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Counsel for Respondent

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Case No. 64515

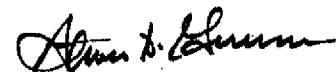
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C272657
)	DEPT NO. V
vs.)	
)	
ANTHONY CASTANEDA,)	TRANSCRIPT OF
)	PROCEEDINGS
Defendant.)	

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 6

MONDAY, JULY 15, 2013

APPEARANCES:

For the State:	ALEXANDER G. CHEN, ESQ. Deputy District Attorney MICHELLE ANTHONY, ESQ. Deputy District Attorney
For the Defendant:	P. DAVID WESTBROOK, ESQ. Deputy Public Defender ERIKA D. BALLOU, ESQ. Deputy Public Defender

RECORDED BY LARA CORCORAN, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

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1 LAS VEGAS, NEVADA, MONDAY, JULY 15, 2013, 11:12 P.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: All right. Case No. C11272657, State of
5 Nevada vs. Anthony Castaneda. Record will reflect presence of
6 the defendant with his counsel, the deputies district attorney
7 prosecuting the case, all officers of the court, and will also
8 reflect that we are outside the presence of the jury. Will
9 counsel so stipulate?

10 MS. BALLOU: Yes, Your Honor.

11 MS. ANTHONY: Yes, Your Honor.

12 MR. CHEN: Yes, Your Honor.

13 MR. WESTBROOK: Yes, Your Honor.

14 THE COURT: Are there any matters outside the
15 presence?

16 MR. CHEN: Yes, Your Honor. If you recall when we
17 left off on Friday, defense counsel did mention something
18 about the fact that they thought there was something wrong
19 with my Powerpoint presentation, which I'd given the jury. I
20 did speak to Ms. Ballou, and I said, Well, if you'd let me
21 know what was wrong, I'd be more than happy to look at it.

22 The one thing I did get wrong on my Powerpoint was a
23 date which was referenced on one of the files on the USB
24 drive. I admit that that was an inadvertent mistake and I'm
25 willing to inform the jury or have the Court inform the jury

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1 that it was wrong. But certainly they'd rely upon their own
2 memory of the evidence. However, my Powerpoint slide was
3 incorrect on that date.

4 MR. WESTBROOK: And, Your Honor, specifically what
5 was wrong is that when they did a recount of the last written
6 dates of the thumb drive, the most important date, which was
7 for Exhibit 12, was incorrect on their Powerpoint slide.
8 Instead of showing that it was February 7th, 2010, which is
9 what the evidence shows, I believe their Powerpoint slide said
10 February 7th, 2008.

11 Now, they wouldn't let me see their Powerpoint slides
12 by numerous requests. I sent an e-mail, which I copied your
13 clerk on this morning. I'm going to ask that that be printed
14 and put into the record on this issue. But I've been asking
15 for this since Friday, we tried to get it this morning, and I
16 wasn't allowed to view it, and they refused, flatly refused to
17 send it to me.

18 I wanted to put that into my Powerpoint presentation,
19 because our theory of the case -- and again, I have not -- I
20 had no doubt whatsoever in my mind, because I'd worked with
21 Mr. Chen before, that this was not intentional. But the --
22 one of the theories of our case here is that the police were
23 sloppy, and here we have the government putting a slide in
24 that gets the most -- one of the most important pieces of
25 evidence in this case wrong. So once again, mistakes are

1 being made.

2 THE COURT: Well, the -- you're -- you want to put
3 their Powerpoint slide into your Powerpoint slide?

4 MR. WESTBROOK: Yes, Your Honor.

5 THE COURT: No. That is not evidence. Now, you can
6 comment on it and say if they happen to even see it, as he
7 went through those things so fast that I don't even know how
8 they could have seen it, but you could certainly say that and
9 -- and we can tell the jury that there was an error in that
10 slide. But it's not evidence. So you can't use it in your
11 Powerpoint. You could talk about it, just like you would if
12 there was no Powerpoint, in the good old days when there was
13 no Powerpoint, which, frankly, I preferred.

14 MR. WESTBROOK: Right.

15 THE COURT: Because of this kind of thing.

16 MR. WESTBROOK: Right.

17 THE COURT: But, you know, you can say, well, the
18 State told you it was this date and that the evidence was
19 this.

20 MR. WESTBROOK: I understand, Your Honor. But it was
21 a misstatement of evidence. And as the Court will recall, I
22 made several objections to misstatement of evidence. This is
23 another misstatement of evidence. So I think it would be
24 appropriate at the very least that the Court say that the
25 slide was in error, and that, in fact, on the thumb drive,

1 State's Exhibit 12, was last written on February 7th, 2010,
2 and not 2008, as the slide indicated.

3 MR. CHEN: Your Honor, this is the reason I would
4 prefer to make the argument myself in front of the Court so
5 that someone's not speaking for my intentions or anything else
6 when they go in front of the jury. I certainly recognize that
7 I put the date in incorrectly. I'm not denying that. In
8 fact, I was even willing to tell Ms. Ballou that I did that,
9 because of professional courtesy, Your Honor. But that's why
10 before court starts I would like to stand up before Your Honor
11 and just let Your Honor know that that is, in fact, an error
12 that I put in my Powerpoint.

13 THE COURT: Right. Well, you've done that. Are you
14 suggesting that you --

15 MR. CHEN: I would like to do it in front of the
16 jury, though, Your Honor.

17 THE COURT: In front of the jury? Yeah. That's --
18 and that's appropriate.

19 MR. WESTBROOK: Actually, Your Honor, I object to
20 that. What that is is him continuing his closing argument
21 after he sat down and going back and trying to correct errors
22 that he made. He didn't catch it himself.

23 THE COURT: Well, then do you want to -- do you want
24 the Court to advise the jury that it was in error or do you
25 want to bring it up yourself? I mean --

1 MR. WESTBROOK: I want the Court to advise the jury
2 that it was in error. If it had happened right afterwards, I
3 would have brought it up myself.

4 THE COURT: Well, I didn't see it. So I don't know
5 if it was an error.

6 MR. WESTBROOK: Well, let's take --

7 THE COURT: Let me see the --

8 MR. WESTBROOK: Let's take a look.

9 THE COURT: Let me see the -- do you have a -- did
10 you print out -- because I asked you to print out so we could
11 mark as a court exhibit the Powerpoints. Everybody has to do
12 that. You have yours, as well?

13 MR. WESTBROOK: I haven't printed it yet. But I
14 will --

15 THE COURT: Okay. Good.

16 MR. WESTBROOK: -- [indiscernible].

17 THE COURT: That's just so we'll have a complete
18 record.

19 MR. CHEN: I do, Your Honor. Can I approach, please?

20 THE COURT: Yes. Thank you.

21 MS. ANTHONY: I just want to make sure, Your Honor,
22 since obviously we are going to have them marked, and once
23 mine's finished, I'll have both of mine marked, as well. But
24 I don't want it available for defense to wave around Mr.
25 Chen's Powerpoint.

1 THE COURT: Oh, no. He's not -- it's not evidence.

2 MR. CHEN: And, Your Honor, I believe --

3 THE COURT: This is only a court exhibit.

4 MR. CHEN: -- the date, which I actually realized as
5 I was giving it, but I didn't comment at the time, was the
6 Euro-001, it was one time that I took a double-take, the last
7 written date that is incorrect. I don't dispute that the
8 evidence was it was February 7th, 2010. That -- that's what
9 that date should be.

10 THE COURT: February 7th, 2010. Yes. All right.
11 2010 was the last --

12 MR. CHEN: Written.

13 THE COURT: Last written date. Okay. On the USB.
14 Okay. All right.

15 MR. CHEN: Could I have it marked by the clerk and
16 submitted as a court exhibit, please?

17 THE COURT: Thank you.

18 THE CLERK: Court's exhibit, can I staple it
19 [indiscernible].

20 THE COURT: Anything else?

21 MR. WESTBROOK: So, as we stand now, Your Honor, is
22 the Court going to --

23 THE COURT: Yes.

24 MR. WESTBROOK: That -- that should be just fine. Am
25 I restricted at all from saying that the State was sloppy in

1 its analysis because -- and its presentation to the jury?
2 Because that is my theory of the case.

3 THE COURT: You can --

4 MR. WESTBROOK: I'm not indicating at all that the
5 district attorney was being dishonest and I don't believe
6 that. What I'm saying is things were overlooked in this case
7 from the very beginning, and that's the reason why we're here.
8 So, I just want to set up the ground rules so I don't run
9 afoul of any ruling by the Court.

10 THE COURT: Well, your -- your closing argument is
11 limited to the evidence. You can comment, obviously, on the
12 -- the slide and say in closing argument the State showed you
13 a slide and that was incorrect. But to -- to talk about as
14 evidence that the State, if, you know, that the district
15 attorney was sloppy in their case and that's somehow evidence
16 as to, you know, I think you need to confine your argument to
17 the evidence, which would be the investigation of the case by
18 the investigators, etcetera. But to say -- what is it you're
19 -- you're thinking that you want to say?

20 MR. WESTBROOK: Well, Your Honor, as you recall, the
21 very beginning in my opening argument, I started out by
22 telling the jury, Pay careful attention to what they include
23 and pay careful attention to what they leave out. And from
24 the start of opening argument, we had the State leaving things
25 out of their analysis. For example, failing to mention that

1 there were two times that Tami Hines was living with my
2 client, not just one, as I said in the opening argument. By
3 saying that Tami found the thumb drive, when at trial the
4 testimony was that Mr. Landeau found the thumb drive.

5 What I want to point out is little mistakes and
6 things that are overlooked that have gotten us here today. I
7 think the fact that they showed an exhibit, although, again,
8 my belief, because Mr. Chen's unintentionally --

9 THE COURT: Wasn't -- it wasn't --

10 MR. WESTBROOK: -- is more evidence of that fact.

11 THE COURT: It wasn't an exhibit. That's what my
12 point is. Don't say that it was evidence, because what
13 happens in closing argument, whether you have visual aids or
14 not, isn't evidence, unless you use evidence. But -- but he
15 wasn't putting up a piece of evidence that was wrong. This
16 was his own -- it was as if he misstated it out of his mouth.
17 So that -- you need to -- to say that and not -- I just don't
18 want the jury to be misled that a piece of evidence was
19 somehow changed by the State or something like that, when this
20 -- this appears to be a clerical error or a misstatement. It
21 would be no different than, I mean, I think every -- every
22 lawyer in this room at some point made a -- a misstatement.
23 Because when we all speak we occasionally do that. And it's
24 not intentional. So you can certainly comment that that was a
25 mistake and --

1 MR. WESTBROOK: Okay.

2 THE COURT: -- I'm going to tell them it was a
3 mistake, as well. And you can comment on it. Just don't make
4 it sound like it -- it's evidence. You can certainly go talk
5 about the evidence that is in and what it said and what it
6 doesn't say. So.

7 MR. WESTBROOK: Thanks for the clarification, Your
8 Honor.

9 THE COURT: Okay. Anything else?

10 MR. CHEN: No, Your Honor.

11 THE COURT: All right. Are we ready to bring them
12 in, then? All right. Let's bring them in.

13 MR. WESTBROOK: We are.

14 THE MARSHAL: All rise for the jury, please.

15 (Jury reconvened at 1:22 p.m.)

16 THE MARSHAL: Your Honor.

17 THE COURT: Thank you. Please be seated. Good
18 afternoon, ladies and gentlemen. How are you doing?

19 THE JURY: Good afternoon.

20 THE COURT: Did you have a good weekend?

21 THE JURY: Yes.

22 THE COURT: Was the wedding successful?

23 JUROR NO. 9: Yes.

24 THE COURT: Good. All right.

25 UNIDENTIFIED JUROR: Guess they got away.

1 JUROR NO. 9: Nobody ran away.

2 THE COURT: Okay. No last minute eloping? All
3 right.

4 Record will reflect all 12 members of the jury, as
5 well as the alternate; will counsel so stipulate?

6 MS. ANTHONY: Yes, Your Honor.

7 MR. WESTBROOK: Yes, Your Honor.

8 MS. BALLOU: Yes, Your Honor.

9 MR. CHEN: Yes, Your Honor.

10 THE COURT: All right. We are at the phase of the
11 trial where the defense is going to present closing argument.

12 Mr. Westbrook.

13 MR. WESTBROOK: Thank you, Your Honor.

14 THE COURT: Oh. And before we get there, one other
15 matter. Ladies and gentlemen, when you heard Mr. Chen's
16 closing argument last Friday, there was an error in one of the
17 slides that I wanted to make -- bring to your attention.
18 There was a slide that indicated on the USB drive that there
19 was a last written date on the last file name, was Euro --
20 what was it?

21 MR. CHEN: 001, Your Honor.

22 THE COURT: Euro-001, and that last written date
23 should have read 2/7 of '10, not the date that was on the
24 slide.

25 All right.

1 MR. WESTBROOK: Thank you, Your Honor.

2 THE COURT: Thank you.

3 MR. WESTBROOK: May I cross over to the TV and try to
4 angle a little bit so it can be seen better?

5 THE COURT: Yes.

6 MR. WESTBROOK: I'm going to attempt to do that
7 without pulling all the cords out of the wall.

8 THE COURT: Please. Please do.

9 MR. WESTBROOK: May I inquire of the jury, or will
10 you inquire of the jury if that's better?

11 THE COURT: Can you see?

12 UNIDENTIFIED JUROR: That's, like, 10 times better.

13 UNIDENTIFIED JUROR: Yeah.

14 DEFENDANT'S CLOSING ARGUMENT

15 MR. WESTBROOK: I know it's been a really long week.
16 This is the part where you're about to do your jobs. It's
17 what you've been sitting here for a whole week for. And as
18 you go into the jury room, I want you to remember something
19 that was said on Monday. And that's that the smallest mistake
20 can lead to the biggest mistake of all.

21 We are here because of a series of assumptions, small
22 little errors, and sometimes willful blindness to the truth.
23 We're also here because this entire case started with lies
24 from Tami Hines, who, regardless of how the district attorneys
25 want to try to portray it as nervousness, admitted to you that

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1 she sat up here on this stand and lied under oath. She
2 admitted it, it's a fact, and when you review exactly what she
3 said, you know it's a fact. Because no doesn't mean yes.

4 So we started there and now we're here. And as soon
5 as this is over, the case will be placed in your hands. And
6 at that point you'll be responsible for making sure that the
7 small mistakes don't add up to one big one.

8 Tony Castaneda is not guilty. You've already gotten
9 the instructions and you know that it's not enough that this
10 -- these pornographic files were on Mr. Castaneda's computer.
11 Okay. That's -- that's not enough. The fact that they were
12 on his computer is not possessive. That is, knowingly -- that
13 is knowing and willful. When you go back and decide, you have
14 to decide whether or not he possessed these knowingly, which
15 means that he realized what he was doing and that it can't be
16 a mistake, it can't be an accident, and it can be ignorance.

17 Now, during this trial you heard that the -- the
18 detectives have no idea where these files came from. There's
19 no download path, there's no FBI tracer that was able to
20 figure out which Web site they came from or even when they got
21 to the computer, as I'll explain later. We know that they
22 were on there. And Mr. Castaneda admitted that they were on
23 there. Furthermore, Mr. Castaneda admitted to what they were
24 once he was finally shown them.

25 As you recall, there's a stipulation in this case.

1 You don't have to look at these files once. They're in
2 evidence. They'll be in a folder. They'll be in the room.
3 But you don't have to look at them. Because we all know what
4 they are. We all know now.

5 Mr. Castaneda did not know when he was interviewed by
6 Detective Tooley, because he had never been shown before. He
7 had never seen them before. If he knew what they were before
8 Detective Tooley started talking to him, that entire
9 conversation would have been completely different. But he
10 didn't know. He's never known. And he's not guilty of
11 knowingly possessing the files.

12 You have to find him not guilty, because the State
13 hasn't proven that he knew they were there. And, by the way,
14 I skipped past that too quickly. Please don't you skip past
15 it. It says knowingly and willingly. Or willfully.
16 Knowingly and willfully. It doesn't say or. It says and.
17 Which means that the files have to be present with his
18 knowledge and according to Mr. Castaneda's will, not someone
19 else's will. Don't skip the and when you're reviewing.
20 Again, ignorance equals a not guilty verdict. Mistake equals
21 a not guilty verdict.

22 Now, if you remember as far back as Friday during the
23 closing argument, Mr. Chen said a couple different times, But
24 there's no evidence of blank. Whose job is it to fill in the
25 blanks in this trial? Well, it's not my job. And if you're

1 expecting it to be my job, then either you weren't paying
2 attention during voir dire or I did a really lousy job.
3 Because it's not my job to fill in the blanks.

4 It is certainly not Mr. Castaneda's job to fill in
5 the blanks. First of all, it's very difficult to fill in
6 blanks when you don't know anything. As he said in the
7 interview 52 different times, he didn't know the files were on
8 his computer, he didn't even know what the files were. So,
9 filling in the blanks when you have no knowledge and you're
10 not doing the investigation is very difficult. That's why we
11 have a system that says innocent until proven guilty and not a
12 system that says guilty until proven innocent.

13 It is the government's burden to fill in the blanks.
14 So when the district attorney gets up here and says, Yes, the
15 detective said it was possible that a virus could have
16 deposited these files on the computer, but there's no evidence
17 of this, then what you have is a blank. A possibility that
18 fits within the evidence that you know, but which was not
19 followed up upon by the government.

20 A blank is a doubt. Every blank is a doubt. And any
21 reasonable doubt, even one single reasonable doubt, means that
22 you return a verdict of not guilty. Now, a reasonable doubt
23 doesn't mean the possibility that aliens could have deposited
24 child pornography onto a computer. No one's saying that.

25 But when you find out from the State's own experts,

1 computer experts, that viruses can deposit these files, that
2 mirror downloading can deposit these files, that everybody in
3 the house apparently had Mr. Castaneda's password so that we
4 don't know when it says Tony's account whether it was Tony or
5 whether it was one of the other five or six people who had
6 access to the account. All right. They don't know who it was
7 who did any of this. That's a reasonable doubt.

8 We're talking about reasonable doubts here. And the
9 reason we have so many of them is because the police
10 investigated this entire case with blinders on. They didn't
11 want to look left and they didn't want to look right. They
12 wanted to look straight forward. And for them, straight
13 forward was we think this guy's guilty, so we're just going to
14 use the evidence that proves that he's guilty and we're going
15 to ignore every single other thing.

16 So, let's talk for a second, while I get some water,
17 about what the evidence did show in this case. Because if we
18 talked about what the evidence didn't show, you'd be here for
19 another week. Things we do not know directly from Detective
20 Ramirez. As you might recall, at the end of my
21 cross-examination, I went over a big list of things we don't
22 know. I said, Detective Ramirez, correct me if I'm wrong,
23 here's a list of things that we don't know. Whose thumb drive
24 this was?

25 He said, "Correct. We don't know that. "Who put the

1 pictures on the thumb drive?" He agreed, "We don't know
2 that." Where the pictures came from? Again, he agreed,
3 "We don't know that." If you want to see the
4 testimony, I believe it's on 7/10/13 at about 3:00, if I
5 remember correctly.

6 Whether the pictures were ever reviewed by human
7 eyes. Now, to this, he said, Well, we know they were reviewed
8 by human eyes, because someone took the pictures. That's
9 absolutely true. Some time in 2003 or '04 or '05, years ago,
10 some horrible person took these horrible pictures. And ever
11 since that happened, as Detective Ramirez and Detective Ehlers
12 agreed, they've been bouncing around the Internet, showing up
13 on people's computers, sometimes intentionally, when the State
14 proves it, sometimes unintentionally, or the State doesn't
15 prove it.

16 They've been the subject of viruses and mirrored
17 downloads. They've been mixed in with other files. And many,
18 many cases have been prosecuted based on these exact same
19 pictures. Multiple copies, multiple file names, all over the
20 Internet. So absolutely, we know many people have seen these
21 files.

22 But prior to being shown them by the detectives, Mr.
23 Castaneda was absolutely not one of them. There was actually
24 two other people in this case who saw the files. Mr. Landeau
25 and Tami Hines. But as you recall, they were never

1 investigated.

2 So, whether the pictures were ever viewed by human
3 eyes -- and then I got more specific. I said, "We don't know,
4 do we, Detective Ramirez, whether Tony Castaneda ever viewed
5 these pictures?" And he agreed. They can't prove that. They
6 don't know that. Really, your analysis could be done right
7 there, couldn't it? They don't know that, they can't prove
8 that. Therefore, reasonable doubt, not guilty. Whether Tony
9 -- Tony Castaneda even knew the child pornography existed,
10 Detective Ramirez, the State's expert agrees they can't prove
11 that.

12 Wow, computer talk in this case. Here's I think all
13 you need to know about the computer talk. This might be on a
14 slide, but I think this really summarizes it. Detective
15 Tooley was the lead investigator in this case. She's been
16 doing this job for five solid years on this team. She's been
17 a police officer and a detective and an investigator for
18 longer than that. But for five solid years her only job has
19 been to research cases involving children and computers.
20 That's it. Child pornography, sometimes worse, sometimes a
21 manufacturing of child pornography, sometimes child sex
22 crimes, which are not allocations here.

23 So this is her job. She does it every single day.
24 And yet she sat up on that witness stand and said that she
25 cannot tell you what the word access means in computer terms.

1 She said it many, many times. She said she doesn't know what
2 created means, she doesn't know what modified means, and she
3 doesn't even know what written by means. I'm sorry, last
4 written -- last written, she doesn't know what that means.

5 If at this moment after a week in this room you feel
6 you have the same amount of knowledge or less than Detective
7 Tooley, the lead investigator on this case, then you have to
8 return a verdict of not guilty. If the lead investigator on
9 this case can't tell you what access, created, modified, and
10 last written means, then how can you possibly proceed as if
11 there was no reasonable doubt in this case? You don't know
12 what it means, either. I don't know what it means. The lead
13 detective doesn't know what it means. And the experts
14 disagree about what it means.

15 When you're evaluating this case, you're going to get
16 an instruction. It's No. 10. It's -- we call it the expert
17 witness instruction, okay. But really what it deals with is
18 witnesses who have special knowledge. We need to throw out
19 the word expert, it can be a little bit misleading. You don't
20 want to elevate people too high, for example. All right. So
21 special knowledge.

22 A witness who has special knowledge, skill,
23 experience, training, or education in a particular science, in
24 this case it's computers, profession or occupation, is an
25 expert witness. An expert witness may give his opinion as to

1 any matter in which he is skilled. You should consider such
2 expert opinion and weigh the reasons, if any, given for it.
3 You are not bound by such an opinion. Give it the weight to
4 which you deem it entitled, whether that be great or slight,
5 and you may reject it if in your judgment the reason given for
6 it is unsound.

7 All right. So both experts proceeded very similarly
8 when they started out. They started out by trying to tell you
9 that access means that it's proof that the file was opened.
10 Detective Ramirez immediately admitted that wasn't true. And
11 when you're thinking about this case, I want you to think
12 about the demeanor and the forthrightness and forthcomingness,
13 if that's even a word, of Detective Ramirez as compared to
14 Detective Ehlers. Detective Ramirez answered every question
15 immediately, as clearly as possible and as fairly as possible.
16 Detective Ehlers had a long explanation for even the most
17 simplest things, the most simple things that he was asked.

18 I asked Detective Ramirez, is open a synonym for
19 access, and he said no immediately. Detective Ehlers said,
20 No, but, um, I think that it was open in this case and that it
21 was accessed in this case and that means opened. And then I
22 asked him a bunch of questions about other programs that can
23 cause an access file to change, and it ended up being about 20
24 or 30 minutes that we'd all like to forget.

25 All right. But Detective Ramirez was very clear.

1 Access does not mean open. Lots of different programs can
2 cause an access log to change, from virus scanners to simple
3 Windows processes to file viewers to Internet Explorer. They
4 look at the files invisibly behind the scenes, they determine
5 what's there and that changes the access record. It doesn't
6 change all of them every time a program is opened. But it has
7 the potential to do so. And we know that virus scanners cause
8 this particular issue. Detective Ramirez was very clear about
9 that. Detective Ehlers wasn't quite as forthcoming. Think
10 about that when you're reviewing this.

11 And when you're trying to prove a case that access
12 means open, and that's what you're basing it on, and you know
13 that access doesn't mean open, that it could mean a great
14 variety of things, then you have a reasonable doubt. And
15 that's what this always comes back to. What did they say and
16 is there room for a reasonable doubt. And if there is, you
17 check not guilty on the box and then you go home. That's how
18 that works.

19 At this moment if you are not sure beyond a
20 reasonable doubt of the meaning of accessed, created, last
21 written, and modified, you must find Mr. Castaneda not guilty.

22 We're going to wait a second. I'm sure this will
23 [indiscernible]. Besides, we have more confidence in
24 computers.

25 Oh, yeah, access. If you have the same level of

1 understanding of the word access as Vizzini has of the word
2 inconceivable, then you have to find Mr. Castaneda not guilty.

3 Boy, that picture was really worth a delay, wasn't
4 it? There we go.

5 Okay. So, we know that access does not mean opened,
6 but we still do not know whether the files were downloaded by
7 a virus, trojan, or a worm. Whether the files were part of a
8 blind download or mirroring.

9 Now, during this interview, Mr. Castaneda was
10 wracking his brain to try to come up with ways that these
11 files could have gotten onto his computers, because he
12 believed Detective Tooley when she said we know that there's
13 child pornography on your computers. And she believed him --
14 or he believed her when she said that to him. So he's trying
15 to figure out how they got there because he didn't know about
16 it. And because he's a network engineer and knows a little
17 bit more about the Internet than the rest of us do, he had a
18 lot of theories.

19 First of all, he admitted he downloads pornography.
20 Downloading pornography on the Internet is like walking
21 through a bad neighborhood at night if you're just trying to
22 get where you're going, but you might get mugged.

23 Now, we don't blame the victims of muggings when they
24 get mugged. But Mr. Castaneda's being blamed because he was
25 in a bad Internet neighborhood and he ended up with some child

1 pornography on his computer. He didn't know it was there. He
2 didn't know he'd been mugged, because he was engaging in a
3 practice called site mirroring. He told the detective that he
4 had software on his computer that mirrors sites. He said he
5 only used it two or three times that he can remember, and that
6 it was a long time ago. As you might recall, they're claiming
7 that this stuff all was downloaded some time in 2007. So that
8 would seem to qualify.

9 And yet the detectives didn't bother to look at his
10 mirroring software. They didn't both to look to see if there
11 were logs showing where he mirrored and what was downloaded.
12 This could have been available, but they didn't bother to go
13 look for it. So we don't know why any of this stuff happened.
14 All we know is that's possible and in fact even likely, given
15 the risks associated with this type of Internet behavior.

16 Mr. Chen said there was no evidence this was caused
17 by a virus or mirroring, but you know it is a reasonable
18 explanation. It is a reasonable explanation. And in a
19 criminal trial, if you have two reasonable explanations, one
20 of which would tend to demonstrate that the defendant is
21 guilty and one of which that would tend to demonstrate that he
22 is not guilty, then you are required by law to find him not
23 guilty. And this was reasonable.

24 Furthermore, the detectives didn't rule it out. They
25 said it was possible. Detective Ramirez more clearly and

1 easily than Detective Ehlers, but both of them agreed that it
2 was possible.

3 And the detectives did not even check. You might
4 recall Detective Ehlers saying that, for example, there were
5 lots of individual accounts on the computer, but he
6 specifically said that all of them had download capability and
7 -- and not just Mr. Castaneda's. Which is interesting. I
8 asked him the question, you know, in this computer, can every
9 one of the accounts download and install software? And he
10 said yes.

11 But then in almost the same -- almost the next breath
12 he said that he didn't know whether the computers were
13 networked or not. Detective Ehlers wouldn't admit the
14 computers were networked. He didn't know if they were
15 networked. He didn't know if there was a wireless network.
16 Detective Ramirez admitted all of this immediately. Detective
17 Ehlers knew -- or, I'm sorry, Detective Ramirez knew that
18 there was a network. He knew there was a wireless network.
19 He didn't know whether it was password protected. Of course,
20 he knew that everybody had Mr. Castaneda's password, so
21 anybody entering the computer with that password would be
22 under the -- under the account Tony. All right.

