

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

DOMONIC MALONE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 61006

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APPELLANT'S APPENDIX

VOLUME 14

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Michael Villani, District Court Judge
District Court No. C224572

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BY, _____
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

| | | |
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| THE STATE OF NEVADA, | . | CASE NO. C-224572 |
| | . | |
| Plaintiff, | . | DEPT. NO. XVII |
| | . | |
| vs. | . | |
| | . | TRANSCRIPT OF |
| DOMONIC RONALDO MALONE, | . | PROCEEDINGS |
| | . | |
| Defendant. | . | |
| | . | |

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

JURY TRIAL - DAY 11

WEDNESDAY, JANUARY 25, 2012

APPEARANCES:

FOR THE PLAINTIFF:

MARC DiGIACOMO, ESQ.
CHRISTOPHER LALLI, ESQ.
Chief Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
CHARLES A. CANO, ESQ.
*Assistant Special Public
Defenders*

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
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1 LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 25, 2012, 10:06 A.M.

2 (Court was called to order)

3 (In the presence of the jury)

4 THE COURT: Good morning, ladies and gentlemen.

5 Welcome back. State, can you please call your next witness?

6 MR. DiGIACOMO: Yes. State calls the custodian of
7 records for AT&T and an engineer by the name C.B., because I
8 can't say the whole thing.

9 THE COURT: All right. Okay.

10 THE MARSHAL: Remain standing. Please, sir, raise
11 your right hand and face the Clerk.

12 CHANDERBHAN GUBDA, STATE'S WITNESS, SWORN

13 THE MARSHAL: If you'll have a seat and slide up to
14 the microphone. Sir, please state and spell your name for the
15 record.

16 THE WITNESS: My name is Chanderbhan Gubda, and I'm
17 working with AT&T.

18 DIRECT EXAMINATION

19 BY MR. DiGIACOMO:

20 Q Can you spell your name for the record?

21 A C-h-a-n-d-e-r-b-h-a-n, and last name is G-u-b-d-a.

22 THE COURT: Go ahead, counsel.

23 BY MR. DiGIACOMO:

24 Q Sir, you indicated you work for AT&T. In what
25 capacity do you work for AT&T?

1 A I work with AT&T as a radio frequency engineer. Do
2 you want me to go into the --

3 Q Yeah. What is a radio frequency engineer?

4 A Okay. Basically, the radio frequency engineer is
5 responsible for maintaining the cell sites in the whole of Las
6 Vegas area. So my job is to maintain those cell sites,
7 optimize those cell sites, look at the performance of these
8 cell towers, and as well as give my inputs on the design for
9 the new cell towers, or the new cell sites.

10 Q In order to have the job that you do, do you have
11 certain educational as well as training and experience
12 background before you became an engineer for AT&T?

13 A Yes. I have a Bachelor's Degree in Electronics and
14 Telecommunication, which is a prerequisite for this kind of a
15 job. And I also -- I have over like 15 years of experience.
16 Minimum experience, I think, is the five years that is
17 required as per the AT&T policies.

18 Q How long have you been working for AT&T?

19 A I've been working for almost one and a half years
20 now.

21 Q Prior to working for AT&T what did you do?

22 A I was the same RF of engineer with a different
23 company.

24 Q And what company was that?

25 A It was T-Mobile.

1 Q T-Mobile?

2 A Yes.

3 Q Okay. AT&T, at some point in time, did they
4 purchase or merge with a cell phone company by the name of
5 Cingular?

6 A Yes.

7 Q And do you know a guy by the name of Jerry Martinez
8 [phonetic]?

9 A Yes, he's -- he's my counterpart.

10 Q He's your counterpart?

11 A Yes.

12 Q For AT&T?

13 A Yes, for AT&T.

14 Q Okay. And did you become aware that in October of
15 2010, he came and testified as to the AT&T cell sites here in
16 Las Vegas in another proceeding --

17 A Yes.

18 Q -- here in Clark County?

19 A Yes.

20 Q And when the request was made of AT&T to get an
21 engineer, you're the individual they sent down here; is that
22 correct?

23 A Yes.

24 Q In addition to being the engineer, did AT&T also
25 task you with identifying certain of their records as business

1 records?

2 A Yes.

3 MR. DiGIACOMO: May I approach, Judge?

4 THE COURT: Yes.

5 MR. PIKE: Your Honor, we discussed this prior to
6 the proceeding today and have agreed to this custodian of
7 record, that these records would be introduced rather than
8 bring in the two witnesses, so.

9 THE COURT: All right. Thank you, Mr. Pike.

10 MR. DiGIACOMO: Thank you.

11 BY MR. DiGIACOMO:

12 Q Sir, I'm just going to show you -- you've brought
13 some records with you today as well; is that correct?

14 A Yes. Yes.

15 Q And looking at your records and confirm that the --
16 generally they're the same records that we have as well. I
17 want you to look at 227, which is probably less dates than you
18 have on your particular records. But 227, and ask you from
19 looking at those, do those appear to be true, fair and
20 accurate copies of AT&T records?

21 A Yes, they are.

22 MR. DiGIACOMO: Move to admit 227.

23 MR. PIKE: No objection, Your Honor.

24 THE COURT: 227 will be admitted.

25 (State's Exhibit 227 is admitted)

1 BY MR. DiGIACOMO:

2 Q Now, in addition to having records of individual
3 customers, and for the record now that it's in, the phone
4 number that this phone was using, is what?

5 A It's 702-408-2845.

6 Q 2845. And it's a TracFone, so there's no
7 identification as to who the individual party is that owns the
8 phone, correct?

9 A No.

10 Q In addition to the records -- individual records
11 themselves, you guys at AT&T maintain a list of cell site --
12 cell sites and cell site locations of various cell phone cell
13 sites here in Las Vegas?

14 A Yes, we do maintain the record for all the cell
15 sites that we have in Las Vegas.

16 Q And if I represent to you that State's 256 -- or I'm
17 sorry, it's proposed 228, is the records that Mr. Martinez
18 provided us last time of the cell sites. If you would briefly
19 look through those and see if they appear to be an accurate
20 list of the cell sites here in Las Vegas.

21 MR. PIKE: We'd stipulate to their admission, Your
22 Honor.

23 MR. DiGIACOMO: I'll move to admit 228 then.

24 MR. PIKE: No objection.

25 THE COURT: 228 will be admitted.

1 MR. PIKE: No objection.

2 (State's Exhibit 228 is admitted)

3 BY MR. DiGIACOMO:

4 Q Now, sir are --

5 A Yeah, they are.

6 Q They are, right?

7 A Yeah.

8 Q Are you familiar with how to read the phone records
9 that tell us what information we need to look at to determine
10 what cell tower a particular phone connected to, at a
11 particular time?

12 A The information we need is the cell ID number, as
13 well as the location, area code number.

14 Q Okay. And you can use that, to combine with this,
15 to find out the address of a particular cell tower?

16 A Yes.

17 Q I'm going to put these on the overhead so the jury
18 can learn how to read this particular information. And I will
19 zoom in. But just so the jury sees that this is the whole
20 thing. I don't know that they can read it from there, so I'm
21 going to zoom in for them.

22 But the ID cell number, or I-cell, and the L-cell
23 are the two numbers you need to know in order to identify --

24 A Yes.

25 Q -- on the other record what cell tower it was?

1 A Yes.

2 Q I'm just going to go to the first line here. And
3 I'll slide it over. There's a phone call on May 25th of 2006,
4 it's at 9:12:48 p.m. It's 43 seconds long. And then I'm
5 going to just zoom into the I-cell and the L-cell there. And
6 it's -- apparently it is -- you said something about -- what's
7 the difference between I-cell and L-cell? Explain that to the
8 ladies and gentlemen of the jury.

9 A Basically, I-cell is the cell identity. And L-cell
10 is the location, area code that we see for that particular
11 cell tower.

12 Q And so if we were to go through, the area code we
13 would be looking for on this particular list, the first thing
14 we would do is look for the area code 31030, correct? And
15 then we would look for 5 -- tower number 527 in that area
16 code?

17 A Basically, it's the tower number 52, and the last
18 digit, it represents the sector, or which -- to which
19 direction the cell tower is pointing to.

20 Q Okay. I'm going to go down here to 3130. So 3130
21 -- 31030-527, so it's area code 31030, that's AT&T's area
22 code, right? It's not like the Post Office's area code?

23 A No, no, it's AT&T's area code.

24 Q It's your cell tower 52, and then this 7 is which of
25 the individual receivers on that particular tower --

1 A Yes.

2 Q -- received it?

3 A Yes.

4 Q And so that is located at 348 North Nellis
5 Boulevard?

6 A That is true.

7 Q And then if you roll over the name of the particular
8 tower is called the Stuart [phonetic] Tower?

9 A Yes.

10 Q And then there's even a GPS location for that
11 particular [inaudible]?

12 A Yes.

13 Q Okay. And so if somebody were to take this
14 particular record, they could go through and see what a
15 particular phone, which tower it hit at a particular time, if
16 they wanted to, and create a big chart, right?

17 A Yes.

18 Q Let me ask you a little bit about the technology.
19 First, let me ask you this. Are you familiar with -- are
20 there multiple forms of technology depending on the company
21 that is associated with their particular cell tower? So does
22 Sprint, Nextel, Verizon and AT&T, do they use the same or
23 slightly different technology?

24 A No, they are -- they have a different technology.

25 Q And let's start with AT&T. Can you describe for the

1 ladies and gentlemen of the jury -- I don't want you to get
2 too specific. I'm sure as an engineer you can give me all
3 kinds of stuff. But generally, if a person has an AT&T cell
4 phone, and they make either a call or some other action with
5 that phone and it connects to a tower, is there some
6 information about the location of that phone in relationship
7 to the tower it connects to that you can figure out from the
8 records?

9 A Yes. Basically, there is a relationship, because
10 the cell phone is going to connect to the nearest tower that
11 is available over there. And we can correlate -- like the
12 call records, we can correlate which tower the cell phone is
13 connected to.

14 Q Okay. So generally speaking for AT&T, and I guess
15 is it generally the same idea for the Sprint and the Sprint --
16 the Sprint, Nextel and the Verizon towers as well?

17 A Sprint, Nextel and the Verizon, they are using
18 different technology, we call it, CDMA technology. I'm not
19 very much into how that technology works, because I've never
20 worked for those technologies. So -- but basically the
21 general concept of the mobile technology is that cell phone is
22 going to hit the nearest tower.

23 Q So there may be differences in the way the
24 individual technology works, but generally a cell phone is
25 going to connect to the tower that's closest to it?

1 A Yes.

2 Q Now, at AT&T do you -- what kind of range are we
3 talking about for towers?

4 A Theoretically, the range that has been prescribed by
5 the Federal Commission for the cellular -- cell phones is 20
6 miles. That is the theoretical limit. But when we design the
7 tower, like for -- we designed it according to areas, like
8 rural area, or the urban area, or the suburban areas.

9 So based on that, we design like for example, if you
10 look at the urban area in Las Vegas mainly, we have almost a
11 tower at almost a mile each.

12 Q Okay. And so if you have a tower at a mile each,
13 what do you set the radius for on the tower to connect to
14 phones?

15 A It should not be more than a mile.

16 Q It should not be more than a mile. So generally, if
17 your record shows that a phone connected to a particular tower
18 here in Las Vegas, generally, it should be within a mile of
19 that --

20 A Yes.

21 Q -- particular tower?

22 A Yes.

23 MR. DiGIACOMO: Thank you, sir. Pass the witness.

24 THE COURT: Cross?

25 MR. PIKE: Thank you very much.

CROSS-EXAMINATION

BY MR. PIKE:

Q Good morning, Mr. Gubda -- Gubda. Am I pronouncing that correctly?

A Yes.

Q Okay. Is part of your training and your education in order to work in the cell tower industry you have to know about the different types of cell phone technology, as well as the different types of tower technology?

A Yes.

Q Is that correct?

A Yes.

Q And many times -- or let me ask you this. It's not uncommon for different cell phone providers to share the same cell tower and put their different receivers up at different areas?

A Yes, that is right.

Q And it's not uncommon for -- in a suburban -- excuse me, an urban area -- I guess Las Vegas is an urban area?

A Yes, it is.

Q Okay. And it's not uncommon in an urban area to actually have cell phone towers closer than a mile within each other?

A Yes, they can be.

Q And one of those reasons is that you have busy

1 areas. When somebody's driving down the Strip there's a high
2 concentration of people that may be using a cell phone?

3 A That is right.

4 Q So there is more -- often more than one cell phone
5 tower within a mile radius?

6 A Yes, there are.

7 Q In fact, when it's -- when the telephone traffic --
8 and I guess that's a proper word, isn't it? When there's a
9 lot of phone calls?

10 A Yes.

11 Q Okay. When the -- when the cell phone -- when the
12 call traffic becomes very high, the technology that you have
13 actually shifts that to another cell tower so that it can
14 better accommodate the connection?

