18 have brought that up to the Court before the jury was even in here. No, it
19 happened in the middle of his testimony. He asked -- they asked questions
20 beyond what they were allowed to bring him in here for in the first place.

21 The report -- they were given all the reports. They had the report
22 with regards to Tom Wahl's report. We addressed this in the Court, how Tom
23 Wahl talked about that there was a weak positive presumption test. And I
24 don't know what Mr. Kohn did if he -- mistakenly, but we weren't hiding
25

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1 nothing.

2 Those tests, every report, everything that's been testified to in
3 here has been given to them. So, with regards to the requirements, regards to
4 the -- what Mr. Schiro will be testifying to -- and we're going to ask the Court
5 to exclude that. There's two remedies. You can continue it. You can exclude
6 it. And in the middle of the trial, when they're giving it to us now, there is no
7 court in this jurisdiction or in the Supreme Court that's going to have a problem
8 with this Court doing that. It's within your discretion. It is something that
9 they knew. That they should have let us know about. And I'm asking the
10 Court to exclude it.

11 It's beyond what happened last week. And the way that came
12 up, Your Honor, they didn't hear it through opening statement, they heard it
13 because what I was doing was asking the Court permission, before I
14 proceeded, to show photos to the jury. And there was three photos that dealt
15 with the luminol test, that's when they found -- we had a long discussion
16 about it at that time. Then they came back later and give us notice that they
17 intended to call him.

18 And, so, at this point in time, Your Honor, I believe that the Court
19 has every right under the statute and the State certainly has every right to ask
20 that you exclude any further testimony. Limit his testimony to what he's
21 already testified to.

22 We don't even know what he's going to testify in the future, but I
23 knew that he started talking about fingerprints.

24 MR. KOHN: Your Honor, may I speak?
25

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1 THE COURT: As we were at the onset of trial, we'd completed the jury
2 selection and were going forward, early on, when the presumptive blood
3 testing issues arose. The Court granted the defense the ability to call Mr.
4 Schiro with regard to expert testimony in that area.

5 The last question that was posed of him before counsel asked to
6 approach and objected concerned latent fingerprint development. That was
7 clearly beyond the scope. Also, crime scene and shoes would be beyond the
8 scope.

9 I think it is of utmost importance that the trial be fair to both
10 sides. And this is a very, very late disclosure. The Court had asked for an
11 offer of proof. The Court does not know if the State still has available to it any
12 of the experts in those areas to be considered to be recalled for possible
13 rebuttal. Nor, do I know what counsel is intending to ask Mr. Schiro in those
14 areas.

15 MR. KOHN: Shall we tell you?

16 THE COURT: So, I would ask for that offer of proof.

17 MR. KOHN: Your Honor, one of the things that came up yesterday with
18 the cross-examination and with other cross that the State has done, is the
19 State is implying that somehow fingerprints of our client were removed from
20 her car. They were trying to hide her fingerprints in the car. There's some
21 discussion about that, that they found Shadi, but they did not find our client.
22 And I think they are trying to show some type of nefarious purpose in that.
23 And I'm sure that's part of argument.

24 I believe Mr. Schiro can talk about fingerprints. How some people
25

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1 have more oils and liquids on their hands and why they would get the
2 fingerprints. So, we can go into that. That's critical.

3 There is some things that the pathologist has talked about, about
4 the blood spatter that would require Mr. Schiro to talk about the blood in the
5 scene and on the walls, especially in light of Mr. Kephart's questions over and
6 over and over again about my client using a baseball bat on Duran Bailey. He
7 went through that at least twice, I think three times in his cross-examination of
8 my client yesterday. He kept talking about the baseball bat.

9 Mr. Schiro can talk about blood spatter and how that would affect
10 it. It's critical to our case because he's -- not only do I believe he's going to
11 argue it and I in good faith believe he's going to argue it, he argued it
12 yesterday in front of the jury in the form of questions.

13 And, the footprints. The fact is they didn't even bring it up. I
14 mean now we're at a point where I hate to --

15 THE COURT: The footprints weren't brought up?

16 MR. KOHN: By the government. We brought it up.

17 MR. KEPHART: No, Your Honor, we had a witness testify to that. He
18 came in here and --

19 MR. KOHN: Your Honor --

20 MR. KEPHART: I'm sorry, go ahead.

21 MR. KOHN: -- I'm not done yet.

22 I mean that's the problem. I have to give away my whole
23 argument. But we can argue this in front of the jury. But the fact of the
24 matter is is the government did not put on evidence of the footprints and did
25

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1 not do anything about it, we did. And I think Mr. Schiro can talk about what
2 standard procedure would be for investigating a crime scene and what could
3 have been done through that.

4 And they put Geller on to say they didn't do anything and how the
5 FBI is. And he could talk about the FBI lab because our expert -- and they've
6 been noticed about Mr. Bodziak but we agreed to that. But he's not available.
7 He's in Florida. This man is here. Those are things that are critical to the
8 defense based on things that have either come out in the government's case or
9 in their cross-examination in our case. And we have a right to put forth that
10 evidence. And, other things that might be expected to be found at the scene
11 based on what they've put forth.

12 Your Honor, we are reacting to the government's case. We have
13 a right to do that. We cannot anticipate everything that they're going to do.

14 THE COURT: You couldn't anticipate that there was blood splatter at
15 this scene?

16 MR. KOHN: Not the way he described it.

17 THE COURT: You could not anticipate that there were no fingerprints of
18 your client found in her car? And you couldn't anticipate that they weren't
19 going to do anything about the footprints, when you hired an expert to do it
20 yourself?