23 So, knowing all of this and knowing that viruses are
24 a problem, did they bother to run a virus scanner? Not once.
25 They didn't check for the presence of viruses, they didn't

1 check virus logs to see if anything was downloaded in the
2 past, which is particularly notable. Detective Ehlers, and I
3 don't know how he could possibly have remembered this, but it
4 wasn't anywhere in his reports. He said that Mr. Castaneda
5 had Norton Antivirus software on one system and then Symantec
6 on the other. And I said, Isn't Symantec the same thing as
7 Norton? And he said, Yes, that I believe one was the other.
8 Who knows how he could possibly have remembered this after,
9 you know, countless investigations he's done in the last three
10 years.

11 But he said that he did. He didn't really know if it
12 was updated or not and he didn't know if there was a contract
13 that updated the virus definition. And you might remember,
14 the virus definitions indicate how good the software is at
15 protecting you. If your virus definitions are five years out
16 of date, then any new virus that comes along within the next
17 five years or the last five years is going to infect your
18 computer. You're not protected against it.

19 He could have gone in and looked at the virus logs to
20 find out what viruses had been eradicated from the computer in
21 the last few years. If a virus is cleaned, it makes a note in
22 the virus scanner log. They didn't check the virus scanner
23 log, and this is really important, because you've got to
24 remember, they weren't trying to investigate whether or not
25 pornography was on this computer -- or downloaded to this

1 computer in 2010. They were trying to figure out whether it
2 was downloaded in 2007 or 2008. That's the key time period.
3 And if you look at what was said on the stand, there is no
4 evidence that child pornography was downloaded either prior to
5 2007 or, if I'm not mistaken, after 2008. In other words, the
6 period that Mr. Castaneda was associated with Tami Hines and
7 with her husband, who was never investigated, and with Michael
8 Landeau, who was never negotiated. Nothing before and nothing
9 after. That would seem like a really good place to
10 investigate, but no one bothered to.

11 Okay. So, the detective didn't even check what was
12 going on with the virus scanner. For all they know, a virus
13 downloaded these files in 2007. The virus scanner eradicated
14 the virus and erased most of the files. Unfortunately, virus
15 scanners aren't perfect and sometimes, as I discussed with the
16 detective, you have to really dig into your computer, go into
17 the registry and manually remove things. Which is very
18 difficult to do if you don't know they're there.

19 So if a virus was doing this in 2007, then they
20 should have checked. But they didn't check because of their
21 blinders. They didn't want to look right and they didn't want
22 to look left. They wanted to look straight forward. The
23 presence of a virus doesn't help them get a conviction. The
24 presence of a virus tends to prove that Mr. Castaneda is
25 innocent. And they weren't interested in that question. If

1 they were, they would have investigated. They didn't care.
2 The government, again, has the burden of proof. So if you
3 ever heard a district attorney standing up here telling you
4 there is no evidence of A, B, or C, that it's their job to
5 provide that evidence. And if it's not there, then you have a
6 reasonable doubt.

7 Again, even Detective Tooley doesn't know what these
8 words mean. If she doesn't know, how can you possibly know
9 after a week what she couldn't figure out in five years? You
10 cannot find Mr. Castaneda guilty of these charges unless you
11 know more than the lead investigator in this case. I don't
12 think anyone here is going to be comfortable saying that.

13 Again, what did the evidence show? These are more
14 things we don't know. One of the files were accessed by a
15 human or automated program. A lot was made of this word
16 accessed. Again, I don't think it means what you think it
17 means. They're trying to tell you it meant that they were
18 opened and viewed. And then they -- both the detective had to
19 back off of that, because it's simply not what the word means.

20 So, not only do we not know that accessed -- that we
21 do not know whether the files were opened when the word
22 accessed is changed in the log, we also don't know whether
23 it's a human being doing it or some kind of automated program,
24 like a virus scan. We don't know that.

25 Or do we? As you recall, during direct examination,

1 the district attorney was going over a very long list of files
2 and accessed dates, modified dates, and created dates. And
3 they left out the times. The accessed times. Brought that up
4 on cross-examination. And these times that they didn't bother
5 to mention prove this. They're making a big deal about the
6 files being accessed 3/24/2010. And -- and here's the reason
7 they wanted -- they wanted to make a big deal about this. You
8 know on 3/24/2010, Tami Hines had already moved out. So did
9 Michael Landeau. So if they were able to prove to you that
10 these files were opened on 3/24/2010, they think they would be
11 excellent proof and maybe would convince you to convict on
12 this case.

13 The problem is they can't prove that a human being
14 accessed these files, and in fact, the evidence showed that it
15 was not a human being. It was not a human being, unless the
16 Flash is a real guy. If Mr. Castaneda's the Flash, I really
17 don't think that suit's going to fit.

18 13 out of 15 files were accessed between 10:05:02 and
19 10:05:09, seven seconds. 13 out of 15 files were accessed
20 within seven seconds. Would you have expected a fair
21 detective who's interested in the truth and not a conviction
22 to have mentioned that little fact? Does that not know -- go
23 against the theory that a human with knowledge and will opened
24 these files? A virus scanner did that. Or a program that
25 catalogues your jpgs did that. Or a Windows system process

1 did that. They view -- your -- your file accessed logs are
2 changed a million times a day. And you can't keep track of it
3 all, and you never would if you could.

4 He didn't know about those files, that was an
5 automatic process. This is not evidence of guilt. This is
6 evidence of innocence. It was misrepresented by the
7 detectives. On 4/1/2010, another date they brought up to you
8 to show accessed history. Nine files between 9:28:46 and
9 9:28:57, 11 seconds, nine different files. Again, impossible
10 for a human.

11 Then you have the issue -- excuse me -- of multiple
12 files viewed over multiple computers at the exact same time.
13 The exact same time. I didn't write the numbers on this
14 Powerpoint slide, but you remember the questions, I hope. I
15 noted that on the laptop and on the Shuttle, the same two
16 files were accessed at the exact same second on the Shuttle,
17 and one second earlier on the laptop, and then the other file
18 one second before that. Two different computers. So now, not
19 only is Mr. Castaneda on these old tired machines, this is an
20 old HP laptop, it doesn't have -- it's not -- it's not showing
21 those files like this. It's -- it's click and then wait on an
22 hourglass for a while.

23 Okay. So, not only is Mr. Castaneda somehow able to
24 view them, you know, 13 files in seven seconds, but apparently
25 he's able to spring between two computers and change access

1 logs with his viewing habits, and then sprint back.
2 Impossible. Absolutely impossible. And yet they're trying to
3 say that the access logs are evidence of guilt. They are not.
4 They are evidence of innocence. And they are certainly a
5 reasonable doubt.

6 Remember that the detectives and prosecutors didn't
7 volunteer this evidence. It came out at cross-examination.
8 Again, single-mindedness is the investigator's greatest enemy.
9 Because what happens when you enter a situation without being
10 a blank slate, without considering all possibilities, is you
11 get locked into an assumption, and sometimes that assumption
12 ends up in a courtroom. And that's why Mr. Castaneda is here.
13 This information just proves their theory. And it provides
14 you reasonable doubt.

15 This was sort of out of left field. Detective Ehlers
16 mentioned this. Detective Ramirez never did. He said that in
17 the unallocated space -- oh, man, there's another vocabulary
18 word. By the way, if you don't know what unallocated space is
19 right now, then you can't rely on any of this. I'll tell you
20 if Detective Tooley were here, she'd tell you she doesn't know
21 what it is. The so-called carved files. What they were
22 saying is there were these files that were carved files, which
23 means that they were partial in some way. Either because
24 they'd been deleted or, as I asked, because they'd been
25 downloaded and the download had been stopped halfway. For

1 example, if you're downloading the file but you don't know
2 it's downloading, and you turn your computer off, what
3 happens? The download stops and you have a part of a file.
4 More evidence this is happening automatically and not because
5 someone is doing it on purpose.

6 So, they have these carved files, and the carved
7 files have that identifier that shows that they belong to one
8 of these horrible images, one of these child pornographic
9 images. And they're in unallocated space, which means they're
10 not part of the regular hard drive, they're not part of these
11 folders that we've been talking about, girls and pics.
12 They're not on the part of the computer you see. They're on
13 the invisible part of the computer that you never see. That's
14 unallocated. It's the invisible part no one touches. It's
15 available to be written over without exception. Nothing in
16 there is forever. It's unallocated. All right.

17 These particular files they were talking about, well,
18 you remember Detective Ehlers said, Well, I believe that these
19 were deleted. And if they were deleted, that shows an
20 intelligence at work. That shows a human being deleted them.
21 Well, first of all, if they're not in allocated space, if you
22 can't even see them, much less delete them, they're invisible.

23 Second of all, as I said to Detective Ramirez,
24 they're the temporary Internet folder. That's proof of two
25 things. Number one, that a virus was responsible for this

1 some time in 2007. Because what it looks like is that you
2 have --

3 MS. ANTHONY: Your Honor, at this point I'm going to
4 object. That's stating facts that are not in evidence.

5 THE COURT: That's sustained.

6 MR. WESTBROOK: If I could, Detective Ramirez said
7 that temporary -- that it's possible for viruses to go to the
8 Internet and look for files. In fact, lots of different
9 software go to the Internet --

10 MS. ANTHONY: And, Your Honor, I'm going to object
11 again.

12 MR. WESTBROOK: I --

13 MS. ANTHONY: That's facts not in evidence.

14 MR. WESTBROOK: It's a direct quote, Your Honor.

15 THE COURT: The jury is -- is once again cautioned to
16 remember that you need to rely on your memory of what the
17 evidence showed. Comments of counsel are not evidence. So
18 you have to rely on your own memory as to what the testimony
19 was.

20 MR. WESTBROOK: I talked to Detective Ramirez
21 specifically about programs that can go to the Internet on
22 their own, without you asking. And we talked about
23 specifically something I think hopefully everybody
24 understands. Music programs. Like iTunes. Okay. I want to
25 download Meatloaf's Bat Out of Hell, because it's a classic.

1 And so I download some of the music. I don't download the
2 whole album, though. And so the music is on my MP3 player.
3 And my MP3 player, then automatically goes to the Internet,
4 searches for the album cover, and downloads it. Now I have a
5 picture of Meatloaf in that great motorcycle zipping out of
6 hell with the flames behind him. But I didn't ask for it.
7 It's just on my computer because the program went and got it.

8 This happens with lots of different programs.
9 Including programs that were all on Mr. Castaneda's computer.
10 All right. These carved files were in the temporary Internet
11 folder. What Detective Ehlers was telling you was that they
12 were somehow manually deleted, but there was no evidence of
13 this. And I even asked him, How can you tell whether it's
14 manually deleted, automatically deleted, or a partial
15 download? And he had no answer for this. He had no answer.
16 He just had his opinion, and his opinion, which you're free to
17 ignore under No. 10 if it doesn't make any sense to you or if
18 you think it's somehow biased, his opinion was that it was
19 manually deleted.

20 Well, these files are deleted unseen and
21 automatically if they're in the temporary Internet folder. As
22 anyone who knows Internet Explorer knows this, Internet
23 options, delete files. And then they automatically delete.
24 If you have too much space used on your hard drive, sometimes
25 Windows says, Hey, you've got, like, a whole gigabyte of

1 temporary Internet files, do you want to delete them? And you
2 go, Yes. And then they automatically delete and you never see
3 them or know what they are.

4 So, there's no evidence whatsoever that this file was
5 deleted by a human and there's only scant evidence that it was
6 deleted at all as opposed to being some kind of a partial
7 download.

8 But more importantly, it doesn't make any sense.
9 Doesn't make any sense. If Mr. Castaneda -- and this is the
10 State's theory, remember, this is what the police are trying
11 to prove -- that Mr. Castaneda knew that he had downloaded
12 child pornography, why would he go into unallocated space
13 that's not in any folder and try to search for and manually
14 delete a couple of files, but then leave exact duplicates of
15 all those files in his regular hard drive inside folders? I
16 mean, he's a network engineer. If he really wanted to delete
17 something, he would use a program that actually deletes
18 things. There are programs that can delete, as the detectives
19 told you, there are programs that can delete everything
20 virtually without a trace. But they're not perfect.

21 You know what is perfect, though? A hammer. Anybody
22 with a hammer has the ability to permanently delete a hard
23 drive. You take it out and you smack it with a hammer until
24 it's in fragments.

25 None of this was done, because he didn't know about

1 it. And the idea that this deleted file, this so-called
2 carved is somehow proof that Mr. Castaneda had knowledge and
3 that he was willful in his possession of this child
4 pornography doesn't make a lick of sense. It's a stretch,
5 just like every other part of their testimony. It's a
6 stretch. And you have a reasonable doubt.

7 Proof versus no proof. There is no proof that Tony
8 Castaneda ever viewed these files or knew they existed. I
9 want you to think back to the end of that cross-examination
10 with Detective Ramirez. Mr. Chen said, "Is there any software
11 program in the world that you're aware of that can tell that
12 type of information?" And Detective Ramirez said, "No."

13 You might remember, I asked Detective Ehlers the
14 exact same question. And he said yes, but didn't specify what
15 this magic software is. And then I said, Was any of it used
16 in this case? And he said, No.

17 They can't prove that this is Mr. Castaneda's
18 pornography. In fact, the evidence strongly suggests that it
19 wasn't. He didn't know about it. And now he's being hung up
20 on something that he didn't know about and he had no defense
21 against. He shouldn't be sitting there.

22 There is substantial proof that the access dates were
23 automatic, because no human could do that. No human could
24 open files like that and view them and run between computers.
25 It's not possible. Virus scanners, diagnostics, file

1 cataloguers, Windows processes, all do that kind of work and
2 they do it automatically every day. No human could have done
3 this. That's what the evidence shows. It does not show that
4 Mr. Castaneda is guilty of these charges.

5 Last written. This one is interesting. I asked
6 Detective Tooley what last written meant, and it's one of the
7 many things about computers that she didn't know. And again,
8 five-year detective doesn't know it, then you've got to have a
9 reasonable doubt. But I asked Detective Ramirez and he knew
10 what it is. And this is exactly, word for word, what he said.
11 "Last written basically means, that's the date that either
12 somebody created that file for the first time or that it was
13 introduced to your computer. So it can be either/or. It's
14 either created on your computer or that's when that file was
15 written to your computer."

16 Exhibit No. 12. The Court instructed you that the
17 State's Powerpoint slide was wrong on this. In fact,
18 Euro-001.jpg, which was on the thumb drive -- remember that,
19 it was on the thumb drive -- was last written on February 7th,
20 2010.

21 This is so important I'm going to use my green laser.
22 Oh, man, green laser's letting me down. All right. I thought
23 it would be a lot brighter. I'll use my finger, that's how
24 important it is.

25 Last written on February 7, 2012 -- 2010. We know

1 who had the thumb drive on February 7th. We don't know
2 anything else in this case about who had what, when. Not a
3 thing. We don't know when the stuff was downloaded onto the
4 computers, we don't know where it was downloaded, we don't
5 know if Tami Hines' husband, who's never been interviewed, did
6 it, we don't know if Tami Hines did it, we don't know if it
7 was a virus or an accident. We know all these things are
8 possible, but we don't know any of it for sure. Certainly not
9 enough to convict somebody beyond a reasonable doubt.

10 There is one thing that we know for sure. One thing
11 that we know for sure regarding these computer files, and
12 that's that on February 7th, 2010, the thumb drive was in the
13 actual possession --- and when I say actual possession, I mean
14 knowingly, I mean willfully -- in the possession of Tami Hines
15 and Michael Landeau. Not Mr. Castaneda. They had moved out
16 of Mr. Castaneda's house. They had the thumb drive, they
17 accessed it. And the very next day they gave it to the
18 police. They'd had the thumb drive for what, 10 days, two
19 weeks, three weeks? They'd had it for quite a while before
20 they turned it over to police.

21 And on February 7th, 2010, Euro-001.jpg was last
22 written. You can stop there. Unfortunately for you, I'm
23 going to keep going a little bit. But you don't have to think
24 anymore. You're done. Because that proves that there's a
25 reasonable doubt in this case. Maybe not to Mr. Landeau and

1 Ms. Hines, but certainly Mr. Castaneda. We'll never know
2 about those guys. Recall, they were never investigated.

3 Don't be misled. There was a Powerpoint in the
4 State's presentation. And I wanted to make sure that you
5 weren't misled by it. There was a picture of Mr. Castaneda's
6 computer. Now, that's not Mr. Castaneda's computer. That's
7 just some picture. This is all demonstrative evidence. As
8 you've been instructed, the stuff we say up there -- up here
9 is not evidence. Neither is this.

10 But I don't want you to be misled. Mr. Castaneda had
11 a computer. And then in their Powerpoint slide, the State did
12 something like that. They wrote a big circle around it and
13 they wrote "Child Pornography" and then they put a bunch of
14 arrows on it. All right.

15 I want you to remember that this is what the computer
16 looked like before it was turned on. Okay. And after it was
17 turned on and file folders were opened, it looked like
18 something like this, you know, with a bunch of files and
19 numbers and names. At no point was there a picture of child
20 pornography on the screen. At no point was there a big red
21 arrow and -- and the words child pornography on the screen.
22 Okay. This wasn't obvious to anybody, especially Mr.
23 Castaneda. These files were hidden in sub files of sub files,
24 surrounded by tons and tons of things that said.jpg at the end
25 of it. There is no evidence that he ever saw them or ever

1 knew about them. Don't be misled.

2 Tabula Rosa, I'm glad that was brought up. This is
3 probably how most people view themselves. We like to be fair
4 and we like to think of considering all sides. And it's very
5 difficult to do that when you walk into a -- into a situation
6 with your mind already made up. Can't be done.

7 I want you think about the investigation in this case
8 and particularly the work of Detective Tooley. Because
9 Detective Tooley thinks she's Tabula Rosa. But you heard the
10 interview and you heard her testimony and you know she's not.
11 She didn't have a blank slate and she didn't have an open
12 mind. She walked into her 90-minute long interview with Mr.
13 Castaneda with her mind already made up. And she never varied
14 her course, not once. No matter how much evidence that was
15 put before her that he wasn't guilty, no matter how many
16 alternate theories he was able to come up for her -- with her,
17 for her. And no matter how many times he said he didn't do
18 it. 52, by the way, is the answer to that question again, 52.

19 You cannot find the truth if you aren't looking for
20 it. And she wasn't looking for it, and that's why she didn't
21 find it.

22 We talked about the Reid Technique and she said that
23 she'd been trained in that. Now, she said she'd been trained
24 in a couple different techniques and that she didn't use one
25 exclusively. But then I went over a long list of what the

1 techniques are with her, which I won't bore with you -- bore
2 you with again. And she admitted to using all of them, you
3 know, doing a narration so that you're overwhelming the
4 suspect with your -- with your words and using tricks, trying
5 to trip them up. And try to be their friend, being sincere
6 and honest and open so that they trust you and they'll admit
7 something. Reid Technique is not designed to get to the
8 truth, it's designed to get confessions. It narrows the
9 investigation. That's one of the big problems, with it.

10 And you saw it happening live, in front of your eyes.
11 It narrowed the investigation. She was looking for a certain
12 information, and that was I did it, they're mine. And she was
13 blind to everything else, because she was using this
14 technique. She wasn't actually talking. She was using this
15 technique.

16 She described -- in a response to Mr. Chen, she
17 described that whole process of that interview as "very
18 conversational." I have never in my life had a conversation
19 where someone was accusing me of possessing child pornography
20 52 times. That's never happened before. I don't think that's
21 very conversational or polite.

22 But the problem is she -- she has blinders on. She
23 doesn't even realize exactly what she's doing, it seems.
24 She's -- she's drinking -- she drank the Kool-Aid. And she's
25 not unbiased.

1 Confirmation bias means reinforcing inaccurate
2 beliefs or assumptions. That's what she was doing here, and
3 that's one of the dangers of the Reid Technique. It means
4 hearing what you want to hear and ignoring anything you don't
5 want to hear. And that's what she did. That's why you don't
6 have a fair investigation here.

7 Even Detective Tooley was fooled by her own
8 techniques. I want you think back to this. She was extremely
9 clear, because I asked her numerous times whether she was
10 interrogating Mr. Castaneda. And she refused to say it. She
11 said that she was interviewing him, not interrogating him,
12 interviewing him. And so I said, Well, let's compare your
13 interview of Tami Hines. And in the interview with Tami
14 Hines, she -- she was doing most of the talking, you weren't
15 doing a big, long narration, right?

16 She said, Yeah. And in your interview of Tami Hines,
17 you weren't accusing her of committing crimes? That's right.
18 In fact, even though she actually had a thumb drive with child
19 pornography on it, you didn't accuse her of possession child
20 pornography, did you?

21 No. Why would I? she said. Well, that's a very good
22 -- very good point. Why would you? Why would you? Good
23 point. Maybe because you're interested in the investigation,
24 in the actual evidence. But why would you? Fine.

25 She insisted she interviewed Mr. Castaneda in the

1 same way. And then I used the Reid Technique on her. I
2 switched up a word. I said when you interviewed Tami Hines
3 you did blank.

4 And then I said, Now, when you interrogated Mr.
5 Castaneda, you did A, B, and C.

6 And she said, Yes. And then I said, Do you see what
7 I just did? I got you to admit that you interrogated Mr.
8 Castaneda. But that's not the truth, is it? You didn't
9 interrogate Mr. Castaneda. There's not one fiber of your
10 being that believes you interrogated Mr. Castaneda, but I just
11 got you to admit it by tricking you.

12 She spent 90 minutes doing this to Mr. Castaneda. 90
13 minutes trying to trick him into saying something that wasn't
14 the truth, because he told her the truth 52 times, he didn't
15 do this. She did 90 minutes, about an hour, maybe even
16 longer. And then a convenient break that's not recorded. We
17 don't need to hear what happened during that break. She said
18 it was unintentional because she thought the interview was
19 over. Although she also admitted that completely matches her
20 technique when she's talking to people in other cases. So
21 place your bets.

22 Okay. And then she came back and talked to him
23 again. All right. He never admitted that he did it. He
24 never gave a single admission that showed that he had
25 knowledge of what was on his computer or that he willfully and

1 knowingly possessed it. Not one. If he had said that, he
2 would have been arrested immediately. That's why she was
3 there. She was there to get him to admit something. And he
4 didn't do it.

5 Even though, unlike her -- I mean, I'm no threat to
6 her. I'm just a defense attorney. When she was interviewing
7 Mr. Castaneda, she was there with the power to arrest him and
8 take away his entire life. While she was talking to him in
9 the back of either a unmarked police car or an FBI car, take
10 your pick, on tape, police were tearing apart his house,
11 taking all of his computers, going through all of his stuff,
12 and searching for evidence against him while his son was
13 watching them from the porch.

14 Think about the kind of pressure Mr. Castaneda was
15 under compared to the kind of pressure Detective Tooley might
16 have been under when I was asking her questions in the
17 courtroom where she was at no risk for anything.

18 And yet even Detective Tooley was tricked by this
19 technique, which is designed to trick people. She was tricked
20 by it. She was trained in it and she was tricked by it.
21 Anything Mr. Castaneda might have said that sounded a little
22 weird or a little goofy is probably a result of being under
23 Reid Technique interrogation by a professional for 90 minutes.
24 But he never admitted to anything. And that's why he wasn't
25 arrested. He never admitted to anything, because he didn't do

1 anything. And that's the truth in this case.

2 So many leads not followed. Technical leads. Was it
3 a virus, was it another program, completely ignored. Factual
4 leads, oh boy. Do you remember what I asked Detective Tooley,
5 Did you know that Tami Hines had a grudge against Detective --
6 or against Mr. Castaneda?

7 And she said, I didn't know that. Did you know he'd
8 been evicted? I didn't know that. Did you know that he
9 sought legal advice to fight the eviction? I didn't know
10 that. She admitted that she would have investigated those
11 leads if she had known that at the time. She said it would
12 have changed the way she looked at the case, but she didn't
13 know it because she didn't check. Her husband, I've got a
14 whole list, I'll show it to you. It's about this thick. I've
15 got a whole list. And if you want to listen to the interview
16 again, you don't need to, but if you wanted to, you could list
17 all the things that Mr. Castaneda tried to tell her could be a
18 possible source for this pornography that was on his computer,
19 things that he didn't know about, you know, before she told
20 him. And he had never seen the pictures she -- he started
21 saying this. You've got to remember, if you listen to the
22 interview again, he had never been shown these pictures before
23 the interview. So he's speaking out of complete ignorance the
24 entire time. All right.

25 She didn't follow up any of his leads. She didn't

1 look for Tami Hines' husband and try to talk to him, even
2 though Tami Hines' husband had access to Mr. Castaneda's
3 computer during the relevant time period. Quick math break.
4 We don't know exactly when Tami Hines first met Mr. Castaneda.
5 We do know that she was still married to her husband, who left
6 her. We know that they were living at a weekly. We think it
7 might be the Budget Suites, there was some talk about that.
8 All right.

9 When she was being interviewed by Detective Tooley,
10 she said that she first met Mr. Castaneda about two and a half
11 years earlier. I'm sorry. She said she first Mr. Castaneda
12 -- met Mr. Castaneda about two years earlier. Don't want to
13 mistake myself. About two years earlier.

14 We were able to do the math. And according to the
15 math, if you can even believe the dates on these files, which
16 again, I think there's ample evidence that they can be changed
17 or that they can be just flat out wrong, if you can believe
18 the created-by dates or the -- or the last-modified dates, I
19 don't know, I can't tell the difference. On these files of
20 the child pornography they all show up in August of 2007.
21 That's almost exactly two years and six months from the day
22 that Tami Hines told the officer about two years ago. So it's
23 all within that relevant time period. She was married at the
24 time. And Mr. Castaneda said that Tami and her husband had
25 access to the computers. Her husband, not her boyfriend. Her

1 husband not her boyfriend. Husband, not boyfriend. Mr.
2 Castaneda would not refer to a man who'd been living in his
3 house for months as husband when he wasn't a husband. But
4 that wasn't followed up on and easily could have been.

5 Easily verifiable facts. Independent facts. Mr.
6 Castaneda's travel schedule with his company. He might not
7 even have been in this state when these things were
8 downloaded. He might have been in Iowa or traveling abroad
9 with his company, with his company doing networking. He said
10 that stuff was out there, they didn't bother to investigate.

11 And the district attorney wants you to go, Well, you
12 know, there's no proof that he was traveling. You can't hold
13 that against Mr. Castaneda. His job is not to prove this
14 case. His job is not to disprove this case. It is the
15 State's job to prove this case. And if you are concerned
16 because they didn't bother to check whether he was even
17 physically in this state at the time these files were
18 allegedly downloaded, I think you have a doubt. You've got a
19 very reasonable doubt. And you only need one.

20 My son let me borrow this. He's six and this is his
21 favorite rock.

22 John, would you mind hitting that five for me. Maybe
23 it'll work. We'll just resume the slide show. Thanks.

24 This is his favorite rock and I've got to give it
25 back or else I'm in big trouble. Did I say he was five?

1 Yeah, he's six now. He's six now. You can't imagine how
2 excited my son was when he found this rock. We were in Death
3 Valley and it was in a gift store. And we were rock hunting.
4 And he thought he was going to find gold the entire trip. And
5 he didn't find gold, because this is not 1849 and we're not in
6 San Francisco, we were in Death Valley.

7 But I was able to go to the rock store and find this
8 really cool looking rock. And so I left this rock on the
9 trail for him to find. And he found it. And he couldn't have
10 been more excited. And he thought it was gold. And I didn't
11 tell him it wasn't gold. For the same reason I haven't broken
12 the news to him about Santa Claus yet. I don't want him to
13 know. Some day he will, and he'll know that's iron pyrite.
14 And my hope is that it'll still mean just as much to him. But
15 it's not gold.

16 Now, that thumb drive was also not gold. It came
17 from a questionable source that wasn't questioned. It -- it
18 didn't just have child pornography on it. It conveniently had
19 all of my client's identification on it, as well. His
20 license, Social Security Card, birth certificate. That's
21 what's connecting him to this thumb drive more than anything
22 else. Also the accusations of somebody who sat up here on the
23 stand and admitted that she lied to all of you.

24 That thumb drive, though, was treated like it was the
25 real thing. Not iron pyrite, not some sparkly rock that

1 clearly has holes in it and is definitely harder than gold and
2 couldn't possibly be gold. Well, it's not in Death Valley,
3 where you don't even find gold. All right. That was treated
4 like gold by the detectives and the investigators and district
5 attorneys in this case. But it wasn't gold. It was fool's
6 gold. And don't let it fool you. They didn't know, because
7 they didn't want to know. And they were misled from the
8 start.