15 A Depending on the distance, I'll say. The distance
16 between the towers.

17 Q And that's a technology that's available, because
18 each tower technically has a range of about 20 miles?

19 A That is the theoretical range that has been
20 described to us.

21 Q And that is put in in order to ensure that everybody
22 can use their cell phone whenever they want to?

23 A Yes.

24 Q Going through the different types of technology, the
25 records as far as where the phone connections are made is

1 within the purview of the records of the individual company;
2 isn't that right?

3 A Can you repeat that?

4 Q That was a bad question. Thanks. Those records of
5 which cell phone is called from each cell -- which the
6 connecting tower from each cell phone is part of an ordinary
7 record that's kept by the cell companies?

8 A That is true, yes.

9 Q The cell companies, in your capacity as a custodian
10 of records, also will maintain voice mails for a certain
11 period of time?

12 A Yes, they do maintain it.

13 Q How long do they keep the voice mails?

14 A I'm not very sure, but I think it's the six month
15 period.

16 Q All right. The cell phone technology, does it
17 differ from company to company?

18 A Yes.

19 Q But there is some basic parameters or technique that
20 is used by each cell phone to connect to that cell phone tower
21 and ultimately then be transferred to the receiving phone?

22 A It depends on the technology that is being used.

23 Q And if you're looking at a record, such as the
24 records that you've provided today, and the cell -- and the
25 number that is an outgoing call goes to the same number, does

1 that generally mean that voice mail is being accessed?

2 A Can you repeat the question again?

3 Q Okay. If these records show that I called my own
4 number, what would that mean to you?

5 A Yeah, that will go to the voice mail.

6 Q And then you can -- the individual subscriber can
7 then access or hear their voice mails?

8 A Yes.

9 MR. DiGIACOMO: Objection, that -- well that calls
10 for speculation.

11 THE COURT: Is there an objection, or?

12 MR. DiGIACOMO: Yeah, it calls for speculation, the
13 number was called. But whether or not someone can access it,
14 has the PIN number, the password, or anything else like that,
15 it calls for speculation.

16 THE COURT: Sustain the objection.

17 MR. PIKE: All right.

18 BY MR. PIKE:

19 Q So that merely just identifies where the phone is
20 at? It doesn't identify who's using it?

21 A No, it will give you the phone number only. It's
22 not going to tell me which person is using it.

23 Q An item such as counsel has indicated, and -- a
24 code, or a security code, or an access code, that would -- may
25 give you information as to who is accessing the phone, or who

1 has those numbers. But the phone call itself does not give
2 that information?

3 A No.

4 Q It just indicates that the phone is, at some point
5 in time, connected to the tower?

6 A Yes.

7 Q Does that have to be done by virtue of a phone call,
8 or can that be done by an inadvertent bumping of the phone?

9 A No, it will be a phone call.

10 Q Okay. Have you ever heard of butt dialing?

11 A No.

12 Q Okay. Let's say I put my cell phone in my pocket
13 and I sit on it and it activates and calls somebody. Have you
14 ever had that happen?

15 A Basically, we have the feature to lock the phone so
16 that accidentally that does not dial in.

17 Q Okay. So you know the technology. For those of us
18 that don't have that, or don't use it, that is something that
19 could happen, isn't it?

20 A Yeah, it can. Yeah.

21 Q Now, when -- as part of your training and knowledge
22 of the cell phone technology, the actual phone itself, the --
23 you can take a cell phone and you can access some information
24 if you have a cell phone, can't you?

25 A Information, like what?

1 Q Well, like let's say there is a message system in
2 place. You could -- if you had that cell phone, you could
3 access the messages from that cell phone.

4 A You mean the voice message?

5 Q The voice messages, yes.

6 A Yes, you can.

7 Q And as a technician, or as an engineer specializing
8 in this area, you're aware that each cell phone has certain
9 types of memory devices in them --

10 A Um --

11 Q -- such as a SIM card, or a --

12 A Yes.

13 Q -- hard memory?

14 A Yeah, there is a SIM card memory.

15 Q And can you describe for the ladies and gentlemen of
16 the jury what a SIM card memory is, and what it does?

17 A Basically, SIM card memory is very limited memory
18 that is used for storing the context, when you store some
19 context. That is used for storing the context, or some sort
20 SMS messages, or the texting messages, or --

21 Q What's an SMS message?

22 A Short messaging service, basically.

23 Q Okay. Thanks.

24 A Or the texting messages, small, or texting messages.
25 Or sometimes if you use a camera phone or anything you can

1 store that also on the SIM.

2 Q And that SIM card can actually be removed from the
3 card -- or from the phone and be processed by someone who's --
4 who has knowledge on how to do that?

5 A Yes. That can be removed. But I'd like to say that
6 CDMA technology does not use the SIM card. It's only the GSM
7 technology.

8 Q Okay. Now, which is the GSM?

9 A The one that AT&T deployed.

10 Q Okay. So that has that access?

11 A Yes.

12 Q That ability?

13 A Yes.

14 Q Okay. In going through and gathering a cell phone,
15 if you're going to try and protect the memory on the SIM card,
16 or the memory that's on the phone, what would you do to
17 protect that?

18 A Protect the memory of the SIM card?

19 Q Yes.

20 A It depends. You can transfer everything from the
21 SIM card to your memory of the cell phone.

22 Q You can do that, or could you take it -- take that
23 and download the information to another computer?

24 A No.

25 Q Could you access it by pressing the menu option and

1 reading the texts, or listening to the -- and recording the
2 cell messages, the voice messages?

3 A No, you cannot do that.

4 Q If it has the buttons to just play it? You can't do
5 that?

6 A I'm not getting your question. Like what -- what
7 are you --?

8 Q Let's -- let me give you a hypothetical. I give you
9 a phone from AT&T. It's charged. It says it has a little
10 ICON at the top that is -- looks like an envelope. What does
11 that mean to you?

12 A Envelope means it could be a text message.

13 Q Could it be a voice message also?

14 A Yes, it can be a voice message as well.

15 Q So that means to you as an engineer that there is
16 information there?

17 A Yes.

18 Q How would you -- how would you access that
19 information?

20 A Simply by pushing a button.

21 Q Okay. And going through, that's pretty standard in
22 the -- the engineering that was available also in 2006?

23 A Yes.

24 Q You've indicated that you -- is there a difference
25 between volatile and non-volatile memory to a cell phone?

1 A I'm not aware of that.

2 Q Okay. You're not familiar with those terms?

3 A No.

4 Q In looking through the text image, are there also
5 data files that may be stored on the phone?

6 A There could be, yes.

7 Q And what type of data would be stored on a phone?

8 A It could be related with the phone itself, like on
9 one platform, or the -- what type of technology the phone is
10 working.

11 Q And you've indicated that there is a -- what was it,
12 the R -- the radio frequency?

13 A Yes, RF, radio frequency.

14 Q Radio frequency. All right. Can you tell us how
15 that radio frequency works and how it connects with the cell
16 phone?

17 A Okay. When you press the green button on the cell
18 phone, green means you are making a call. Then the cell
19 phone, it logs onto the nearest site and it starts talking to
20 the nearest site, what we call is a control messaging. And
21 it's -- that cell tower checks the phone, whether the phone is
22 valid phone for that particular operator, and all those. Then
23 they do the encryption, what we call, for secure
24 communication.

25 And once that is authenticated, then the cell phone

1 -- this tower tries to find other cell phone on -- for which
2 number this cell phone has dialed. So it pages that cell
3 phone through its -- what we call is the MSC, or the mobile
4 switching center. It allows through that particular switching
5 center. So that switching center tries to find out where the
6 other cell phone is, so it will start paging that particular
7 cell phone over there.

8 Once it finds that cell phone over there then it
9 tells this tower that, hey, I found that cell phone on this
10 particular tower, so now you can connect these two cell
11 phones. So I'm just trying to tell you the layman's term.

12 Q I appreciate. And that happens in microseconds,
13 doesn't it?

14 A Yes. It happens very quickly, in milliseconds, I'll
15 say.

16 Q Milliseconds. Okay.

17 A Yes.

18 Q Even more -- smaller than what I suggested.

19 Now, also when a phone is then turned off, when the
20 phone is turned off or the battery is taken out, there's no
21 longer any electricity or charge going to the phone itself,
22 the phone is not accessing or connecting to anything, is it?

23 A Yes. That is true.

24 Q As soon as the phone is turned on, it starts to do a
25 process whereby it connects with the server that it's using,

1 doesn't it?

2 A As soon as you turn on the phone it will try to find
3 the nearest tower, cell phone tower.

4 Q And that's so that that phone can be located?

5 A Yes.

6 Q And in addition to that, the phone often will go
7 through and process itself and bring itself up to speed on
8 whatever messages or any phone calls that may have been made
9 on that phone, or to that phone number, rather?

10 A If you are talking about a missed call thing, then
11 no. That cannot be retrieved on that particular phone. But
12 if somebody has left a voice message, or the SMS or short
13 messaging service, that can be retrieved.

14 Q That can be -- and that stays on the phone for about
15 the same period that it's -- if it's not accessed by the phone
16 -- excuse me, if it's not accessed by the phone itself, it is
17 only stored in the provider records for about 30 days, or six
18 months you've indicated?

19 A Yes.

20 Q And then it's deleted. So then that phone message
21 is no longer available to that telephone, is it?

22 A No.

23 Q If you were going to store a phone to preserve any
24 messages that may be on the phone, or any text messages, or
25 anything to preserve that memory, your opinion as a -- as an

1 engineer, would it be better to store it in a radio frequency
2 isolation bag as opposed to just a paper bag like this?

3 A Store -- you mean the SMS?

4 Q Store any piece of information, SMS, text message,
5 anything that may be on that phone?

6 A Basically, what you can do is in the technology that
7 we are using, or the GSM technology, there is an option to
8 access the email also. You can set up your email. And you
9 can forward all those messages to your email.

10 Q Okay. But that's a different app as opposed to the
11 voice messages?

12 A Yes, that is a different app.

13 Q Or the text messages?

14 A Yes.

15 Q And to prevent the phone from accessing -- let's say
16 you have a phone and you want to process it. And it hasn't
17 been turned on. In order to access the information on that
18 phone you'd need to take it to an area to -- where the radio
19 frequencies from the server could not actually reach that
20 phone, so it wouldn't update and possibly delete information?

21 A It will not do anything, unless and until it is
22 logged onto the site.

23 Q All right. Thank you very much, sir. I appreciate
24 you coming in today.

25 THE COURT: Any redirect?

1 MR. DiGIACOMO: Very briefly.

2 REDIRECT EXAMINATION

3 BY MR. DiGIACOMO:

4 Q Sir, you talked about in 2012, there is certain
5 information that is maintained for six months, like let's say
6 voice mails. In your experience over the years -- let's talk
7 about cell site information.

8 Six years ago was the retention rating for a cell
9 site and what information we can get from that cell site data
10 different than it is now, in 2012?

11 A For the GSM technology that we are talking --

12 Q Yes.

13 A -- as per the record, no, it's the same.

14 Q Okay. What about other technologies?

15 A For other technologies, it depends. Means, we have
16 upgraded a lot of things when the -- with time, so.

17 Q So though these particular AT&T records, they were
18 on the GSM, but there was other technologies that both AT&T,
19 the other cell phone companies as you, correct?

20 A Yes.

21 Q And, you know, six years ago -- and for some of
22 those companies it was as little as 30 days to get some of the
23 information, and as much as six months, and all that time kind
24 of varied, correct?

25 A Yes.

1 Q Now, Mr. Pike asked a lot of questions about a cell
2 phone. And I just have my cell phone. So, for example, I
3 have a cell phone here. Unfortunately, it's not AT&T. But I
4 have my cell phone.

5 But if I don't have this cell phone connected to a
6 particular provider, so I don't have AT&T -- I don't have a
7 contract with AT&T, I don't have a contract with anybody else,
8 I haven't purchased a phone card, let's say, from a company or
9 anything else like that, I'd still have a cell phone that
10 could turn on, the battery would turn on, turn off. But it
11 doesn't necessarily have a phone number or the ability to do
12 any connection, correct?

13 A Yes, that is correct, yeah.

14 Q And if it also doesn't have a SIM card there may be
15 no ability to figure out any information from it?

16 A Yes.

17 MR. DiGIACOMO: I have nothing further, Judge.

18 THE COURT: Mr. Pike?

19 RE CROSS-EXAMINATION

20 BY MR. PIKE:

21 Q I didn't charge my battery last night and my phone's
22 dead. But if -- again, taking Mr. DiGiacomo's hypothetical
23 that it's not connected -- that I have a cell phone that I'm
24 no longer using. I take this phone and I say, I don't want to
25 use it anymore. I access and change the number and just keep

1 ahold of that. It still does have some access. In fact,
2 can't I charge that up, turn it on, and even though I don't
3 have a provider, I can call 911?

4 A Yes, you can call 911. That is a must.

5 Q And so it can access the cell towers. And it does
6 serve a purpose. It does serve a use and it can be used to
7 access 911?

8 A Only the 911.

9 Q All right. Thank you.

10 MR. PIKE: Nothing further.

11 THE COURT: Anything further by the State?

12 MR. DiGIACOMO: No, Your Honor.

13 THE COURT: Any questions by any of our jurors? No
14 questions. Thank you, sir, for your testimony. You are
15 excused. Next witness for the State?