21 MR. KOHN: It's the way things come out in trial, Your Honor. And they
22 have a right to call other witness. But, we are being denied a right to put on
23 our case. There are other remedies other than exclusion. This is the worst
24 remedy.

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1 THE COURT: I don't see that any of this is a surprise to the defense. I
2 see that this witness at this late date being called to testify into these areas is
3 a surprise to the prosecution.

4 My question to the prosecution is in light of the offer of proof that
5 Mr. Kohn has just made, do you have at your disposal that are still subject to
6 subpoena, experts that can be recalled in terms of latent fingerprint develop-
7 ment, blood splatter and footprints?

8 MR. KEPHART: As far as I know when they completed their testimony
9 they were released from testimony. I wouldn't know because I have to go
10 back and see if I can locate them and have them come in.

11 I know that there was a lot of testimony by the defense in cross-
12 examination with regards to the coroner involving potential blood splatter.
13 There was testimony already from Joe Geller with regards to the footprints.
14 And, matter of fact, the defense had some photos on that. And there was
15 testimony to Tom Thowsen about the footprints and where he explained that
16 he knew the defense had it sized.

17 It was right, we knew that they had it sized. That's not an issue
18 to us. And the fingerprints I -- that would be Joe Geller. I don't know that -- I
19 mean they testified last week, there would be -- I would think that we would
20 know what their intentions were, at least after their testimony and not at the
21 last minute. So, I can't tell the Court that, I don't know whether or not.

22 I would say that we'd have to go subpoena them again and
23 contact them to come back in and that would probably cause a continuance for
24 us to talk to them and determine what they're going to -- and I don't know -- I

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1 know what they're saying he's going to say, but we don't have a report from
2 him. We don't have anything from this man to tell us what he'd be saying
3 with regards to our contacting of our other experts to question them, whether
4 or not they'd even have anything to rebut to him. But that's our problem.

5 THE COURT: Now, that I'm thinking back on the footwear issue, it
6 seems that the testimony was that Metro would have had to send it out to the
7 FBI to get done? And --

8 MR. KEPHART: Well, no, no, Your Honor. Joe Geller testified that he
9 examined all the known footwear prints that he had --

10 THE COURT: Uh-huh.

11 MR. KEPHART: -- to what was at the scene, including the tire tracks and
12 found that the defendant's didn't match. And then all the footwear that they
13 had didn't match it.

14 THE COURT: Uh-huh.

15 MR. KEPHART: The concern the defendant had was that you didn't have
16 it sized.

17 THE COURT: Uh-huh.

18 MR. KEPHART: And I mean he said it wasn't her foot. He said that. It
19 wasn't the footwear that we had from her. So, I mean, to get it sized, I don't
20 know, I guess that's just one additional thing that could be done. And that's
21 where he said, I couldn't have sized it, I would have had to send it out to the
22 FBI for that. And then Tom Thowsens, Detective Thowsens was aware of
23 that. And that's where he testified that he knew that the defense had already
24 had that done. So, that's the information with regards to the FBI.

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1 THE COURT: In light of that it seems that what's already been
2 presented at trial is that the photographs were taken at the crime scene. That
3 the bloody footprints were documented and that that allowed the defense to
4 have them sized. And that the law enforcement prosecution side did not have
5 that done. I think that's already been put forth to the jury. Being that there
6 isn't an expert readily available to the prosecution to get into that area, I'm
7 going to sustain the objection on the footprint testimony by this witness.

8 With regard to the latent fingerprint and the blood spatter, I'm
9 going to ask that over the break, that we're going to have a pretty long break
10 this afternoon, the State contact the crime lab and see if the witnesses that
11 you had subpoenaed or any additional rebuttal expert witnesses in those two
12 areas would be available to you or not and I'll reserve ruling on those two
13 areas until after we return.

14 MR. KOHN: May I confer with counsel, make sure there's nothing I
15 missed because this is not my witness.

16 MR. KEPHART: Your Honor, one concern that the State has is that the
17 fact that they'd never noticed of a crime scene expert that they're intending to
18 use this man for now, very well could have altered our position on what we
19 chose to introduce. That's why they'd have to notify us. That's the purpose
20 of the statute. So, I have to tell you that regardless of what the experts say
21 when we talk to them, I'm going to ask the Court to continue this one week.
22 And that'll give me an opportunity to phantom what Mr. Schiro --

23 THE COURT: I can't do that. I've already scheduled another trial to start
24 Monday morning at 10:00 and we've not instructed this jury --

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1 MR. KEPHART: Right.
2 THE COURT: -- that they would be staying here beyond Friday this
3 week. I can't try two cases at once.
4 MR. KEPHART: Oh, I understand that, Your Honor. Then I need to go --
5 THE COURT: And I'm set for trial five weeks in a row. I have a trial
6 every week.
7 MR. KEPHART: Well, that's where we run into the problem where I
8 believe that --
9 THE COURT: I think it would be more problematic to sever it and bring it
10 back six weeks from now to resume. Who knows how many of the jurors
11 we'd still have available.
12 MR. KEPHART: Well, that's why we're to be noticed, so we won't run
13 into these problems, because it takes into consideration the Court's schedules
14 as well. Thank you, Your Honor.
15 THE COURT: You're welcome.
16 MR. KOHN: Your Honor, we did not receive a report from Mr. Schiro. If
17 we would have, we would have provided it. And we have no duty in the law
18 to get one.
19 What we said was George Schiro, as an expert in forensic
20 science, it is anticipated that George Schiro will testify regarding the collection,
21 preservation and testing of evidence from the crime scene.
22 MR. KEPHART: That may be what it says on the motion, Your Honor.
23 But the argument and the reason it was admitted we've addressed.
24 MR. KOHN: And if --
25