9 I'm not going to be up here for too much longer. But
10 I've got to try to be complete because I don't get a chance to
11 address you again. It's the State's burden and with that
12 burden comes the ability to talk last. They get to talk last.
13 They get to tell you their side of the case last, and that's
14 the last thing you'll hear before you go into the jury room.
15 So I've got to be complete. And I apologize if I'm boring
16 you. And if you want to go into the jury room and say, Man,
17 that Westbrook is the worst, I have no problem. I'm fine with
18 that. You wouldn't be the first. But you can't take it out
19 against my client, please. It's not his fault.

20 So this case is based on lies. Hit space, see if
21 that works. All right. I'm not trying to demonstrate, by --
22 by the way, the unreliability of computers by having my
23 computer not work. That's just a coincidence.

24 Tami Hines lied to you. All right. And we don't
25 have to guess that, whether she lied or not. We know it,

1 because she said it, and also because she flatly contradicted
2 herself. She said to you on that stand under oath, I told
3 Detective Tooley the truth during that interview. And then I
4 noted that that interview was not what she said here. She
5 said that she had found the -- the thumb drive, and then up
6 here she said that Michael Landeau found the thumb drive.
7 It's not -- it's two opposite stories.

8 So I pointed that out to her, and she said, Well, I
9 lied to Detective Tooley. Which means two things. One of the
10 two stories is a lie, but more importantly, when she under
11 oath said, I told Detective Tooley the truth, that was a lie.
12 I found the thumb drive. Michael Landeau found the thumb
13 drive. Two different stories. They both cannot possibly be
14 true.

15 I didn't recognize it at first. Now, I confronted
16 her with her exact statement about this.

17 Question from the district attorney in another
18 hearing, "When you found the flash drive, did you know right
19 away that it belonged to Mr. Castaneda?"

20 Her answer, "No." Period. No confusion, no hedging,
21 no, Well, maybe not right away, but after a few minutes. Or,
22 Maybe not right away, but then I took a look at it and I could
23 tell it was his. Her answer, "No." Period. End of sentence,
24 end of story.

25 And then the State got up -- got up and said -- well,

1 first of all, here, you know, she said I immediately
2 recognized it. Okay. After saying at the other hearing that
3 she didn't notice it right away, here she said she immediately
4 recognized it. And she had all of these incredible details
5 about why she recognized it. Do you remember? Mr. Castaneda
6 always had it with him. It was his constant companion, it was
7 always in his pocket, it was always on his key chain or it was
8 in his hand, or it was right next to him, or it was in the
9 computer. He always had it with him all the time. Remember
10 that, because we're going to talk about common sense here in a
11 minute, and that'll be very important.

12 So, at another hearing under oath she says, "No, I
13 didn't immediately recognize it." And then here she says that
14 she immediately recognized it and had all these facts to back
15 that up.

16 She admitted she lied under oath. And then she said
17 she was just nervous when the -- the State said, Maybe you
18 were just nervous. She agreed with that.

19 And then this is really interesting. Because you
20 also heard Michael Landeau testify. Now, we don't have prior
21 statements from Michael Landeau. Why? You know why. Because
22 no one investigated Michael Landeau. Here's what we know
23 about Michael Landeau. He was homeless. Mr. Castaneda took
24 him in along with Tami and their family, he had access to the
25 computers -- everybody had access to the computers and the

1 passwords, he actually had the thumb drive in his physical
2 little hand, he had it in his hand, he knew it had child
3 pornography on it, because he looked and he admitted that. We
4 know this about Michael Landeau. And that's about it. Oh,
5 I'm sorry, we also know he was on disability. And we know
6 that Tami was living off of his disability. Which you might
7 want to think about when you're in there, as well; what would
8 happen to Tami if Michael Landeau went away for possession of
9 child pornography. Pretty sure she wouldn't be getting that
10 disability check, would she?

11 So, Tami said that Landeau -- Landeau -- Landeau and
12 her discussed the case prior to her testimony. She admitted
13 that. Mr. Landeau said that they had never discussed the
14 case. Well, they can't both be telling the truth. But I
15 would like you to note not only was their story similar up on
16 the stand, but even the words they used were the same. They
17 both specifically talked about him always having it in his
18 pocket, having it on his key chain, either having it in his
19 hand or having it nearby. For them it was extremely important
20 to convince you that this was Mr. Castaneda's thumb drive.
21 Tami admits that they had discussed the -- the case before
22 coming in here to testify and Mr. Landeau denies it.

23 You -- you already know -- you already know people
24 aren't telling the truth to you. You don't have to guess with
25 these two. Other people might fudge it and they might stretch

1 it and they might try to put a good spin on it. But you know
2 that you've been lied to, because it's patently obvious until
3 they -- they admitted it.

4 That brings you to No. 9. Instruction No. 9. "The
5 credibility or believability of a witness should be determined
6 by his manner upon the stand, his relationship to the
7 parties," for example, people who have a grudge have a
8 strained relationship with the parties, consider that, "his
9 fears, motives, interests or feelings, his opportunity to
10 observe the matter to which he testified, the reasonableness
11 of his statements, and the strength or weakness of his
12 recollections. If you believe that a witness has lied about
13 any material fact in this case, you may disregard the entire
14 testimony of that witness or any portion of his testimony
15 which is not proved by other evidence."

16 If you go to a restaurant and you order a big plate
17 of spaghetti, oh man, are you hungry. You get the biggest
18 plate of spaghetti that you could possibly imagine. And you
19 can't wait for it to come out. And it comes out and, man, it
20 smells good from across the room. You know, it's got the
21 sauce that Mama makes, it's got the meatballs, and you can't
22 wait for the waiter to get there with that spaghetti. And he
23 puts it down in front of you, and you grab your fork and you
24 grab your spoon, because you're going to twirl it up real
25 nice, and you look in the middle of it, and there's a gigantic

1 cockroach in the middle of your plate of spaghetti. Not a
2 small, like, Japanese cockroach, German cockroach. The
3 Madagascar hissing beetle that Indiana Jones is always
4 brushing off of his coat. That's what we're talking about
5 here and it's right in the middle of your pasta.

6 That is a bummer. What are you going to do about it?
7 Are you going to eat around it? I mean, you are hungry.
8 Maybe you're going to eat around it. All right. Are you
9 going to just flick that Madagascar hissing beetle off the top
10 of your pile of spaghetti and just go to town on the whole
11 thing? How dirty could it possibly be? Are you going to
12 order another plate of spaghetti? Waiter, I would like
13 another plate of spaghetti from the chef that created this
14 plate of spaghetti that has a roach on it. And I would like
15 you as a waiter who served me this plate of roach spaghetti to
16 bring me another plate in this restaurant that is filthy and
17 has roaches.

18 Or are you going to push away from the table, walk
19 out of that restaurant, write a scathing Yelp review, and
20 never come back? That's what this instruction is about. If
21 someone has lied to you and you know they have lied to you,
22 you don't have to believe anything they've said. You can pick
23 out some parts, if you like, if you're not concerned about the
24 roach droppings that might be in them. Or you can just step
25 away from the table.

1 Well, the chef in this matter is Tami Hines. And
2 she's not just the -- the chef for purposes of this analogy.
3 She's the one who started all of this. This entire case
4 springs from Tami Hines, who we know is mad at Mr. Castaneda,
5 who we know had access to this thumb drive and had it in her
6 actual possession. And, thanks to the forensic analysis,
7 evidence presented by the State that was unfortunately ignored
8 by the State, they even got it wrong in their slide when they
9 were presenting it to you in closing argument, it was ignored
10 by the detectives who were on the stand until I brought it up,
11 evidence that shows the last-written date of file Euro-001.jpg
12 was February 7th, 2010, when it was in the exclusive
13 possession of Tami and Michael Landeau. That's the chef.
14 That's who made this plate of spaghetti. That's who put the
15 roach in it and that's who you should discount entirely. She
16 is the first domino in this collision of injustice that put
17 Mr. Castaneda in that chair.

18 I don't know what she did. I don't know why she did
19 it. I don't know where this porn came from. I don't know
20 anything about it. Except that it started with a liar who
21 lied. And when that happens, under Instruction No. 9, you can
22 finish your analysis, you can discount it, you can step away
23 from the table, and you can vote not guilty.

24 There's another instruction that tells you to use
25 your common sense, and I really hope you do. If this was

1 Castaneda's thumb drive, if he kept it on his person at all
2 times, if he knew his license, Social Security Card and birth
3 certificate were on it, and he knew, as the State has argued
4 to you, that it contained child pornography, they -- this is
5 what they -- this is their case, they said all this. If any
6 of this were actually true, why didn't he notice or care that
7 it was gone? He always had this thing on him, right? It has
8 all this incriminating stuff and also his personal
9 information. And it was gone for a couple of weeks. He
10 didn't notice it was gone? He didn't freak out?

11 Ever left -- left your wallet at a restaurant?
12 You're making phone calls, you're calling the bank, you're --
13 cancelling your credit cards, you're putting a hold on them,
14 you're putting a fraud alert on stuff.

15 None of that happened in this case. Did he bother to
16 erase his hard drives? No. Not only did he not erase his
17 hard drives, but he kept the hard drives and the computer that
18 they were on in the middle of the living room on a computer
19 that everyone in this house had access to. Not only did he
20 not hide his -- his so-called child pornography, his so-called
21 child pornography, he didn't even put it in a folder that
22 would suggest it was something else. You know, old family
23 pictures, archive-00654. No, it was in a title -- a folder
24 titled "adult girl pics." He wasn't trying to hide any of
25 this. And he didn't know it was there.

1 He didn't know it was there. It doesn't make any
2 sense whatsoever. And if he had known that his thumb drive
3 with his pornography, his child -- his illegal child
4 pornography on it, was missing somewhere, he would have
5 destroyed his hard drives. Again, even if he wasn't a network
6 engineer, which he is, and even if he didn't have access to --
7 to computer software that can erase a hard drive, we're
8 talking about a \$50 hard drive, get a hammer. Break it into
9 pieces. You're done. Everybody has a technological expertise
10 to erase a hard drive if they own a hammer.

11 None of that happened, because it wasn't his thumb
12 drive. He didn't know anything about it. And, in fact, the
13 district attorney suggested to you that he had admitted during
14 that long interview that he had, that this was his thumb
15 drive. That is absolutely incorrect. He did not know what
16 thumb drive they were talking about. And if you take -- you
17 don't have the pages in front of you, unfortunately. But it's
18 on page 106. If you listen to the end of the interview, he
19 specifically says that he has one- and two-gigabyte hard
20 drives. And he said that he'd be surprised if his entire
21 pornography directory was on a single hard drive, because you
22 would need a hard drive that was 10 or 15 gigabytes. He has
23 one- or two-gigabyte hard drives.

24 He never mentioned an eight-gigabyte hard drive,
25 because he was never owned an eight-gigabyte hard drive. All

1 right. And furthermore, do you believe that people would
2 actually recognize -- and I keep saying hard drive and I meant
3 thumb drive. So scratch everything that I just said about
4 hard drive, I meant thumb drive. Okay.

5 He said he had one- or two-gigabyte thumb drives. He
6 said that he was surprised his entire porn directory could
7 possibly be on a thumb drive, because he doesn't have a 10- to
8 15-gigabyte thumb drive. He only has had these small ones,
9 these one- or two-gigabyte ones. Never an eight-gigabyte one.
10 It was never mentioned.

11 And do you really believe that somebody could
12 recognize what a thumb drive looks like based on its
13 appearance? There wasn't anything particularly unique about
14 that thumb drive. Now, a unique thumb drive would be like
15 this. This is my thumb drive. And it's unique because it
16 transforms into a puma. Specifically, Ravage. He's a
17 Decepticon. I'm from the '80s.

18 That is a unique thumb drive. If you ever see that
19 thumb drive again, you'll probably recognize it. All right.
20 The thumb drive in this case was non unique. It's just your
21 average run-of-the-mill thumb drive. We know it's not the one
22 Mr. Castaneda was talking about, because it wasn't one or two
23 gigabytes. It was eight gigabytes. And it was never in his
24 possession. Even if it was, they can't prove that he put
25 child pornography on it. Not knowingly, not willfully.

1 That's the standard.

2 He didn't put a block on his credit cards, he did
3 nothing. He did nothing, because he didn't know there was
4 danger. He didn't know there was danger because he didn't
5 know he had the porn. It's such a simple case. It's such a
6 simple case when you look at your burden and you look at what
7 we're trying to do in a courtroom. It's unsatisfying
8 sometimes.

9 I would love it if I were Matlock. I would love the
10 residuals. But I would love it if I were Matlock and I could
11 put someone on the stand and I could prove that he's the real
12 killer and have him admit it. That's a ridiculous standard.
13 That doesn't happen in real life any more than CSI is real for
14 the State.

15 In CSI, computers are magic and everything is decided
16 based on, you know, huge high-definition computer graphics.
17 And that's all garbage. It's all just entertainment. In a
18 real courtroom it can be a little bit unsatisfying. You're
19 going to leave this courtroom not knowing exactly what
20 happened, because you're not here to find out exactly what
21 happened. What you're here to find out is whether or not the
22 government proved their case beyond a reasonable doubt.
23 That's what you're trying to figure out. And this case is
24 rife with doubt. There is more doubt than there is fact in
25 this case.

1 The government's just wrong. They're wrong. And you
2 know why they're wrong. It's because the police who were
3 investigating the case weren't trying to be right.

4 You guys are the riggers in this case. It's your job
5 at this point to make sure that no mistakes are made. You
6 have to check everything carefully. Because right now Tony
7 Castaneda is suspended high up in the air and he's relying on
8 you to check everything and make sure that it works. Hold the
9 State to their burden. Their burden is to prove to you beyond
10 a reasonable doubt that he knew the stuff was on his computer,
11 that he knew what it was, that he willfully possessed it. And
12 that it wasn't one of the five other people or six other
13 people who had his password and has access to his computers.
14 No, not anybody else, just him.

15 Don't get confused, by the way, by this possession
16 instruction. All right. There is a instruction, No. 12, that
17 says that the law recognizes two kinds of possession, actual
18 possession and constructive possession. "A person who
19 knowingly has direct physical control over a thing at a given
20 time is in an actual custody. A person who, although not in
21 actual possession, has both power and intention at a given
22 time, who exercised dominion and control over a thing, either
23 directly or through another person or persons, is in
24 constructive possession of it.

25 "Possession may also be exclusive or joint. Joint

1 possession occurs when two or more persons have the right or
2 ability to maintain control or dominion over the property.
3 You may find that the element of possession as that term is
4 used and these instructions is present, if you find beyond a
5 reasonable doubt that the defendant had actual or constructive
6 possession, either alone or jointly with another person."

7 Okay.

8 The -- the files were on his computer. All right.
9 Don't get confused and think that, because the files were on
10 his computer, that means he constructively possessed them.
11 Because whether it's direct possession or constructive
12 possession, whether he held it in his hand or he owned the
13 computer it was on, you still don't convict if you don't find
14 it was knowingly or willfully -- knowingly and willfully,
15 excuse me -- and. Told you not to forget the and, and I
16 forgot the and. Knowingly and willfully. That they didn't
17 prove that he knew that the files were there. And they didn't
18 prove that he willfully kept the files in his possession.
19 Then whether it's constructive or direct possession doesn't
20 matter. Because knowingly and willfully is the point of this
21 case.

22 They haven't proved it. They can't prove it. And
23 like I said, he's suspended in the air right now. And you are
24 the only people here who can keep him from falling to the
25 ground. Tony Castaneda is not guilty on this case. Consider

1 what you know. Consider what you don't know. And when you
2 mark the form, mark not guilty.

3 MS. BALLOU: Dave, your thumb drive.

4 MR. WESTBROOK: Sorry?

5 MS. BALLOU: Your thumb drive.

6 MR. WESTBROOK: Oh, that's right. My thumb drive.

7 Thanks.

8 THE COURT: Thank you. How's my jury doing? Do you
9 need a break? Okay. State.

10 MS. ANTHONY: Where can I put it? Do we have another
11 podium? I got it.

12 Does that work? Okay. All right. I have a lot of
13 slides. I'm going to try to be very brief as best I can.
14 You've heard a lot in this case. You've heard the evidence
15 the State has presented, you've heard from defense counsel.
16 So I'm going to try to run through it as quickly as possible.
17 But I do need to address the arguments by defense counsel.

18 STATE'S REBUTTAL ARGUMENT

19 MS. ANTHONY: So let me start with this. Defense
20 counsel just started talking about the thumb drive and saying
21 that if he knew his thumb drive was missing, why wouldn't he
22 have reported it to the police, why wouldn't he have done
23 this, why wouldn't he have done that? That thumb drive has
24 child pornography on it. It is the defendant's thumb drive.
25 Why would he ever go to the police and tell them, Hey --

UNCERTIFIED ROUGH DRAFT

1 MR. WESTBROOK: Objection. That misstates what I
2 said. I didn't say why didn't he go to the police.

3 THE COURT: Sustained. He didn't say. He said why
4 didn't he take a hammer to the hard drive, as I remember it.

5 MS. ANTHONY: He also -- well, I'll move on. That
6 thumb drive has child pornography and is the defendant's and
7 we've proven that to you. And that thumb drive ended up with
8 Tami Hines. Okay. Tami Hines came in and testified, and so
9 did Michael, her boyfriend at the time. You have Jury
10 Instruction No. 9. This is what defense counsel just went
11 over ad nauseam about credibility of witnesses. The
12 credibility is manner upon the stand and the strength and
13 weaknesses of his recollections are things for you to remember
14 and to look about, think about, and include everything that
15 they said. So, of course, I'm going to talk about the first
16 person, Ms. Tami Hines.

17 Tami Hines came in here and she testified as to what
18 she saw. And defense counsel wants to call her a liar. She
19 said, I lied. She did. But you have to take everything that
20 she said in context. Defense counsel's taking one question
21 and one answer.

22 MR. WESTBROOK: Objection. That misstates my closing
23 argument and also the testimony.

24 THE COURT: Overruled.

25 MS. ANTHONY: Defense counsel read to you -- she lied

1 and then he said this is why she lied.

2 "When you found the flash drive did you know right
3 away that it belonged to Mr. Castaneda?"

4 And she said, "No." And he said, over and over
5 again, one word, no.

6 She said no. She's a big liar. Remember when I got
7 up on redirect and I asked her the next question? Same
8 transcript, very next question. "What did you do with the
9 flash drive when you found it?" Her answer, "Actually, I'm
10 not the one that found it, my boyfriend found it. He then -- I
11 was watching a movie sitting on the sofa, I'd fallen asleep
12 watching a movie, and he told me that he found it, that he
13 picked it up and went to and put it in the computer, and then
14 he awakened me."

15 MR. WESTBROOK: Objection. That's two different
16 questions, not the same question answered two different ways.

17 MS. ANTHONY: Your Honor, I just read two questions
18 right in a row. Defense counsel's correct, it is two
19 questions. And those are the two questions that I just read
20 to the jury.

21 THE COURT: Overruled.

22 MS. ANTHONY: Defense counsel appears that he's going
23 to be objecting quite a bit during my rebuttal. So let's see
24 if I can get through this.

25 MR. WESTBROOK: Objection. It's improper argument to

1 comment on objections.

2 THE COURT: Sustained. Just try your best.

3 MS. ANTHONY: Tami Hines answered the questions. She
4 answered the questions. She knew about the thumb drive. She
5 knew who it belonged to. She was mistaken when she answered
6 one question. She said from the witness stand, "I lied."
7 Well, that's because at the preliminary hearing she said, "I
8 didn't immediately recognize it." But the very next question
9 she answered, she knew it, she saw it, she knew who it
10 belonged to, and she knew how she found it. Those questions
11 -- and then she came in and she told you about that. Tami
12 Hines.

13 Now, defense counsel made a big deal about she set
14 all of this up. She had this big motive, don't forget, all
15 along when she moved the second time in with the defendant, it
16 was only until Mike got the disability check and then they
17 were moving out. They never planned to stay very long and
18 they planned to leave once the check got there. They got the
19 check and they moved out the same day. There's no mass
20 conspiracy. They followed their plan. They moved in and they
21 moved out as soon as that disability check was there.

22 And they moved out, let's talk about dates. Defense
23 counsel gets the dates wrong. He says that they were there,
24 that they moved out at least three weeks -- three weeks before
25 that USB stick was found.

1 MR. WESTBROOK: Objection. That misstates my closing
2 argument. I said one, two, three weeks. It was an estimate.

3 THE COURT: I -- I don't -- honestly don't remember
4 what you said on that particular point. So the jury will
5 remember what they remember. Okay.

6 MS. ANTHONY: Mike testified from the jury stand he
7 moved out early February. Early February, even if you start
8 with February 1st, USB stick was found on February 7th.
9 There's no way that that's three weeks. They moved out early
10 February. He found it when he was putting his totes away. He
11 woke up Tami Hines. He didn't have the USB stick for three
12 weeks.

13 And timing in this case -- timing in this case is
14 relevant. It's relevant, and we're going to go through the
15 timing and where it leads you and what you can take from the
16 timing in this case.

17 Defense counsel says it all -- this case all started
18 with Tami Hines. That's not correct. It all started with the
19 defendant and when the defendant is the one who downloaded the
20 child pornography. Starts with the defendant. Tami just
21 happened to find his possessions, which he didn't want others
22 to find, the child pornography.

23 Defense counsel equated that thumb drive to fool's
24 gold. There is no denying that what's on that thumb drive is
25 child pornography. Defense counsel's admitted it, stipulated

1 to it, it is child pornography. It's not fool's gold. It
2 really is what we charged in this case, child pornography.

3 All right. So let's go talk about what we did prove
4 in this case. Tami Hines, and I'm just going to backtrack a
5 little bit, she did tell Detective Tooley February 8th, 2010,
6 the day after she found that USB drive, the very next day.
7 Remember it was late at night when Mike found the USB. She
8 was watching a movie. He woke her up. And they flipped
9 through -- quickly through each of the -- each of those
10 photographs, they were looking to make sure that their
11 children were not on it. And they said they. Mike was living
12 with them, was treating her children as his own at the time.

13 And she, on that very next day during that interview,
14 she told Detective Tooley she recognized that USB stick and it
15 was the defendant's. That's February 8th, 2010, well before
16 the preliminary hearing date when defense counsel wants you to
17 believe that Tami Hines lied. She knew February 8th, 2010,
18 that that USB stick belonged to the defendant. She described
19 it at the preliminary hearing, then she came in here and she
20 described it to you, as well.

21 All right. What is also consistent are those access
22 dates. And the access dates on the USB drive, all of the
23 access dates on the USB drive, all of those images were all
24 February 7th, 2010. Those were the dates, it's very
25 consistent with Tami and Mike flipping through. It matches.

1 They came in and testified that they saw it, and that's
2 consistent with what they said. This is consistent. This is
3 actual evidence. And it's consistent with what Mike says.

4 So, remember the instructions about credibility, it's
5 Instruction No. 9. It also says, "If you believe that a
6 witness has lied about any material fact in the case, you may
7 disregard the entire testimony of that witness or any person"
8 -- or, I'm sorry, "or any portion of his testimony which is
9 not proved by other evidence." Tami told you about when they
10 accessed it. The access date supports it. Mike came in and
11 gave you the same information.

12 Tami gave you information you can rely on,
13 information, the evidence that Tami told you from this witness
14 stand.

15 MR. WESTBROOK: Your Honor, I have an objection based
16 on this slide. First of all, it says, "Defendant himself says
17 he copies his driver's license to the USB drive." I think
18 they're trying to indicate that he said that he was copying it
19 to his eight-gigabyte USB drive, which is a misstatement of
20 the evidence. Secondly, she's talking about the access date
21 being 2/7/2010, that's correct. My concern is she's confusing
22 it also with the written-by date.

23 MS. ANTHONY: And, Your Honor, if I would just -- I
24 have only read the first part in the slide I haven't even
25 explained it. And apparently defense counsel wants to get up

1 and try to, again, interrupt my rebuttal and give his own
2 rebuttal argument to himself. I haven't even explained this
3 slide.

4 THE COURT: Sustained. Counsel, she hasn't even
5 gotten there. This isn't -- the -- the jury understands it's
6 a demonstrative, it is not the evidence of the case, it's just
7 outlines -- we don't -- I don't know what she's going to say
8 about this.

9 MR. WESTBROOK: Thank you, Your Honor.

10 THE COURT: Go ahead.

11 MS. ANTHONY: All right. Apparently I won't be able
12 to be very quick today.

13 So, any portion of this testimony which is not proved
14 by the other evidence. I've already explained to you about
15 Tami. She did use the word lie. But based on her prior
16 testimony, what she came in, she was just mistaken. And that
17 happens. That happens often. And it doesn't mean you have to
18 disregard her entire testimony.

19 The USB stick. That USB stick belonged to the
20 defendant. Mike also came in and he told you the USB stick
21 belonged to the defendant. Tami told you, Mike told you.
22 Corroborating evidence. Eight gigabyte. You heard testimony
23 that that USB stick was eight gigabyte. Mike said it was an
24 eight-gigabyte USB drive. Mike is corroborating the evidence
25 in this case.

1 Mike said he found the USB stick. He also described
2 waking Tami up. Tami and Mike are corroborating each other.
3 And the last-accessed date was 2/7/2010. Tami, Mike, and the
4 evidence in this case corroborate each other.

5 Defendant himself, in his own interview, says he
6 copied his drivers license onto a USB drive. We have a USB
7 drive in this case. And his driver's license was copied onto
8 the USB in this case.

9 Defense --

10 MR. WESTBROOK: And then I object to the
11 mischaracterization.

12 THE COURT: Overruled.

13 MS. ANTHONY: Defense wants you to believe the
14 defendant, a computer expert, that he didn't know what was
15 located on his USB drive. He didn't know what was on his
16 Shuttle computer. He didn't know which was on his HP laptop.
17 In his interview he says he has 25 years of computer
18 experience. He has many, many, many certificates. And all of
19 them were found on the USB drive. He is a network engineer
20 and he is an intern at engineering. He is not an ordinary
21 person who just uses computers to play Candy Crush. He is
22 somebody who's knowledgeable, he's got degrees, 25 years of
23 experience.

24 And he works from home on that computer, the main
25 computer, the Shuttle. He uses it, he works there, he uses it

1 all of the time. His whole life is computers.

2 Actually, I'm not sure what just happened. Hold on
3 just a second. Court's indulgence.

4 All right. These are the documents, and you'll have
5 in evidence to look at. And they support what the defendant
6 says in his interview. He has a California State University,
7 Fresno degree, Industrial Technology Manufacturing Industries,
8 Computers. Educational Services, Hewlett Packard,
9 administration, and its name. Certificate of Attendance, New
10 Horizons, Another Computer Beyond, Microsoft Excel. Another
11 one, the Beginning Paradox for Windows, 16-hour courses these
12 are, Beginning Paradox, Immediate -- Intermediate Paradox.
13 He's got a letter in there from Microsoft that's got I think
14 three or four different types of certificates, and one of them
15 being in networking.

16 He's got two other certificates that were on that USB
17 drive regarding computers. Netware System Manager course,
18 Introduction to Data Communications course. Defendant is very
19 knowledgeable in computers. He knows what's on his computer.
20 He uses it all the time.

21 Defense counsel's arguments are not reasonable, and
22 here's why. You have an instruction with reasonable doubt.
23 This is probably the most important instruction that you have.
24 It's Instruction No. 6. "A reasonable doubt is one that's
25 based on reason. It has to be reasonable. It's not mere

1 possible doubt. And then doubt, to be reasonable, must be
2 actual, not mere possibility or speculation." Speculation
3 cannot be part of your decision. That is super important
4 here.

5 So, "Doubt to be reasonable must be actual, not mere
6 possibility or speculation."

7 Defense counsel talked about all these blanks, and
8 all these blanks mean that you can find reasonable doubt. And
9 that's not an accurate statement of the law. Right? What --
10 when I asked that expert, Detective Ehlers, is this possible,
11 did you find evidence in this case? Did you find evidence in
12 this case? No. No, there was no evidence that any of defense
13 theory happened here.