16 MR. DiGIACOMO: Kent Timothy.

17 THE MARSHAL: Sir, if you will remain standing.
18 Please, sir, raise your right hand facing the Clerk.

19 KENT WORKMAN TIMOTHY, STATE'S WITNESS, SWORN

20 THE MARSHAL: If you would have a seat sir. Please
21 slide up to the microphone. Please, sir, state and spell your
22 name for the record.

23 THE WITNESS: Okay. Kent Workman Timothy,
24 T-I-M-O-T-H-Y.

25 THE COURT: Go ahead, counsel.

1 DIRECT EXAMINATION

2 BY MR. DiGIACOMO:

3 Q Sir, how are you employed?

4 A I'm employed as a latent print examiner for the City
5 of Henderson, Nevada.

6 Q And what does that mean you do on a daily basis?

7 A Well, my job assignment, my job description is to
8 develop, recover, compare, analyze fingerprints, footwear, and
9 tire tracks, to search them through AFIS systems and compare
10 them to known record, or other records that we may have.11 Q And in order to have the job for the City of
12 Henderson, do you have any certain education, training and
13 experience in the area of latent -- latent fingerprint, as
14 well as tire track comparison, as well as footwear comparison?15 A Yes. I have over 500 hours of training specific to
16 those disciplines, provided through the International
17 Association for Identification through the FBI, RCMP,
18 Mississippi State Crime Lab, Utah State Crime Lab. I'm also
19 certified by our certifying body, which is the International
20 Association for Identification.21 I hold three certifications. One is a Senior Crime
22 Scene Analyst. My second certification is as a latent print
23 examiner. That deals specifically with fingerprints and
24 footprints. I'm also certified as a footwear and tire track
25 examiner. And that deals with shoe prints, shoe impressions

1 and tire impressions from scenes.

2 Q Now, how long have you been with the City of
3 Henderson?

4 A Since January of 2004.

5 Q How long have you been in the field of latent
6 fingerprinting comparisons?

7 A Well, I started my law enforcement career in 1980,
8 as a police officer, in West Valley City, Utah. In 1995, I
9 was assigned to that agency's first crime scene unit, where my
10 job was to respond to major crime scenes and then to gain
11 additional training in comparisons. So I've been working in
12 fingerprints as far as comparisons since about 1995.

13 Q Now, we'll get to the science in just a moment. But
14 were you the original fingerprint examiner assigned to Case
15 No. 06-11513?

16 A No, I was not.

17 Q Who was?

18 A Mr. Clay Allred.

19 Q And who is Clay Allred?

20 A Clay Allred is a latent print examiner. He was --
21 he'd been employed with Henderson since September of 2003. He
22 had previously been employed by the U.S. Army Crime Lab in
23 Georgia. He is also a certified latent print examiner through
24 the IAI.

25 Q And while I don't know that maybe you even know

1 specifically what his exact location currently is, currently
2 does Clay Allred work for the Henderson Police Department?

3 A No, he does not.

4 Q Does he still work for a government agency?

5 A As a subcontractor.

6 Q And do you know what his physical location is?

7 A Somewhere around Fallujah Afghanistan.

8 Q Based upon Mr. Allred's clear unavailability in this
9 particular case -- well let me ask you this. When Clay Allred
10 was doing the work in this particular case, is there some
11 procedure instituted at the lab to either verify or review the
12 work conducted by another examiner?

13 A Yes. Every report that is concluded or completed by
14 an examiner is reviewed technically by another examiner, and
15 then by a supervisor. And every identification that is made,
16 either of fingerprints, footware or tire track is then
17 technically reviewed or verified, or not verified as to the
18 quality of the identification. So everything is reviewed that
19 goes out of the lab.

20 Q Now, Mr. Allred, he did a number of various reports
21 and comparisons in this particular case. Is that a fair
22 characterization?

23 A Yes, he did.

24 Q Were you either the technical reviewer, if there was
25 no verification, or the verifier or non-verifier if there was

1 an identification of the various work that he did in this
2 particular case?

3 A Yes, that's correct.

4 Q And so have you had an opportunity to review not
5 only all of his reports, but his underlying documentation, and
6 then where there was an identification, the actual physical
7 latent to make a comparison independent by yourself, to
8 determine if his results were correct or not correct?

9 A At the time of the verification of any
10 identification we look at the actual latent prints or
11 impressions that are involved, as well as the record prints.
12 And then those are returned to the vault. And I have reviewed
13 all of his reports and case notes.

14 Q So, let's back up a little bit, because we're
15 talking about what his results are and we're not really
16 talking about what the science is. So, let's start at the
17 very beginning. And some of this may be somewhat basic, but
18 these are -- most of these jurors probably haven't had a
19 fingerprint examiner in front of them before.

20 So if you could just briefly explain what a latent
21 fingerprint is and then why it is that that can be important
22 in a forensic setting.

23 Q All right. The word "latent print" is generically
24 used in our profession to refer to a fingerprint which may
25 have come from a scene, or from a document and been provided

1 to us for comparison to a known impression, or to another
2 latent impression, or for AFIS search.

3 What we will do is take the print, examine it
4 carefully and do a series of analysis on that print to
5 determine whether or not it may be of sufficient value for
6 comparison, can we see detail in the print, can we see a
7 pattern in the print.

8 This analysis process is the very first thing that
9 happens with every single impression that comes in. We then
10 will extract from that analysis the minutia that we're going
11 to look at. We then do a comparison, make an evaluation, and
12 then submit a report, which is then verified as to its -- in
13 this case whether or not an identification is made.

14 Q Okay. Fingerprints are unique to the individual?

15 A The basic premise upon which comparison or the
16 science of fingerprints is founded are uniqueness and
17 persistence. Now, that essentially means that of all the
18 fingerprints that have been examined, there are no two
19 fingerprints that have ever been found to be the same, coming
20 from two different individuals.

21 The concept of persistence gives us the foundation
22 that these fingerprints which develop on your hands and on the
23 soles of your feet develop between the 10th and 15th week of
24 gestation, and those remain unchanged unless there is damage
25 to those surfaces, until the body decomposes after death.

1 Q Is that even true for, let's say, identical twins,
2 that they have different fingerprints even though they may
3 have the same DNA?

4 A They do have different fingerprints.

5 Q We touched on it a little bit, but is there a
6 difference between a patent print and a latent print?

7 A All right. The three types of fingerprints which we
8 commonly come across at scenes are referred to as latent,
9 patent, or plastic. Now, latent is used in a generic term to
10 refer to all of them, usually, in our reports.

11 But a latent print is a print which requires some
12 type of development for it to either be recovered by
13 photography, or by a lift. Whether that's development with
14 powders, with chemicals, or by light to then be photographed
15 and recovered that way.

16 Now, a patent print is something that is patent.
17 Something that is obvious, or visible. The word "patent" is
18 -- means visible. It's a fingerprint which merely needs to be
19 recorded, or lifted. It might be a deposit in dirt. It might
20 be a deposit in blood. It might be a deposit in grease, or
21 paint, or anything which leaves a visible print.

22 The third type of print is plastic print. Now,
23 that's a type of print which is left in a substance. If, for
24 example, you touch a bar of butter, you will leave a plastic
25 print, because your fingerprint -- your finger has impressed

1 into that surface. Window putty, putty, clay, things like
2 that. Where you leave a three dimensional record of that
3 contact, that's a plastic print.

4 Q And merely because an individual touches an item,
5 does that necessarily mean that the individual has left a
6 fingerprint on it?

7 A No, not necessarily.

8 Q Why not?

9 A Well, because the process of leaving a fingerprint
10 involves the exchange of some kind. Dr. Edmond Locard, a
11 famous anthropologist and scientist, is the one who gave us
12 the Locard Exchange Principle, which is the foundational
13 principle for all forensics. He stated that we simply
14 interact with our environments. We either leave something
15 behind or we take something away.

16 Now, in the case of fingerprints if I, for example,
17 get some paint on my hand, I then touch a surface, I can
18 transfer that paint to that surface. Now, it's entirely
19 possible that my contact is going to leave a fingerprint that
20 can be identified, because the contact is clear, and simple,
21 and involves little motion or pressure. Or I could leave an
22 impression which has almost no detail at all, because of a
23 high amount of pressure, or slippage, or twisting, or some
24 type of motion that disturbs, or interferes with the recording
25 of that print.

1 Now, if the surface is also clean and my hands are
2 clean there will be no contact -- there will be no
3 transference -- well, there will be contact, but there will be
4 no transference, because there's nothing to move from one
5 surface to the other, or to be taken from one surface to the
6 other. We have cases -- it's very common where a person will
7 touch a slightly dirty surface that's been subjected to the
8 atmosphere for awhile and they will lift from that surface,
9 rather than deposit to the surface.

10 Either way, it can leave a mark. Whether or not
11 it's identifiable is an entirely different question.

12 Q Are there any way to ever date a particular
13 fingerprint?

14 A There's no reliable method to look at a fingerprint
15 or examine it until -- with any kind of precision when it was
16 deposited.

17 Q Are there certain environmental factors that affect
18 the -- not the length that a fingerprint remains there, but at
19 least the length that the ridge detail is sufficient for you
20 to be able to make an identification?

21 Do you understand my question?

22 A Right. Yes. If a surface, for example, has been
23 washed, if it's been cleaned, if it's been rubbed or abraded
24 -- we have a rather dry climate here and fingerprints are
25 basically 98 to 99 percent moisture of one type or another.

1 Within a matter of moments or hours in this environment, the
2 majority of what may be left behind, if it's simple
3 perspiration residue, is going to evaporate. Very little will
4 be left that may be developed.

5 There are also things such as barriers placed
6 between a hand and a surface that can interfere with the
7 deposition or that transference that results in the
8 fingerprint.

9 Q So let me get to kind of a series of reports that
10 you were either the technical reviewer, or verifier on, and
11 then I'm going to -- I'm just going to ask you general
12 questions about what your conclusions were as to the ones
13 where you actually did a verification.

14 A Okay.

15 Q Did the -- was the report issued related to
16 exemplars taken from two females that were identified as
17 Dawson One and Dawson Two, but basically Jane Doe females
18 taken at autopsy?

19 A Yes.

20 Q And was there some sort of computer system that you
21 have access to, to run those particular prints and see if
22 there is any information that can lead you to do a
23 verification?

24 A Yes. One of the palm prints was run through our
25 local AFIS database.

1 Q And what's AFIS?

2 A AFIS is an acronym for Automated Fingerprint
3 Identification System.

4 Q And what is it that you can do with AFIS -- let me
5 rephrase it like this. Merely because you put a fingerprint
6 in, what spits out of the computer, is it going to tell you
7 that that's the guy, or is there something more you've got to
8 do?

9 A Well, it doesn't quite work as well as it does on
10 CSI. There's no lights and bells and whistles that go off,
11 and things don't flip and turn around. And, you know, the
12 name of the person flashes on the screen.

13 We get -- after we enter the print we get a
14 candidate list. It's then the responsibility of the operator
15 of the system to go down through that candidate list and make
16 an evaluation or, in fact, the identification as to whether or
17 not he believes this latent print that he's searched can be
18 identified to one of the record prints that's come up in the
19 system.

20 Q So was Dawson No. 2, you said the palm print, was
21 that entered into AFIS and was there a record that came back
22 for an individual that was identified as a Charlotte Fountain,
23 that I believe the jury knows as Charlotte Combado, that came
24 back from AFIS?

25 A Yes.

1 Q And then did you do an independent verification of
2 that AFIS hit to the known exemplar of Ms. Fountain to Dawson
3 No. 2 to determine that is, in fact, the same person?

4 A Yes. It's -- it's the policy of our Department and
5 standard practice within the community that whenever an
6 identification is made, that even identification that is aided
7 by an AFIS system, by an operator, that identification is
8 verified by another qualified person.

9 Q And likewise, for Dawson One, did you receive the
10 recorded prints of Victoria McGee and apply them to the
11 autopsy prints of Dawson No. 1 to determine that that is, in
12 fact, Victoria McGee?

13 A Yes, they were identified by Mr. Allred and I did
14 verify the identification.

15 Q Were there 25 latent lift cards recovered by Crime
16 Scene Analyst Farrell from a gray Nissan Stanza?

17 A Yes, there were.

18 Q And did you -- or were there a known prints, did you
19 have the known prints of -- we've talked about Charlotte
20 Fountain/Combado, Victoria McGee, Melissa Estores, Domonic
21 Malone, Jason McCarty and Donald Herb?

22 A Yes, sir.

23 Q Okay. And from that were there an identification of
24 Mr. Malone on three of those latent print cards, and then
25 ultimately did you do a verification of that identification?

1 A Yes, I did.

2 Q So Mr. Malone was identified to the exterior front
3 windshield of this gray Nissan Stanza?

4 A Yes.

5 Q He was identified to the exterior front driver's-
6 side door window, and identified to the rearview mirror of
7 this gray Nissan Stanza?

8 A Yes, sir.

9 Q In addition to that, was one of the prints, lift
10 number 8, entered into the AFIS system, or I guess maybe more
11 than one of those prints. But were some of those prints
12 entered into AFIS, and ultimately was there a candidate list
13 that was generated, and then eventually an identification to
14 somebody?