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1 THE COURT: Well, that would be very sneaky. That wouldn't have
2 been your intention.
3 MR. KOHN: No, no. But I mean we left it broad because we didn't
4 know what we were going to hear from him.
5 And the fact is, is counsel saying he would have put on difference
6 evidence or --
7 THE COURT: That's what he's saying. He said he may have presented
8 things differently or used --
9 MR. KEPHART: I mean we --
10 MR. KOHN: I will put all the evidence on.
11 THE COURT: -- different witnesses. His arguments may have been
12 different.
13 MS. DIGIACOMO: Your Honor --
14 MR. KOHN: Your Honor, will he be allowed to talk about the crime
15 scene and what he would be expected to find in an area like this with this kind
16 of beating?
17 MR. KEPHART: Expected to find?
18 MR. KOHN: You can talk to him. Talk to him.
19 THE COURT: No. I think the issue is not other crime scenes, the issue
20 is this one. I think that would be much more potentially confusing and
21 misleading to the jury than probative.
22 We're going to go off the record, as he has a phone call coming
23 in.
24 (Whereupon the courtroom was at ease)
25

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1 THE COURT: We were off the record.
2 Mr. Kohn has asked if the State would -- they would pass the
3 witness on the presumptive blood testing area to be cross-examined at this
4 time and then we'll come back after the break and see if -- see what's
5 happening with your witnesses and if he's going to give any further testimony.
6 MR. KEPHART: Right. And I was addressing that, is that I would prefer
7 not to do that because if you'll recall I had to pose an objection right at the
8 portion of his testimony he's talking about fingerprints. I approached the
9 bench. And now we've had this discussion. I don't want to leave with the
10 jury some false belief that I'm trying to hide something from them as well.
11 This is something that they knew about it. They shouldn't have
12 done it in this manner. And, now, we're in a point, we're put up against the
13 wall here, Your Honor. We're backed up against the wall. They're back-
14 dooring this evidence in.
15 THE COURT: The thing is we've had the jury sitting out there for half an
16 hour now.
17 MR. KEPHART: Yeah.
18 THE COURT: Do you want them to waste their whole morning or do you
19 want to take 15 minutes and do a cross-examination on this section? I mean
20 what's happens, happened, we can't undo it.
21 MR. KEPHART: I'll do the cross.
22 THE COURT: All right. It will be limited to this one area and we'll
23 reserve ruling till later in the day on the fingerprint and blood splatter areas.
24 Mr. Bailiff if you would ask just Juror Number 1, Mr. Goldberg, to
25

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1 return to the courtroom at this time, please.
2 THE BAILIFF: Yes, I will.
3 THE COURT: The record shall reflect that Mr. Goldberg is in the
4 courtroom and he may return to his seat.
5 Mr. Goldberg, Mr. Schiro, who is on the witness stand flew into
6 town from out of state yesterday and was in the hallway but never came into
7 the courtroom.
8 This is being advised at the request of counsel and in response to
9 Mr. Goldberg's note, which can be marked as the Court's next in number.
10 If the bailiff would have the remaining jurors now enter.
11 MR. KOHN: Your Honor, can we approach real quick?
12 THE COURT: Of course.
13 (Whereupon a bench conference was held
14 * * * * *)
15 (Whereupon the following proceedings were held
16 in the presence of the jury)
17 THE COURT: You may be seated as you return to your seats.
18 State may cross.
19 MR. KEPHART: Thank you, Your Honor.
20 CROSS-EXAMINATION
21 BY MR. KEPHART:
22 Q Mr. Schiro, do you agree with me that both luminol and
23 phenolphthalin are both presumptive tests for the detection of blood?
24 A Yes.
25

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008

1 Q And it's your testimony here that the Hema Trace test is more
2 sensitive than the phenolphthalin test?

3 A Yes, the Hema Trace in our experiments at the Louisiana State
4 Police Crime Lab, we found the Hema Trace test to be more sensitive than the
5 phenolphthalin.

6 Q And that's in your lab?

7 A That's correct.

8 Q That's not necessarily consistent with the literature involving both
9 -- involving phenolphthalin and Hema Trace, is it?

10 A I'm not aware of any specific literature to which you're referring.

11 Q Okay. And both phenolphthalin and luminol, both of them have
12 false positives --

13 A Yes.

14 Q -- you'd agree?

15 A Yes.

16 Q And both of them have some common false positives, is that
17 correct?

18 A Yes, I believe that the false positives are actually common to both.
19 But I believe the luminol is more sensitive to those false positives than
20 phenolphthalin.

21 Q What my question was is that both of them have common
22 materials that cause a false positive?

23 A Yes.

24 Q And one of those is copper salts?

25

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1 A Yes.

2 Q Okay. And just so I'm clear here, a human stool sample or a
3 human stool, human urine or human vomit could cause a positive reaction in
4 both luminol or phenolphthalin, only if there's blood in those, that correct?

5 A Well, if there's blood and there's no other type of like vegetable
6 material or anything that may be mixed in there.