14 Let's go through it.

15 MR. WESTBROOK: Objection, Your Honor. This is
16 burden shifting.

17 THE COURT: Overruled.

18 MS. ANTHONY: This information, a lot of it came from
19 Detective Ramirez, and a lot of it came from Detective Ehlers.
20 Defense counsel spent some time talking about Detective
21 Ehlers. Detective Ehlers, judge his demeanor. When he
22 testified from here, judge his demeanor. He had difficulty
23 understanding the technical questions on both sides. I'll
24 take the blame for that, because here I am asking him
25 questions, I'm trying to use the lingo, don't quite know the

1 lingo, and in my questions was trying to answer them. But he
2 didn't quite understand them. And, quite frankly, he also
3 didn't understand defense counsel's. And every time he would
4 ask some questions, he would answer them and he'd say, Well,
5 can I explain that? He was trying to educate everybody on the
6 lingo.

7 MR. WESTBROOK: Objection. This is vouching. It's
8 improper argument.

9 THE COURT: Overruled.

10 MS. ANTHONY: You cannot base your decision in this
11 case on speculation.

12 Defense has a theory. Virus. Virus did it. There
13 is no evidence in this case that a virus put that child
14 pornography on the thumb drive, the shuttle, or the HP laptop.

15 MR. WESTBROOK: Objection. This is direct burden
16 shifting. It is --

17 THE COURT: Overruled.

18 MS. ANTHONY: The question posed to Detective Ehlers,
19 "Did you find any evidence of virus in this case?"

20 His answer, "No." Remember --

21 MR. WESTBROOK: Objection. Misstates his complete
22 answer.

23 THE COURT: Overruled.

24 MS. ANTHONY: Remember, this defendant is a computer
25 expert. He worked in computers 25 years. During that

1 interview, scale of 1 to 10, what is his computer experience?
2 The highest is a 10, he says 10. And he says, I'm an Internet
3 engineer. I am a network engineer.

4 All of these facts play into this case. Detective
5 Ehlers, there was virus working -- or was virus scanner, there
6 was virus working on his computer. It was up and running.
7 This child pornography, the first one, starts on the lap --
8 the HP laptop, and it dates back till 2007. It is not
9 reasonable that if there was a virus, that this man, with all
10 of this experience, would have a virus on his computer for
11 three years.

12 MR. WESTBROOK: Objection. Misstates a scientific
13 evidence, misstates the defense argument. The idea that we
14 would have this -- it wasn't part of our argument and it's
15 certainly not part of the evidence.

16 THE COURT: Overruled.

17 MS. ANTHONY: Viruses do not delete images. The
18 images were not -- we're talking about the unallocated space.
19 The images were deleted by a person. They were accessed and
20 they were manipulated. That was Detective Ehlers' testimony.
21 And that's important here. I'm going to come back and talk
22 about that unallocated space.

23 Unallocated space. It was described to you and it's
24 important in this case, so I'm going to come back to that.
25 This is not a case that a virus put this information on the

1 defendant's thumb drive, Shuttle, or HP laptop. There is no
2 evidence of that. That would be speculation. And it's not
3 reasonable.

4 Zip files. Defense counsel asked a lot of questions
5 about zip files. And there's a zip file there. There's no
6 evidence of that here, either. Right? And, in fact, the
7 defendant himself in that interview says he doesn't use
8 compressed files. Again, going to move on. But don't
9 forget --

10 MR. WESTBROOK: Objection. Misstates the evidence
11 and it's also burden shifting. That's not what was said in
12 the interview.

13 MS. ANTHONY: Well, let's see what it says --

14 THE COURT: Wait.

15 MS. ANTHONY: -- in the interview.

16 THE COURT: Wait.

17 MS. ANTHONY: It's right here, Your Honor.

18 THE COURT: All right. The -- and the jury is just
19 cautioned that whatever counsels say in argument isn't the
20 evidence and you'll have to rely upon your -- your
21 recollection of the testimony and the examination of the
22 evidence.

23 Go ahead.

24 MS. ANTHONY: Question, "But based on everything
25 you're telling me, you know, obviously the items are not going

1 to be in clear view that we're looking for. Okay."

2 "Well, they should be." The child pornography,
3 right, the child pornography that the detectives are looking
4 for.

5 Defense -- defendant's answer, "Well, they should be.
6 I, uh, I -- I don't, uh, hide any kinds of files."

7 Child pornography doesn't hide. And while A -- the
8 answer, sorry, "Or anything like that."

9 Question, "Well, and -- and it's not that I don't
10 believe you, but obviously."

11 Defendant, "Okay." Detective, "I have to be a
12 skeptic because of what I do." Defendant, "I understand."
13 Question, "Okay." Defendant, "But there are no things like
14 compressed file folders or anything like that." That's what a
15 zip file is. "There are no things like compressed file
16 folders or anything like that." Doesn't use them. His own
17 words.

18 MR. WESTBROOK: Objection. He did not say I don't
19 use compressed files. He said there are no compressed files
20 hiding child pornography on his computer.

21 MS. ANTHONY: Objection.

22 MR. WESTBROOK: She's misstating the evidence. It's
23 in black and white. Actually, yellow and white.

24 MS. ANTHONY: Your Honor --

25 THE COURT: All right.

1 MS. ANTHONY: -- first off, I read exactly what the
2 defendant said. Defense counsel objected to say that I was
3 misreading it, and then his own objection is misstating what I
4 read.

5 THE COURT: All right. So once again, the jury will
6 decide the interpretation to give any evidence, including what
7 the defendant said and what he meant by that. You're -- you
8 decide the facts.

9 MS. ANTHONY: And since defense counsel continues to
10 object, I'd like to read to you --

11 MR. WESTBROOK: Objection.

12 MS. ANTHONY: -- Instruction No. 8.

13 MR. WESTBROOK: That's improper.

14 THE COURT: Counsel, he has to -- he is required to
15 make contemporaneous objections if he feels they're required.
16 That's his -- the jury was previously instructed that lawyers
17 have to make objections and not to hold that against them.
18 Please don't comment on it. Just do your best to get through
19 your argument.

20 MS. ANTHONY: Again, statements, arguments, opinions
21 of counsel, are not evidence in this case.

22 All right. Let's go back to speculation, not
23 reasonable. Again, the zip file theory. No evidence. Even
24 the defendant says he doesn't use compressed files or zip
25 files.

1 Music theory. This one was good. There is no
2 evidence, remember the music theory, there's no evidence of
3 it. The computer automatically plays music and searches out
4 child pornography to go with that music.

5 MR. WESTBROOK: Objection. Complete
6 mischaracterization of any argument ever made, number one.
7 Number two, it was disparity. And number three, again, it's
8 burden shifting.

9 MS. ANTHONY: I'm responding to --

10 THE COURT: Well --

11 MS. ANTHONY: -- defense counsel's arguments, Your
12 Honor. I don't know why he has to object every other...

13 THE COURT: He feels --

14 MR. WESTBROOK: Because they're objectionable.

15 THE COURT: Okay. Again, he feels he has to object.
16 The law requires him to make contemporaneous objections. Live
17 with it. Okay. Now, move on. That's overruled.

18 MS. ANTHONY: All right. Defense counsel's talked
19 about this music theory that he's playing some type of album
20 and then it's going to automatically go out and get these
21 images. Well, first off, these programs that were talked
22 about, Detective Ehlers said that these programs had to, one,
23 be installed, two, have been signed up to do that, and what
24 type of program do you know of that would -- you're playing
25 music and it's going out into the Internet and get child

1 pornography? Type of music with images like in our case.
2 Girl on dick 06 or Girl on dick 08. That's not reasonable.

3 Additionally, when you listen to the defendant's
4 interview, when you listen to his own interview, he says, I'm
5 a computer guy, I'm a network guy. I don't have MP3 players,
6 I don't have iPods, I don't do that. Music theory is not
7 reasonable in this case.

8 MR. WESTBROOK: Judge, I object to calling it music
9 theory. This is not even close to anything I've been arguing.
10 This is a complete misstatement of every fact and every
11 argument in this case. And I object to the slide, which is
12 completely objectionable and misleading to the jury.

13 THE COURT: All right. So the -- there was never any
14 evidence about what you want to characterize as the music
15 theory. This was just an analogy by defense counsel in his
16 closing argument.

17 MS. ANTHONY: Your Honor --

18 THE COURT: There was never any evidence --

19 MS. ANTHONY: There was. There was a question to
20 Detective Ehlers about this music program going out and
21 getting images off the computer. There was a question
22 regarding that. There were several questions regarding that
23 and this is what this is in reference to.

24 MR. WESTBROOK: It wasn't exactly, Your Honor. I
25 didn't suggest that a music program went out and downloaded

1 child pornography. The slide is ridiculous.

2 THE COURT: The -- I believe the testimony was -- and
3 the jury will have to recall it, but the testimony was about
4 were there types of programs that would go out and search for
5 things that might go with that particular program. But there
6 was no -- there was never any testimony that there were
7 programs, music programs that searched for child
8 pornography --

9 MS. ANTHONY: That's my point.

10 THE COURT: -- specifically.

11 MS. ANTHONY: That's my point.

12 THE COURT: All right. So maybe we misunderstood.
13 So, go on.

14 MS. ANTHONY: All right. Defendant's interview. The
15 defendant's own interview, he talks about the only way
16 something gets on a thumb drive is if somebody puts it there.
17 So this thumb drive isn't being accessed by the Internet.
18 Things just suddenly getting put there. The defendant himself
19 talked about how a thumb drive worked -- works. The only way
20 something gets there is if somebody puts it on the thumb
21 drive.

22 There's a conspiracy theory in this case regarding
23 Tami and Mike and the evidence in this case. We've talked a
24 little bit about it. I'm going to try to speed through it as
25 briefly as I can.

1 But there's this -- Tami and Mike did not put the
2 child pornography on the thumb drive or either of the two
3 computers. And use your common sense, which you have a jury
4 instruction about that. First off, why would Tami put the
5 child pornography on a USB stick, then have it in her
6 possession? Why would she have it and have it in her
7 possession if she was trying to set the defendant up? Why
8 wouldn't she leave it in the house, leave it by the computer,
9 and then call the police and tell the police that it was
10 there? She's not setting him up.

11 Why wouldn't -- with -- even without the thumb drive,
12 why wouldn't she just call the police and say he has it on the
13 computers? And if she was really, really setting the
14 defendant up, why wouldn't, at the preliminary hearing when
15 the question was asked, Did you immediately know about the USB
16 drive, why wouldn't she at that very moment say, Yes, of
17 course, it's his? If she was really, really trying to set him
18 up, that wouldn't have been her answer.

19 MR. WESTBROOK: Your Honor, I wanted to let her
20 finish the slide. I object to the slide and to the argument
21 as burden shifting.

22 THE COURT: Overruled.

23 MS. ANTHONY: And if she was trying to set the
24 defendant up, there were other computers in the house. Why
25 didn't she put it on every single computer? She didn't.

1 Because she isn't the one who put this child pornography on
2 the defendant's thumb drive, the Shuttle, or HP laptop. It
3 was the defendant.

4 Again, if it was Tami who was doing all of this to
5 set the defendant up, why wouldn't she have gone through --
6 why would she have gone through all the trouble to change
7 dates, change times, put different dates and times on a
8 computer and change the names? Why would she have done that?
9 She didn't. She didn't do that here. It was the defendant
10 who's downloading and looking at these images.

11 I have a chart here, it's actually on two slides.
12 But they're highlighted and the colors match each other. And
13 these are the created dates, the created dates are the dates
14 that it was first put onto that individual device. So it's
15 important just to look at, we went through all of them and
16 gone through [indiscernible] and just let me brief. If you
17 look at the USB stick, every single one, including the next
18 slide, because I had to put two together, the charts were too
19 small, 11/25/08 is the date that all of those items -- this is
20 the created date. The date that they were all put on the
21 thumb drive.

22 The Shuttle. All of the images that we have charged
23 that are on the Shuttle, so the desktop, all of those have a
24 date, December 10th, 2008. It's an important date. It's the
25 date that they were put onto the Shuttle.

1 And the laptop, which is the oldest device in this
2 group. This laptop has different dates of when these images
3 were placed onto that laptop. They are all in August of 2007,
4 but they're different dates. And they're color coordinated.
5 2 girls 01 is 8/9/07, girl on dick 06 and girl on dick 08 were
6 both August 13th, 2007, you have some Exhibit 6, 7, and 8 were
7 put on August 11th, 2007. These dates being put on, they're
8 -- it's the creation date.

9 And then the next slide continues on showing you
10 different dates. The dates that they were all put on the USB
11 drive, the exact same. The dates that they were put on the
12 Shuttle, the exact same. The dates that they were put onto
13 the HP laptop, all August 2007, but different dates.

14 Again, there's no evidence that Tami set the
15 defendant up. I'm going to go back just for a moment. When
16 you look at this and the chart that was created when we spoke
17 to the detectives, these do not match identically. They are
18 not 1 through 15 exactly the same on HP -- I'm sorry, the HP
19 laptop, the Shuttle, and the USB. They're all a little
20 different. They have different names. Some of them are
21 carved, some of them weren't carved. They all have different
22 times. For example, USB Exhibit No. 6, it wasn't on the USB
23 drive, but it was both on the Shuttle and the HP laptop.

24 If Tami really wanted to get the defendant good,
25 wouldn't she have made them all match? Wouldn't there have

1 been 15 on each and every computer and laptop? Tami didn't
2 set the defendant up.

3 And most importantly, let's talk about those
4 unallocated images. The unallocated images. If Tami and Mike
5 are going to set up the defendant, why would they have deleted
6 some images? And this is the argument about the unallocated
7 space. So, Detective Ehlers told you that an image is once on
8 the computer, and then it's deleted. And once it's deleted,
9 it goes into the unallocated space. And the unallocated space
10 is where you can no longer see it. And that's where it's able
11 to be rewritten.

12 But he also testified that he knew that it had been
13 deleted from these different devices because the MD5, the hash
14 tags, matched up. It was the exact same image. And the way
15 that it got to the unallocated space is that it had been
16 deleted and moved into this. Once you delete it, it gets
17 moved into this space. It's not something that you just can't
18 see.

19 And -- and that was a part of defense counsel's
20 argument that I wanted to point out to you. It was on these
21 devices, deleted, and once it's deleted, it's moved into
22 unallocated, where you can't see it and you can't use it
23 unless you have special forensic programs, like Detective
24 Ehlers and Ramirez did.

25 And most importantly, if she really -- Tami or Mike

1 were both really trying to set up the defendant, really trying
2 to do it, wouldn't they have come in here and told you, I got
3 -- either I got this USB drive, it was the defendant's and I
4 saw him looking at it and there's child pornography on it?
5 And same as with his computers at his own house? Wouldn't
6 they have told you that? They didn't.

7 I'd like to give you an example about these
8 file-created dates. I just talked about them, but something
9 that might help you back in the jury room to remember what
10 they mean. The created date's like a birthday. It's the date
11 that it's introduced on that media for the first time. So the
12 USB drive, the birth date of those images on that USB drive,
13 November 25th, 2008. The birth date of those images on the
14 Shuttle, December 10th, 2008. And for the laptop, they were
15 various dates, August of 2007.

16 MR. WESTBROOK: And, Your Honor, I object to this --
17 this oversimplification completely misstates the evidence
18 about what a created date is. It's wrong.

19 THE COURT: Overruled.

20 MS. ANTHONY: Last written and last modified. And
21 this was some of the information taken from Detective Ehlers
22 and Detective Ramirez. It's usually the date that was taken
23 from the original location and it doesn't get updated unless
24 it's been modified. Or another way to say it is that it stays
25 the same unless it's modified. So --

1 MR. WESTBROOK: Objection to this slide and this
2 instruction, as well. Last written and last modified do not
3 mean the same thing. This misstates the evidence at trial and
4 it's wrong.

5 THE COURT: The jury will rely on what they recall is
6 the testimony from various witnesses who testified about this.

7 MS. ANTHONY: So, why have I made such a big deal
8 about these dates? They matter. And here's how this all
9 happened. And it all started on the HP laptop. Those created
10 dates, the date things were placed onto that laptop were
11 either 8/9/07, 8/11/07, 8 -- or 8/13/07. That means that
12 those were all downloaded onto that device, they were placed
13 there on that device on those dates. The first time that that
14 device, that laptop saw those images, is that date.

15 Then they were moved from the laptop to the USB
16 stick, and the last-written and the last-modified date doesn't
17 usually get updated unless something was changed. So we know
18 that the USB drive, that the birth date was 11/25/08. The
19 last-written and last-modified date, they don't usually
20 change. So you -- you look back into your notes if you were
21 writing those dates, if you went through them all, last
22 written, last modified, they were all the same, 8/9/07,
23 8/11/07, 8/13/07, with the exception of the one of file which
24 is Euro-01.jpg. And that's the one that my co-counsel made a
25 mistake on his slide. So that date was 2/7/2010.

1 Now, remember, I went through each and every one of
2 these images. And when I went through them with Detective
3 Ehlers, I asked them were -- were they the same images? He
4 said yes. So, something could have been changed, a saving or
5 something, when Tami and Mike looked at it 2/7/10. But it was
6 the exact same image. And it had been placed already on that
7 thumb drive on November 25th, 2008. It is not that that file
8 got placed onto that USB drive on 2/7/2010. Maybe it was
9 saved different, maybe something touched it and something
10 modified, but it was the same image. And I asked Detective
11 Ehlers about that.

12 So, it moves from an HP laptop to the USB stick, and
13 from the USB stick to the Shuttle. And again, looking at the
14 dates, last-written/modified date, right, doesn't usually get
15 updated. All of the birthday, the created date on the -- on
16 the Shuttle, 2/10/2008. The last-written dates, the same
17 dates that we've been talking about. Same dates as on the
18 USB. And look, even the Euro-01, it's back to 8/11/07, which
19 is the same as what it was on, on the USB.

20 So even if Mike and Tami had that USB, they looked at
21 it, something happened at that one image as they looked at it,
22 they saved it different, something, it's the same on that
23 Shuttle. It didn't change the image.

24 And all of this evidence shows that the USB was
25 placed in the Shuttle and the files were copied onto the

1 Shuttle from the USB prior to Tami and Mike having the USB
2 stick. That's why that date is important.

3 And additionally, you heard that the operating system
4 on the Shuttle computer was updated on December 10th, 2008.
5 The defendant updates his computer system and places his child
6 pornography onto this computer.

7 So, just went through all of those dates. I'm going
8 to try to move on. Giving you 2007 when these items were
9 placed on the laptop, 2008 to the USB, shortly thereafter to
10 the Shuttle. 2007, 2008, 2008.

11 Tami and Mike were not living with the defendant at
12 any time when these items were placed on these devices. Tami
13 told you she lived with the defendant once or twice, it
14 doesn't matter, in 2009. She moved out in 2010. It does not
15 matter if she lived with him once or she lived with him twice.
16 It all happened in 2009, she moved out in 2010. Those items
17 were already placed on the USB, the Shuttle, and the laptop.

18 Let's talk about the defendant's interview. Defense
19 counsel said if he knew, meaning the defendant, if he knew his
20 answers -- I was typing too fast. If he knew, his answers
21 would have been different. If he saw those images, if
22 Detective Tooley had shown him those images, his answers would
23 have been different. Does it matter what images of child
24 pornography are on there and what the defendant would have
25 been shown? Does that even matter? They're -- it's all child

1 pornography. And his answers shouldn't have been any
2 different.

3 So, at defendant's interview. I want to highlight
4 some of the defendant's answers, because they're very telling.
5 Sure, he denied that he had the child pornography. But look
6 at the details and the words that he uses. It's important.

7 All right. So, Question, "Like, what types of sites
8 were you downloading these images from?"

9 Answer, "You -- that would be sort of random because,
10 ah, um -- or, ah, I would -- I really can't, ah, um, clarify
11 what kind of sites I might have downloaded from -- from,
12 because it was never a major interest or something I went
13 looking for." They're talking about child pornography. "Ah,
14 um, I may have chosen someone because they were pretty, not
15 because they were young."

16 Pretty versus young. He still chose them.

17 MR. WESTBROOK: Objection. Out of contest -- context
18 and misstates his interview.

19 THE COURT: Overruled.

20 MS. ANTHONY: His words in the interview were
21 "young." Do you remember the search terms that were used on
22 the defendant's computers under his user account? "Young."
23 "Young" was placed into porntsunami.com, FUQ.com,
24 Lemmingtube.com, VideoBang.com, XVideos.com, XTubemovies.com,
25 ChronoTube.com. Defendant used the search term "young."

1 Those images are in evidence. You have them.
2 They're going back with you. They're in an envelope. You
3 take a look at those and there is no way that you will think
4 that somebody would have chosen those images and -- and said
5 that they were pretty, and there's no way that somebody would
6 have looked at those images and chose them because they were
7 young. There would be --

8 MR. WESTBROOK: Objection. That misstates his
9 interview. He didn't save those images at all. And every
10 single Web site she just talked about is a legal Web site. If
11 she's trying to implicate that he downloaded these pictures
12 from those Web sites, that completely misstates the -- the
13 testimony as misconduct.

14 Secondly, we have a stipulation about the pictures.
15 They're not necessary to be looked at in this case, because we
16 stipulated that those pictures are child pornography.

17 THE COURT: There is a stipulation. The photographs
18 are in evidence and they're -- they are -- the stipulation
19 also contemplated that they -- the jury would get them and
20 they would have the option to look at them in -- in the jury
21 deliberation room as opposed to open court. As to whether or
22 not this is mischaracterizing the interview, the jury has to
23 recall the interview. You also have the disc of the entire
24 interview, if you wish to listen to it again and give it the
25 weight that you think is appropriate.

1 MS. ANTHONY: He said it wasn't a major interest. It
2 wasn't a major interest. That means it was an interest.
3 Child pornography, an interest of the defendant's.

4 Defendant's interview. He also says, "It's never
5 been" -- I believe it said "peccadillo of me." Looking at
6 child pornography is not a small problem. If you look at
7 child pornography or -- I'm sorry, if you do not look at child
8 pornography, the answer would have been no.

9 Your Honor, I'm going to ask the defense not continue
10 to argue from the counsel -- he's -- as I'm saying these, he's
11 making comments regarding, although he's not objecting, he's
12 regarding. I heard it over here. I'm sure the jury can hear
13 it.

14 MR. WESTBROOK: I'm sorry, Your Honor. I was
15 discussing things with my client as I'm required to do.

16 THE COURT: All right. But you need to do it
17 quietly.

18 MR. WESTBROOK: I'll try to do it more quietly. I
19 apologize.

20 THE COURT: All right.

21 MS. ANTHONY: All right. What else did the defendant
22 say? Defendant's interview.

23 "I don't know how old the girls look." "It might
24 have been, yeah, ah, so, ah, well, the only thing is that how
25 I would acquire them, by surfing through multiple Web pages

1 and saving what I thought was interesting."

2 State's Exhibits 1 through 15, defendant found
3 interesting and he saved them.

4 MR. WESTBROOK: Objection. Misstates the evidence.

5 THE COURT: Overruled.

6 MS. ANTHONY: Defendant's argument. Question, "Okay.
7 Well, obviously, it's the Internet, 'cause --" Answer, "Yeah."
8 "These images, like I said, I know these images, I know
9 they're on the Internet." She's talking about child -- child
10 pornography.

11 "Yeah." Question, "Just based off my experience,
12 but, you know, it's how you went and got -- and got them.
13 Like I said, most people use file sharing programs. It's the
14 most common and quickest way."

15 "Ha. Well." Question, "Now, I don't know if you did
16 that." Answer, "I typically don't. I just go to the Internet
17 Web page." And if you go to the Internet Web page, you are
18 the one downloading it, you are the one seeing it, you are the
19 one choosing it, you are the one saying it's interesting, and
20 you are the one who's downloading knowingly and possessing
21 child pornography.

22 MR. WESTBROOK: I'm sorry, Your Honor. I object to
23 this slide with the argument on it. She is piecing together
24 little words from this interview and pretending like they're
25 complete statements.

1 THE COURT: Overruled.

2 MS. ANTHONY: Detective told the defendant that the
3 images were child pornography. That's in the interview. And
4 his response was, "I typically don't use file sharing
5 programs, I just go to the Web page."

6 So, if you -- this is the same argument I just made.
7 If you go to the Internet Web page, you know what's on the
8 Internet Web page. It's not some unknown downloaded file that
9 was just accidentally transferred.

10 Defendant's interview. Question by Detective Tooley,
11 "Any of this making any sense?" Answer, "Sure. Mm-hmm. I
12 understand. But as far as I know, I mean, I've -- I've even
13 loaded a folder of, um, ah, ah, adult stuff on USB cards. I
14 don't think I -- don't think it's ever been an interest for
15 child porn."

16 If you've never looked at child pornography, the
17 answer is no and you've never had an interest in it. And how
18 can one not know if they've never had an interest in child
19 pornography?

20 Of course, defense counsel has made some -- some
21 arguments regarding, you know, the State, nobody saw the
22 defendant look at that child pornography. That's true. We've
23 never denied that. This is a circumstantial case. You have
24 some instructions on how to view this case. And I just want
25 to give you a brief example of a circumstantial case.

1 So, I have a dog. He's a poodle. He's a standard
2 poodle about this big. I call him a ninja. And I have -- you
3 know those baby locks? I have them on my pantry in my
4 kitchen. Because one day I came home, my entire kitchen,
5 brown sugar, rice, cereal, all over my floor, my kitchen
6 floor. The only dog that was out was my poodle. I call him
7 ninja poodle. He got into the pantry. He, with his paw,
8 moved the door down, got in, decided he was going to have
9 flour and rice and brown sugar all over my floor. I wasn't
10 there. I didn't see it. But I still know how it happened.
11 Ninja poodle.

12 No matter how much I looked at Ninja and I asked him,
13 Why did you get into the brown sugar, of all things? Or the
14 rice? He couldn't talk. He didn't tell me. But I still
15 knew. Ninja poodle got into the pantry. And from now on, I
16 now have a baby lock on my pantry for ninja poodle.

17 You have an instruction that talks about
18 circumstantial evidence. Circumstantial evidence is the proof
19 of chains of facts and circumstances which tend to show
20 whether the defendant is guilty or not guilty. The law makes
21 no distinction between the weight given either direct or
22 circumstantial evidence. All of the evidence that's been
23 described in this case is circumstantial and you can use that
24 information to find the defendant guilty.

25 Common sense. We've all talked about it. You have

1 an instruction, No. 17. Please use it when you're in the jury
2 room. You can draw reasonable inferences and take your common
3 everyday sense with you.

4 Reasonable doubt, I've talked about it. I made a
5 point that it's just not mere speculation. A doubt, to be
6 reasonable, must be actual. Not mere possibility or
7 speculation.

8 But it's reasonable and it makes sense that the
9 defendant knew the child pornography was on his computer. He
10 knew. He's admitted that he loaded his drivers licence on a
11 USB stick. We have that -- we have a USB stick here that has
12 the defendant's personal information, including the drivers
13 license. He's admitted he loaded an adult folder onto the USB
14 stick. He's admitted that the adult folder had file folders
15 that included Movie 01, Movie 02, Pic 01, Pic 02, and
16 Celebrity. And oh, guess what, he didn't mention, but it's
17 found in the same folder structure, girlpics. He knew that
18 child pornography was also on that USB stick. That drivers
19 license, looking at the dates, was loaded onto that USB stick
20 after the child pornography was already there. It's about a
21 week difference.

22 It was December 1st, 2008. These are the documents
23 that were on there. It's a birth certificate, there's a
24 military certificate, his drivers license, rebel card, Social
25 Security, and his Cal State Fresno diploma.

1 Defendant, again, I would access it. "Okay. Well,
2 I'm just trying to -- trying to think of possibilities as to
3 where you have gotten any child pornography. Okay."

4 Answer, "Well, I do. I do that because for a while
5 there I didn't have any house-wide networking."

6 "Okay." "So when I would -- and I was using a USB
7 dongle because I was traveling." Taking your child
8 pornography with you.

9 MR. WESTBROOK: Objection.

10 MS. ANTHONY: "So -- so I would go online" --

11 THE COURT: Overruled.

12 MS. ANTHONY: -- "and, um, and I would let it
13 download during the night and then I would access it" -- I
14 would access it -- "whenever I was active during the day."