15 A That's correct.

16 Q And did you do a verification to that AFIS hit of a
17 Luellen Jones [phonetic] to the exterior passenger-side door,
18 small window?

19 A Yes, sir.

20 Q Absent those one, two, three, four identifications
21 of those 25 prints, were there any identifications made to
22 anybody other than Mr. Malone or Ms. Jones?

23 A I'm just going to check a copy of a report, but I
24 don't believe so, no.

25 Q During the course of your review, technical review

1 of the case file, did you come across a report generated by
2 Mr. Allred in September of 2006, referencing 9 photographs of
3 latent prints that were taken of a golf club shaft? And did
4 you, in fact, have the photographs attached to the back of
5 that reports the -- for your technical review?

6 A Yes, I did.

7 Q And ultimately did you have to do -- well did you
8 have all the same knowns, people we've talked about,
9 Charlotte, Victoria, Melissa, Mr. Malone, Mr. McCarty and Mr.
10 Herb?

11 A They were, yes.

12 Q I mean, they were available throughout this case
13 file for comparison; is that correct?

14 A They were, yes.

15 Q Okay. Of those nine photographs, did you do a
16 technical review of the report that indicated that they were
17 of extremely limited quality and quantity in detail?

18 A Yes.

19 Q And did that technical review also involve that the
20 -- basically, the latents couldn't be identified to or
21 eliminated from any of those people, because of the quality of
22 those latent prints?

23 A That's correct.

24 Q So there was no verification to do on that, there
25 was just not enough information to utilize to do what wanted

1 to be done?

2 A That's correct.

3 Q Did you conduct a review of an August 26th, 2006,
4 report by Mr. Allred on two latent prints lifts recovered by
5 Crime Scene Analyst Barber from a location at 1525 Fremont
6 Street, Apartment 222?

7 A Yes.

8 Q And did that review involve one palm print and one
9 latent fingerprint?

10 A Yes, sir.

11 Q And were there any identifications that were able to
12 be made and then having to be verified by you?

13 A One as a result of an AFIS search.

14 Q And which was it, was it the palm print or the
15 fingerprint that came up in AFIS?

16 A The fingerprints.

17 Q And did you then do a verification of the
18 identification of the fingerprint to an individual that you
19 identified through AFIS as a Leonard Shawn Robinson
20 [phonetic]?

21 A Yes.

22 Q Let's talk about the 22 latent lift cards from a
23 white Honda that were submitted to you. I don't know if the
24 report says it, but from Joy Smith [sic] off a white Honda.
25 Did you do both the technical review, as well as the

1 verifications of identifications from that particular vehicle?

2 A Yes.

3 Q And that's an August 28th, 2006 report?

4 A Correct.

5 Q And during the course of those 25 latent print
6 cards, was there an identification made to Mr. Herb on two of
7 those cards?

8 A Yes.

9 Q And Mr. Herb was identified to the rear window and
10 the rearview mirror of the vehicle?

11 A Yes, sir.

12 Q And there was a palm print from the center of the
13 hood of the car, was that identified to anybody?

14 A Yes, to a Jason McCarty.

15 Q And then there -- was there a -- some of the prints
16 entered into AFIS and was there an AFIS hit off one of the
17 prints?

18 A Yes, there was.

19 Q And is that to the rearview mirror?

20 A That's correct.

21 Q And is that to an individual that was identified
22 through AFIS and ultimately verified by both you and Mr.
23 Allred as Juan Contreras [phonetic]?

24 A Yes, sir.

25 Q That leads me to a green Alero. Ultimately, did you

1 do the technical review of the report related to the 35 latent
2 lift cards from the green Oldsmobile Alero, as well as
3 verifications of the various identifications that were made
4 off that vehicle?

5 A Yes, sir.

6 Q For one of those verifications, did you create for
7 court today a demonstrative -- three demonstrative pictures to
8 explain to the ladies and gentlemen of the jury how it is you
9 were able to make the identification?

10 A Yes.

11 MR. DiGIACOMO: May I approach, Judge?

12 THE COURT: Yes.

13 MR. DiGIACOMO: Having previously shown counsel, and
14 I actually provided them copies of.

15 MR. PIKE: That's correct, Your Honor.

16 BY MR. DiGIACOMO:

17 Q Showing you what's been marked as State's proposed
18 Exhibits 252 to 253. Are those the exhibits that you created?

19 A Yes, I made them yesterday.

20 Q Okay. And would those -- would those exhibits help
21 you in explaining the course of your analysis of one
22 particular print involved in this case?

23 A Yes, they would.

24 MR. DiGIACOMO: Move to admit 251 through 253.

25 MR. PIKE: No objection, Your Honor.

1 THE COURT: They'll be admitted.

2 (State's Exhibits 251 through 253 admitted)

3 BY MR. DiGIACOMO:

4 Q I'm going to get to this print last, but I'm going
5 to go through the rest of the prints that you verified. Once
6 again, you had all of the same players; you had the three
7 girls and the -- Mr. Malone, Mr. McCarty and Mr. Herb,
8 correct?

9 A Correct.

10 Q And there were 5 latent finger and palm prints which
11 were identified to the record palm -- finger and palm prints
12 of Jason McCarty; is that correct?

13 A Yes, sir.

14 Q And so you verified that he was identified to the
15 exterior driver's-side, the exterior gas tank, and the
16 interior driver's-side door window on 5 separate prints?

17 A Yes, sir.

18 Q In addition to that, there were 5 latent finger and
19 palm prints on the vehicle which were identified to the record
20 palm prints -- finger and palm prints of Donald Herb?

21 A Yes.

22 Q And so Mr. Herb was identified on the exterior
23 driver's-side and the passenger's-side trunk, on those 5 basic
24 prints; is that correct?

25 A Yes.

1 Q So now let's get to the single fingerprint. And I'm
2 going to ask you a couple of questions. The jury's kind of
3 already seen this before, but State's Exhibit number -- let me
4 pull it out of the bag -- 115-A, and it is print number 19 out
5 of that. I'm going to put that print card up there for you
6 and ask you, do you recognize some of the writing that is on
7 this particular card?

8 A I do.

9 Q And can you explain to the ladies and gentlemen of
10 the jury why that writing would be on this particular card?

11 A First, up here at the top, those are the initials
12 and the identification number that I recognize as belonging to
13 Patrick Farrell. I've been seeing those for several years
14 now.

15 This writing here in the bottom corner and this
16 writing here belong to Mr. Allred. That's the way that he has
17 indicated that the fingerprint had been searched through the
18 print track AFIS system. And here he has indicated right
19 palm, Malone, and then his identification number. And that
20 right there is his initials, C.A.

21 Q And so on this particular card, there is actually --
22 or is there more than one fingerprint, even though it's one
23 card?

24 A There's several impressions, yes.

25 Q There's more than one impression. I guess you can't

1 say it's more than one fingerprint.

2 A Right.

3 Q Okay. And so the identification that was made, is
4 it this -- of this impression over here? Which impression is
5 the actual identification made of? Sorry, go ahead. Do that
6 again. I just cleared the screen on you.

7 A No, I cleared it too. If I could look at the latent
8 print and then we'll put it back up, I'll be able to tell you.
9 It's very light. Um-hum. This is what he's indicating.

10 Q Okay. And then on the very bottom the jury saw, it
11 said, "verified," and something written down there. Do you
12 know whose writing that is?

13 A That is mine.

14 Q Okay. And so it's this area down here that is being
15 identified?

16 A Yes, the latent impression contained in that area.

17 Q So I'm just going to go through and have you explain
18 how it is you make that particular identification in this
19 particular case. And I will just start with, put up 251, and
20 then you tell me when you want 252, and when you want 253, and
21 we should be able to go through it.

22 A Okay.

23 Q So showing you what's been admitted now as 251, if
24 you could explain to the ladies and gentlemen of the jury what
25 we're looking at, and how it is you go about your analysis.

1 A All right. On the left side of the screen is the
2 latent impression. Well, on the right side of the screen is
3 the known impression. This is an actual screen capture from
4 the AFIS system that I used yesterday to produce these images
5 so I could demonstrate this comparison.

6 On the left hand side here, an analysis of that
7 impression would show an experienced examiner that what we're
8 probably dealing with is a piece of palm. There's a very
9 distinctive sort of creasing that occurs in palms with the
10 primary ridge, or the primary creasing running in this
11 direction. And then towards the outer edge of the palm, right
12 about in here, if you look at your palm you'll see there are a
13 series of flaring creases, or feathering creases, sometimes
14 called crow's feet. That's sort of a landmark which we use to
15 give us an idea as to where to look to make the
16 identification.

17 Once that step is concluded, we have an idea where
18 to look, we can see what the ridges are doing, how they're
19 flowing. We then move to looking for particular minutia; the
20 ridge endings, the bifurcations, which is a splitting or a
21 joining of two ridges, or a dot, which is a single ridge
22 element that simply sits by itself within a -- an impression.

23 We located a series of those. In this case, the
24 series that as I was doing my work really stands out is a
25 series of overlapping and short ending -- or ending ridges

1 right up here towards the top left.

2 Now, in doing a comparison what we will do is locate
3 a target group, locate it in reference to a series of
4 landmarks, and then go to our known impression. If we look in
5 this region, on the other side we see the same type of
6 formation.

7 Now, a comparison involves, as I said, the first
8 step is locating this ridge structure to see where we may be
9 looking. The second step is actually locating a number of
10 these ridge endings or bifurcations, looking at their
11 relationship to each other. Do they form a triangle? If so,
12 what's the particular shape of the triangle? Do they form a
13 rectangle? What is that particular shape? And then going to
14 the other impression and finding that.

15 And by the time we ever get to the point of doing a
16 comparison, we've already gone through the entire image and
17 located a number of features that we want to compare between
18 the two impressions.

19 When I did this search yesterday, the latent
20 impression on the left was already in the system. And so I
21 accessed it from just the standard database of fingerprints
22 that are in there and launched a search. Totally lights out,
23 as we say, with no human intervention.

24 The result of that search was this screen that
25 you're seeing right here.

1 If I could have the next one.

2 Q Would you like me to clear this for you?

3 A Yeah.

4 Q I'm putting on the overhead 252, for the record.

5 A All right.

6 Q It's a little light, so let me come in just a little
7 bit for you.

8 A That's good. All right. I should've pointed this
9 out on the previous screen, but I'll explain something on this
10 screen. Right here on both of these screens you'll see a
11 little button depressed with two markers in it? That's a
12 button for this system which is called the mated minutia.

13 When I press that button, what you're seeing here
14 now occurs. What we're looking at here are the minutia which
15 the system found that have a very high level of
16 correspondence. In other words, the AFIS system is telling me
17 this is what I'm looking at, and this is why I'm giving this
18 record print such a high relative score on our list of
19 candidates. And if we notice, it's the number one candidate.

20 But what the system has noted is a whole series of
21 ridge endings, bifurcations and dots, or points. And they all
22 have this same numerical relationship from one to the other.
23 If we look at these top two right here, and right here, you'll
24 notice how they appear, how they relate to the ridges
25 immediately around them.

1 And then if we count down, we've got the same number
2 of ridges between this minutia and this minutia. And those
3 same type of relationships exist throughout here. That's what
4 the system is telling me it's -- why it's indicating this is
5 in the number one position on this candidate list.

6 It -- if I could have you -- well it's fine.
7 Looking at this second screen, I went ahead and indicated, but
8 it defaults to nothing, you know, a non-item, because it
9 requires a human examiner to make that determination.

10 Q So then we get to 253. Explain to us what it is
11 that you are demonstrating in 253.

12 A All right.

13 Q Let me [inaudible].

14 A This is another feature of the system, where I can
15 take the same two images that were used in the search, take
16 them to another page, like opening up another web page, but
17 still within the same system. I can then create what people
18 commonly think of, or what they commonly expect to see when
19 they think of a fingerprint comparison chart.

20 Here I've noted only 12 features. But if you look
21 between them, you can find a large number of short ridges,
22 ridge endings and bifurcations in both of these impressions
23 that correspond between one impression and the other.

24 Q At the end of the day, is it your opinion that that
25 fingerprint is identified to a particular individual?

1 A This palm print.

2 Q I guess, I apologize. Palm print is identified to a
3 particular individual?

4 A Yes.

5 Q And who is that individual?

6 A It was identified to the record prints in the name
7 of Domonic Malone.

8 Q Okay. And is it your opinion, since it was taken
9 from the exterior of the passenger's-side window, that in your
10 opinion that Domonic Malone had to have touched that window?

11 A Yes.

12 MR. DiGIACOMO: Thank you, Judge. I have nothing
13 further. I pass the witness.

14 THE COURT: All right. Any cross?

15 CROSS-EXAMINATION

16 BY MR. PIKE:

17 Q Good morning, sir.

18 A Good morning, sir.

19 Q Suffice it to say that since you started in 1980,
20 that the -- this scientific community has -- and the advent of
21 computers has really changed how fingerprints are identified?

22 A Yes, it has, greatly.

23 Q Okay. In fact, probably when you started the best
24 thing that you may have had was a folder of known prints and
25 you'd just try and give it a score and try and match it. Did

1 you ever do that?