7 Q And the way that you get blood in a stool or urine or vomit is if
8 you have some kind of maybe medical problem?

9 A That's one possibility, yes.

10 Q And are you familiar with any of the chemists here in our lab?

11 A Yes.

12 Q Are you familiar with Tom Wahl?

13 A Yes.

14 Q Would you agree that he is a qualified expert in your field?

15 A Yes.

16 Q Before you came here today, did you prepare any report that the
17 State could look at --

18 A No.

19 Q -- that was involving your testimony?

20 A No.

21 Q Now, you indicated that the first test that you do is a visual test?

22 A Yes.

23 Q And, oftentimes you may not see certain things visually, that's
24 why you use the luminol?

25

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1 A Well, in the papers that -- I've written a paper on collection and
2 preservation of blood evidence and my recommendation is luminol is used as a
3 absolute last resort.

4 Q My question to you, sir, was is when you can't see it visually,
5 would you use luminol?

6 A It would be case dependent but I have used it before when I
7 haven't been able to visualize anything.

8 Q And you also said that luminol has a shelf life?

9 A That's correct.

10 Q Okay. And before you use luminol, however, there's a way of
11 mixing it, is that correct, that you would use?

12 A That's correct.

13 Q Okay. And when you mix it, you mix it for purposes of actually
14 conducting the test?

15 A That's correct.

16 Q Okay. Then if you set it on the shelf for a little while, then it
17 wears out, is that right?

18 A Well, after about 20 minutes it's going to start automatically
19 reacting.

20 Q Okay. And a qualified crime scene analyst you would hope,
21 because you deal with this, you would hope that that qualified crime scene
22 analyst would know that it may have a problem after about 20 minutes?

23 A I would hope so.

24 Q Okay. And that's something that they're trained or at least in
25

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1 your understanding, in your experience, that's something that they're trained
2 in?

3 A Well, it depends on who trains them.

4 Q Okay.

5 A And, you know, what research they've done.

6 Q But that would be something that you would train?

7 A Yes.

8 Q And you would tell them, hey, crime scene analyst when you do
9 this, you got 20 minutes to get it done?

10 A Yes.

11 Q Okay. And there's nothing in this case that you have learned that
12 would suggest that our crime scene analysts didn't follow their training and
13 experience how to use luminol, is there?

14 A No.

15 Q So, as far as you know it was done properly?

16 A Yes.

17 Q And the photos that you looked at, you agree -- Exhibit Number
18 112 -- appears to be a positive reaction done by luminol?

19 A Yes.

20 Q Because you've seen a lot of them?

21 A Yes.

22 Q Would you agree --

23 MR. KOHN: Can I see that picture, counsel?

24 THE COURT: Slipcover.

25

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1 MR. KOHN: Oh, thanks. Got it. I know.
2 Q (By Mr. Kephart) Exhibit Number 113 now, you'd agree that
3 that's a positive reaction by luminol?
4 A Yes.
5 Q And you would agree that Exhibit Number 114, these marks right
6 here (indicating) are a positive reaction for luminol?
7 A Yes.
8 Q And the -- you said there's certain types of substances that are
9 harder to destroy the blood sample from, is that right?
10 A I don't understand what --
11 Q Well, if you put blood on glass --
12 A Uh-huh.
13 Q -- you can wipe it off a lot easier than you put it in carpet,
14 correct?
15 A Yes.
16 Q Because of the crevices and all that, that you said?
17 A Yes.
18 Q Okay. Would that possibly be similar to a hard surface, like plastic
19 surface versus carpet?
20 A Just about any non porous surface it would probably be easier to
21 clean, again, provided it's not a textured, real texturey (sic) porous, non porous
22 surface.
23 Q You would agree that the seat in that car or what you saw there is
24 a porous surface?
25

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1 A Yes.
2 Q And that the door panel is a porous surface?
3 A Yes.
4 Q And even the seat cover is a porous surface?
5 A Yes.
6 Q Okay. And you also said that there's -- you said it's very difficult
7 to clean up but if you know how to do it, would you agree with me if you
8 know what you need to clean up, you could possibly get it done?
9 A I know how to do it and I can't get bloodstains out at home.
10 Q Okay. Not at all? Never at all?
11 A Never.
12 Q Okay. Now, you said though you can't get bloodstains out. My
13 question to you is can you get them out to beyond the confirmatory test?
14 A Not the Hema Trace test. I wouldn't think you could. Again, if
15 you've --
16 Q Okay. Now, I'm not asking you to think.
17 A Okay.
18 Q Okay. Can you get them out?
19 A Yes, you could. Yes.
20 Q Okay. So, if you knew that this car had blood in the car and then
21 the experts come back and say, hey, here's at least a presumptive test,
22 wouldn't you agree that that presumptive test was at least accurate as it's set
23 up to be a presumptive test for blood?
24 A As -- yes.
25

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1 Q Okay. And it's your position from where you're from in Louisiana,
2 am I right?
3 A Yes.
4 Q Okay. That if you don't get a confirmatory test, your answer is
5 that it's not blood?
6 A It's not human blood.
7 Q It's not human blood?
8 A Correct.
9 Q Okay. So, you don't know -- that may be animal blood?
10 A It's a possibility.
11 Q So, you're saying it's not human blood because you don't get the
12 confirmatory test; however, you can clean it to the point where you wouldn't
13 get the confirmatory test?
14 A You could but you wouldn't get the phenolphthalin test positive, in
15 my opinion.
16 Q Okay. So, if another expert says that the phenolphthalin test is --
17 it goes luminol most sensitive, phenolphthalin next, the Hema Trace and then
18 the DNA, it's your testimony that that expert would be incorrect?
19 A I would disagree with his opinion.
20 Q Okay. Tom Wahl testified in this trial that he conducted the
21 confirmatory test and would not say that it's blood. But he also said he would
22 not say it's not blood. That's not the opinion of -- the standard that you use
23 from where you're at in Louisiana, is that correct?
24 A As I said, it's not human blood is where my stand is.
25