15 Chain of facts and circumstances in this case -- I'm
16 almost finished. I'm trying to go through it here.
17 Defendant's house, defendant's laptop, defendant's Shuttle.
18 Defendant's user accounts, defendant's documents, the search
19 term "young." And we've gone through how those search terms
20 were put through those Web sites. Defendant's deleted images.
21 And all of these point to the defendant, Anthony Castaneda.

22 I ask that you find him guilty of all 15 counts of
23 possession of visual presentation depicting sexual conduct of
24 a child.

25 THE COURT: All right. The clerk will now swear the

1 officers to take charge of the jury.

2 (Officers sworn.)

3 THE COURT: Thank you. Marshall.

4 THE MARSHAL: Yes, Your Honor.

5 THE COURT: Will you take the jury to the jury
6 deliberation room.

7 THE MARSHAL: Ladies and gentlemen of the jury,
8 please.

9 (Jury recessed to deliberate at 3:29 p.m.)

10 THE COURT: And my law clerk -- alternate -- is
11 waiting I believe in the hall, also, to take charge of the
12 alternate.

13 MR. WESTBROOK: Your Honor, I have a --

14 THE COURT: Just a minute. Just --

15 MR. WESTBROOK: Sorry.

16 THE COURT: -- let's get the door closed. All right.
17 The record will reflect that the jury and the alternate have
18 departed the courtroom. There any matters outside the
19 presence?

20 MR. WESTBROOK: Just a quick motion for a mistrial
21 based on prosecution's misconduct. I have never seen so many
22 misstatements and mischaracterizations in my entire life.
23 Every single argument I made in this trial was warped and
24 mischaracterized for the jury. I tried to object to
25 everything, but frankly there's some things that I missed

1 because I was afraid that I was annoying the jury.

2 I object to her slide show presentation as a whole.
3 It misstated every facet of evidence in this case. And it put
4 words in my mouth I never spoke. I misstate -- I -- I object
5 and ask for a mistrial based on her knitting together words
6 from that interview as if they were spoken consecutively about
7 pretending like they were about things they weren't about.
8 They were completely out of context, it was completely
9 misleading.

10 There is so much prosecutorial misconduct in that
11 last rebuttal that it's completely destroyed my client's right
12 to due process and to a fair trial in front of a jury. I
13 believe that it -- it could not have done anything at all
14 except prejudice this jury. And I'm asking for a mistrial and
15 dismissal with prejudice.

16 THE COURT: All right. State's position?

17 MS. ANTHONY: Your Honor, I used the defendant's own
18 words in the interview that we played. Quite frankly, I
19 responded to Mr. Westbrook's own comments. In fact, Mr.
20 Westbrook talked about the defendant never blocking his credit
21 cards and he had a slide about it. That was never testified
22 to, nothing about that. Mr. Westbrook brought in evidence
23 that was not even part of this case. He made comments that
24 weren't evidence, not -- questions didn't come from this jury.
25 Those came from Mr. Westbrook.

1 What I did was I took the interview and I didn't say
2 they were one right after another. I said these are the
3 defendant's words. And I went through them. I think it's
4 fair. I think it's commenting on the evidence. And it's
5 arguing the facts that the jury had. I don't believe it's
6 prosecutorial misconduct. And if I had, I wouldn't have done
7 it. Absolutely not.

8 THE COURT: All right. Well, the Court does not find
9 that there was prosecutorial misconduct. The interview
10 excerpts that were cited were in direct contradiction to
11 arguments of counsel and defense counsel concerning what
12 defense -- the defense believed the evidence showed. And I
13 think it was fair comment.

14 So the motion for mistrial is denied. Will you
15 please make sure you leave your phone Numbers with the clerks,
16 but I would say, since it's 3:30, don't stray far.

17 MR. WESTBROOK: We'll be across the street, Your
18 Honor. And I have the sheet right now.

19 (Court recessed for the evening at 3:33 p.m.)
20
21
22
23
24
25

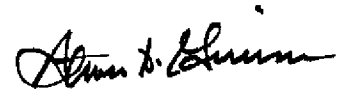
ACKNOWLEDGMENT:

Pursuant to Rule 3C(d) of Nevada Rules of Appellate Procedure, this is a rough draft transcript expeditiously prepared, not proofread, corrected or certified to be an accurate transcript.

A handwritten signature in cursive script, reading "Kimberly Lawson", is written over a horizontal line.

KIMBERLY LAWSON
TRANSCRIBER

UNCERTIFIED ROUGH DRAFT



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C272657
)	DEPT NO. V
vs.)	
)	
ANTHONY CASTANEDA,)	TRANSCRIPT OF
)	PROCEEDINGS
Defendant.)	

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 7

TUESDAY, JULY 16, 2013

APPEARANCES:

For the State:	ALEXANDER G. CHEN, ESQ. Deputy District Attorney MICHELLE ANTHONY, ESQ. Deputy District Attorney
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For the Defendant:	P. DAVID WESTBROOK, ESQ. Deputy Public Defender ERIKA D. BALLOU, ESQ. Deputy Public Defender
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001597

1 LAS VEGAS, NEVADA, TUESDAY, JULY 16, 2013, 12:27 P.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: All right. We're on the record. Case
5 No. C11272657, State of Nevada vs. Anthony Castaneda. We are
6 outside the presence of the jury. Defendant is present with
7 his counsel, the deputies district attorney prosecuting the
8 case are present, as are all officers of the court. I've been
9 informed we have a verdict. But before we bring the jury in
10 to find out what the verdict is, I have one matter that I need
11 to put on the record.

12 During -- well, immediately after closing arguments
13 yesterday, my law clerk brought to my attention that the
14 defense Powerpoint used in closing argument had -- had
15 Tagalog, on page 1, I have that in my hand here, a Tagalog
16 phrase. Which, of course, concerned the Court.

17 I checked on a translation on the computer to
18 determine that that translation basically states, Tony
19 Castaneda is innocent, in Tagalog. Okay. So I did not feel
20 that that warranted a mistrial.

21 However, I just wish to admonish counsel that you
22 better not ever pull something like that again. That is
23 absolutely improper. This was -- this -- you don't put
24 foreign language without a translation into evidence in front
25 of a jury, especially where it was clearly pointed to a juror

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1 on our jury who speaks Tagalog. Don't do that. That is --
2 there's plenty of case law that it is improper to direct
3 arguments directly to a particular juror. All right. Don't
4 do that.

5 And that's my only comment in there. All right. Are
6 we ready to bring them in?

7 THE MARSHAL: Yes, Your Honor.

8 THE COURT: Thank you.

9 (Pause in proceedings.)

10 THE COURT: All right. Be seated and we'll all leap
11 to our feet when they're here.

12 (Pause in proceedings.)

13 THE MARSHAL: All rise for the presence of the jury.

14 (Jury reconvened at 12:33 p.m.)

15 THE MARSHAL: Your Honor.

16 THE COURT: Thank you. Please be seated. All right.
17 The record will reflect that we are back within the presence
18 of all 12 members of the jury.

19 (Phone rings.)

20 THE DEFENDANT: Excuse me, Your Honor.

21 MR. WESTBROOK: Apologize, Your Honor.

22 THE COURT: And who is the foreperson?

23 JUROR NO. 9: I am, Your Honor.

24 THE COURT: Mr. Eberle. Thank you. Mr. Eberle, has
25 the jury reached a verdict?

1 JUROR NO. 9: We have, Your Honor.

2 THE COURT: If you'll give it to the marshal, please.

3 The verdict form is not dated. I need you to fill

4 the date in and return it to me. Do you have a pen?

5 JUROR NO. 9: Yes, I do.

6 THE COURT: Okay.

7 JUROR NO. 9: Is today the 15th?

8 THE COURT: 16th.

9 MS. ANTHONY: 16th.

10 MS. BALLOU: 16th.

11 JUROR NO. 9: 16th. Is that it?

12 THE COURT: Yes.

13 JUROR NO. 9: Sorry, sir. Thank you.

14 THE COURT: Thank you. Thank you. The clerk will
15 now read the verdict.

16 THE CLERK: District Court, Clark County, Nevada,
17 Case No. C11272657-1, Department 5, verdict.

18 We, the jury, in the above-entitled case, find the
19 defendant, Anthony Castaneda, as follows:

20 Count 1, Possession of Visual Presentation Depicting
21 Sexual Conduct of a Child, guilty of possession of visual
22 presentation depicting sexual conduct of a child;

23 Count 2, Possession of Visual Presentation Depicting
24 Sexual Conduct of a Child, guilty of possession of visual
25 presentation depicting sexual conduct of a child;

1 Count 3, Possession of Visual Presentation Depicting
2 Sexual Conduct of a Child, guilty of possession of visual
3 presentation depicting sexual conduct of a child;

4 Count 4, Possession of Visual Presentation Depicting
5 Sexual Conduct of a Child, guilty of possession of visual
6 presentation depicting sexual conduct of a child;

7 Count 5, Possession of Visual Presentation Depicting
8 Sexual Conduct of a Child, guilty of possession of visual
9 presentation depicting sexual conduct of a child;

10 Count 6, Possession of Visual Presentation Depicting
11 Sexual Conduct of a Child, guilty of possession of visual
12 presentation depicting sexual conduct of a child;

13 Count 7, Possession of Visual Presentation Depicting
14 Sexual Conduct of a Child, guilty of possession of visual
15 presentation depicting sexual conduct of a child;

16 Count 8, Possession of Visual Presentation Depicting
17 Sexual Conduct of a Child, guilty of possession of visual
18 presentation depicting sexual conduct of a child;

19 Count 9, Possession of Visual Presentation Depicting
20 Sexual Conduct of a Child, guilty of possession of visual
21 presentation depicting sexual conduct of a child;

22 Count 10, Possession of Visual Presentation Depicting
23 Sexual Conduct of a Child, guilty of possession of visual
24 presentation depicting sexual conduct of a child;

25 Count 11, Possession of Visual Presentation Depicting

1 Sexual Conduct of a Child, guilty of possession of visual
2 presentation depicting sexual conduct of a child;

3 Count 12, Possession of Visual Presentation Depicting
4 Sexual Conduct of a Child, guilty of possession of visual
5 presentation depicting sexual conduct of a child;

6 Count 13, Possession of Visual Presentation Depicting
7 Sexual Conduct of a Child, guilty of possession of visual
8 presentation depicting sexual conduct of a child;

9 Count 14, Possession of Visual Presentation Depicting
10 Sexual Conduct of a Child, guilty of possession of visual
11 presentation depicting sexual conduct of a child;

12 Count 15, Possession of Visual Presentation Depicting
13 Sexual Conduct of a Child, guilty of possession of visual
14 presentation depicting sexual conduct of a child.

15 Dated this 16th day of July, Foreperson James Eberle.

16 Ladies and gentlemen of the jury, are these your
17 verdicts as read, so say you one, so say you all?

18 THE JURY: Yes.

19 THE COURT: Would either party like to have the jury
20 polled?

21 MR. WESTBROOK: I would, Your Honor.

22 THE COURT: Poll the jury.

23 THE CLERK: Juror No. 1, Teresa Sanchez, is this your
24 verdict as read?

25 JUROR NO. 1: Yes.

1 THE CLERK: Juror No. 2, Elizabeth Mahalik, is this
2 your verdict as read?

3 JUROR NO. 2: Yes.

4 THE CLERK: Juror No. 3, Matthew Howard, is this your
5 verdict as read?

6 JUROR NO. 3: Yes.

7 THE CLERK: Juror No. 4, Daisy Marquez, is this your
8 verdict as read?

9 JUROR NO. 4: Yes.

10 THE CLERK: Juror No. 5, Gabriela Chavez, is this
11 your verdict as read?

12 JUROR NO. 5: Yes.

13 THE CLERK: Juror No. 6, Merlinda Flores, is this
14 your verdict as read?

15 JUROR NO. 6: Yes.

16 THE CLERK: Juror No. 7, Monica Soun, is this your
17 verdict as read?

18 JUROR NO. 7: Yes.

19 THE CLERK: Juror No. 8, Renee Losey, is this your
20 verdict as read?

21 JUROR NO. 8: Yes.

22 THE CLERK: Juror No. 9, James Eberle, is this your
23 verdict as read?

24 JUROR NO. 9: Yes.

25 THE CLERK: Juror No. 10, Reham Almed, is this your

UNCERTIFIED ROUGH DRAFT

1 verdict as read?

2 JUROR NO. 10: Yes.

3 THE CLERK: Juror No. 11, Richard Nailling, is this
4 your verdict as read?

5 JUROR NO. 11: Yes.

6 THE CLERK: Juror No. 12, Erick Virtucio, is this
7 your verdict as read?

8 JUROR NO. 12: Yes.

9 THE COURT: Thank you. Ladies and gentlemen, as you
10 know, the right to trial by jury is a very important part of
11 our process of government and our system of justice. And I
12 thank you for all the time that you've put into this case. It
13 was a difficult case, it went longer than you were originally
14 told it would go, so there was additional sacrifice that you
15 had in rearranging your schedules to make that happen. The
16 subject matter was a difficult one to deal with, and the
17 evidence was at times complicated and you were always very
18 attentive.

19 (Phone ringing.)

20 THE MARSHAL: Mr. Castaneda, sir.

21 MR. WESTBROOK: Sorry, Your Honor. That was my
22 fault. That was my fault, not his. I apologize, Your Honor.

23 THE COURT: Anyway, I would like to thank you. I
24 know that all the attorneys also thank you for your
25 attentiveness throughout the trial.

1 You are now, of course, released from your obligation
2 not to discuss the case. And -- which means that you're free
3 to discuss it if you wish to. Of course, you do not have to.
4 So if any person asks you about your deliberations or your
5 feelings or whatever about this case, you may or may not talk
6 to them at your choice.

7 Oftentimes, the lawyers like to speak with the jurors
8 to find out what their feelings were about their presentation
9 of the case or their lawyering skills. It helps them improve.
10 And so if you'd like to speak to the lawyers, again, you may,
11 but you do not have to.

12 If anyone persists in asking to speak to you and you
13 don't want to speak to them, then you need to just report that
14 to me and I will handle that.

15 What I'm going to do at this time is just have the
16 marshal escort you back to the jury room briefly. I'll be
17 there in a moment to thank you personally and also to let you
18 know whether any of the attorneys wish to speak with you. And
19 I'll alert you to that fact and -- and let them -- and then
20 I'll transmit whether you want to speak to any of them or
21 which ones of you are willing to, and let them know where they
22 would meet you to do that.

23 Thank you again, so much.

24 THE MARSHAL: All rise. This court is now adjourned.

25 Ladies and gentlemen of the jury.

1 (Jury dismissed at 12:41 p.m.)

2 THE COURT: All right. The record will reflect that
3 the jury has departed the room. And the marshal will be on
4 his way back. The defendant will be remanded to custody.

5 MR. WESTBROOK: Your Honor, may I make a record on
6 that?

7 THE COURT: Are there any matters? Yes.

8 MR. WESTBROOK: I will ask that you not remand him to
9 custody. He's been out on this case for years. We have great
10 contact with him. This case is probationable. He's an
11 excellent candidate for probation, considering that he doesn't
12 have any other offenses on his record, certainly not that I'm
13 aware of. And this is a nonviolent crime, as his information
14 that he didn't -- he didn't take these pictures. They were on
15 his computer and that was about it.

16 I think it was a very close case as far as the
17 evidence of guilt goes. And it's something that we're
18 definitely going to appeal aggressively. I think he stands a
19 very good chance of reversal on appeal, Your Honor. And I
20 believe that taking him into custody right now on a
21 probational -- probationable case, and the case that the
22 Court's already made up its mind regarding whether or not to
23 sentence him to prison --

24 THE COURT: No. I have no idea about his prior
25 record or anything. So.

1 MR. WESTBROOK: Well, and it --

2 THE COURT: Of course not.

3 MR. WESTBROOK: -- even more reason, then, not to
4 take him into custody when he's proven -- I mean, he came here
5 to face a verdict. He came directly from work, and he came
6 into this courtroom knowing what could possibly happen, to
7 face a verdict. I think that proves that he will come back at
8 sentencing. There's no reason to think that he won't. And I
9 see absolutely no reason to take him into custody at this
10 time.

11 THE COURT: And State?

12 MS. ANTHONY: And the State would request that the
13 defendant be remanded. He did bench warrant on April 22nd,
14 2013. That was at calender call. So he has been warranted in
15 this case before. And we -- at this time we do ask that he be
16 remanded into custody on these --

17 MR. WESTBROOK: And, Your Honor, that was not his
18 fault. That bench warrant was not his fault. It was a
19 miscommunication with counsel regarding whether or not he had
20 to be present at calender call. And as you'll recall, he
21 showed up on the day of trial, which is when he thought he had
22 to be here. So that's our fault, not his fault.

23 THE COURT: All right. What do you know about the
24 defendant's prior record, his -- any of the things that I
25 would consider?

1 MS. ANTHONY: Your Honor, he doesn't have a prior
2 record. I think he has a misdemeanor -- a misdemeanor charge.
3 That's the only record that he does have. I can tell you
4 that. I do know that he did bench warrant in this case. He
5 has now been convicted, he's no longer presumed innocent of 15
6 counts of child pornography. Based on that, I would ask that
7 he be remanded.

8 THE COURT: Okay. And defense, does the -- does the
9 defendant have a job here? Does he own property?

10 MR. WESTBROOK: Yes, Your Honor. He came here from
11 his job. He doesn't own a house anymore.

12 Correct? He rents.

13 THE DEFENDANT: Right.

14 MR. WESTBROOK: Okay. He rents. His car is here.
15 In fact, his car is parked outside. If he's taken into
16 custody today, I don't know what would happen to his car. In
17 fact, I apologize. I was asking him for a number of -- of one
18 of his relatives in town regarding the car, and that's why his
19 phone went on. That was my fault. I didn't realize that it
20 was just in his phone, that his phone would make a noise.

21 But he has a tie to the community. I have great
22 contact with him. I have his personal cell phone number. He
23 has my personal cell phone number. I don't give that out to a
24 lot of clients, as you might imagine, Your Honor. We all have
25 good contact with him. And I have no problem --

1 Do you have a passport?

2 THE DEFENDANT: No.

3 MR. WESTBROOK: He doesn't have a passport. I was
4 going to say we could surrender his passport. He does not
5 have a passport. We'll keep good track of him.

6 And -- and more than that, I've been telling him
7 throughout this entire process that if he's convicted, then
8 he's going to have to demonstrate to Your Honor that he is a
9 good candidate for probation. I believe he's an excellent
10 candidate for probation. He has a job, he has the ability to
11 follow through with it. So.

12 THE COURT: Where is he working?

13 MR. WESTBROOK: He's working for --

14 THE DEFENDANT: A company called --

15 THE MARSHAL: Sir, stand and address the Court.

16 THE DEFENDANT: Sorry. A company called Fundtech.
17 And I am -- it's -- I'm a systems administrator for a banking
18 company.

19 THE COURT: Okay. And do you go to a physical place
20 or do you do this from home?

21 THE DEFENDANT: I do -- I do both.

22 THE COURT: Okay. And they're here in town?

23 THE DEFENDANT: There are actually three physical
24 locations here in town I go to visit.

25 THE COURT: All right.

1 MS. ANTHONY: Does he have access to the Internet?
2 That's a huge concern for the State, Your Honor.

3 THE DEFENDANT: All my systems are text interfaces,
4 they don't have graphic interfaces. They're industrial
5 computers ---

6 THE COURT: Okay. Well, all of that ---

7 THE DEFENDANT: -- for the bank.

8 THE COURT: -- will have to be -- let's see. The
9 other question I also had was whether this -- this conviction
10 requires, before the PSI ---

11 MS. ANTHONY: It does.

12 THE COURT: -- the psychosexual -- okay.

13 MS. ANTHONY: It does. Which --

14 THE COURT: So that makes the -- the date different.

15 MS. ANTHONY: It makes the date longer.

16 THE COURT: What is the current bail? Is he out on
17 OR or --

18 MR. WESTBROOK: He's on OR release, Your Honor.

19 THE COURT: All right.

20 MR. WESTBROOK: And our office will arrange for the
21 psychosexual evaluation. That's one of the things that we do
22 all the time.

23 THE COURT: All right. Well --

24 MS. BALLOU: I think that the Court does it when
25 it's --

1 MR. WESTBROOK: Oh, you're right.

2 MS. BALLOU: -- trial.

3 MR. WESTBROOK: You're right.

4 MS. ANTHONY: Your Honor, if I can just make a
5 record.

6 THE COURT: Yes.

7 MS. ANTHONY: That on May 2nd, 2011, this defendant
8 was told that he is not to operate, based on the notes in my
9 file, when he was given that OR, he is not to operate any
10 computers while he is out. That's a note from the file from
11 2011. Clearly that's happening now. He just said where he
12 works and what he's doing. So that would be a violation of
13 his OR. We have a problem here regarding --

14 THE COURT: Well, he was on OR prior to conviction.
15 I'm inclined to set some bail at this point. So you can argue
16 about a bail setting.

17 MS. ANTHONY: Standard bail I believe will be
18 appropriate in this case. I mean, he's already, according to
19 the notes in here, he's already violating the conditions of
20 his OR. He's not to operate computers. There's some lengthy
21 notes in here. And he's just informed the Court that he is
22 already violating his OR. So standard bail of \$20,000, which
23 is what I believe it is per count, would be appropriate.

24 MR. WESTBROOK: And, Your Honor, I think \$20,000 per
25 count on a case that involves computer files is inappropriate.

1 In fact I'll be filing a motion saying that these counts
2 should be consolidated into one count, anyway. That'll be a
3 substantive motion that I'll be filing at some point soon.

4 I mean, I would request that the Court's inclined to
5 set bail, on a total bail of \$10,000. Cash or surety.

6 THE COURT: All right. Well, -- well, I'm inclined
7 to set bail in the amount of \$50,000 cash or surety. So he
8 needs to post that -- today's Tuesday --

9 (Phone ringing.)

10 THE MARSHAL: Mr. Castaneda.

11 MR. WESTBROOK: Again, I apologize, Your Honor. It's
12 my fault the phone is on. And he came right from work.

13 THE MARSHAL: This is the third time, counsel.

14 THE DEFENDANT: I'm --

15 THE MARSHAL: The third time.

16 MR. WESTBROOK: I know. But turning it off would
17 have made another noise.

18 THE COURT: Sounds like we need the hammer remedy.

19 MR. WESTBROOK: That's true. I agree with that. In
20 fact, getting hammered I think is something we should all
21 consider after work.

22 THE COURT: I have too much work.

23 THE MARSHAL: I don't care. Turn it off.

24 THE COURT: We're still on the record. So let's --

25 THE MARSHAL: Excuse me, Your Honor.

1 THE COURT: All right. So he needs to -- and 50's
2 fine. But he needs to -- he's going to be remanded till
3 that's posted.

4 MR. WESTBROOK: Okay. Thank you, Your Honor.

5 MS. ANTHONY: I'm going to -- should he post bail,
6 can we have some restrictions on no Internet use, no computer
7 use. I mean, per the evidence in this case regarding the
8 child pornography, we did have stipulation regarding keeping
9 out the evidence, what was on the computer, including the
10 bestiality and everything else. And I think that comes into
11 play for --

12 THE COURT: All right. So, yes, if -- if he does
13 post the bond, he needs to not have access to outside
14 Internet. Now, he's working on a closed system where he's
15 administering on a limited access network, these computers.
16 And that's fine. But if he has the ability to go out from
17 those computers out to the Internet, that's not going to be
18 allowed. So. And I -- are you working on a LAN?

19 THE DEFENDANT: Just in my house. It goes to VPN to
20 end client.

21 MR. WESTBROOK: So, it's a virtual credit network.

22 THE DEFENDANT: Yeah. So there is no access to the
23 outside world. There is no access to the Internet.

24 THE COURT: Well --

25 MS. ANTHONY: To get there, he has to use the

1 Internet.

2 THE COURT: Yeah.

3 MR. WESTBROOK: Well, that's where we start talking
4 about what the Internet actually means. I think the concern
5 here is the World Wide Web. Which is where the pictures are
6 located. He does not have access to the World Wide Web, and
7 he can certainly restrict his computer so that he's not
8 accessing the World Wide Web.

9 The Internet is a different thing entirely.
10 Everything that we use is on the Internet, including bank
11 software programs and -- and that sort of thing. So we're
12 talking about two different places.

13 THE COURT: I understand that. But --

14 THE DEFENDANT: If -- if you want, Your Honor --

15 THE COURT: -- you access the -- you access the --
16 your banking software through the World Wide Web, as far as
17 I'm not talking about the bank you're working for. I'm
18 talking about if you were doing online banking. So, I mean --

19 THE DEFENDANT: No.

20 THE COURT: -- I use, you know, I did use, from home
21 to be able to access my computer at work, what he's talking
22 about. But that doesn't mean I can't also use my computer to
23 access the World Wide Web.

24 MR. WESTBROOK: Sure.

25 THE COURT: So.

1 MR. WESTBROOK: For -- for him --

2 THE COURT: I don't -- what restrictions does he have
3 on his computer?

4 MR. WESTBROOK: Well, first of all, we can certainly
5 place restrictions. And obviously, if his, you know, if he
6 violates any of that, then he's going to be an awful candidate
7 for probation later on, because he will not comply with the
8 Court's order. What he's actually doing is working on a
9 virtual private network, which is not Web-based, correct?

10 THE DEFENDANT: Right.

11 MR. WESTBROOK: Okay. It's -- it's a direct Internet
12 access. It's -- it's using fiber optic lines and those can be
13 used for something else.

14 THE COURT: But he doesn't access the -- the VPN from
15 the Internet, from --

16 MR. WESTBROOK: Not from the Web.

17 THE DEFENDANT: [Indiscernible.]

18 THE COURT: -- from the Web?

19 MR. WESTBROOK: Yes. Now, what we can do is we can
20 remove -- am I correct that you don't require a Web browser to
21 do any of this?

22 THE DEFENDANT: No.

23 MR. WESTBROOK: Yeah. We can remove every Web
24 browser from his software. I have no problem with that.
25 Internet Explorer, Firefox, Google Chrome, Opera, Safari,

1 whatever other browsers you want, and then there will be no
2 way to view anything on the Web. Because you do need a Web
3 browser to view the Web.

4 MS. ANTHONY: One, my question is who's going to
5 monitor this? Two, he's knowledgeable in all of this. He has
6 discs, as you've heard, discs of software sitting there, and
7 obviously, this is going to have to be monitored if he makes
8 bail and he's out, it's going to have to be monitored. He's
9 not on probation now. Who's going to do it?

10 THE COURT: Do you have a suggestion?

11 MS. ANTHONY: I don't.

12 THE COURT: Okay. Well --

13 MS. ANTHONY: I mean, I don't think that I can ask
14 Parole and Probation to go there.

15 THE COURT: If he gets probation -- yeah. I don't --

16 MS. ANTHONY: I mean, I don't think I can.

17 THE COURT: -- think before he's placed on probation
18 that -- that P&P, who are already taxed to their limits, can
19 monitor. But --

20 MS. ANTHONY: And then the only one will be my
21 forensic evidence people. And I don't know that, in fact,
22 they can do that.

23 THE COURT: Well, can he work from his office
24 locations, then?

25 MR. WESTBROOK: Can you do that at all?

1 THE DEFENDANT: I can probably --

2 THE COURT: All right. Then that'll be the case.

3 All right. So we -- you need to turn over your computer
4 equipment to your counsel for safekeeping, pending. So that
5 way there's not computer equipment capable of accessing the
6 Internet. He'll work on the limited network at his office
7 locations where it's only on his limited access network.

8 MS. ANTHONY: And after that's done, can I have the
9 officers go to his house, make sure that nothing's there?

10 THE COURT: Well, yes. If you can make that happen.

11 MS. ANTHONY: Okay. So, if Mr. Westbrook will call
12 and let us know that the computers have been turned over, then
13 I will ask the officers in this case to go to the defendant's
14 house just to make -- I mean, that's appropriate, correct?