2 A Many times.

3 Q Okay. Now, AFIS is an automated system that it
4 creates -- or does it give a numerical association to
5 identifiers to known prints?

6 A The candidates that are listed on the print are
7 listed in a descending order, each of them having what the
8 system has decided is a relative value or quality to the
9 identification. It's not listed in a percentile of
10 probability. It's given a raw score, so to speak.

11 Q And part of that may have to do with the fact that
12 the prints are submitted by, like, work card individuals,
13 maybe from other avenues, and the quality of the fingerprints
14 or the palm prints may vary from the person that actually
15 takes that palm print or fingerprint?

16 A Yes.

17 Q Okay. You hope that everything that somebody takes
18 in that context may be of AFIS quality, but it may not always
19 be of AFIS quality?

20 A We hope that they do a good job.

21 Q Because that affects your ability to get a good
22 candidate list and to make a match?

23 A Yes, sir.

24 Q For instance, on the Alero there were 35 lifts that
25 were done, and you've testified that five of those matched to

1 Donald Herb, five of them matched to Jason McCarty and one
2 exterior window matched to Domonic Malone. So that leaves 24
3 prints of unknown people?

4 A Either unknown people or insufficient quality.

5 Q How many were of AFIS quality?

6 A I don't know.

7 Q Similarly, on the Nissan that you examined, or
8 excuse me, assisted with the reviewing the reports on that.
9 And let me ask, it's -- it's very common to do a redundant
10 review like this just for circumstances where someone may
11 leave an office, or may not, or have an assignment like
12 occurred in this case. So what you're doing is done every
13 day, in order to preserve these records for purposes of
14 testimony?

15 A I have testified in other cases.

16 Q I know, but I mean --

17 A For -- for Mr. Allred.

18 Q Okay. And that's -- and that's -- you do a
19 redundant review of these just so that you can do that, so
20 that somebody is always available?

21 A Well, we do the review of the report as part of the
22 regular work product. When a report is generated, it's
23 reviewed technically by myself, and then administratively by
24 our supervisor.

25 Q So you have three people that are involved in a

1 review?

2 A Yes.

3 Q Sometimes have you disagreed with Mr. Allred's
4 interpretation?

5 A Interpretation --

6 Q Have you ever disagreed --

7 A -- of what?

8 Q -- with his -- of a fingerprint or a match?

9 A No.

10 Q How long have you been working with him?

11 A I worked with him for a total of five years.

12 Q You started with the Henderson Police Department
13 when?

14 A 2004.

15 Q So -- and you first testified as an expert regarding
16 fingerprint analysis back when?

17 A I'm sorry?

18 Q When did you first qualify and testify concerning
19 fingerprint identification?

20 A That would've been when I was still in Utah working
21 for the agency there. I don't remember the date.

22 Q Okay. Sometimes since the '80s?

23 A It would've been late '90s, probably --

24 Q Okay.

25 A -- 2000'ish.

1 Q All right. You've been at it a long time. And when
2 you came to the Henderson Lab in 2006, although you had
3 qualified and testified as an expert, you were coming to a lab
4 that was not an accredited lab at that time, was it?

5 A 2004. And no, we are not yet accredited.

6 Q You're not yet accredited? Okay. And you came in
7 2004 as an expert to help -- or to work as an expert on
8 fingerprint identification and other areas of identification?

9 A Yes, sir.

10 Q And in going through the identification process, did
11 you actually -- did you ever have any contact with the
12 vehicles that these fingerprints were taken from?

13 A I don't believe I did.

14 Q You were given the known -- or excuse me, the
15 exemplars and the comparison was made. And you can replicate
16 that even until today with the AFIS as you've indicated in
17 your testimony?

18 A Yes.

19 Q And an unknown print can be run on AFIS again maybe
20 next year and there may be a match if it's of AFIS quality?

21 A It can be run. They are stored within the AFIS and
22 they're run against new incoming record prints.

23 Q And in this case, the actual known prints that you
24 were given were just limited. It was Charlotte Combado,
25 Victoria McGee, Domonic Malone, Donald Herb, Jason McCarty and

1 those were the known ones that you were initially assigned to
2 compare these fingerprints to to make a determination if they
3 match?

4 A That Mr. Allred was assigned to compare.

5 Q He was -- that's right. And then as part of that
6 process, but then they're also run on AFIS?

7 A I am not familiar other than what's in his report as
8 to what he did.

9 Q Okay. You didn't run the unknown prints on AFIS?

10 A Me personally?

11 Q Yeah.

12 A The only print that I had contact with in an AFIS
13 venue was using the system yesterday to produce the charts
14 which we've shown.

15 Q Now, the ability to extract fingerprints has
16 improved over the years, hasn't it?

17 A Yes.

18 Q Some old school is still done like the black powder
19 and white powder?

20 A Black powder, gray powder, white powder is still a
21 very common method to be used in the field.

22 Q And you've had to extract fingerprints from unusual
23 locations, haven't you, over your tenure as an expert?

24 A From vehicles to pumpkins.

25 Q Pumpkins? All right. What's the most unusual place

1 you've taken a fingerprint or processed and obtained a
2 fingerprint from?

3 A It would've been the pumpkin that was used in a
4 boyfriend/girlfriend vehicle damage case.

5 Q Have you ever processed a fingerprint -- or obtained
6 a fingerprint off of a credit card?

7 A Yes.

8 Q Have you obtained a fingerprint off of a telephone
9 receiver?

10 A Yes.

11 Q A cell phone?

12 A Yes.

13 Q And you -- and you have the ability when you're
14 interpreting a fingerprint to tell generally whether or not
15 that fingerprint is an overlay onto a liquid. I think that's
16 a plastic, or onto something that absorbs it like that, as
17 opposed to having a liquid on your hand and then putting it
18 onto an area?

19 A Well, the difference between a plastic imprint --
20 plastic print, which is an impressed print, and a patent
21 print, which is a transference that results in a visible
22 print, what I will see the vast majority of the time is either
23 a photograph which has been stored by one of our people, or a
24 lift that has been produced by one of our people.

25 And by examination of those we can, you know, very

1 often tell whether the surface was -- was a smooth non-porous
2 surface, or some kind of a surface that might have absorbed it
3 like a -- like a check.

4 Q Okay. And a sliding glass door would be a smooth
5 surface?

6 A Yes.

7 Q And there was a report generated in this that there
8 was an access door of -- and there were -- there were minimal
9 value, no identification were made on some fingerprints with
10 that in Mr. Allred's report.

11 A That's the report --

12 Q I think it's Item No. 1173-2.

13 A Yes, his report -- one of the several reports dated
14 August 28th, 1173-2-3, that's the package and items numbers
15 for those latent prints.

16 Q And there was a process that -- processing -- a
17 review of those prints to determine whether or not they could
18 be identified or if they were of identifiable quality?

19 A Yes.

20 Q And what was the determination made on that?

21 A The latent print was compared insofar as possible to
22 the record prints, and the records in the palms, but according
23 to his report, there was no identification made.

24 Q Okay.

25 A They were of minimal -- he states, "Minimal

1 quantitative value." That's latent print examiner speak for
2 not very much.

3 Q Okay. Good luck.

4 A Yeah.

5 Q Just kind of throw up your hands with that. All
6 right. And then at 525 [sic] Fremont, was -- does that report
7 indicate where -- what apartment in 525 those fingerprints
8 were drawn from?

9 A His report -- his report -- the description section,
10 which is information that is inserted into the report based
11 upon what the Crime Scene Analyst has entered, indicates 1525
12 Fremont Street, Apartment 222.

13 Q Thank you very much. You've indicated in your
14 testimony that there is a time frame during which fingerprints
15 will generally disappear from a location. Is that true
16 generally?

17 A A time frame, combined with an event frame. Because
18 this residue, which as I had indicated, is mostly moisture of
19 some kind, about 98 to 99 percent will evaporate fairly
20 quickly. But that does leave behind some salts, minerals,
21 skin cells, if those were involved in the residue that was
22 transferred.

23 Q Have you ever processed an item, say a year later,
24 and obtained a fingerprint off of it?

25 A Yes.

1 Q What is the longest time that you've been able to
2 process an item and get fingerprints that have snot previously
3 been located?

4 A I'm trying to think back through cases. We try and
5 get through everything within about a couple of months. I
6 don't do much of the processing here, but back at the -- back
7 at West Valley, probably about a year or two.

8 Q Okay. So you'd agree with me that you want to
9 process it as soon as possible to avoid any loss of evidence?

10 A Yes, sir.

11 Q And if you have the opportunity, then you could
12 process it at a later time, but the sooner you can get to the
13 item to process it for fingerprints the better?

14 A Generally, yes.

15 Q The -- let's see. During the identification
16 process, you've indicated that when AFIS is run, AFIS will
17 give you a candidate list. Is that candidate list preserved
18 for evidentiary value -- or purposes, or is it just used by
19 the examiner to review those prints and the names on the
20 candidate list are discarded?

21 A As I recall from the system, there is a history
22 feature which can be accessed. We can also preserve that by
23 printing them out from the examples that I had produced, the
24 -- I think the top 8 or 9 candidate identification numbers are
25 preserved on that list.

1 Q And on -- and that was a feature that was available
2 in 2005 -- or 2006?

3 A 2006, yes.

4 Q Do you know whether or not that candidate list was
5 preserved on the examination by your predecessor?

6 A He did do one screen print, and I believe it was
7 just to search for the -- or a recall of the latent. I don't
8 recall whether he preserved a candidate list or not.

9 We have had on major system upgrade in 2009, where
10 we went from one version of the print track system to now the
11 newer version of the software that's used.

12 Q And as you've demonstrated in what you presented
13 today, you're able to identify it, not just off of the tip of
14 the fingerprints, or the fingerprints, but also of palm
15 prints?

16 A Yes. Our database at Henderson includes both finger
17 impressions and palms all the way down to the wrist.

18 Q That becomes important because sometimes the surface
19 on the lift that is done may just have contact with the palm
20 if, for instance, if I was grabbing my pen like this?

21 A That's correct.

22 Q You used the term, as far as the identification, as
23 -- and I just caught part of it. The minutia? What was the
24 term that you used?

25 A Minutia.

1 Q Okay. And that was in conjunction with another
2 term. They're looking at the identifiable minutia or what was
3 the term of art that you used?

4 A Well, the terms that are used within the industry to
5 describe minutia -- minutia is this family of features -- the
6 minutia are ridge endings where a ridge simply stops, or
7 bifurcations. To bifurcate means to divide. And that's -- so
8 that's a location where a ridge will split. And the other
9 common minutia is a ridge dot. That's where a single ridge
10 element has developed between two ridges and it sits all by
11 itself, or as a possible extension of a ridge.

12 So ridge endings, bifurcations and dots are the
13 principle descriptions of the features and everything in
14 fingerprints or palm prints is really a combination of those
15 three things.

16 Q And it also is enhanced by a database --
17 fingerprints and the -- excuse me -- and the opportunity to
18 identify somebody from fingerprints also depends upon the
19 availability of a large number of fingerprints to search, and
20 that was the concept of AFIS, wasn't it?

21 A Well, the concept of AFIS was to make the searching
22 of a latent fingerprint far easier than going to a file
23 cabinet and pulling out 50 and going through them one at a
24 time. The size of the database is important, the quality of
25 the database is important.

1 Q Okay.

2 MR. PIKE: I don't have any further questions.
3 Thank you very much.

4 THE COURT: Any redirect?

5 MR. DiGIACOMO: Very briefly.

6 REDIRECT EXAMINATION

7 BY MR. DiGIACOMO:

8 Q Is there something known as AFIS quality in
9 fingerprint examination and is that term utilized?

10 A It is.

11 Q And what does that mean?

12 A In general, it means when we can look at a latent
13 print and we can find anywhere from 4 to 6 minutia to start a
14 search and anywhere up to -- we will search up to 15 minutia.
15 When you get beyond that, you get into issues of skin
16 deformation which might affect the identification process.

17 So when we refer to a fingerprint as AFIS quality,
18 we're commonly talking about either a fingerprint or a palm
19 print that has a minimum of 4 to 6 minutia with good clarity.

20 Q And when you as an examiner have an AFIS quality
21 print and it has not yet been identified, is it your normal
22 practice to enter that into the AFIS system to see if there's
23 going to be a -- a search done?

24 A In a case it is not unusual at all. We commonly get
25 requests and we get so much work we try to stick pretty much

1 to what we're requested. But it's not unusual for us to take
2 a print that a detective needs identified and do an AFIS
3 search.

4 Q And in this particular case, there appears to have
5 been a number of AFIS hits on Mr. Allred's reports, correct?

6 A That's correct.

7 Q That you wind up verifying?

8 A Yes, sir.

9 Q If he entered any of the other AFIS quality prints
10 into the system they're still sitting in the system currently?

11 A Yes. One of the features of AFIS systems that we
12 have available is to take the fingerprint from the scene to
13 enter it in the system, to do the encoding, to do an initial
14 search, to even do a second or third search at that time. And
15 then that unidentified fingerprint or palm print goes into
16 another database, so that every time a new set of fingerprint
17 or palm print records comes to us from the civil processing
18 center, or from the jail, or from somewhere else, that new set
19 of record prints is automatically compared to everything in
20 that unidentified database.