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1 Q Okay. So, the photograph -- if you knew that an individual had
2 blood on her hand and drove this car (indicating), you would still say simply
3 because there's no confirmatory test that it's not human blood?
4 A That's correct.
5 Q But you still can't say that there's no blood in that car, could you?
6 A No, I couldn't.
7 Q No human blood in that car?
8 A No human blood was detected in that car in my opinion.
9 Q Okay. Just based on these photos and the two tests and your
10 standard of the confirmatory test --
11 A That's correct.
12 Q -- which you believe is the Hema Trace is more sensitive than the
13 phenolphthalin?
14 A Well, our experiments have shown that in our lab.
15 Q In your lab?
16 A Correct.
17 Q Okay. But you're not aware of any literature that says otherwise?
18 A I'm not. No.
19 MR. KEPHART: Nothing further, Your Honor.
20 MR. KOHN: Should we take our break at this time, Your Honor?
21 THE COURT: That would be fine.
22 You may step down from the stand.
23 THE WITNESS: Thank you.
24 MR. KOHN: We have some redirect but -- so.
25

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1 THE COURT: You'll reserve it till when we return?

2 MR. KOHN: Yes, Your Honor.

3 THE COURT: We're going to resume at 3:30?

4 MR. KOHN: I thought so, yes.

5 THE COURT: Ladies and gentlemen, during this late lunch recess you're
6 admonished not to talk or converse among yourselves or with anyone else on
7 any subject connected with the trial. You are not to read, watch or listen to
8 any report of or any commentary on the trial or any person connected with the
9 trial by any medium of information, including without limitation newspaper,
10 television, radio and internet. And, you are not to form or express any opinion
11 on any subject connected with the trial until the case is finally submitted to
12 you. If at 3:30 you'd please be available in the hallway outside the rear door.
13 We'll be in recess till that time.

14 (Whereupon the luncheon recess was taken
15 at the hour of 1:00 p.m.)

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1 THURSDAY, MAY 16, 2002; 3:25 p.m.

2
3 (Whereupon the following proceedings were held
4 outside the presence of the jury)

5 THE COURT: The record shall reflect that we're all re-assembled and
6 accounted for, apparently we were able to get everything done over this break.
7 We're outside the presence of the jury in State versus Lobato,
8 C177394.

9 Mr. Kephart, what did you find out?

10 MR. KEPHART: Well, Your Honor, I want -- first of all, before I address
11 that, I just want to make another record that like defense counsel throughout
12 this trial, they once again served on me another notice of alibi. Supplemental
13 notice of alibi, naming a Robert McCarty and a Juana McCarty, apparently that
14 is a neighbor of the defendant. I just received that when I walked back to my
15 office, it was on my desk.

16 What I found out with regards to the experts is that it's my under-
17 standing that many, many months ago Phil Kohn or somebody who
18 represented himself as the attorney representing Blaise Lobato in this case,
19 contacted the Las Vegas Metropolitan Police Department Criminalistic Bureau
20 and specifically talked to Debbie McCracken about blood spatter information on
21 this case. There was questions asked of her. She indicated to me that
22 because she was familiar with -- from the questions asked then, that she'd
23 probably be the one to end up have to work the case up, but there was
24 nothing ever worked up at that time. She said it would take, pushing it, at
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1 least two weeks to get that done.

2 She also pointed out to me -- I sent a copy of Mr. Schiro's CV to
3 her because she had never heard of him before and she pointed out to me that
4 there's nothing in the CV, except for one aspect in 1996 that he went to a
5 Bloodstain Pattern Analysis Crime Scene Documentation course and that she
6 noticed through her information that he's not a member of the International
7 Association for Identification. He's not a member of the International
8 Association of Bloodstain Pattern Analysis. There's nothing to suggest that
9 he's ever qualified, other than his statement today, after the Court accepted
10 him only as a forensic biologist, forensic biology expert, that he's been
11 qualified as an expert in this field before.

12 And I tried to contact Joe Geller, who was the expert that we
13 used in this case and when I called he was out for lunch and he never called
14 me back by the time I came back down to Court. So, I don't know where he's
15 at with that.

16 But I did notice also in his CV, Mr. Schiro's CV that he provided to
17 us, that there's nothing in this CV that suggests that he's an expert in
18 fingerprint analysis. Nothing to suggest that at all.

19 What the CV is talking about is his forensic DNA analysis, DNA
20 workshop, DNA typing. His forensic biology situation. And I would suggest
21 that's because he only -- if he has other information, it was simply because he
22 was preparing to testify in the field of forensic biology. So, at this point in
23 time that's all I can offer the Court.

24 MR. KOHN: May I answer that?

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1 THE COURT: So, Mr. Geller is in town, he was just out to lunch, so you
2 weren't able to speak with him?

3 MR. KEPHART: Right.

4 THE COURT: Okay.

5 Yes, Mr. Kohn.

6 MR. KOHN: Your Honor, in terms of Debra McCracken, she is clearly
7 right that I contacted her many, many months ago in preparation for trial the
8 first time. I asked her about it. She told me that she can only do a work-up if
9 requested by the detectives, which is an amazing coincidence because that's
10 what Mr. Geller told me in terms of sending the footprints to the FBI lab. It
11 has to come through the detectives.