15 THE COURT: Yes. And you will coordinate that with
16 counsel.

17 MR. WESTBROOK: Yeah. I'll do -- that won't happen
18 unless and until he's able to make bail.

19 THE COURT: Right. All right. Any other questions
20 or concerns?

21 MS. ANTHONY: None.

22 THE COURT: All right. Thank you.

23 MR. WESTBROOK: Before he leaves, can I get the
24 information to call the relatives that I asked him for
25 earlier?

1 THE COURT: Yes.

2 MR. WESTBROOK: Thank you, Your Honor.

3 THE COURT: All right. Thank you. Oh. We need to
4 give you the date for the sentencing.

5 MR. WESTBROOK: Oh, thank you.

6 MS. ANTHONY: I'm sorry, what did Mr. Westbrook just
7 ask for?

8 MR. WESTBROOK: I want the -- the phone number for
9 his relatives so someone can come get his car.

10 MS. ANTHONY: Oh. Okay. Sorry.

11 THE COURT: Sentencing.

12 THE CLERK: Sentencing will be October 14th, 9:00
13 a.m.

14 THE COURT: Thank you.

15 MR. WESTBROOK: Thank you, Your Honor.

16 (Court adjourned at 12:54 p.m.)

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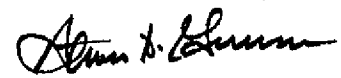
ACKNOWLEDGMENT:

Pursuant to Rule 3C(d) of Nevada Rules of Appellate Procedure, this is a rough draft transcript expeditiously prepared, not proofread, corrected or certified to be an accurate transcript.

A handwritten signature in cursive script, reading "Kimberly Lawson", is written over a horizontal line.

KIMBERLY LAWSON
TRANSCRIBER

UNCERTIFIED ROUGH DRAFT


CLERK OF THE COURT

1 RTRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 ANTHONY CASTANEDA,

9 Defendant.

CASE NO. C272657

DEPT. NO. V

10
11 BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

12 MONDAY, OCTOBER 14, 2013

13 RECORDER'S TRANSCRIPT RE:
14 DEFENDANT'S MOTION TO VACATE COUNTS TWO THROUGH
15 FIFTEEN/SENTENCING

16 APPEARANCES:

17 For the Plaintiff:

MARIA LAVELL
Chief Deputy District Attorney

19 MICHELLE ANTHONY
20 Deputy District Attorney

21 For the Defendant:

22 DAVID P. WESTBROOK
23 ERIKA D. BALLOU
24 Deputy Public Defenders

25 RECORDED BY: LARA CORCORAN, COURT RECORDER

1 LAS VEGAS, NEVADA, MONDAY, OCTOBER 14, 2013, 10:12 A.M.

2 * * * * *

3 THE COURT: Case Number C272657, State of Nevada versus
4 Anthony Castaneda.

5 THE DEFENDANT: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. WESTBROOK: Good morning, Your Honor, David Westbrook on
8 behalf of Mr. Castaneda. Ms. Ballou sends her apologies. She's still in court, but
9 we can go ahead and proceed without her, and my law clerk Mr. Van Love is here
10 as well.

11 THE COURT: All right. I think that you may have been misled
12 somewhat by an email that was sent to counsel from my law clerk –

13 MR. WESTBROOK: Okay.

14 THE COURT: – that indicated that I was fine with proceeding with
15 sentencing today and hearing this motion in the ordinary course. No, I'm not.

16 MR. WESTBROOK: Okay.

17 THE COURT: I did not sign the order shortening time because I didn't
18 feel that it was a proper emergency for an order shortening time. I mean, I don't –
19 couldn't understand why the motion hadn't been filed much before it was. I will hear
20 the motion, but I don't want to proceed to sentencing and – because that will just
21 cause havoc with the jail.

22 MR. WESTBROOK: It seemed like it would be a little bit of a difficult
23 procedural matter, but there's a way it could be done. I just – I wasn't sure what the
24 –

25 THE COURT: Yeah.

1 MR. WESTBROOK: I was – I was confused by the email; you're right.

2 THE COURT: Yes. So that was just a misunderstanding as to what my
3 intent was, because all I said was I'm not signing this OST. That's all I said.

4 MR. WESTBROOK: All right.

5 THE COURT: All right. So we need to continue the sentencing, but
6 also the State's opposition to this motion would have been due today.

7 MS. ANTHONY: Because of the way of the timing I – there – I was not
8 prepared to – I mean, I will respond to it. I am going to respond to it. Obviously, I
9 couldn't prepare for it knowing whether we were sentencing or not sentencing, how
10 it got filed. I mean the State can't file things without the judge signing off. I don't
11 know how Mr. Westbrook was allowed to, so – or Your Honor.

12 THE COURT: What?

13 MR. WESTBROOK: I don't know what you're talking about, because I
14 filed the motion to vacate counts –

15 THE COURT: Right. I'm talking –

16 MR. WESTBROOK: – with more than enough time.

17 THE COURT: Right. I'm talking about the motion to vacate counts.

18 MS. ANTHONY: Oh, I didn't receive that, Your Honor. Maybe it was
19 sent to our SVU unit and not transferred over or – I did see the other motion
20 regarding the –

21 MR. WESTBROOK: I have a –

22 MS. ANTHONY: – experts, which I still have to figure out.

23 THE COURT: Right. That – so that has to be –

24 MR. WESTBROOK: And, Your Honor, I have a courtesy copy I can
25 hand to the State right now. But we filed it the way we always file things, which is –

1 unless it's something requiring an order shortening time of course -- we filed it,
2 electronically, so.

3 THE COURT: Right. It was served -- it was filed electronically
4 and --

5 MS. ANTHONY: It may have gone to SVU and I'm not sure if it made
6 its way to me, so if I could request a continuance on that I'll respond to it. We're
7 obviously not going forward with sentencing today anyhow.

8 THE COURT: All right.

9 MR. WESTBROOK: Well, Your Honor, if the Court's not inclined to go
10 forward with sentencing today I'd hate Mr. Castaneda to have to, you know, wait in
11 jail pending this thing? Is there a possibility of getting him an OR so the State can
12 have more time to respond?

13 THE COURT: No. But I -- I mean, this was properly served. And so
14 we're -- all right. Are we --

15 MR. WESTBROOK: Your Honor, I have another suggestion, if I --

16 THE COURT: Just a minute.

17 (Colloquy regarding the removal of other defendants from the courtroom)

18 THE COURT: All right. Okay. So here's the thing. I know it's a big
19 office over at the DA's office, but you gotta -- there's got to be some -- now that
20 we've gone to this mandatory e-filing there's got to be some procedure to make sure
21 that people are getting the motions on time.

22 So this was -- this motion was served -- it was filed electronically and
23 served on the DA's office with the email address pdmotions@ccdancv.com, which is
24 my understanding of how that happens. Do --

25 MS. ANTHONY: I'm not disagreeing that my office didn't get it. I'm

1 sure we did get it.

2 THE COURT: Okay.

3 MS. ANTHONY: I just didn't receive it. If you trail it I'll read it now and

4 I'll just respond orally –

5 THE COURT: No, no, no.

6 MS. ANTHONY: If the Court's not –

7 THE COURT: No, it's –

8 MS. ANTHONY: Either way it's fine, Your Honor.

9 THE COURT: Calm down. All right. So you're – it's actually, because

10 of the counting – and you get three extra days for whenever there's service

11 electronically and you don't – because the response is due in seven days under the

12 criminal rules, and you don't count non-judicial days, it's actually not due until today

13 at 5.

14 MS. ANTHONY: How exciting.

15 THE COURT: So –

16 MR. WESTBROOK: I'll be here at 5 if anyone wants to come back. I

17 have no problem.

18 MS. ANTHONY: I'll bet.

19 THE COURT: All right. But also, I mean, the rule says that I can if

20 there's not – if there is not a timely opposition filed I may construe that as a

21 concession, but I'm not going to construe that as a concession in this case. And

22 since – so could you have a written response filed in two days?

23 MS. ANTHONY: Yes, Your Honor, I definitely will.

24 THE COURT: All right.

25 MS. ANTHONY: Thank you.

1 THE COURT: So you'll file the written response in two days and we'll
2 put that on for hearing on Wednesday?

3 THE CLERK: So it'll be filed and heard on – in two days?

4 THE COURT: Yes.

5 THE CLERK: Okay.

6 THE COURT: She's got today and tomorrow.
7 And if you'll just send a courtesy copy of your response –
8 MS. ANTHONY: Absolutely.

9 THE COURT: – I'll make sure to read it Tuesday evening.

10 THE CLERK: October 16th at 9.

11 MR. WESTBROOK: And, Your Honor, would it be your inclination to go
12 forward with sentencing at that time or just the motion argument?

13 THE COURT: If you want me to hear the other motion then I won't go
14 through with sentencing on Wednesday.

15 MR. WESTBROOK: Okay.

16 THE COURT: That has – have you filed that now?

17 MR. WESTBROOK: I was going to file it open court today since the – I
18 figured that would be easier for the State as well and just get a copy and make sure
19 she gets it personally.

20 MS. LAVELL: Except we'd need five days to respond.

21 MR. WESTBROOK: Of course, naturally.

22 MS. LAVELL: So we couldn't do it Wednesday.

23 MR. WESTBROOK: I understand that.
24 But my question, Your Honor, though, on this –
25 THE COURT: Right. So you're going to – if you're going to file it in

1 open court today, and serve it today, they still have seven days to file a response to
2 that motion, not counting holidays and weekends. So what is that? What is that?

3 THE CLERK: It would be due next Wednesday, the 23rd.

4 THE COURT: Okay. So you'll file an opposition by next Wednesday.

5 MS. ANTHONY: Okay.

6 THE COURT: That'll be the –

7 THE CLERK: The 23rd.

8 THE COURT: Yeah. And then we'll set it for –

9 THE CLERK: Will that be on calendar for – oh.

10 THE COURT: Yeah. Then we'll set it for hearing.

11 THE CLERK: October 28th. Now what motion is that?

12 THE COURT: How is it styled?

13 MR. WESTBROOK: Motion to reconsider defendant's motion for
14 mistrial due to prosecutorial misconduct. So motion to reconsider, I think, would
15 probably be the shorthand.

16 THE COURT: All right. And –

17 THE CLERK: Okay. That's October 28th then.

18 THE COURT: And we'll set it down for decision on that motion and
19 sentencing.

20 MR. WESTBROOK: Yeah. And, Your Honor, what I was going to say
21 is if you were ready to go forward with sentencing today other than this motion work,
22 what I was going to suggest to Your Honor is that, you know, the mistrial thing is
23 well preserved. I think that Your Honor would agree with that. I made a lot of
24 objections during the closing argument, et cetera.

25 There's new information in this, because it was information that we got

1 from the jury, specifically after we discussed the matter with them. I could always
2 just have submitted it and made it part of the record, but if you're not inclined to go
3 forward because of the other motion as well then, you know, I just would ask for an
4 OR on Mr. –

5 MS. ANTHONY: Is this a third motion?

6 MR. WESTBROOK: I'm sorry?

7 THE COURT: Yeah.

8 MR. WESTBROOK: No, there's two motions and a offer of proof. The
9 first motion is the one that was filed and on calendar for today, which was the motion
10 to dismiss 14 of the 15 counts or to, you know, to merge or vacate the counts,
11 however you would like to phrase it, and the second motion was a motion to
12 reconsider the motion for mistrial based on conversations with the jury.

13 And I'll tell Your Honor that one of the reasons why I was holding off on
14 filing that motion is I was trying to get in contact with the jury foreman, who is a pilot,
15 and I just haven't been successful yet. I wanted to get an affidavit from him instead
16 of just my declaration, but I was forced to go forward with just the declaration.

17 THE COURT: Well, I haven't – you know, I skimmed –

18 MS. ANTHONY: Has that been filed? I –

19 THE COURT: I skimmed that motion.

20 MR. WESTBROOK: That's right here in my hand.

21 THE COURT: Skimmed-skimmed that motion.

22 MS. LAVELL: David, do you have a copy of that one?

23 THE COURT: I mean, generally speaking of course, as you know,
24 conversations with jury about – juries after the fact about their deliberations is never
25 to be the basis for most anything, but I haven't decided, of course, that motion. I'm

1 just saying I will consider it, and the State will have a response. I'm not prepared to
2 go forward to sentencing today because you've got this other motion that impacts
3 that.

4 MS. ANTHONY: So that really is a third then?

5 MR. WESTBROOK: It's a second, because one of them is not a
6 motion, it's an offer of proof.

7 THE COURT: It's got –

8 MS. ANTHONY: So there's three things I need to respond to, how
9 about that?

10 MS. LAVELL: Yes.

11 THE COURT: Well there's the – there's some offer of proof which – I
12 did not see that. That's an odd thing. What – you're – it's an offer of proof of
13 something that you should have done during the trial?

14 MR. WESTBROOK: No, Your Honor, it's not.

15 During the trial, as you might recall, I requested permission of the Court
16 to have a rebuttal expert because I was surprised by the testimony of the State's
17 expert. It wasn't in any report. I was denied that. And then at the time I said, Your
18 Honor, I've made my record about what I believe the expert would say, however, to
19 supplement the record I'd like to file an offer of proof from the expert himself so that
20 that's part of the Court's record, and I was given permission to do just that.

21 It's a good appellate practice, Your Honor. And it's done in any case by

22 –

23 THE COURT: Well, if it was done – if it was done during the trial, but
24 not after the trial when it's too late for me to act upon it. And then –

25 MR. WESTBROOK: Well, Your Honor, all the information that is in the

1 offer of proof was given to the Court accurately during the trial by me. The offer of
2 proof is to supplement the record and I was given permission to do it following the
3 trial. I couldn't do it during the trial, it would have been impossible. I was in the
4 middle of the trial.

5 THE COURT: Well –

6 MR. WESTBROOK: And I was already denied the motion.

7 THE COURT: -- I don't recall allowing you to supplement an offer of
8 proof with information that would be obtained after the trial was over.

9 MR. WESTBROOK: Well, it's direct responses from the expert to the
10 detective. It's showing exactly what would have been said had the expert been
11 allowed to – had I – had we been able to call the expert – had we been allowed to
12 call the expert in rebuttal, as we believe it was our right.

13 THE COURT: Okay.

14 MR. WESTBROOK: The offer of proof demonstrates that, and it's
15 important for the Supreme Court to get it on a record. It's not a motion. That's why
16 – it's one of the reasons why it's not a motion.

17 THE COURT: I know.

18 MR. WESTBROOK: Yeah. It's just an offer of proof.

19 THE COURT: It's an offer of proof that should have been made during
20 the trial. And so if you're saying that you made a complete offer of proof during the
21 trial then that's adequate.

22 MR. WESTBROOK: Well, in fairness, Your Honor, I have a due
23 process right to supplement the record with what we believe the expert would have
24 said. In fact, as someone who's been on the appellate team for four and a half
25 years, when we go the Supreme Court and there is no offer of proof that gets held

1 against us. That's one of the reasons why I did it in writing, so it would be part of the
2 record.

3 THE COURT: Well, then you –

4 MR. WESTBROOK: And I was given permission to do it as well. I said
5 I would submit it in writing and there's – it's on the record; I was given permission to
6 do this already.

7 THE COURT: I don't recall that.

8 MS. ANTHONY: I don't recall that.

9 THE COURT: I mean, anything is possible, but I don't recall that.
10 That's unusual that you would ask to supplement the record after the trial – months
11 after the trial was over. But if you – I think it should be styled motion to supplement
12 the record and I'm going to treat it that way.

13 And so the State can – if you wish to file an objection to that you can.

14 But do you have authority for what you just said today, that you have
15 the right to supplement the record after the trial?

16 MR. WESTBROOK: Yes, I do.

17 THE COURT: All right.

18 MR. WESTBROOK: Number one –

19 THE COURT: Do you – is it in – is it in the offer?

20 MR. WESTBROOK: No, it's not, Your Honor –

21 THE COURT: Oh.

22 MR. WESTBROOK: – because it's just an offer, it's not a motion, and I
23 don't have to do a motion when it was already granted. I already asked the Court
24 permission. If we can look up the record –

25 THE COURT: Okay. I'm just saying I don't recall.

1 MR. WESTBROOK: Okay.

2 THE COURT: All right. So maybe you could alert me to where you
3 think that happened or possibly when so I can –

4 MR. WESTBROOK: Immediately following –

5 THE COURT: – look at JAVS.

6 MR. WESTBROOK: I'm sorry to interrupt, Your Honor.

7 THE COURT: That's fine.

8 MR. WESTBROOK: Immediately following Detective Ehlers' testimony.
9 And I can pull it and send it to the Court. I think I've got – I think I've got it all. Yeah.
10 I think I've got the entire trial, so I'll just pull it for you.

11 THE COURT: Okay. Thank you. That would be helpful.

12 MR. WESTBROOK: Okay.

13 THE COURT: All right.

14 MS. LAVELL: Perhaps he can attach it to the motion so the State can
15 respond to it.

16 MR. WESTBROOK: Well, it's a video, so I –

17 MS. LAVELL: Well, the trial transcript then.

18 MR. WESTBROOK: I don't have a trial transcript.

19 THE COURT: We don't have a transcript yet. He's talking about he's
20 got the JAVS.

21 MR. WESTBROOK: Yeah, that's all I've got, Judge.

22 THE COURT: All right. So we'll address that the same time we're
23 going to address this other motion, the – Wednesday.

24 THE CLERK: The proof will be on this Wednesday?

25 THE COURT: Uh-huh.

1 THE CLERK: The offer of proof. Okay.

2 MR. WESTBROOK: Your Honor, would you like to do them all on the
3 same day if sentencing is going to be continued until they're all decided? It's fine
4 with me if you'd like to just shrink your calendar down.

5 THE COURT: That's fine. I didn't --

6 THE CLERK: October 28th isn't --

7 MS. ANTHONY: Your Honor, I will not be able to respond to two
8 different motions by Wednesday.

9 THE COURT: No, no, no. It would have to be -- yeah, later, so --

10 MR. WESTBROOK: That's fine.

11 THE COURT: -- is that all right?

12 MR. WESTBROOK: Whatever is easier for the Court or for the State.

13 THE COURT: We're going to push everything to the later date.

14 MR. WESTBROOK: That's fine, Your Honor.

15 THE COURT: Okay.

16 MR. WESTBROOK: The later date was going have to proceed prior to
17 sentencing. Is that what I'm understanding?

18 THE COURT: Yes.

19 MR. WESTBROOK: Then I'm fine.

20 THE COURT: All right.

21 THE CLERK: For the -- so everything's October 28th at 9 --

22 THE COURT: Okay.

23 THE CLERK: --so that'd give her a few more days to respond.

24 THE COURT: Okay.

25 MR. WESTBROOK: That sounds fine, Your Honor.

1 THE COURT: Thank you.

2 MS. ANTHONY: Yay.

3 MR. WESTBROOK: And, Your Honor, so, again, the Court's not willing
4 to give an OR motion to my client prior to the hearing of these?

5 THE COURT: Correct.

6 MR. WESTBROOK: Okay.

7 THE COURT: I was surprised to see that he was in custody because I
8 expected that he was going to make bail. In fact, we talked about that at length, the
9 conditions when he made bail, but I think, you know, the bail is sufficient if you want
10 to bring a motion.

11 MR. WESTBROOK: I understand, Your Honor. Unfortunately, the
12 reason that my clients are stuck with me is 'cause they got no money.

13 THE COURT: All right. Well, he was working. That was why I thought
14 that he would – I mean, that was what was represented to me anyway.

15 MR. WESTBROOK: Thank you, Your Honor.

16 THE COURT: All right. Thank you.

17 PROCEEDING CONCLUDED AT 10:27 A.M.

18 * * * * *

19

20 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-
21 video recording of this proceeding in the above-entitled case.

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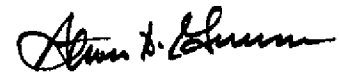
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LARA CORCORAN
Court Recorder/Transcriber



CLERK OF THE COURT

1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,
9 Plaintiff,

10 vs.

11 ANTHONY CASTANEDA,
12 Defendant.

CASE NO. C-11-272657-1

DEPT. V

ROUGH DRAFT TRANSCRIPT

13
14
15 BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE
16 MONDAY, JULY 1, 2013

17 RECORDER'S ROUGHT DRAFT TRANSCRIPT
18 **CALENDAR CALL**

19 APPEARANCES:

20 For the State:

MICHELLE ANTHONY, ESQ.
Deputy District Attorney

21
22 For the Defendant:

ERIKA D. BALLOU, ESQ.
DAVID WESTBROOK, ESQ.
Deputy Public Defenders

23
24
25 RECORDED BY: SANDRA PRUCHNIC, TRANSCRIBER/COURT RECORDER

1
2 Las Vegas, Nevada - Monday, July 1, 2013, 10:16 a.m.

3 * * * * *

4 THE COURT: Case number C272657, State of Nevada versus Anthony Castaneda.

5 MS. BALLOU: He's present, out of custody, Your Honor.

6 THE COURT: All right. This is calendar call. Are we ready to go?

7 MS. ANTHONY: Good morning, Your Honor. Michelle Anthony, on behalf of the
8 State. The State is ready. I anticipate seven to nine witnesses. I'm not gonna say two days.
9 Probably a week. There are some stipulations that the State and defense are working on. We
10 would like to get them filed. I think it's just a minor change to one of the stipulations.

11 In addition to that, I believe we're gonna need to have a Hernandez hearing as
12 well in this case.

13 THE COURT: And when do you propose you want to have that? Just -- I mean, we
14 don't need to -- if I keep it, which this is not the kind of case I'd probably inflict on anybody
15 else, given the subject matter, so I'd probably not want to send it, even if we had overflow,
16 which we don't right now.

17 MR. WESTBROOK: Well, Your Honor, one of the records -- David Westbrook, by
18 the way --

19 THE COURT: Yes.

20 MR. WESTBROOK: -- for the Public Defender's Office. We haven't met before.

21 THE COURT: Good morning.

22 MR. WESTBROOK: Good to meet you, Your Honor.

23 One of our stipulations has to do with the actual presentation of the evidence.
24 Essentially it would be that the pictures themselves would be submitted to the jury, but they
25 would not be published to the jury during the trial. The jury would only look at them if they

1 thought they needed to for some reason in the back. So that would I think hopefully be
2 helpful as far as if this had to go to some kind of an overflow situation.

3 MS. ANTHONY: But the subject matter doesn't change. And my --

4 MR. WESTBROOK: That's correct.

5 THE COURT: Yeah, right, the subject matter --

6 MS. ANTHONY: -- my preference is to keep it in this court.

7 THE COURT: The subject matter doesn't change, but there is no overflow this week,
8 so I did send an E-mail out to my colleagues to see if anyone was interested in trials, so as of
9 just before I took the bench, there were no replies, but I'm still hopeful that maybe someone
10 might reply. So what I want to do is kind of call all the calendar calls and see what we have
11 and then figure it --

12 MR. WESTBROOK: Well, Your Honor, if I may --

13 THE COURT: -- from there.

14 MR. WESTBROOK: -- as far as our situation, coming in today we are going to
15 announce ready. I'm very new to the case. I've been on for about five days. I spoke to my
16 client this morning for the first time. Obviously Ms. Ballou has been talking to him all this
17 time. And he indicated to me that there might be some technical evidence that he might still
18 have in his possession that I don't think was seized. I have a little bit of computer
19 knowledge 'cause I used to run a little Internet company long before the bubble burst and I
20 had to become a shiftless lawyer. But I'm hoping that I'll be able to understand it a little bit
21 better than people in the past just because I have a little bit of background in that, and I don't
22 know if it's gonna be a situation where we're gonna have something to turn over to the State,
23 that they need to review with their expert or not. It could be absolutely nothing. It could be
24 something that we don't need to present, or wouldn't be appropriate, or isn't important at all.

25 I just don't know because, unfortunately, when I was given the technical

1 information this morning it was flying over my head, but I need to sit down with my client
2 and see if it's anything that needs to be presented. Again, we were prepared to walk in here
3 and announce ready today, and I still think we can be ready. We would certainly do
4 everything we need to in order to make the State prepared for any new evidence or existing
5 evidence that hasn't been turned over to give them, but --

6 THE COURT: Oh, well, you need to be ready.

7 MR. WESTBROOK: I agree, Judge.

8 THE COURT: I mean, that's -- I'm not continuing this trial again, and any motions
9 that this -- I'm not requiring the State to waive any objections they may have to any last-
10 minute evidence that should have been turned over in reciprocal discovery. I don't know
11 what it is or if there is any, so that seems premature for everybody to get excited about it,
12 but --

13 MS. ANTHONY: And if I could just make a brief record.

14 THE COURT: Yes.

15 MS. ANTHONY: This is the fourth time this case has been set --

16 THE COURT: Correct. It's not --

17 MS. ANTHONY: -- for calendar call. The last time we actually -- the defendant's
18 bench warranted that calendar call. That's why it was continued. But there's also a
19 continuance which included the defense getting an expert, and no expert notices were filed,
20 and the expert would be for this, and there's been several other continuances regarding
21 discovery.

22 My belief is that the defendant himself -- and this is not an issue -- the
23 defendant himself is trying to stall. That's my personal belief.

24 MR. WESTBROOK: And, Your Honor, he hasn't asked to stall, just for the record.
25 I'm still -- we're still announcing ready today. I wanted to put that issue out there 'cause it's

1 a new thing, it's a mystery, and it could be just that I'm new to the case. This could have
2 already been decided a year ago. I just wanted to talk to him and make sure that we had the
3 technical details and I wanted to let the State know that if we have anything to turn over,
4 we'll turn it over in a timely fashion and we plan on being ready.

5 THE COURT: Okay. Do you agree that the case is gonna take the full five days of
6 the week?

7 MR. WESTBROOK: I do, Judge.

8 MS. BALLOU: I think so.

9 THE COURT: Okay. All right. Well, we'll keep that. I mean, I'm gonna keep that
10 here I think, but I need to look at everything and figure out what's left.

11 MS. ANTHONY: I do have some scheduling. I have some witnesses that could only
12 get on on Wednesday. I'm flying 'em from Reno to testify and flying them back. I have a
13 few Wednesday scheduling issues, but if it's the full week, I can make it work.

14 MR. WESTBROOK: And, Your Honor, as far as the Hernandez hearing, fifteen
15 minutes. It's not gonna --

16 MS. BALLOU: Yeah. I don't think --

17 THE COURT: Okay.

18 MS. BALLOU: -- it should take very long.

19 THE COURT: All right. No problem. So we don't need to --

20 MS. BALLOU: Hernandez --

21 THE COURT: -- schedule it ahead of time.

22 MS. BALLOU: No. I think we can do it on the first day of trial.

23 THE COURT: Okay.

24 MS. BALLOU: If that's next Monday, then we just schedule the jury to start at like
25 1:30 and we can start at 1, or maybe we do it at 10 after your calendar's done. I don't know

1 how long your calendar is on Monday, but it won't be a huge, big deal.

2 THE COURT: Okay. All right. Ms. Ballou, do you have to rush off?

3 MS. BALLOU: I do, so I can leave this with Mr. Westbrook, but if you can call my
4 other cases --

5 THE COURT: Yes.

6 MS. BALLOU: -- I would appreciate it.

7 [Proceeding trailed at 10:22 a.m.]

8 [Case recalled at 11:58 a.m.]

9 MR. WESTBROOK: Your Honor, I apologize. I think Mr. Casaneda went down to
10 put quarters in the meter. We could either trail it for his presence or I'm gonna meet with
11 him right after this, if you'd like me to set our date.

12 THE COURT: Yes. You're the only case left now for trial. We'll keep it here.
13 We'll start -- I'll tell the Jury Commissioner to have the jury ready at 1:30, that way we can
14 deal with the matters outside the presence of the venire panel with the Hernandez issue at 1.

15 MS. BALLOU: And we're gonna do that at 1:00? Thank you.

16 THE COURT: Yeah. So we'll --

17 MS. ANTHONY: Can you tell me what the schedule might be so I can get witnesses.

18 THE COURT: Sure.

19 MS. ANTHONY: Tuesday, when do you think we'll start, and then Wednesday.

20 THE COURT: Tuesday we should be able -- oh, wait, we have a hearing Tuesday.

21 THE CLERK: No, I think that's tomorrow.

22 THE COURT: Oh, that's right, that's tomorrow.

23 THE CLERK: Yeah.

24 THE COURT: Okay. We're good on --

25 THE CLERK: Yeah, we're good.

1 THE COURT: We're good on Tuesday. We don't have anything. We should be able
2 to start at 9 on Tuesday. Wednesday we'll have to start at 1 'cause of calendar. Thursday at
3 9, and Friday if we're still --

4 MS. BALLOU: We hope to not be going.

5 THE COURT: Yeah.

6 MS. ANTHONY: I'm actually schedule to be gone on Friday. If we're still in trial,
7 I'll be here on Friday. I'm hoping to not be.