21 Q And -- or if there is a -- can't say it's going to
22 be a match, because the computer can't do the match, but if
23 there is a correlation with a high score, is somebody then
24 notified, hey, we think we can identify this?

25 A Well, every day we have a work flow that involves

1 looking at all of the new incoming prints. And then each set
2 of incoming record prints gives us a candidate list for
3 possible latent matches, and a candidate list for possible
4 palm matches. So with every incoming set of prints we go
5 through that process of checking this candidate list generated
6 by the -- or generated from the unidentified latents.

7 Q And so in the ensuing six years, or however long
8 it's been since these reports have been generated, if there
9 had been a subsequent match of those prints that are in that
10 system there would've been a report generated, someone -- you
11 would've had to verify it, if Mr. Allred wasn't there, it
12 would've been you and somebody else who would've done a
13 verification and the report would've been disseminated to the
14 police and the various people.

15 A Yes, we get several reverse hits. They're known as
16 reverse hits in the industry, because they come from 10 print
17 records. We get several of those a month.

18 Q And to your knowledge that hasn't happened in this
19 case?

20 A Not that I'm aware of, no.

21 Q And so, you know, for example if an individual named
22 Trey Black had been arrested and entered into the system and
23 he hadn't previously been in there, that has been searched,
24 that known print has been searched against the unknown AFIS
25 prints that are still sitting in there and no identification

1 has been made?

2 A Correct.

3 MR. DiGIACOMO: Nothing further, Judge.

4 THE COURT: Anything further, Mr. Pike?

5 RECROSS-EXAMINATION

6 BY MR. PIKE:

7 Q If you have a fingerprint that is useful but the
8 known -- but not of AFIS quality, and you have a known print
9 that is not of good quality, you have the ability to request
10 from the detective, can you go out and get a better
11 fingerprint from this person? Can you go out and get a palm
12 print from this person so that you can do a comparison on a
13 fingerprint of limited quality?

14 A We do have the capability to request them to do
15 that, yes.

16 Q And occasionally they -- in your experience you've
17 had detectives go out and take additional fingerprints so that
18 you could do a more accurate and thorough check?

19 A Well, with their permission, yes.

20 Q Okay.

21 MR. PIKE: Thank you very much. I don't have any
22 further questions.

23 MR. DiGIACOMO: Nothing further.

24 THE COURT: Any questions from any of the jurors?

25 No -- no questions, sir. Thank you for your testimony. You

1 are excused.

2 As far as your next witness, is --

3 MR. DiGIACOMO: Tomorrow morning.

4 THE COURT: Pardon?

5 MR. DiGIACOMO: Tomorrow morning.

6 THE COURT: So we're done?

7 MR. DiGIACOMO: Yeah, we're done.

8 THE COURT: Done for the day. All right. We went a
9 little quicker today than we expected ladies and gentlemen of
10 the jury. And so we're going to adjourn for the day.

11 MR. PIKE: May we approach the bench, Your Honor?

12 THE COURT: Sure.

13 (Bench conference)

14 MR. PIKE: You may want to let the jury know that
15 we're anticipating that we're ahead of schedule. I don't --
16 do you want to do that so they know we're wasting their time
17 [inaudible].

18 THE COURT: Right.

19 MR. DiGIACOMO: That's fine.

20 MR. PIKE: If you --

21 MR. LALLI: I'm sorry?

22 MR. PIKE: Just say we're ahead of schedule or so
23 that -- I don't know if we want to do that or not.

24 THE COURT: Yeah, we'll I'll tell them.

25 MR. PIKE: Just because if it's a short day

1 [inaudible].

2 THE COURT: Okay. And then tomorrow, 10:00?

3 MR. DiGIACOMO: Tomorrow, depending on what your
4 calendar is. 10:00 would be fine. Our only issue is going to
5 be if Mr. -- Detective Collins is on the stand. Apparently,
6 HPOA is suing whoever, the City of Henderson. And Kishner
7 [phonetic] is having some sort of preliminary injunction
8 evidentiary hearing at 1:30 which he's the witness for. So
9 that may present an issue as to timing for him. But I think
10 that we're going to be well past his time we call [inaudible]
11 witness. If not, we'll start and maybe we can do him later.

12 THE COURT: Is he another -- I mean, is there more
13 witnesses in that hearing? So should I contact her and say,
14 can you call him at 2:00 o'clock, or 2:15?

15 MR. DiGIACOMO: I don't know. I actually think he
16 may be the moving party, too.

17 THE COURT: Okay.

18 MR. DiGIACOMO: He may be the representative for the
19 HPOA at the table. But she may not be holding an evidentiary
20 hearing. He wasn't real clear on his labor law and becoming
21 an expert in labor law in that kind of capacity. So --

22 THE COURT: And he's with HPD, right?

23 MR. DiGIACOMO: Yeah, HPOA, I think, is what it is.
24 The HPOA. And so I just don't know -- I told him to just come
25 -- I think we're going to get through the morning with all the

1 witnesses and I told him to just come down when you're done --

2 THE COURT: Okay.

3 MR. DiGIACOMO: -- with your hearing, so.

4 MR. PIKE: And just so they know that we've
5 accomplished enough so that --

6 THE COURT: Okay.

7 MR. PIKE: -- we're ahead of schedule.

8 THE COURT: All right. Okay.

9 (End of bench conference)

10 THE COURT: Ladies and gentlemen, we're going to see
11 you back tomorrow at 10:00. And even though we're ending
12 early today, the attorneys advise me that we are ahead of
13 schedule, okay? So we're not going to -- because of the early
14 release today, we're not going to put you further back. We
15 are ahead of schedule of this trial. Okay?

16 And so ladies and gentlemen, during this recess it
17 is your duty not to converse among yourselves or with anyone
18 else on any subject connected with this case, or to read,
19 watch or listen to any report of or commentary on the trial by
20 any person connected with the trial or by any medium of
21 information, including without limitation, newspaper,
22 television, radio or the Internet. You're not to form or
23 express an opinion on any subject connected with this case
24 until this matter is submitted to you.

25 We'll see you back tomorrow, 10:00 a.m. Have a good

1 day.

2 (Pause in the proceedings)

3 (Jury recessed at 11:41 a.m.)

4 THE COURT: All right. We're outside the presence
5 of the jury panel. As far as the schedule of witnesses for
6 the State's case and I don't know if the defense is going to
7 be calling any witnesses, I want to try to get a better idea
8 of when we would start to discuss the jury instructions.

9 MR. PIKE: Your Honor, I -- I think we'll -- if
10 their witnesses on Friday finish early and they don't want to
11 rest until Monday, or if they decide to rest on Friday, or
12 whatever, if they rest before too late we could probably
13 settle them then with -- you know, with the exception of one
14 or two minor ones. We can get the basic ones done.

15 Otherwise, Monday we can do that. I don't know what
16 time the Court has for its calendar in the morning.

17 THE COURT: For tomorrow? Or Friday, or Monday?

18 MR. PIKE: No, for Monday.

19 MR. LALLI: Your Honor, in terms of settling
20 instructions, I've reviewed the defense instructions. I've
21 got -- found legal support for either their inclusion or
22 exclusion. And we're ready to discuss those whenever the
23 Court and defense is ready to do that.

24 MR. PIKE: Do you want us to come back a 3:00
25 o'clock this afternoon? I don't know what Your Honor has for

1 this afternoon. If you want us to do the --

2 MR. DiGIACOMO: Well, isn't the Court the one who
3 needed the 3:30 today anyway?

4 THE COURT: Right.

5 MR. PIKE: Oh, I'm sorry.

6 MR. DiGIACOMO: So [inaudible] got [inaudible].

7 THE COURT: And perhaps we may -- will this work
8 within your -- the State's schedule for your witnesses? On
9 Friday, as far as adjourning at 3:30 or so, or 4:00?

10 MR. DiGIACOMO: That won't be a problem, because by
11 that point, if we're still going, it'll just still be Gerry
12 Collins at that point. We're literally down to two, maybe
13 three witnesses, depending on what happens --

14 MR. LALLI: Right.

15 MR. DiGIACOMO: -- tomorrow morning.

16 MR. LALLI: Correct.

17 THE COURT: Okay. Now, is there -- can someone give
18 me a heads-up as far as, you know, Mr. Pike, if you object to
19 4 of their instructions, as far as like sending an e-mail to
20 my law clerk stating -- I know they're not numbered, but
21 stating, the instruction regarding flight, let's say. I don't
22 even know if there's a flight instruction. We object -- you
23 know, we object to that one.

24 Don't make your argument, but just say, we object to
25 that one. We object to the one about, you know, joint

1 possession, or something, you know, whatever it may be.

2 MR. PIKE: You bet.

3 THE COURT: And that way I can focus in. And,
4 State, if you can do the same. So this way I am focusing on
5 the ones that are in dispute.

6 MR. PIKE: I understand. Yeah, so I'll get that
7 done.

8 MR. LALLI: I can -- well, I can tell the Court, Mr.
9 Pike is requesting three lesser includeds, two of which I
10 don't believe we have an objection to. So when you see, for
11 instance, an instruction on larceny, we're not going to oppose
12 that as a lesser included to robbery.

13 The same with respect to kidnapping and false
14 imprisonment. I think with except those two, we either object
15 to all of their instructions, or have an alternative that's
16 already in our packet.

17 THE COURT: Okay. And how many did you submit? I
18 mean, are we talking about a hundred, are we talking 10, 5?

19 MR. PIKE: No, I didn't submit that many. I
20 actually gave a -- the original and a copy to the Court that
21 was when I e-mailed it to the State. So that's already been
22 provided to the Court. And I forwarded along with some of the
23 State's by Mr. DiGiacomo. So I think I had 12 instructions.

24 THE COURT: Okay.

25 MR. LALLI: And with respect to the robbery and the

1 larceny, I'm not sure that larceny is necessarily a lesser
2 included. It's a specific intent crime. So we can air that
3 out. But, I mean, with those -- with a couple of potential
4 lesser includeds we may agree with one or two of those.

5 THE COURT: All right.

6 MR. PIKE: So I will e-mail that over to the Court
7 this afternoon.

8 MR. DiGIACOMO: Thank you.

9 MR. PIKE: Thank you very much, Your Honor.

10 THE COURT: Anything by either side before we
11 adjourn? Nope? All right.

12 (Court recessed at 11:46 a.m., until the following day,
13 Thursday, January 26, 2012, at 10:00 a.m.)

14 * * * * *

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INDEXWITNESSES

| <u>NAME</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|-------------|---------------|--------------|-----------------|----------------|
|-------------|---------------|--------------|-----------------|----------------|

STATE'S WITNESSES:

| | | | | |
|----------------------|----|----|----|----|
| Chanderbhan Gubda | 2 | 12 | 24 | 25 |
| Kent Workman Timothy | 27 | 50 | 62 | 65 |

* * * * *

EXHIBITS

| <u>DESCRIPTION:</u> | <u>ADMITTED</u> |
|---------------------|-----------------|
|---------------------|-----------------|

| | |
|-----------------------------------|----|
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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CLERK OF THE COURT

JAN 26 2012

BY, Carol Donahoo
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13 Plaintiff,
14 vs.
15 DOMONIC MALONE,
16 Defendant.

CASE NO. C 224572
DEPT. NO. XVII

06C224572-2
OBJ
Objection
1758339



**MALONE'S OBJECTIONS TO THE STATE'S
PROPOSED TRIAL PHASE JURY INSTRUCTIONS**

Date: N/A
Time: N/A

COMES NOW, Defendant Domonic Malone, by and through his attorneys David M. Schieck, Special Public Defender. Randall H. Pike, Assistant Special Public Defender and Charles A. Cano, Deputy Special Public Defender, and objects to the State's Proposed Trial Phase Jury Instructions as follows: The proposed number coincides with the given instruction at the trial of codefendant McCarty. As the proposed instructions are currently not paginated, also included is the opening sentence of the instruction.

Proposed Instruction No. 3 (Redacted Information)

The instruction repeatedly refers to "Defendants," but does not identify anyone in the

1 first paragraph of the instruction. In a trial with one defendant, this is confusing.

2
3 At line 12, concerning Count 4, the State alleges that the Defendants did "seize,
4 confine, inveigle, entice, decoy, abduct, conceal, kidnap or carry away Melissa Estores."
5 Malone objects to this instruction as it fails to comply with Runion v. State, 116 Nev. 1041,
6 1050-51, 13 P.3d 52, 58-59 (2000), and its mandate that district courts cease merely quoting
7 the applicable statutes when instructing the jury, and should instead "tailor instructions to the
8 facts and circumstances of the case, rather than simply relying on 'stock instructions.'" This
9 same objection applies to line 21 of the second page of the instruction, concerning Count 7;
10 and to line 23 of the third page of the instruction, concerning Count 12; to line 1 of the fourth
11 page of the instruction, concerning count 13.