12 Tom Thowsen and I have talked about that. I questioned him
13 about it at the preliminary hearing. But did I talk to Miss McCracken?
14 Absolutely. Did I have access to have her do the work for me? Clearly, I did
15 not. But am I the person she talked to? No doubt about it. I did talk to her.
16 She did return my phone calls. She just couldn't do the work-up on my
17 request.

18 And the problem is I'm not going to go to the DA and ask them
19 will you do it my way? Because they're not going to do it my way, they're
20 going to do it the way they need it for their own case. So, in terms of was
21 Miss McCracken contacted? Absolutely. I didn't know they had a blood
22 spatter, that's how I first found out about it. But, yes, absolutely, I am the
23 person to whom she spoke.

24 In terms of the expert's qualification, that's either for the Court to
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1 decide or for the trier of fact. And if you want to bring him back to see if he
2 really has the qualifications to discuss this area, I'm certainly open to that. But
3 Miss McCracken, I hope she wasn't implying that someone was lying to her
4 about who Phil Kohn was. And I hope she wasn't lying that, yes, she prepared
5 a report. Because she did not without the request of the investigating
6 detective, which was Tom Thowsen. And that never came.

7 MR. KEPHART: Your Honor, if I misspoke I -- Debra McCracken told me
8 she did not prepare a report, if that's -- I don't think I said that. But what I'm
9 saying if she needs to and is required to, it'd be at least two weeks pushing it
10 to be able to do that.

11 The other thing is is that Mr. Kohn new about it months ago. And
12 then we get it sprung on us right now with Mr. Schiro. Right now. And that's
13 our complaint. That's why.

14 We have to specifically, specifically notice a blood spatter expert
15 in order to use them. We can't notice a forensic expert or anything. We have
16 to -- the Court's here in the Eighth Judicial District require the State to
17 specifically notice that and that didn't --

18 THE COURT: When I asked for the offer of proof on the blood spatter, I
19 didn't get a whole lot of specifics, other than kind of a general statement that
20 concerned blood spatter and baseball bat.

21 And it appears that it's not -- well, it was initially represented that
22 this was a new issue that was raised for the first time in light of the State's
23 cross-examination of Miss Lobato. It now appears that that's not correct.
24 That this would not be timely noticed. And, as it would take two weeks to
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1 develop a response, the Court will sustain the objection as to the blood
2 spatter.

3 The Court will allow the questioning on the lack of the defendant's
4 fingerprints being found in the Fiero.

5 MR. KOHN: May I say one thing?

6 THE COURT: In anticipation that Mr. Geller may be available to the State
7 as a rebuttal witness, if they so choose to pursue that.

8 MR. KOHN: Your Honor, just -- all that my point was making was that
9 Metro knew long ago that I was concerned about blood spatter. So, it's
10 wasn't like they were not on notice of my concern, they just did nothing about
11 it. But the Court's ruled and I do not mean to argue with the Court's ruling. I
12 just want it clear that they knew my concern back in -- did she tell you when I
13 called?

14 MR. KEPHART: She said months and months ago.

15 THE COURT: And like I said, it's not something that just came to light
16 due to the cross-examination of Miss Lobato then.

17 MR. KOHN: Okay. But --

18 THE COURT: Would the bailiff please bring the jury in?

19 MR. KOHN: A couple of things, really quickly, Your Honor. It's not very
20 quickly.

21 Counsel pointed out that we did send them and we are prepared
22 to file but it's the wrong spelling of other witnesses that came to light after the
23 cross-examination yesterday. It happens to be the next door neighbor --

24 THE COURT: We don't need to address the supplemental alibi right now.
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1 We have the jury waiting and we have the expert in from out of state and we'll
2 get back to that later.

3 MS. DiGIACOMO: Your Honor, just while he's getting the jury this is real
4 briefly.

5 I would just like to bring to the Court's attention, you know my
6 husband, Marc DiGiacomo, he left the courtroom earlier. He overheard
7 witnesses or the Lobatos outside talking loudly and the jury was nearby. I'm
8 not exactly sure what he overheard.

9 When I came back into the courthouse from my errand, while we
10 were on our break, I specifically overheard this person (indicating) talking with
11 the Lobatos, complaining loudly about the jury and how they were looking at
12 him or giving him dirty looks. And I think that all of these people need to be
13 admonished not to talk about the case, especially when they're -- could be
14 within the earshot of the jury.

15 THE COURT: The record shall reflect that when Miss DiGiacomo said
16 this person, she pointed to a female who's been in the audience through most
17 of the trial, who's been shaking her head to the negative in response to that
18 statement.

19 I would ask defendant's counsel to please reiterate that to these
20 individuals, that they need to keep their voices down in the hallway, please.

21 MR. KOHN: I will do that, Your Honor.

22 THE COURT: Thank you.

23 (Whereupon the following proceedings were held
24 in the presence of the jury)
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1 THE COURT: The record shall reflect that the bailiff is returning the jury
2 to the courtroom and as they arrive at their seats they may be seated.

3 MR. KOHN: Will the Court give me a rest --

4 THE COURT: The record shall reflect that Miss DiGiacomo, Mr. Kephart,
5 Mr. Kohn, Miss Lobato and Miss Navarro have been here since we just
6 returned from a break.

7 Do you wish to step to the hall, speak to your witness, he's going
8 to be recalled?

9 MS. NAVARRO: If I may for just one minute.

10 THE COURT: The record shall reflect that Mr. Schiro is returning to the
11 courtroom. If you would please be seated. And the Court reminds you that
12 you remain under oath. Miss Navarro may proceed.