8 THE CLERK: And how many -- so it's supposed to last four days?

9 MR. WESTBROOK: That's correct.

10 THE CLERK: Four to five days?

11 MS. ANTHONY: Seven to nine witnesses.

12 MS. BALLOU: And we actually have a couple noticed as well.

13 THE CLERK: You don't need an extra large panel for any reason, do we, or a larger
14 than normal panel?

15 MR. WESTBROOK: We do not.

16 MS. BALLOU: Because there are gonna be lots of people who want to get off based
17 on the subject matter.

18 THE CLERK: That's why I was wondering do you need a larger --

19 MS. BALLOU: I think we probably do because of the subject matter.

20 THE CLERK: So 50 you think?

21 THE COURT: Fifty, let's get 50 and see how we do.

22 THE CLERK: Okay.

23 THE COURT: All right. And if we have to go Friday, we may not be able to start
24 until 1 on Friday or we'll just play it by ear. It will depend on what the civil calendar looks
25 like for Friday morning.

1 MS. ANTHONY: Okay. Thank you very much.

2 MS. BALLOU: Thank you, Your Honor.

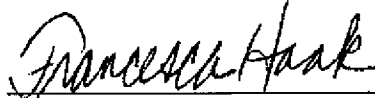
3 MR. WESTBROOK: Thanks.

4 THE COURT: See you Monday.

5 [Proceeding concluded at 12:01 a.m.]

6 * * *

7 ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I
8 acknowledge that this is a rough draft transcript, expeditiously prepared, not
9 proofread, corrected, or certified to be an accurate transcript.

10 

11 FRANCESCA HAAK
12 Recorder/Transcriber
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CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ANTHONY CASTANEDA,

Defendant.

CASE NO. C-11-272657-1

DEPT. V

ROUGH DRAFT TRANSCRIPT

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE
MONDAY, OCTOBER 28, 2013

RECORDER'S ROUGHT DRAFT TRANSCRIPT
ALL PENDING MOTIONS; SENTENCING (VERDICT 07/16/13)

APPEARANCES:

For the State:

MICHELLE ANTHONY, ESQ.
ALEXANDER G. CHEN, ESQ.
Deputy District Attorneys

For the Defendant:

ERIKA D. BALLOU, ESQ.
DAVID WESTBROOK, ESQ.
Deputy Public Defenders

RECORDED BY: LARA CORCORAN, COURT RECORDER

1 Las Vegas, Nevada - Monday, October 28, 2013, 10:33 a.m.

2 * * * * *

3 THE COURT: Case number C272657, State of Nevada versus Anthony Castaneda.

4 MR. WESTBROOK: Good morning, Your Honor. David Westbrook here, on behalf
5 of Mr. Castaneda. Good morning, Mr. Castaneda.

6 THE COURT: Good morning. All right. This is on for defendant's motion to vacate
7 counts 2 through 15, motion to reconsider the defendant's motion for mistrial, and
8 sentencing.

9 MR. WESTBROOK: And then there was also a matter of the offer of proof as well,
10 Your Honor.

11 THE COURT: Right. And there is -- now there is a motion to strike that, and it's set
12 for hearing -- I thought I saw that. It's not showing on the calendar, but I thought when I
13 looked at it last week, that it was the 28th.

14 MR. WESTBROOK: I thought it was all today. I didn't -- I wasn't aware. I think
15 it's easily dispatched by just reading the statute. If I -- if you want to hear it today, I'm
16 prepared.

17 THE COURT: Why not?

18 MR. WESTBROOK: Oh, okay. Well, that's the important -- you're the important
19 party being -- as far as that goes.

20 THE COURT: I didn't have courtesy copies. I would have printed it out, but I saw
21 that it was set for hearing --

22 MR. WESTBROOK: Your Honor, I can approach with a copy.

23 THE COURT: -- on the 28th.

24 MR. WESTBROOK: The 28th of November?

25 THE COURT: No. I'm trying to find it, but it --

1 THE COURT: Today is the --

2 THE CLERK: 26th.

3 THE COURT: -- 28th.

4 THE CLERK: Oh, 28th.

5 MR. WESTBROOK: I think I've got both the State's and --

6 THE COURT: Is it on today or not? It's not on the calendar.

7 THE CLERK: There's another motion to reconsider motion for a mistrial due to
8 prosecutorial -- we already had that.

9 THE COURT: Yeah, there's a motion to strike that was filed but was stayed.

10 MR. WESTBROOK: And that was filed on the 8th too -- oh, I'm sorry, that's wrong.

11 THE CLERK: Oh, it says vacated on an error.

12 THE COURT: Vacated on an error; who vacated it?

13 THE CLERK: I don't know. Let me see. I can look it through -- I don't vacate,
14 unless someone sends it to me, so I can at least look and see if I received an E-mail, but I'm
15 guessing not.

16 MS. LAVELLE: Your Honor, can you just tell me if this is the last case on your
17 calendar?

18 THE COURT: Yes, it is. Thank you, Ms. Lavelle.

19 THE CLERK: I don't know how it got vacated.

20 THE COURT: All right. So somehow the State's motion to strike your offer of proof
21 got vacated, certainly not by me, and my JEA has not been here for a week, so I have no idea
22 how that happened.

23 MS. ANTHONY: Okay.

24 THE COURT: So we can put that on for Wednesday, and we could hear the two
25 motions and sentencing on Wednesday, and that motion, or how do we want to --

1 MR. WESTBROOK: Well, it's -- that motion -- the issue is, first of all, there's a
2 statute directly on point. There's absolutely zero question that I have the right to file an offer
3 of proof in court. It's really not a question.

4 THE COURT: It's -- the question is whether you can file it after the trial's over.

5 MR. WESTBROOK: Right, but that's the only time I could have filed it.

6 THE COURT: Yeah, somebody accidentally, from another department, vacated.

7 THE CLERK: Yeah.

8 THE COURT: Probably put in the wrong case number or something.

9 MR. WESTBROOK: I'd be fine with them vacating work for the rest of the week too,
10 as long as they're at it.

11 The statute, Your Honor -- and I'm sure you'll get the documentation -- is NRS
12 39A.165, and it's quite clear. Also, interestingly, the case that was cited by the State also
13 spells out my right to file these things. I mean, Phillips versus State is the case that they
14 cited, and it states specifically that we're able to file these things at the District Court level,
15 and that's the only appropriate place to do it. What Phillips says is that you can't file new
16 evidence into the Appellate Court record, obviously. That's why you have to do it here,
17 which is exactly the procedure that I'm doing.

18 THE COURT: Okay. But I guess --

19 MR. WESTBROOK: But --

20 THE COURT: Well, I'll have to look at the motion and the cases that are cited. As I
21 see it, the issue is can you -- after the trial is over, after a verdict is in, and all of the record
22 on appeal has been established, now start adding additional things to the record. That, I
23 think, is the issue, so I don't know.

24 MR. WESTBROOK: And, Your Honor, my position would be that the record is not
25 done. We're making a record today. We'll make a record throughout the sentencing.

1 THE COURT: Not --

2 MR. WESTBROOK: The record's not done 'til it's certified to -- and you have a
3 JOC.

4 THE COURT: So -- okay. So -- but that's not on for hearing this morning. I haven't
5 read it.

6 MR. WESTBROOK: Your Honor, may I approach with courtesy copies?

7 THE COURT: You may, sure.

8 [Mr. Westbrook approaches the bench]

9 MS. ANTHONY: Your Honor, on Wednesday, Mr. Chen and I both have District
10 Court calendars that we are in different courts, so Wednesday would --

11 THE CLERK: Oh, this coming Wednesday? How 'bout November 6th?

12 MS. ANTHONY: I don't know that far out, but --

13 THE CLERK: It's just next week.

14 MS. ANTHONY: -- I can't do it on Wednesday for sure.

15 MR. WESTBROOK: And, Your Honor, my only issue -- and I'll show up whenever
16 you'd like me to show up. My only issue is that I think Mr. Castaneda is an excellent
17 candidate for probation. P&P recommended probation in this case. It's a nonviolent
18 offense. He's got zero criminal record outside of traffic misdemeanors. You know, he had a
19 job before going in. I -- he -- job prospects now, but, you know, he's not currently employed
20 'cause he's been in since the trial ended, and we're -- spent a lot of time waiting, you know,
21 for P&P because of their busy schedule. You know, I don't want to delay his release if
22 there's a shot of him getting out today. But the problem is though, you know, once the JOC
23 is filed, that's the transfer of jurisdiction. However, if he's not on probation, number one,
24 the Court retains some jurisdiction, and, number two, the Court can just delay, in my
25 opinion, filing the JOC until after this is all scheduled.

1 I just don't want him to have to sit in jail anymore. Now, obviously if you're
2 not gonna let him out, that's different. I know you're not gonna tip your hand on that
3 probably. I always like to hear it if it's good news, and if it's bad news I'd rather you keep it
4 to yourself. But, you know, I just -- I hate to delay it any further. I think he's an excellent
5 candidate for probation. And, to be perfectly honest, I completely believe in his innocence,
6 and I'll explain that later. I know that there is a -- not a grand tradition of standing up at
7 sentencing arguments and talking about how it isn't your client who's after a trial. I'm gonna
8 depart with a grand tradition because I believe in it so strongly.

9 THE COURT: Okay. We're not at sentencing yet.

10 MS. ANTHONY: Where are we?

11 MR. WESTBROOK: I'm processing everything so --

12 MS. ANTHONY: But we are still listening to Mr. Westbrook, and we are going to be
13 here all day.

14 THE COURT: What I'd like to do is take the motions that we do have on calendar.
15 We can proceed to sentencing and delay -- I mean, I don't know what I'm gonna do on
16 sentencing yet because I haven't heard all the arguments. I haven't heard Mr. Castaneda
17 address the Court. I don't make sentencing decisions finally. I may have some idea, but I
18 don't make them until I hear everything. And so we can go forward. We can delay the JOC
19 until I decide this other motion as well, because as long as I don't, you know, sign it, then
20 you're correct, I -- we still have jurisdiction. So that's what I propose, and we can reset that
21 other motion that got vacated in error for -- we can't do it Wednesday, but how 'bout
22 Monday?

23 MR. WESTBROOK: Any time is fine with me, Your Honor, and I'll even do a
24 special setting if you like, whatever you like.

25 MS. ANTHONY: I'm sorry, what date is Monday?

1 THE CLERK: November 4th.

2 MR. WESTBROOK: Right.

3 MS. ANTHONY: I don't know. I mean, we can put it on and I'll get coverage. I just
4 know that this Wednesday I could not. We have two people in trial. Both of us are in
5 District Court. I know that this Wednesday I couldn't. I will --

6 THE COURT: Okay. So Monday you don't know, but you'll make sure it's covered
7 one way or the other. All right.

8 MS. ANTHONY: Unless I'm in trial, which is a possibility, but yes.

9 THE COURT: Well, that's always a possibility.

10 MS. ANTHONY: True.

11 THE COURT: So the 4th.

12 THE CLERK: November 4th, 9 a.m.

13 THE COURT: All right.

14 THE CLERK: And we're gonna add that motion back then, right?

15 THE COURT: Yeah. That'll just be on the motion -- the State's motion to strike.
16 Okay. So we've got -- let's do the motion to reconsider defendant's motion for mistrial due
17 to prosecutorial misconduct first. All right, Mr. Westbrook.

18 MR. WESTBROOK: Your Honor, I think for the most part the motion stands on its
19 own. What I want to do is explain the purpose of the declarations. I think it was
20 misunderstood in the State's response.

21 May I approach the podium, Your Honor?

22 THE COURT: Yes.

23 MR. WESTBROOK: I want to make sure I've got my notes with me.

24 THE CLERK: Which one are you doing first?

25 THE COURT: Motion to reconsider defendant's motion for mistrial.

1 THE CLERK: Okay.

2 MR. WESTBROOK: In Glover versus 8th Judicial District Court, that's 125 NV
3 691.702 2009 case dealing with misconduct, interestingly misconduct of the defense attorney
4 and not of a prosecutor. The Court said that the public's interest lies in seeing that verdicts
5 in criminal causes are the result of honest deliberation by individuals who are of a mind free
6 from bias and prejudice. Of course there's lots of case law on point that talks about
7 prosecutors and their particular power over a jury. They are the government. They are the
8 state. They're in league with the police. Jurors who show up to jury service and sit in the
9 box believe in law and order and they believe in the system. Therefore, prosecutors
10 inherently have a greater effect. When they commit misconduct it has a greater effect.

11 Now, there's a fairly bright line rule that you can't use a declaration detailing
12 what jurors said in order to impeach the jury verdict. Jurors can't impeach their own verdict,
13 okay? That's not what I'm doing here, and I want to make it very clear what the purpose of
14 filing the declaration was.

15 When we went back and talked to the jury, I had no idea what they would say.
16 I just knew that they deliberated for a very long time on this case, and when they stated the
17 basis for their verdict, I was very much taken aback, but I wasn't surprised, and the reason I
18 wasn't surprised is because when the State was standing up here shifting the burden and
19 misstating the evidence, editing pieces of interviews, and then sticking them together in the
20 wrong order, showing things out of context, I knew what was gonna happen. The jury was
21 gonna get back there, and they were gonna be confused, and they were gonna make the
22 wrong decision, and that's exactly what happened.

23 Now, I'm not, again, presenting the juror's words in order to impeach their
24 verdict or to have them impeach their own verdict. What I'm doing is I'm demonstrating the
25 prejudice of the prosecutorial misconduct. I made 25 objections not because I like to hear

1 the sound of my own voice, which I do, but because it was important. The trial was slipping
2 away. Justice was slipping away right in front of us during that closing argument. The State
3 got up here, and in response to every single one of the defense's points, they said: But
4 there's no evidence of that. That is burden shifting, and the effect on the jury, as we know
5 from talking to the jury -- I mean, it was obvious to me just from hearing it in court without
6 talking to the jury, but the jury confirmed it. The effect on the jury was to confuse them and
7 to confuse them about the instructions. They got back there and they said: Wow, we were
8 really concerned that the police didn't investigate these people who found the flash drive.
9 They didn't even look at their computers. I mean, all of the pornography could have come
10 from those computers, but the police didn't even investigate it. So, you know, but we
11 couldn't speculate because it says so in the instruction.

12 That is burden shifting. That is the result of burden shifting. They felt that
13 because we didn't present evidence, that they couldn't speculate as to the holes in the State's
14 case. What they should have done was come away with that going, wow, the State has a lot
15 of holes in their case. I had a reasonable doubt. I need to acquit.

16 THE COURT: Okay. But you're still -- you are still relying on this declaration of
17 your speaking with, it seemed to me, like one particular juror saying things to you. And, I
18 mean, you just can't, you just can't rely on that. So, I mean, I think you need to confine your
19 argument to whether or not, you know, without regard to what the jury told you because, you
20 know, they -- jurors say all kinds of things, and that's why we can't go back after every trial
21 and say, wait, I need a do over because the jury told me XYZ after the fact that they --

22 I mean, when we voir dire a jury we ask them: Have you ever served on a
23 jury? Without telling me what your verdict was, were you able to reach a verdict?

24 But now you want to go interview the jurors and say, ah, see, the same -- the
25 reason you denied my motion for mistrial at the time, Your Honor, was incorrect. And, of

1 course, my rulings at the time were that it wasn't burden shifting because the State's expert
2 witness had testified at length on the stand that there -- he found no evidence of virus scan.
3 Now, you were able to come back and try and impeach him and say: Did you run a virus
4 scan? No, I didn't run a virus scan, but there are other things that would indicate to me if
5 there was a virus, and I didn't find any of those things. So all of this was not burden shifting.
6 They had an expert witness who testified. And so when the State is saying there's no
7 evidence, it's -- she is commenting on the testimony of her own expert who said: No, I could
8 find no evidence that -- in fact, I found evidence in my opinion, I found, and based upon
9 what I found, I found evidence that, yes, he did actually download this pornography on
10 specific dates, et cetera, so --

11 MR. WESTBROOK: He didn't say --

12 THE COURT: -- oh, okay.

13 MR. WESTBROOK: I mean --

14 THE COURT: I mean, I understand that you have this belief that your client is
15 innocent, but --

16 MR. WESTBROOK: Okay.

17 THE COURT: -- that's --

18 MR. WESTBROOK: Your Honor --

19 THE COURT: I'm not gonna --

20 MR. WESTBROOK: -- if I may --

21 THE COURT: I'm not gonna argue what --

22 MR. WESTBROOK: I don't want to argue the facts, Your Honor.

23 THE COURT: -- the evidence showed because the jury decided.

24 MR. WESTBROOK: I don't want to argue facts. I want to make it very clear why I
25 presented this. I'm not asking for a do over here because I talked to the jury. My arguments

1 have not changed since I originally made them. During all my objections I was saying
2 exactly the same thing.

3 THE COURT: I know.

4 MR. WESTBROOK: In order to demonstrate prejudice, I'm putting what the jury
5 said to confirm that what I was saying was correct. It did have the prejudicial effect I said it
6 would.

7 THE COURT: All right.

8 MR. WESTBROOK: That's the reason why it was presented. It's not a violation of
9 the rule regarding juries impeaching their own verdicts. That's not why it's being presented.
10 It's being presented to show prejudice.

11 Furthermore, yes, the State had an expert, but he did not say that he was able to
12 determine when it was downloaded or how it was download or from where it was
13 downloaded. That never happened. It wasn't part of the case. Secondly, I didn't have an
14 expert, and that leads me to the reason why I asked for one which we'll be talking about next
15 Monday.

16 THE COURT: All right. I don't --

17 MR. WESTBROOK: Okay?

18 THE COURT: -- want to -- as I say, I don't want to argue what all of the testimony of
19 the expert was, but --

20 MR. WESTBROOK: I understand, Your Honor.

21 THE COURT: So I'm not gonna go there. But you did not reply -- file a reply to the
22 State's opposition, so I want to know what your position is to their opposition which says
23 that they believe that you can't -- that I cannot grant a motion for a mistrial after the verdict.

24 MR. WESTBROOK: You can do a motion for a mistrial any point that justice allows.
25 That's a right that's guaranteed to this Court and a responsibility I might add under the 5th

1 Amendment of the Constitution as applied to the State of Nevada -- the 14th Amendment,
2 fundamental fairness and the interest of justice.

3 THE COURT: And why should I do that as opposed to allow it to go up on appeal?

4 MR. WESTBROOK: Because an innocent man was convicted.

5 THE COURT: Okay.

6 MR. WESTBROOK: And he should -- and the conviction should be reversed. And
7 he was convicted because of misconduct that happened in the courtroom. Now, I understand
8 that the Court doesn't agree with misconduct, okay? I strongly disagree with that, and I was
9 hoping that once the Court saw the prejudicial effect of that misconduct on this jury in real
10 time, they were also confused about the contents of the interview because it was
11 misrepresented here. They thought that they found a smoking gun and that Mr. Castaneda
12 had acknowledged, before the police ever told him anything about it, had acknowledged the
13 existence of pornography on his computer. That was not true. It never happened. And, in
14 fact, the State would even tell you that it didn't happen because he was told there was
15 pornography when he was served the warrant, but they were misled by the State, and so they
16 got it wrong.

17 I'm not saying that they're impeaching their own verdict. That's not the point.
18 The point is it's prejudice, and the Court has to consider the prejudice, and, frankly, I've
19 gotta prove the prejudice, which I've just. So obviously the Court disagrees with me. I think
20 it should be reconsidered, and the Court certainly has the right to reconsider it because it was
21 preserved at trial, and it's a motion for reconsideration. It's prior to the JOC, and the Court
22 has jurisdiction. Had I gone up, had the JOC been filed, then this would be out of time and it
23 would be purely an appellate issue. That hasn't happened. This Court still has jurisdiction,
24 just like it has jurisdiction over my offers of proof. I'm completing the record down here at
25 the trial level where it's supposed to be done. I'm not filing new evidence on appeal, which

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1 can't be done. That's the purpose of this entire exercise.

2 THE COURT: Okay.

3 MR. WESTBROOK: With that, I'll submit it, unless you have more questions.

4 THE COURT: All right. No, thank you. State, what's your position?

5 MR. CHEN: Your Honor, I think you raised most of the things that the State has to
6 say. All of the commentary during the closing arguments, as well as the rebuttal argument,
7 were commenting on the evidence. Albeit it I understand the defense wouldn't like to hear
8 the things that we argued; however, they were based on the actual evidence, including I
9 remember asking Detective Tooley if it was mentioned to him why they were there, and she
10 says: Well, I think I showed him the search warrant. -- is my recollection. And then during
11 the audio, the audio was not doctored. We didn't doctor the audio. They listened to the
12 audio in court, the agreed upon version between defense counsel and the State. We didn't
13 move statements in that. And in that he's the one who said: Nothing involving children.
14 He's the first person to say that. We commented on that, Judge. I don't think that's
15 improper, to comment on that given that that's the actual audio of the defendant's statement.

16 As a matter of misconduct, Your Honor, I believe there were at least 25
17 objections, as defense counsel pointed out. Your Honor, I believe repeatedly said: Your --
18 the jury's to rely upon their own recollection of the evidence. You did not sustain at least --
19 the vast majority. I don't believe any of those were sustained, and I don't believe that the
20 Court found misconduct. The only misconduct that I remember the Court finding was with
21 regards to defense counsel's closing argument and targeting a specific juror, but that's the
22 only finding I remember of the Court finding that there was any misconduct during closing
23 arguments, Your Honor.

24 But with that, I do think that the case is quite clear that after the verdict has
25 come back, that a motion for mistrial is not the appropriate remedy. Maybe defense counsel

1 could have filed a motion for a new trial, which is regulated by statute, Your Honor, but with
2 regards to granting a mistrial, the time has passed for that.

3 MR. WESTBROOK: And, Your Honor, just two things on that. Number one, it
4 would have passed had I not already filed one. This is a motion to reconsider, not a new
5 motion for mistrial. That's the distinction. And number two, Mr. Chen just demonstrated
6 exactly what the problem was with the misconduct. He was well aware, as he just admitted,
7 that a warrant was served and that my client was informed that they were looking for child
8 pornography. Then when he was the first one to mention child pornography in the interview,
9 the State realized, wow, that sounds really good and they commented it -- on it to the jury in
10 an attempt to mislead the jury. That is misconduct, and it worked. It worked. That's the
11 purpose of our declaration, is to show that it worked. They were intentionally misled, and
12 that was the admission we just heard right now in this courtroom.

13 I'll submit with that, Judge.

14 MR. CHEN: Your Honor, I'm sorry to respond, but it's incredible that Mr.
15 Westbrook gathered that from what I had just said. I believe I gave Detective Tooley's
16 response as well as I talked about the audio. I didn't put it in the way that Mr. Westbrook
17 has just described.

18 THE COURT: So we don't know what -- I mean, Detective Tooley's testimony was
19 that he -- she believed she'd shown him the warrant, whether he read that or not, and then the
20 audio was played. My recollection was you argued against that as well. There were many
21 times during the trial where there was -- where you objected that there was -- the State was
22 misstating the evidence. That's when I would say -- because I didn't remember what all the
23 evidence was certainly. I wish I could remember every detail, but I always admonish any
24 time there is an objection like that, that the jury is to rely, unless I know for certain that it
25 was an absolute misstatement, I'm not gonna start weighing in on those things.

1 But I do know that as far as the motions concerning burden shifting, that I was
2 very cognizant of those and making sure that the State was -- that there had been evidence
3 from their own witnesses to back up what they were saying in closing argument. And so I
4 did read the case cited by the State concerning -- it was a civil case, this Carlson versus
5 Locatelli [phonetic] and civil case where the Judge, trial Judge, after the trial was over,
6 miscaptioned the order to show it was granting a motion for mistrial when actually it was a
7 motion for a new trial, and the Court found that they were gonna interpret that it really was,
8 in fact. And then in passing, in sort of dicta, they said, well, once the case is over and it's
9 gone to verdict, that, you know, you can't do a motion for a mistrial.

10 So, but even assuming I had the ability to grant a motion for mistrial at this
11 point in time, I had declined to do that. I considered when you made your motion at trial; I
12 rejected that on its merits. I don't think anything in particular has changed. I talked to the
13 jury too after the fact. It seemed to me no different than any time you talk to a jury.
14 Sometimes they misapprehend small facts. Sometimes they make decisions based on Lord
15 knows what. But we can't, if we went back and started revisiting every verdict, I think that
16 there was sufficient evidence for them to bring the verdict that they did, and, of course,
17 you'll have the ability on appeal to have an Appellate Court, with the full record, which I
18 don't have that.

19 MR. WESTBROOK: I don't either. I had to go through that tape.

20 THE COURT: So we'll let the Supreme Court do what they do as far as that, so that
21 motion's denied.

22 MR. WESTBROOK: Thank you. And, Your Honor, for the record, you were not
23 involved in the conversation -- I'm not suggesting that you were.

24 THE COURT: No.

25 MR. WESTBROOK: -- that we had with the jury.

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1 THE COURT: No.

2 MR. WESTBROOK: That was just myself and Ms. Anthony.

3 THE COURT: Correct.

4 MR. WESTBROOK: You were referring to your own conversation later.

5 THE COURT: Right.

6 MR. WESTBROOK: Actually before us.

7 THE COURT: Yes --

8 MR. WESTBROOK: Thank you.

9 THE COURT: -- and which mainly to whether they wanted to talk to you all, but --

10 MR. WESTBROOK: And four said yes and the rest ran for the hills.

11 THE COURT: Yes.

12 MR. WESTBROOK: Wisely.

13 THE COURT: I think they heard enough --

14 MR. WESTBROOK: Wisely.

15 THE COURT: -- by then.

16 MR. WESTBROOK: I don't blame 'em.

17 THE COURT: All right. So the next motion is the defense motion to vacate counts 2
18 through 15.

19 MR. WESTBROOK: And, Your Honor, again, the key to my motion here is not to
20 say that the statute is unconstitutional. I think that was misapprehended a bit in the State's
21 response. Maybe that's my fault. I'm saying that if it's interpreted to allow multiple
22 convictions for one singular act of possession, which is what this is -- and I'll address that in
23 a second -- one singular act of possession, then it would be unconstitutional, okay? This
24 statutory scheme has been analyzed in the context of production of pornography, and it was
25 found that, number one, you take a look at the unit of prosecution. In that case it's

1 production; in this case it's possession. And you determine how many there are, and that
2 guides how many convictions you can have. In this case there is one unit and one singular
3 event, one possession. That was the day the police seized everything. That's it. No
4 possession was ever proved, by the way, or even tried to be proved for the thumb drive. But
5 even if it was, we're talking about copies of the exact same files.

6 Now, in their response the State tries to argue that because there were different
7 creation dates on these files, that that means that there were different moments of possession;
8 that's 100 percent wrong, and it's -- it shows, number one, a lack of understanding about the
9 technical aspects of the testimony of the witnesses, number one, and, number two, they
10 didn't try to establish, nor did the jury vote on, whether or not there was possession on the
11 dates that were creation dates in the file. The one date that they established was the date the
12 stuff was seized, and that's it, one moment of possession, and that's the day the police seized
13 it, and that's it.

14 THE COURT: All right. So the charging document itself charges that he possessed
15 these things between this date and this date then, right?

16 MR. WESTBROOK: But the only time --

17 THE COURT: Not the date of the execution of the search warrant. And there was
18 evidence, in fact, about when these things were placed on the computer.

19 MR. WESTBROOK: If I may, Your Honor, there wasn't, and I'll explain the
20 technical aspects of this, and before I do, I'd like to explain why I know this a little bit. I had
21 an Internet company in 1994. I was one of the first people in the worldwide Web. I worked
22 for a company called Senior.com. It wasn't successful, which is why I'm here today instead
23 of sitting in my yacht in my big, huge bathtub full of jewels, okay? Six blocks over was
24 Amazon.com. They did a little bit better. I should have walked six more blocks. So I had
25 an Internet company. I eventually started my own Internet company, okay? I have a little bit

1 of a background in this stuff. Now, granted, my level of knowledge today, 15 years after the
2 fact, you know, I closed my doors in about 2000, so 13 years after the fact is prehistoric
3 compared to current knowledge. But there are certain things that don't change. One of those
4 things is understanding of file structures and networks. A creation date does not mean that is
5 the date the file was possessed, that was the date the file was created. Ironically, creation
6 date does not mean the day the file was created. It can be changed by multiple processes, as
7 the State's own witnesses suggested.