12
13 **Proposed Instruction No. 8 (Conspiracy)**

14 The instruction begins with "A conspiracy is an agreement...". The final
15 sentence of the proposed instruction is : "In particular, a conspiracy may be supported by a
16 coordinated series of acts, in furtherance of the underlying offense, sufficient to infer the
17 existence of an agreement." The instruction could be misleading as to the State's burden of
18 proof, in violation of In re: Winship, 397 U.S. 358 (1970). Malone proposes that the
19 language be changed to the following: "In particular, the State may establish the offense of
20 conspiracy by showing a coordinated series of acts, in furtherance of the underlying offense,
21 sufficient to prove beyond a reasonable doubt the existence of an agreement."

22
23 **Proposed Instruction No. 9 (Conspiracy, joint liability) & Instruction No. 18 (Robbery)**

24 The proposed instruction begins "Where several parties knowingly and with criminal
25 intent..." and "Robbery is the unlawful taking....". Malone objects to these instructions on the
26 ground that they do not include robbery as a specific intent offense. At common law, robbery
27 was a specific intent crime and required "a felonious taking of money or goods of any value
28 from the person of another or in his presence against his will, by violence or putting him in

1 fear.” State v. Olin, 725 P.2d 801, 806 (Idaho 1986). “Felonious taking” refers to the
2 specific intent to deprive the owner of his property. Bell v. State, 394 So.2d 979 (Fla.1981);
3 see also People v. Ford, 388 P.2d 892, 906 (Cal. 1964) (an essential element of robbery is a
4 specific intent to steal); Moyers v. State, 197 S.E. 846, 847 (Ga. 1938) (although the statute’s
5 definition of robbery does not expressly say so, it implies an intent to steal); State v.
6 Hollyway, 41 Iowa 200, 202 (1875) (in robbery it is essential that the taking of the goods be
7 specifically intended to deprive the owner of his property); People v. Koerber, 155 N.E. 79,
8 82 (N.Y. 1926) (the gist of robbery is larceny by force from a person and the gist of larceny is
9 taking and carrying away of property of another with the specific intent to steal the property);
10 State v. Slingerland, 19 Nev. 135, 7 P. 280, 283 (1885).

11 Some jurisdictions still require proof of the specific intent to rob. Allen v. State, 857
12 A.2d 101, 128 (Md. App. 2004) (robbery is a specific intent crime); Simmons v. U.S., 554
13 A.2d 1167, 1169 (D.C. 1989) (specific intent to steal is an element of robbery); Com. v.
14 Stewart, 547 A.2d 1189, 1191 (Pa. Super. 1988) (specific intent to deprive is required for
15 robbery conviction). Other jurisdictions, however, hold that robbery is a general intent
16 crime. People v. Simms, 736 N.E.2d 1092, 1115 (Ill. 2000) (robbery is a general intent
17 crime, for which proof that the prohibited harm was intended is not necessary to support
18 conviction); State v. Augustine, 545 So. 2d 1203, 1205 (La. Ct. App. 4th Cir. 1989)
19 (prosecution in robbery case was under no obligation to establish specific intent, as element
20 has been removed from most recent definition of armed robbery); Litteral v. State, 97 Nev.
21 503, 505-06, 634 P.2d 1226, 1227 (1981) (robbery under statute is a general intent crime),
22 overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986).

23 NRS 200.380 defines robbery as “the unlawful taking of personal property from the
24 person of another, or in his presence, against his will, by means of force or violence or fear of
25 injury, immediate or future, to his person or property, or the person or property of a member
26 of his family, or of anyone in his company at the time of the robbery.” The statute is silent as
27 to intent. Where a statute creating or describing a criminal offense uses a general term that is
28 not defined, the general practice is to give the term its common-law meaning. See U.S. v.

1 Gray, 448 F.2d 164, 167 (9th Cir. 1971); Adler v. Sheriff, Clark County, 92 Nev. 641, 643,
2 556 P.2d 549 (1976) (applying common law definition of extortion). See also U.S. v.
3 Gonzales, 456 F.3d 1178, 1182 (10th Cir. 2006); State v. Gallegos, 228 N.W.2d 615 (Neb.
4 1975); U.S. v. Everett, 700 F.2d 900, 904 (3d Cir. 1983) (applying common law definition of
5 attempt). Where a statute forbids but does not define an offense, the definition may be
6 obtained from the common law. See State v. Mattan, 300 N.W.2d 810, 813 (Neb. 1981);
7 State v. Vance, 403 S.E.2d 495, 501-02 (N.C. 1991).

8 Prior to 1981, Nevada case law defined robbery as a specific intent crime. Turner v.
9 State, 96 Nev. 164, 165, 605 P.2d 1140, 1141 (1980); Brimmage v. State, 93 Nev. 434, 443,
10 567 P.2d 54, 60 (1977); State v. Sala, 63 Nev. 270, 287, 169 P.2d 524, 533 (1946). That is,
11 the "taking" in the robbery must have been committed with the specific intent to permanently
12 deprive the owner of her property. Turner, 96 Nev. at 165. Currently, and quite inexplicably,
13 Nevada defines robbery as a general intent crime. See Litteral, 97 Nev. at 506, 634 P.2d at
14 1227 (holding NRS 200.380 is silent as to intent so robbery in the state of Nevada is a
15 general intent crime), overruling Turner, 96 Nev. 164, 605 P.2d 1140. The Court in Litteral
16 instructed "robbery under statute is a general intent crime which is meant to include all
17 violent takings from the person or presence of another" and "no intent is necessary except the
18 intention of doing the act denounced by the statute." Id. Twenty years later, in Leonard v.
19 State, the Court made it clear that robbery in Nevada does not require specific intent;
20 "pursuant to Nevada's robbery statute... it is not necessary that force or violence involved in
21 the robbery be committed with the specific intent to commit robbery." 117 Nev. 53, 76-77, 17
22 P.3d 397, 412 (2001). Rather, the Court held, "a robbery may be shown where a defendant
23 simply takes advantage of the terrifying situation he or she created and flees with the victim's
24 property." Id. (quoting Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976)).
25 See also Chappell v. State, 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998).

26 Malone submits that Litteral was wrongly decided and that Turner provided the
27 appropriate analysis of the intent element of the offense of robbery. In light of the ambiguity
28 of the statute, the common law history, and the rule of lenity, Haney v. State, 185 P.3d 350,

1 353 (Nev. 2008), U.S. v. Santos, 128 S.Ct. 2020, 2025 (2008), this Court should conclude
2 that robbery is a specific intent offense and should overrule Litteral and its progeny.

3 Even if this Court concludes that robbery as a stand-alone offense, should be a general
4 intent offense, it should nevertheless find that robbery, when used as a basis for felony-
5 murder, must be defined as a specific intent offense. Under the felony-murder doctrine, the
6 commission of a felony serves as a substitute for establishing the mens rea element of first-
7 degree murder. McConnell v. State, 121 Nev. 25, 30, 107 P.3d 1287, 1290 (2005). When the
8 underlying felony is robbery, the felonious intent, or intent to rob, serves as a substitute for
9 the malice requirement for murder. State v. Contreras, 118 Nev. 332, 334, 46 P.3d 661, 662
10 (2002); Com. v. Prater, 725 N.E.2d 233, 241-42 (Mass. 2000). "Felonious intent" with
11 respect to robbery translates to a specific intent to permanently deprive the owner of his
12 property, and must have been formed prior to, or at the time of, the murder to act as a
13 substitute for malice. Slingerland, 19 Nev. 135, 7 P.3d at 283; Nay v. State, 167 P.3d 430,
14 434-35 (Nev. 2007); People v. Horning, 102 P.3d 228, 250 (Cal. App. 2004); State v.
15 Cheatham, 6 P.3d 815, 820 (Idaho 2000); State v. Sherrill, 657 S.W.2d 731, 737 (Mo. Ct.
16 App. S.D. 1983). A murder that precedes formation of the intent to rob is not within the
17 perpetration of robbery, and, thus, is not felony murder. Nay, 167 P.3d at 434-35; People v.
18 Reynolds, 186 Cal. App. 3d 988 (1986); Com. v. Spallone, 406 A.2d 1146, 1147 (Pa. Super.
19 1979). Thus robbery as an element of felony murder must require a showing of specific
20 intent to rob. Id.; U.S. v. Lilly, 512 F.2d 1259, 1261 (9th Cir. 1975). To hold otherwise
21 would allow an individual to be convicted of first-degree murder without having the specific
22 intent to commit any crime, let alone the requisite mens rea to commit first-degree murder.
23 Id. To the extent that the Nevada Supreme Court's existing case-law holds to the contrary,
24 see e.g. Leonard, 117 Nev. at 77, 17 P.3d at 412, those cases should be overruled.

25 Requiring that a robbery used to establish felony-murder must be established as a
26 specific intent offense is consistent with federal constitutional authority, and authority from
27 this Court, that requires that the state's death penalty scheme narrow the class of persons
28 eligible for the death penalty. In McConnell v. State, 120 Nev. 1043, 1066 & n. 62, 102 P.3d

1 606, 622 & n. 62 (2004), this Court recognized that “[a]t a bare minimum . . . a narrowing
2 device must identify a more restrictive and more culpable class of first degree murder
3 defendants than the pre-Furman capital homicide class.” (Quoting Richard A. Rosen,
4 *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C.L. Rev. 1103,
5 1124 (1990)). As set forth above, authority from this Court established that in 1972, when
6 the Supreme Court decided Furman v. Georgia, 408 U.S. 238 (1972), robbery in Nevada was
7 a specific intent offense. By changing the definition of robbery and omitting the specific
8 intent element, Nevada expanded the class of persons eligible for the death penalty, in
9 contravention of the requirements of Furman as explained in Gregg v. Georgia, 428 U.S. 153
10 (1976) and Lowenfield v. Phelps, 484 U.S. 231 (1988). Requiring the element of specific
11 intent for robbery offenses that are used to establish felony-murder would be consistent with
12 the narrowing requirement of the Eighth Amendment, as explained in McConnell.

13
14 **Proposed Instruction No. 10 (Slight Evidence for Conspiracy)**

15 This instruction begins, “Wherever there is slight...” This proposed instruction states
16 that “*Whenever there is slight evidence that a conspiracy existed*, and that the defendant was
17 one of the members of the conspiracy, then the statements and the acts by the person likewise
18 a member may be considered by the jury as evidence in the case as to the defendant found to
19 have been a member . . .” Malone objects to this instruction because it improperly suggests
20 to the jurors that they could find him guilty under a conspiracy theory of liability based upon
21 “slight evidence,” rather than the constitutional requirement of proving the charge beyond a
22 reasonable doubt. This proposed instruction lessens the State’s required burden of proof, and
23 would violate his constitutional right to due process under the federal and state constitutions.
24 Additionally, “failure to instruct a jury on the necessity of proof of guilt beyond a reasonable
25 doubt can never be harmless error.” Jackson v. Virginia, 443 U.S. 307, 320 n. 14 (1979).

26 The language of this instruction would be a proper guide for a trial court’s decision to
27 admit evidence of extra-judicial co-conspirator statements, but it is not an appropriate
28 instruction for a jury. The instruction fails to inform the jury of the “beyond a reasonable

1 doubt" standard that is required to prove that Malone is guilty under a conspiracy theory of
2 liability.

3 The slight evidence standard to admit co-conspirator statements was articulated in
4 McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987). At issue in McDowell
5 was whether the out-of-court statements by various co-conspirators implicating McDowell in
6 the conspiracy were properly admitted. In determining the admissibility of the co-conspirator
7 statements, the McDowell Court held that "The preliminary question of the existence of a
8 conspiracy for purposes of NRS 51.035(3)(e) need only be established, as properly found by
9 the district court in the instant case, by slight evidence." Id. In other words, the slight
10 evidence standard articulated in McDowell was provided for trial courts to determine the
11 admissibility of co-conspirator statements. It was not provided as a standard upon which to
12 instruct a jury on the required evidence to establish the existence of a conspiracy charge.

13 Once a trial judge makes a preliminary determination that the requirements for
14 admission of a statement have been satisfied, there is no reason to instruct the jury that it is
15 required to make an identical determination independently of the court. U.S. v. Hagmann,
16 950 F.2d 175, 181 n.11 (5th Cir. 1991). See also U.S. v. Martinez de Ortiz, 907 F.2d 629
17 (7th Cir. 1990) (en banc); U.S. v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979) (the trial judge
18 should not instruct the jury on the burden of proof of the preliminary question of
19 admissibility of co-conspirator statements). A jury cannot be expected to apply the "slight
20 evidence" standard to the identical elements to which they must also apply the beyond a
21 reasonable doubt standard that applies to the substantive law of conspiracy. The instruction
22 proposed here may mislead the jury and should not be given. See Zelavin v. Tonopah
23 Belmont Dev. Co., 39 Nev. 1, 7, 149 P. 188, 189 (1915). The fact that another instruction
24 informs the jury of the reasonable doubt standard does not cure the constitutional error
25 presented here. See Penry v. Johnson, 532 U.S. 782, 799 (2001) (a jury charge which is
26 internally contradictory places jurors in an impossible situation); Francis v. Franklin, 471
27 U.S. 307, 322 (1985) ("Language that merely contradicts and does not explain a
28 constitutionally infirm instruction will not suffice to absolve the infirmity.").