13 MS. NAVARRO: Thank you, Judge.

14 REDIRECT EXAMINATION

15 BY MS. NAVARRO:

16 Q Mr. Schiro, before our break we were talking about latent finger-
17 print development. Could you please tell us what your education experience is
18 in that field?

19 A I've taken several training classes in latent fingerprint develop-
20 ment. I've been trained by people in -- within the labs that I've worked in on
21 latent fingerprint development.

22 I've also processed probably several hundred vehicles as far as
23 processing them for latent fingerprints, along with crime scenes and evidence
24 in the lab.
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1 Q Have you ever testified before as an expert on latent fingerprint
2 development?
3 A Yes.
4 Q And where was that?
5 A In Louisiana.
6 MS. NAVARRO: Your Honor, at this point I would request that he be
7 certified as an expert to testify in this case about latent fingerprint
8 development.
9 THE COURT: State reserves the prior --
10 MR. KEPHART: Yes.
11 THE COURT: -- objections?
12 MR. KEPHART: Yes, Your Honor.
13 THE COURT: Overruled.
14 MR. KEPHART: Thank you.
15 THE COURT: Motion granted.
16 MS. NAVARRO: Thank you, Judge.
17 Mr. Schiro, what have you reviewed in this case in regards to the
18 fingerprint analysis that was performed?
19 THE WITNESS: Some photographs and some reports.
20 Q (By Ms. Navarro) And could you please explain to the jury what is
21 done when latent fingerprints are processed?
22 A Well, whenever a vehicle is processed, for example, first thing that
23 we do is we'll go ahead and we'll photograph the exterior of the vehicle to
24 make sure we document it prior to it being fingerprinted.
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1 Then we'll go ahead and we'll take some powder and we'll dust
2 for fingerprints along the exterior of the vehicle.
3 Once we've got -- and what we'll do once we see prints, we'll go
4 ahead and we'll take some print lifting tape, just like you've seen on TV and
5 we'll go ahead and we'll lift the prints and we'll collect those and set those
6 aside and submit those to a bureau of identification.
7 After we finish processing the exterior of the vehicle, we'll move
8 to the interior of the vehicle and begin processing the different surfaces in the
9 same manner. We'd begin by photographing it, then we'd go ahead and dust
10 the vehicle for prints.
11 Q And do you always find latent prints?
12 A Not always.
13 Q Why not?
14 A There are different factors as to whether fingerprints will be
15 found. Whenever we're looking for fingerprints, whether it's a house or a car,
16 we take a shotgun approach, basically, we just hit it with the powder and see
17 if anything turns up.
18 Several factors are going to determine whether or not we find any
19 fingerprints. One, is going to be the individual's physiology and behavior.
20 Some people who may be clean a lot, maybe wash their hands a lot, aren't
21 going to have as many oils or sweat residues that are going to leave behind a --
22 that will leave behind a fingerprint for us to find.
23 Also, the type of surface. Certain rough surfaces we won't be
24 able to get fingerprints from. Also, environmental factors can play into
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1 whether or not we find fingerprints. For example, being from Louisiana where
2 we have a lot of swamps and it's really humid and it rains a lot, we have a
3 high humidity content so the fingerprint residues -- around 97 percent of finger-
4 print residue is going to be water. And if you live in a dry environment it's
5 more than likely that that water will evaporate out from the fingerprint. So,
6 again, there are a number of factors that are going to determine whether or not
7 we'll be able to get any usable prints from an object.
8 Q Now, you also used a different term, you said usable prints. Is
9 that a unique term?
10 A No, some prints we may dust the surface and get maybe just a
11 little partial print, not enough for an identification or anything and, you know, it
12 may not be lifted. Or, we may have some smudges. Or, we may have what
13 we call overlaid prints where a number of people have touched the surface and
14 some of the prints obliterate the other prints.
15 Q So, it's possible that there are prints on a specific surface but that
16 they're just not usable when they're lifted?
17 A That's correct. Or, they may not have even been lifted because
18 the person doing the collecting may not have felt that they were usable.
19 Q So, how would you explain prints not being on one -- for example,
20 if I owned a car or someone owns a car and their prints not being on their own
21 car? How would you explain that?
22 A Well, again, with all the factors you're dealing with, in particular
23 the interiors of vehicles, there aren't a lot of smooth surfaces on the interior of
24 the vehicles. You have the windows and the mirror. A lot of the stick shifts
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1 and sometimes the steering wheels are textured or they may be cracked. They
2 may not take powder very well whenever we try and dust them. So, again,
3 there could be any number of reasons why you wouldn't get any prints from a
4 person's vehicle.
5 Q And you also testified that the environment might have something
6 to do with it, the heat --
7 A Yes.
8 Q -- the lack of humidity?
9 A Yes, this being a drier environment all the prints may tend to
10 evaporate more readily if it's just in, again, if it's just a print where someone
11 has just touched the surface and their natural sweat and oils would be
12 deposited.
13 Q So, if a vehicle is sitting out in the sun not in a garage or under a
14 carport but under the sun, say a July in Nevada, a July sun, could that play a
15 part in whether or not there were latent prints that were recovered from a
16 vehicle?
17 A Yes.
18 Q When you process a vehicle for prints do you usually find prints
19 more likely on the inside or outside of the vehicle?
20 A Usually the bulk of where I find prints is usually on the exterior of
21 the vehicle, provided it hasn't rained or anything because the surfaces -- you
22 have a lot more smooth surfaces on the exterior of the vehicle typically.
23 Q And how many cases, approximately, have you served as a
24 consultant in the forensic science field?
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1 A I've worked approximately 2,100 cases.
2 Q And, of those, how many times have you testified?
3 A I've testified in a little over 105 cases.
4 Q And of those 105 cases that you've testified in how many of
5 those were for the defense?
6 A This is the fourth time I've been called as a defense witness.
7 Q So, all those other times you testified, who were you testifying
8 for?
9 A For the prosecution.
10 Q So, this is a pretty unique case?
11 A Yes.
12 MS. NAVARRO: Pass the witness.
13 THE COURT: Cross?
14 MR. KEPHART: Thank you.