1 **Proposed Instruction No. 13 (Kidnaping)**

2 This instruction begins, "Every person who willfully seizes...". The instruction
3 provides a laundry list of ways (seizes, confines, inveigles, entices, decoys, abducts,
4 conceals, kidnaps or carries away) in which Kidnaping may be committed, even though
5 several of these methods do not apply to this case. Thus, it fails to comply with Runion v.
6 State, 116 Nev. 1041, 1050-51, 13 P.3d 52, 58-59 (2000), and its mandate that district courts
7 cease merely quoting the applicable statutes when instructing the jury, and should instead
8 "tailor instructions to the facts and circumstances of the case, rather than simply relying on
9 'stock instructions.'" The last paragraph provides that "the law does not require the person
10 being kidnapped to be carried away for any minimal distance." This generic principle does
11 not apply to the facts of this case and it should therefore not be included in the instruction.
12 He also objects to this instruction because it fails to define "inveigle" and this word is not in
13 the vocabulary of the average person.

14
15 **Proposed Instruction No. 20 (Pandering)**

16 This instructions states that "Any person who induces, encourages, inveigles, entices
17 or compels a persons to become a prostitute or to continue to engage in prostitution is guilty
18 of pandering." Malone objects to this instruction as it fails to comply with Runion v. State,
19 116 Nev. 1041, 1050-51, 13 P.3d 52, 58-59 (2000), and its mandate that district courts cease
20 merely quoting the applicable statutes when instructing the jury, and should instead "tailor
21 instructions to the facts and circumstances of the case, rather than simply relying on 'stock
22 instructions.'" He also objects to this instruction because it fails to define "inveigle" and this
23 word is not in the vocabulary of the average person.

24
25 **Proposed Instruction No. 22 (Burglary)**

26 This instruction begins, "Any person who by day or night...". This instruction lists
27 "house, room, apartment, or other building." It should list only the structure charged under
28 the information, in compliance with Runion v. State, 116 Nev. 1041, 1050-51, 13 P.3d 52,

1 58-59 (2000), which requires that instructions be tailored to the facts of the case.

2
3 **Proposed Instruction No. 24 (Intention for Burglary)**

4 The proposed instruction states that "the intention with which an entry was made is a
5 question of fact which may be inferred from the defendant's conduct and all other
6 circumstances disclosed by the evidence." This instruction could lead a jury to believe that
7 the State is not required to prove intention beyond a reasonable doubt, in violation of
8 Jackson v. Virginia, 443 U.S. 307, 320 n. 14 (1979). Malone objects on this ground and
9 submits that a clarifying instruction that "the State must establish intention beyond a
10 reasonable doubt" would satisfy the objection.

11
12 **Proposed Instruction No. 34 (Intention for Murder)**

13 The proposed instruction states that "the prosecution is not required to present direct
14 evidence of a defendant's state of mind as it existed during the commission of a crime . The
15 jury may infer the existence of a particular state of mind of a party or a witness from the
16 circumstances disclosed by the evidence." This instruction could lead a jury to believe that
17 the State is not required to prove intention beyond a reasonable doubt, in violation of
18 Jackson v. Virginia, 443 U.S. 307, 320 n. 14 (1979). Malone objects on this ground and
19 submits that a clarifying instruction that "the State must establish intention beyond a
20 reasonable doubt" would satisfy the objection.

21
22 **Proposed Instruction No. 36 (Guilt Verdict)**

23 The proposed instruction states that "While a guilty verdict must be unanimous, you
24 need not be unanimous on the means or the theory of first degree murder in arriving at your
25 verdict." This instruction presupposes that there will be a verdict of guilty. When given by
26 the district court, it unduly suggests that this should be the result. The instruction should be
27 rephrased to say that "If the jury returns a verdict of guilty on the charge of first degree
28 murder, it must be unanimous. The jurors, however, need not be unanimous on the means or

1 the theory of first degree murder in arriving at the verdict. If the jurors are not unanimous in
2 finding that the defendant committed the offense of first degree murder, then a verdict of not
3 guilty must be returned on this charge.”
4

5 **Proposed Instruction No. 38 (First Degree vs. Second Degree)**

6 The instruction should state “unanimously” between “you” and “find,” and “beyond a
7 reasonable doubt” after “established” in the first line of the instruction. This instruction is
8 necessary to satisfy the State’s burden of proof, as explained in Jackson v. Virginia, 443 U.S.
9 307, 320 n. 14 (1979).
10

11 **Proposed Instruction No. 44 (Presumption of Innocence)**

12 Malone objects to the first paragraph of this proposed instruction:

13 The Defendant is presumed innocent until the contrary is proved. This
14 presumption places upon the State the burden of proving beyond a reasonable
15 doubt every material element of the crime charged and that the Defendant is the
16 person who committed the offense.

16 The portion of the instruction at issue here is the first paragraph and not the second
17 paragraph. Malone recognizes that NRS 175.211 mandates the second paragraph of the
18 instruction and recognizes that the Nevada Supreme Court has repeatedly affirmed the
19 constitutionality of the second paragraph of this instruction. See e.g. Buchanan v. State, 119
20 Nev. 201, 221, 69 P.3d 694, 708 (2003); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548, 554
21 (1991). The first paragraph of this instruction is not mandated by statute. Either of Nevada’s
22 two instructions on the presumption of innocence are appropriate:

23 NRS 175.191 provides the following:

24 A defendant in a criminal action is presumed to be innocent until the
25 contrary is proved; and in case of a reasonable doubt whether the defendant’s
26 guilt is satisfactorily shown, the defendant is entitled to be acquitted.

27 NRS 175.201 provides the following:

28 Every person charged with the commission of a crime shall be presumed
innocent until the contrary is proved by competent evidence beyond a
reasonable doubt; and when an offense has been proved against the person, and
there exists a reasonable doubt as to which of two or more degrees the person is

1 guilty, the person shall be convicted only of the lowest.

2 Malone requests that this Court give the statutory definition of the presumption of innocence
3 in lieu of the non-statutory definition provided by the State.

4 Malone also objects to this portion of the instruction because there is no instruction
5 defining which elements of the offenses are material, and that without such an instruction,
6 the jurors may speculate as to which were material and which are not. The failure to do so
7 renders the instruction confusing and misleading, and lessens the State's burden of proof as
8 the jury may decide, without guidance, that it is free to determine which elements of the
9 offenses are material and which are immaterial.

10 Recently, in Nunnery v. State, 263 P.3d, 259-60 (Nev. 2011), the Nevada Supreme
11 Court addressed this issue (though it did not address the statutory issue set forth above). In
12 rejecting this issue, the Nevada Supreme Court found that it "has repeatedly upheld such
13 language" and cited to Morales v. State, 122 Nev. 966, 971, 143 P.3d 463, 466 (2006);
14 Crawford v. State, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005); Gaxiola v. State, 121 Nev.
15 633, 650, 119 P.3d 1225, 1233 (2005); and Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d
16 288, 296 (1998). Nunnery, 263 P.3d at 259-60. None of these cases, however, addressed the
17 issue presented here. Rather, in Morales, 122 Nev. at 970-711, 143 P.3d at 466, the Nevada
18 Supreme Court found that the jury was properly instructed on a firearm offense and properly
19 instructed that they were required to find the defendant guilty beyond a reasonable doubt on
20 each element in order to reach verdicts of guilty. There was no challenge to the use of the
21 term "material" within the instruction and no discussion as to whether the district court
22 should be obligated to inform the jury which elements are material when using this
23 instruction. In Crawford, 121 Nev. at 750-51, 121 P.3d at 586-87, the Nevada Supreme
24 Court accepted, but found harmless, a defendant's argument that the district court erred in
25 refusing to give a proposed jury instruction on the State's burden to prove that the defendant
26 did not act in the heat of passion. In addressing the issue, the Nevada Supreme Court noted
27 that the jury was given a general instruction on reasonable doubt, which included the "every
28 material element" language at issue here, but it did so in the context of evaluating whether

1 the defendant was prejudiced by the refusal to give his proffered instruction. Id. at 751, 121
2 P.3d at 587. The Nevada Supreme Court did not address whether the district court erred in
3 failing to define the "material elements" of the offense. Id. In Gaxiola, 121 Nev. at 647-50,
4 119 P.3d at 1232-33, the Nevada Supreme Court considered a defendant's challenge to a "no
5 corroboration" jury instruction in a sexual assault case. After a lengthy discussion, in which
6 the Nevada Supreme Court found that the instruction was correct, it stated in passing that "it
7 is therefore appropriate for the district court to instruct the jurors that it is sufficient to base
8 their decision on the alleged victim's uncorroborated testimony as long the testimony
9 establishes all the material elements of the crime." Id. at 650, 119 Nev. at 1233. The Court
10 in no way considered the instruction at issue here and did not address whether the district
11 court is obligated to inform the jury of which elements are material when using this
12 instruction. Finally, in Leonard, 114 Nev. at 1209, 969 P.2d at 296, the Nevada Supreme
13 Court held that the district court did not deny the defendant the presumption of innocence by
14 instructing the jury to do "equal and exact justice between the Defendant and the State of
15 Nevada." The Court found that the equal and exact justice instruction did not concern the
16 presumption of innocence, and noted that a separate instruction informed the jury that the
17 State has the burden of proving beyond a reasonable doubt every material element of the
18 crime and that the defendant was the person who committed the offense: Id.

19 Prior to Nunnery, the Nevada Supreme Court neither considered nor addressed the
20 issue presented here: must the jury be instructed as to which elements are material if a jury
21 instruction states that the State is obligated to prove beyond a reasonable doubt only those
22 elements that are "material." In other words, the Court had not addressed the issue of
23 whether an instruction which invites the jury to determine materiality for itself is proper.
24 Prior opinions mentioning the concept of "material element" did not address this specific
25 issue. The mere fact that this Court has generally discussed "material elements," within
26 contexts entirely different from the issue presented here, is insufficient to establish that this
27 Court "has repeatedly upheld such language." See generally Anderson v. Harless, 459 U.S.
28 4, 6-7 (1982) (concluding that issues must be specifically raised and finding failure to

1 exhaust state remedies where the defendant challenged a malice instruction and argued it was
2 reversible error, but did not specifically present a federal constitutional claim: "It is not
3 enough that all the facts necessary to support the federal claim were before the state courts . .
4 . or that a somewhat similar state-law claim was made." (citations omitted). Nunnery should
5 therefore be overruled as to this issue.

6 In any event, in Nunnery, the Nevada Supreme Court did not mandate that the
7 instruction at issue here be given. As noted above, it is not mandated by statute. Malone
8 submits that the instruction is unconstitutional and should not be given. "In state criminal
9 trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against
10 conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute
11 the crime with which he is charged.'" Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam)
12 (quoting In re Winship, 397 U.S. 358, 364 (1970)). "This reasonable-doubt standard 'plays a
13 vital role in the American scheme of criminal procedure.'" Id. (quoting Winship, 397 U.S. at
14 363). The instruction here failed to comply with Winship and Cage in that it allowed the jury
15 to speculate as to which elements of the offenses were material and which were not.

16 In the alternative, Malone submits that all instructions setting forth the elements of the
17 offenses should affirmatively state that each of the elements are material and must be
18 established beyond a reasonable doubt by the State.

19
20 **Proposed Instruction No. 45**

21 The proposed instruction states "Although your verdict must be unanimous as to
22 whether the Defendant is not guilty, you do not have to agree on any particular theory of
23 reasonable doubt." This instruction is confusing and not supported by the law. Malone
24 proposes the following alternative instruction "While a not guilty verdict must be unanimous,
25 you need not be unanimous as to the basis for finding reasonable doubt."

26
27 **Proposed Instruction No. 47 (Guilt of Another Person)**

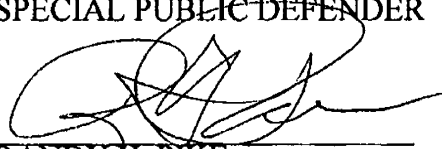
28 The proposed instruction states "You are here to determine whether the Defendant is

1 guilty or not guilty from the evidence in the case." This misstates the jury's role and
2 function, as set forth in Cage v. Louisiana, 498 U.S. 39 (1990) and In re Winship, 397 U.S.
3 358, 364 (1970). The jury should be instructed that "You are here to determine whether the
4 State has met its burden of proving beyond a reasonable doubt that the defendant is guilty.
5 Your decision must be based on the evidence in this case." The remainder of the instruction
6 is acceptable.

7 DATED this 25th day of January, 2012.

8 SUBMITTED BY:

9 DAVID M. SCHIECK
10 SPECIAL PUBLIC DEFENDER

11 
12 RANDY H. PIKE
13 CHARLES A. CANO
14 330 S. Third St., Ste. 800
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16 Attorneys for Defendant Malone

17 RECEIPT OF COPY

18 RECEIPT of a copy of Malone's Objections to the State's Proposed Trial Phase Jury
19 Instructions is hereby acknowledged this ____ day of January, 2012.

20 DISTRICT ATTORNEY'S OFFICE

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22 Las Vegas NV 89155
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