15 RECROSS-EXAMINATION

16 BY MR. KEPHART:
17 Q This case, though, you're not hired by the prosecution, you're
18 hired by the defense, aren't you?
19 A That's correct.
20 Q Okay. And you're from Louisiana?
21 A Yes.
22 Q And Louisiana rains a lot and there's a lot of moisture in
23 Louisiana?
24 A Yes.
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1 Q Okay. How many times have you lifted prints in Las Vegas,
2 Nevada?
3 A Never.
4 Q Okay. How many times have you lifted prints in Panaca, Nevada?
5 A Never.
6 Q But we all know that dry environment, because our experts talk
7 about it, will eventually -- could eventually affect a fingerprint?
8 A Yes.
9 Q Okay. Do they have air conditioners in the cars in Louisiana?
10 A Excuse me.
11 Q Do they have air conditioning in the cars in Louisiana?
12 A Yes.
13 Q Okay. And would the air conditioning affect a fingerprint?
14 A As long as it's running it would tend to -- any of the moisture
15 that's in the fingerprint would tend to stay longer.
16 Q In Louisiana it's so humid that in the heat of the summer people
17 that are in the car tend to sweat?
18 A No, not with air conditioning.
19 Q Okay. But if their air conditioner isn't working --
20 A Oh, yes.
21 Q -- they tend to sweat, right? Or, if you even just step out of the
22 car in the heat of the summer, there's no air conditioning, people sweat, the
23 humidity?
24 A Correct.
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1 Q Okay. And would you agree with me that people in Nevada sweat
2 as well during the heat of the summer?
3 A I can't say for sure but I would assume that there's a certain
4 degree of sweating that goes on.
5 Q Okay. And during a period possibly of driving for a period of time
6 that people might sweat in their car?
7 A Yes.
8 Q Okay. And they might get -- so, if we're talking about a person
9 who cleans himself all the time, that may not be a factor if you're driving for a
10 period of time and you're sweating?
11 A That's correct.
12 Q Unless, of course, you're stopping at every stop and washing your
13 hands and doing all that, right?
14 A Correct.
15 Q Okay. So -- but on the other hand if a person -- you said that
16 there's different ways that a car may not have prints and you were talking
17 about the environment, maybe the way that the people were, you know, trying
18 to pull the prints and thought maybe they weren't good prints, you know. It
19 also could be destroyed by a person purposely, right?
20 A That's a possibility, yes.
21 Q I mean that's why people do that when they steal cars and that,
22 they wipe their prints off so police can't find them later?
23 A Yes, that has happened.
24 Q Okay. And, so, if you purposely try to clean a vehicle, chances
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1 are that you're trying to get rid of evidence that's in the car?
2 A Well, it depends on what the person's motivation is for cleaning
3 the vehicle.
4 Q My question of you, sir, is if you're purposely trying to clean the
5 vehicle, chances are is that you would destroy evidence in that car?
6 A Yes.
7 Q Meaning fingerprints?
8 A Yes.
9 Q And, maybe, even blood?
10 A Possibly.
11 Q Okay. And -- nothing further, Your Honor.
12 THE COURT: Redirect?
13 MS. NAVARRO: Thank you, Judge.
14 REDIRECT EXAMINATION
15 BY MS. NAVARRO:
16 Q Mr. Schiro, all the fingerprints weren't destroyed in the vehicle in
17 this case, were they?
18 A No, not according to the reports I read.
19 Q In fact, they were able to obtain at least 18 or 19 latent finger-
20 prints, is that correct?
21 A I believe so.
22 Q And there was, actually, a report that the crime scene
23 investigator, Miss Louise Renhard, found some vomit inside the vehicle?
24 A Yes.
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1 Q So, if someone was trying to clean this car out, they didn't do a
2 very good job, did they?

3 MR. KEPHART: Your Honor, objection.

4 THE COURT: Sustained.

5 MS. NAVARRO: No further questions.

6 THE COURT: Further cross?

7 RECROSS-EXAMINATION

8 BY MR. KEPHART:

9 Q Sir, you said you read a report and they asked you about 18 or 19
10 fingerprints. Isn't it true that there was only four prints lifted from the car?

11 A I don't recall, specifically.

12 Q If I was to tell you that there was only four prints lifted from the
13 car, would you agree with me?

14 A If it's in a report, yeah.

15 Q Thank you. Not 18 or 19?

16 A That would depend what the report said, yes.

17 MR. KEPHART: Thank you.

18 Nothing further, Your Honor.

19 MS. NAVARRO: Nothing further, Your Honor.

20 THE COURT: You may step down.

21 THE WITNESS: Am I excused?

22 THE COURT: Yes, you are.

23 Defense may call their next witness.

24 MS. NAVARRO: Judge, the defense calls Miss Jo Ann Dennert.

25 THE COURT: Would counsel approach.

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