8 The State did not try to demonstrate when these files were downloaded. In
9 fact, they specifically said they weren't even trying to determine that, nor could they
10 determine who downloaded them or from what source. That wasn't part of their offer of
11 proof. All they were trying to show was possession.

12 As far as possession goes, they were only able to establish it for one day, and
13 that's the day it was seized. Now, they put a range of dates, but if you had got the rationale
14 that because they used a range of dates he should be open to multiple charges, then he should
15 be charged one time for every single day in between that time period that they offered.

16 Let's take this as something we all know a little bit more about -- a drug
17 possession case. That's really easy to understand. Whether he has a bunch of different
18 packets of cocaine, or one packet of cocaine, he can only be charged with one count of
19 possession as long as it's all cocaine. Now, if he has cocaine, meth, marijuana, and heroin,
20 those are different substances, and the possession of those constitute different crimes.

21 This is all one thing. The child pornography is all one thing. Okay.

22 THE COURT: Even if they're different images, completely different images?

23 MR. WESTBROOK: Yes. And that's the holding of the cases that interpret this
24 entire -- first of all, the cases interpret this entire range of statutes. This statute is included in
25 that range of statutes, so this statute has been interpreted, except the case focused on

1 production and not possession, but it's the exact same interpretation. This has already been
2 decided.

3 THE COURT: Well, but the case that focuses on production, that was the whole --
4 that was the whole thrust of the case, that the production happened all at one time.

5 MR. WESTBROOK: With multiple different children. And it was said specifically
6 that multiple victims do not constitute multiple charges just -- you have to look at the actual
7 thing they're trying to prove here, which is the production itself. Now, if they had found
8 different productions, that would be different. Here you have one possession. There you had
9 one production. The fact that there is different pictures of different people doesn't count. It
10 doesn't matter for purposes of the possession, which is the unit of prosecution. That was
11 already decided in the production case. It was one unit of production, multiple people
12 involved, but one unit of production, ergo it has to be one unit of possession here.

13 And the analogy that was spoke of by the Court, which I put in there was,
14 you'd have an absurd result if you decided any other way because a video image -- and
15 there's no question about this -- would constitute one charge 'cause it's one video, except
16 that a video is actually millions of frames of individual pictures. That's what a video is. I
17 think Edison proved that with his flip book of the horse. It's multiple different pictures that
18 are knitted together, okay? We don't charge people per frame even though technically that is
19 multiple pictures. It's millions of potential counts. We don't do that because it's a singular
20 act of possession, and to decide otherwise would make different penalties for possession of
21 pictures and possession of videos. It would mean that if I had a video, even if it was four
22 hours longs with billions potentially of frames, I could be charged with one crime. But if I
23 printed off three still images from that same video, it would be three crimes. That doesn't
24 make a lick of sense.

25 THE COURT: How about if you had three different videos?

1 MR. WESTBROOK: Then it's one unit of possession still because it's the same
2 content. Now, if you were charging me with production, and it was proved that those videos
3 were produced on a different day and I -- on different days with different people, and I'm the
4 one who produced them, then that would be different. But, again, you're talking about units
5 of prosecution here.

6 And then the State goes through and talks about lots of federal laws and federal
7 cases, all of which are completely different than our statute, and they prosecute different
8 things. If I may -- hang on one second.

9 Okay. As they talk about USC 22.52A.2, and cases involving two completely
10 different crimes, distribution and receiving. And, in fact, even though it's on a completely
11 different topic, this case proves my point. In the case that was cited, which I believe is
12 Sipaloni [phonetic], there were three distinct acts of distributing child pornography, three
13 different things mailed at different times, three distinct acts. The unit of prosecution was
14 distribution. They had proof that it happened three different times. The unit of prosecution
15 of possession here -- and there was only one act of possession. We don't charge him for all
16 the different copies of the pictures either because they were replicated many different places.
17 We only charge him for one because that's all that it was here.

18 To decide otherwise would be the same thing as in a drug case of taking all the
19 individual fine grains of cocaine and charging him per grain, okay? It's all the same stuff in
20 all the same place at all the same time. That's the key. He didn't commit acts of possession
21 on different days. They didn't go into his house and take away -- the subject of the
22 investigation -- they didn't go and take it away on Thursday and then find him across town
23 with more stuff on Friday. It all happened on the same day at the same time, and all of the
24 technical arguments about the creation dates of the files misunderstands what a file creation
25 date is, completely misunderstands it, and it misunderstands the testimony that the State

1 possessed.

2 THE COURT: I don't -- I think I understood the creation date. I mean, I realize they
3 were using different terms interchangeably, but the bottom line was that there was evidence
4 that these images were placed on particular hardware devices and that you can tell when it
5 first came onto that hardware device. That's what you can see when you go into the
6 history --

7 MR. WESTBROOK: Right.

8 THE COURT: -- of that file.

9 MR. WESTBROOK: That's partially correct, Your Honor. That's one of the things
10 that it can show. But also the State's witnesses testified -- one more easily than the other --
11 that if you have an automatic software backup program, if you move a folder that has files
12 contained in it, it also changes those creation dates because once a file is moved, copied, or
13 backed up, it's essentially being recreated, so you have different creation dates. Virus
14 scanners affect access dates as well.

15 THE COURT: Well, that's different than, you know, if you place the document on
16 your computer, that's gonna show as the original date, and that date stays the same. If you
17 open it, yes, it's gonna now show the last --

18 MR. WESTBROOK: Access.

19 THE COURT: -- access date. That's different than the first date.

20 MR. WESTBROOK: And that's actually incorrect, Your Honor. That's the whole
21 point. That's the reason why I was begging for an expert. The creation date does change. It
22 does change. Every time you copy it, or put it on a different machine, or have an automated
23 backup, as my client did -- he had a tape drive backup -- every time you do that, it changes
24 the creation date. If it gets overwritten, it changes the creation date. This is not like a
25 copyright date in a book that doesn't change because it's printed on a page. It gets

1 overwritten. That's the technology.

2 THE COURT: Okay. But that would -- that's fine for arguing that it couldn't have
3 been any time prior to the first date, right, but you at least know that that hasn't happened
4 since that time because that date -- you say that these things can change that date. We know
5 at least --

6 MR. WESTBROOK: Sure.

7 THE COURT: Right?

8 MR. WESTBROOK: Yeah, nothing was accessed after that date obviously.

9 THE COURT: Right.

10 MR. WESTBROOK: Otherwise there would be some kind of --

11 THE COURT: Right.

12 MR. WESTBROOK: Well, again, I just --

13 THE COURT: So --

14 MR. WESTBROOK: -- used the word access incorrectly.

15 THE COURT: So if there's an --

16 MR. WESTBROOK: It wasn't created.

17 THE COURT: -- automatic backup that was changing the creation date -- if we want
18 to call it the creation date -- every day because it was an automatic daily backup, then it
19 should be every file should show the same date; it doesn't.

20 MR. WESTBROOK: Sure.

21 THE COURT: It didn't.

22 MR. WESTBROOK: Well, it wasn't a daily backup, for one thing.

23 THE COURT: All right. Well --

24 MR. WESTBROOK: But --

25 THE COURT: -- it should --

1 MR. WESTBROOK: -- the whole point is though, Judge --

2 THE COURT: -- every file should have the same date, whether it was daily, or
3 weekly, or whatever.

4 MR. WESTBROOK: And that's not how they work either. They wouldn't because --

5 THE COURT: On that device, if it was being backed up --

6 MR. WESTBROOK: Sorry, Your Honor. That's not how they work. I hate to
7 disagree with you, but that's not how it works. They don't back up every file every day. In
8 fact, unless it's scheduled, they don't even do it on a regular basis. But that's not even the
9 point.

10 THE COURT: Well, we don't --

11 MR. WESTBROOK: I can -- we can dispense the entire technical argument with this,
12 Your Honor. The jury never voted on when these files were created. That was not part of
13 the verdict. We have no factual ruling from a jury that says that he created these files on
14 these days, ergo he possessed them on these days; that is not part of the verdict and should
15 not be considered here.

16 For our purposes, the only evidence we have is a guilty -- a conviction from a
17 jury that was told he possessed them on the day they were recovered by the police. That's
18 the only day that matters. All this stuff that the State is putting into the record, it was never
19 verified by the jury. It is not a matter of fact for this case and can't be used as such.

20 THE COURT: But you told the jury the State had to prove each and every count,
21 right?

22 MR. WESTBROOK: Each and every count, yes.

23 THE COURT: Each and every count, correct, so the State had to come forward with
24 evidence as to that he possessed each and every separate image separately. In other words,
25 they could have acquitted him of some if they didn't believe there was sufficient proof,

1 right? Didn't you argue that?

2 MR. WESTBROOK: They would have to prove separate moments of possession as
3 well, which was not proved. All that was proved -- and I disagree that this was proved as
4 well, but the jury disagrees with me apparently. All that was proved was one moment of
5 possession, not multiple moments of possession, just one, and that's it. That's the whole
6 point.

7 And the citations to Jackson and Blockburger are wrong 'cause we're not
8 comparing statutes here. Jackson is wrong anyway, although it doesn't really have an effect
9 because that would be an ex post facto application of Jackson. Regardless, it doesn't have
10 any effect because we're not comparing different statutes. This is the same statute on the
11 same day. It's already been clearly interpreted by the Supreme Court because this statute
12 was included in the range of statutes that was interpreted by the production statute. It's a
13 very clear -- only one conviction can come from this. And that's my record.

14 MS. ANTHONY: Your Honor, first off, I'm going to request that the Court strike
15 Mr. Westbrook's again attempt to supplement the record with expert testimony claiming, you
16 know, he has all this experience, so now he's going to educate the Court as to what these
17 terms mean. So with that, I'm going to ask that that portion of the record be stricken because
18 we already had the testimony in this case as to what these terms mean. It came out. Mr.
19 Westbrook didn't have an expert. He is now wishing he did, but at the time he didn't, and, in
20 fact, one of the basis of the defense's continuances in this case with the -- the continuance
21 directly prior to trial was so that the defense could get their own expert.

22 Unfortunately, Mr. Westbrook wasn't on the case then, but we had an entire
23 continuance for that mere purpose -- the defense wanted an expert; you granted a
24 continuance. I mean, I think we even -- it was the morning of trial they wanted an expert. It
25 got continued for that reason.

1 THE COURT: All right. Well, okay.

2 MS. ANTHONY: So for that --

3 THE COURT: Save your breath there because I'm not -- I'm not considering Mr.
4 Westbrook's testimony as evidence in this case.

5 MS. ANTHONY: And --

6 THE COURT: It's just argument.

7 MS. ANTHONY: -- I know that it's going up, and this is going to be litigated, and
8 that's the reason --

9 THE COURT: Well, okay.

10 MS. ANTHONY: -- for it.

11 THE COURT: All right. And so let's make it clear that the rulings I made are based
12 upon the evidence I heard at trial, not, you know, your -- and maybe you have some
13 expertise. I have no idea. But I have to base my rulings on what I heard at the trial of this
14 matter. All right. So I'm not considering any testimony as being -- as changing the
15 evidence. All right?

16 MS. ANTHONY: I can be brief. I know the Court has read my motion, specifically
17 focusing on Wilson -- or my opposition, sorry -- focusing on Wilson. Mr. Westbrook wants
18 to say that it's one act regarding this possession, and Wilson specifically said -- and, in fact,
19 he spoke about the case today for production. Wilson says yes, there was one production,
20 but each of those four photographs were possession and each one was possession, and he was
21 convicted of one count of the production, and then the four -- I believe it was four counts of
22 possession, and it was upheld, and that's exactly what we have here. We have the 15 counts
23 of possession, and the 15 counts they are individual pictures, they are individual victims,
24 they're individual files, and Mr. Westbrook wants to say that they are one item, one laptop.
25 We had three different things. We had a laptop, we had the shuttle computer, and we had the

1 USB stick, so we have different means of I guess possession -- the USB stick, the laptop, and
2 the shuttle. And he just wants to lump 'em into one and say it's possession of all of these
3 things, and that's not the case. There's the 15 counts. We labeled them out separately as by
4 images, and we described them. We proved it to the jury, each and every one of them. We
5 had lengthy conversations with each of the experts. In Wilson, which is cited in my motion
6 on page 5, Wilson affirmed the convictions on all four counts of child pornography for each
7 photograph that was taken during the production of child pornography, and the production
8 was a performance and one act, and that's where Mr. Westbrook is getting the unit, and
9 that's for performance. But it was also that same case broke down the possession. They
10 were found guilty of four counts of possession, one for each photograph that was taken.

11 MR. WESTBROOK: Your Honor, I'd like to look at Wilson to verify this, but it was
12 not four counts of possession; it was four counts of production. And I'm reading directly
13 from Wilson: Upon review of the State's exhibits, we conclude that the State's exhibits
14 establish four counts of production of child pornography. He was originally charged with
15 12. They were able to determine that four were different units of production, ergo he was
16 convicted of four. I see nothing that says that he was charged with or convicted of four
17 counts of possession, but I don't have the entire case in front of me. I don't think that that's
18 accurate though. It was four counts of production, according to what I'm reading, not
19 possession, production. That's the key, it's production, units of production. This is units of
20 possession. There's not four, there's not 15, there's just one.

21 THE COURT: Well, it seems to me that the whole point of the Legislature
22 criminalizing possession of child pornography is to protect child victims, sort of like
23 criminalizing the possession of ivory, right?

24 MR. WESTBROOK: Sure.

25 THE COURT: Because you want to keep poachers from killing elephants and taking

1 their ivory, so you criminalize possession of the ivory so as to keep elephants from being
2 killed. So the Legislature, when they decide they want to pass laws to criminalize possession
3 and child pornography, it's to protect children who would otherwise be victimized and so
4 every time you go in and you possess an image of child pornography -- and in this case
5 where it's proved up -- the State would have to prove -- now you stipulated that each and
6 every image was, in fact, child pornography so as to avoid them having to prove that up and
7 displaying the photos in court which -- for which I am eternally grateful, having seen only
8 one of them.

9 But it seems to me that where you have a document, you know, a charging
10 document, and you have evidence that supports that Mr. Castaneda was, in fact, in
11 possession of these items at different times, and you have a situation where the State has to
12 prove in each and every count that, in fact, it was child pornography, and that he possessed
13 it, and each image is different with different children depicted, that that is what the
14 Legislature intended.

15 Now, an argument regarding how someone should be sentenced concerning
16 that is different than that. So for the reasons and arguments that are stated -- set forth in
17 depth in the State's opposition to your motion, I'm gonna deny the motion. And, again, issue
18 an appeal.

19 MR. WESTBROOK: This is gonna be a --

20 THE COURT: 'Cause I could be wrong.

21 MR. WESTBROOK: -- real tough road for my appellate attorney, isn't it?

22 THE COURT: I could be wrong.

23 MR. WESTBROOK: As far as the size of the record.

24 THE COURT: It will be, but they're up to it.

25 All right. So are we ready to proceed to sentencing?

1 MR. WESTBROOK: I am, Your Honor.

2 THE COURT: All right.

3 MS. ANTHONY: Your Honor, I think that, considering -- Mr. Chen and I have been
4 thinking about it as we're going through the motions. Considering the fact that we still have
5 the other motion out there, I know that this case is clearly going up to -- Mr. Westbrook is
6 going to appeal it. It's clearly going up to the Supreme Court, and I believe that in order for
7 us to make a clean record, because there is still one motion that's outstanding, I think it
8 would be prudent for us to continue the sentencing until that date because we have seen
9 previously regarding Judge ruling, and then when it goes up on to appeal, defense uses
10 whatever ruling happens during sentencing considering a motion still outstanding against the
11 record on appeal. So even -- you haven't said how you're going to rule one way or the other.
12 But once the ruling comes out, defense doesn't like it, it gets thrown into as another issue up
13 on appeal. It happens all the time. We've seen it. And I just really would like to be prudent
14 and make sure that if we hear the motions, and then the sentencing, and then we are -- it's
15 clear.

16 THE COURT: Well, we can hear that motion on -- oh, no. Can't you have -- send
17 someone on Wednesday?

18 MR. CHEN: I'll change my schedule to make it Wednesday. I don't mind expediting
19 it. The purpose is not to delay. But just for the record, we would prefer that our motions be
20 heard. I'll find someone to cover me on Wednesday.

21 MR. WESTBROOK: That's fine with me, Your Honor. I mean, I would ask for an
22 OR motion, but I think if it's Wednesday, probably the Court wouldn't be inclined to grant
23 that. You know, I wouldn't make an argument when the entire thing was my idea in the first
24 place. I don't think that our argument would be particularly successful, but, you know, the
25 Court's preference. It's whatever you think is best, Judge.

1 THE COURT: All right. Let's continue it 'til Wednesday for a hearing on the last
2 motion to strike -- State's motion to strike and for sentencing.

3 MR. WESTBROOK: And that means the Monday date is vacated.

4 THE COURT: That means the Monday date is vacated.

5 MR. WESTBROOK: Great. Thank you, Your Honor.

6 THE COURT: So we'll do it soon.

7 THE CLERK: October 30th, 9 a.m.

8 THE COURT: Thank you.

9 MR. WESTBROOK: Thank you, Judge.

10 [Proceeding concluded at 11:08 a.m.]

11 * * *

12 ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I
13 acknowledge that this is a rough draft transcript, expeditiously prepared, not
14 proofread, corrected, or certified to be an accurate transcript.

15 
16 _____
17 FRANCESCA HAAK
18 Recorder/Transcriber
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DISTRICT COURT
CLARK COUNTY, NEVADA

ROUGH DRAFT TRANSCRIPT

RECORDER'S ROUGHT DRAFT TRANSCRIPT
ALL PENDING MOTIONS; SENTENCING [VERDICT 07/16/13]

ERIKA D. BALLOU, ESQ.
DAVID WESTBROOK, ESQ.
Deputy Public Defenders

1671

1 Las Vegas, Nevada - Wednesday, October 30, 2013, 10:18 a.m.

2 * * * * *

3 THE COURT: Case number C272657, State of Nevada versus Anthony Castaneda.

4 The record will reflect the presence of Mr. Castaneda in custody.

5 MR. WESTBROOK: Good morning, Your Honor. David Westbrook, Erika Ballou,
6 on behalf of Mr. Castaneda.

7 THE COURT: This is on the State's motion to strike offer of proof regarding
8 defendant's motion to call a computer expert. As well, there appears to be a countermotion
9 to reconsider the defendant's motion to call an expert witness in rebuttal, although that does
10 not show on the calendar. It's in the -- in Mr. Westbrook's response -- the memorandum I
11 should say.

12 MR. WESTBROOK: And, Your Honor, if you'd like to retreat that as a reply to the
13 State's answer, they were two ships passing in the night as far as the filing goes.

14 THE COURT: Yes, it seemed.

15 MR. WESTBROOK: Yeah. But, you know, if you want to appropriately consider
16 that as a reply, essentially what I do in that is I -- when I was in court -- let me explain what I
17 was doing. When I was in court, Your Honor suggested that you would have rather seen my
18 offer of proof as a motion. My position was that under the law it didn't have to be a motion,
19 but I wasn't able to give you either, number one, a precise time when you said that you
20 approved filing of the offer of proof, or, number two, I couldn't recall a statute in that
21 motion, which I ended up retitling as a motion because I was remembering that conversation
22 that we had in court, I'd offer the statute and then I went through the JAVS recordings and
23 listened to it all over again, and I was able to identify the three places where I said that I was
24 gonna be filing an offer of proof and in the one place where the Court said okay I think was
25 the quote; it's in that motion.

1 And then the fact that there was never an objection to the offer of proof, and
2 there was never an indication I wouldn't get the file. So however you want to treat that, it's
3 all topical and on the same topic that we're on today.

4 THE COURT: Very well. And by that I do not mean I agree with everything you've
5 said, just as when I say all right, which I have now realized I say constantly, as well as okay,
6 I tend to say that as a transition or in the same way that President Obama says well now
7 before he says almost anything. So I reviewed the JAVS as well, so all right, when I
8 reviewed that what I saw was that when I said all right to you, it was one of those transitions,
9 it was not saying to you that I was acquiescing in what you were putting for, which was that
10 you were going to file an offer of proof after the trial was over. I can't really stop you from
11 filing anything that you want to file, no matter what I think of its merits, et cetera, but I can
12 say and make a record of the fact that this offer of proof, which I wanna ask you about
13 further --

14 MR. WESTBROOK: Sure.

15 THE COURT: -- is not going to be marked as a court exhibit or be part -- for the trial
16 or be considered a part of the record of the trial for purposes of appeal, because it didn't
17 happen at the time of the trial, and I made an extensive record outside the presence of the
18 jury that pointed out the fact that you had not yet retained an expert, so your motion was to
19 be allowed to call a rebuttal expert, and I pointed out, well, you don't have the rebuttal
20 expert, so your motion to be able to recall or call a rebuttal expert that you hadn't noticed,
21 that you hadn't retained, and didn't have any offer of proof of, was not something that I
22 could or would grant for all the reasons that I stated on the record at the time. So you can't
23 really come in now and say, uh, this expert that I retained or consulted -- it's unclear to me
24 which -- but after the fact is now my offer of proof that you based your ruling on during the
25 trial. You can't do that. You may have it for some other purpose. I think I even discuss that,

1 post-conviction purposes, what have you. But let me also say that I was less than happy that
2 you had cited as authority for your ability or actually as authority for the assertion that the
3 Court must accept an offer of proof, a written offer of proof, by citing to NRS 398.165,
4 which, Mr. Westbrook, did you read that statute before you cited it? Did you actually look
5 that statute up?

6 MR. WESTBROOK: I quoted the entire thing in the brief.

7 THE COURT: All right. So you understand that it is contained within the
8 intercollegiate athletics chapter.

9 MR. WESTBROOK: No, I didn't actually, Your Honor, because I got it directly off
10 of Westlaw.

11 THE COURT: Okay. So you might --

12 MR. WESTBROOK: I didn't have access to the book.

13 THE COURT: All right.

14 MR. WESTBROOK: So I apologize for that, but it doesn't mean it's not accurate.
15 What --

16 THE COURT: All right.

17 MR. WESTBROOK: -- the Court can't deny --

18 THE COURT: No, no, no. Stop. Okay. So I'm somewhat troubled by the fact that
19 you continually like to make objections saying that the State is misleading the Court about
20 things and then that you would cite apparently through the neglect of looking at the statute.
21 The fact that it was in chapter 398 might have clued you in that it might not be relevant and
22 that you might -- you don't need to look this up, and, you know, you are, as you pointed out,
23 familiar with the Internet. So I would advise you to load on your computer the Nevada Law
24 Library, which is complete statutes Online, not the annotations, but the statutes are there.
25 And so and you -- if you had looked, you would have seen that this deals only with

1 proceedings under this chapter, and proceedings are defined under this chapter as being any
2 proceeding by a national collegiate athletic association or an institution involving an
3 institution located in this state or persons associated with an institution located in this that
4 may result in the imposition of a sanction for a violation of a rule of a national collegiate
5 athletic association, including any related investigative action. So it is completely an
6 apposite to this case.

7 The other thing that I'd like to point out is that you requested that I consider
8 this a motion to reconsider under EDCR 2.24, which, if you'd read the rule, you see is --
9 limits you to making such a motion within 10 days of the order. Obviously, this trial
10 happened many, many months ago. Additionally, your -- you indicate that since a verdict
11 has already been rendered, the Court's decision to reverse the earlier ruling would result, by
12 necessity, in a new trial. So I would refer you to NRS 175.381, which, if you had wanted to,
13 you could have filed a motion for judgment of acquittal after a verdict of guilty, as long as
14 you had done it within seven days after the jury was discharged, and that motion could have
15 included the motion for a new trial. But since that motion was never filed, you don't -- you
16 cannot file a motion -- such a motion, and so that is denied.

17 I'm just somewhat disappointed since I am -- I know that you are -- you have
18 exceptional skills as a lawyer, that you would file this. I'm just disappointed.

19 MR. WESTBROOK: Your Honor, may I explain what happened with that?

20 THE COURT: Yes.

21 MR. WESTBROOK: I appreciate you saying I have exceptional skills as a lawyer.
22 What I don't have is exceptional access as a lawyer. At the Public Defender's Office I have
23 not, during my entire time there, gotten a new computer, which I've been there now for nine
24 years. My computer is this little plastic box, and sometimes it works, and sometimes it
25 doesn't. The reason why I wasn't able to see the header on this, Your Honor, otherwise I

1 never would have cited to it, is because I prepared this motion on my telephone because my
2 computer is down and has been down for weeks. I can't get a new one. I can't get it fixed.
3 It's a joke. I had to purchase a computer on my own with my own money, bring it into the
4 office, and have it set up so that I could have a computer in my office. We've apparently got
5 a closet full of replacement -- excuse me, hiccups -- a closet full of replacement computers,
6 which, for some reason, can't be given to us. No one I know of in the office has ever gotten
7 a new computer in the last nine years. We have garbage equipment, Your Honor, and I
8 wasn't able to look at it. It's embarrassing that this would be cited, but when I look it up on
9 my phone -- and this is not even the phone I'm looking it up on. This one actually has a big
10 screen. My other one has a little, tiny screen. When I'm looking it up on an iPhone,
11 unfortunately, I wasn't able to see the header. I was trying to do what the Court asked and
12 file this as a motion. But, to be honest, Your Honor, never once in all the times I've made an
13 offer of proof has anyone ever suggested that I don't have the right to make an offer of proof.

14 THE COURT: You can make an offer of proof during the time of the hearing because
15 what's the purpose -- think about it. What's the purpose of an offer of proof? It's the time
16 for you to say this is what I believe the proof would be if I'm allowed to submit it. So it's to
17 enable the Court to make a ruling at the time, so filing an offer of proof after the trial is over
18 is not very helpful.

19 MR. WESTBROOK: I think I understand the misunderstanding, Your Honor. I'm
20 not asking the Court to consider this. I -- we titled it as a motion because, again, the Court
21 asked me to file a motion, and I wanted to comply with the Court's order. Okay? And that's
22 why I said right now you can retreat it as a reply. I don't -- it doesn't matter. The issue here
23 is not to have the Court change its ruling. The issue and the reason why I filed it as an offer
24 of proof is because I made these exact representations as to what would be said if I was able
25 to contact an expert. And for the record this expert had already been retained on a different

1 standard. We were -- I guess he was reviewing the original report by the officers when it
2 first came out. Leon Mare was already retained in this case. I had already spoken to him in
3 this case. I wasn't sure he was the exact expert that I would use because I wasn't sure if I
4 needed specifically a Microsoft Windows engineer, and I didn't know if that was his specific
5 frame of expertise, so I didn't say him by name, but he had already been retained. He just
6 hadn't been retained to review the testimony of Detective Ehlers and to comment on it in a
7 report.

8 Furthermore, as I said on the tape when I was making my record, that I wasn't
9 going to have time to retain him prior to closing argument, and since the Court had already
10 ruled, you know, I wouldn't be able to spend the time doing it because it would be for
11 nothing. I wouldn't be able to present his evidence at trial so there would be no reason to do
12 it. And, number two, at the Public Defender's Office we can't just hire experts unless there's
13 a reason for it, and there wouldn't be a reason for it if my client was found not guilty.

14 So all -- the only reason that I was talking to an expert in the first place was to
15 complete the record that I had already made. I said that Detective Ehlers was giving
16 misinformation, that he was talking about the things that weren't in his report such as this
17 business about unallocated space and whether or not it's proof of actual action on the part of
18 Mr. Castaneda. I said all those things, and then what I did is I went and did what I told the
19 Court what I was gonna do, I went and got my expert to file a report. The purpose of the
20 report is to show prejudice, Your Honor. I was denied the right -- what I believe is the right.
21 The Court doesn't believe it's a right. I was denied the right to call an expert on my client's
22 behalf in rebuttal, in response to something that the State's expert said that wasn't in any
23 report and I couldn't have prepared for.

24 I made my record at the time for the Court's consideration about what would
25 have been said by an expert. Everything I said in front of the Court was confirmed later by

1 the actual expert that I retained and got permission to pay for, okay? So --

2 THE COURT: Let me ask you about --

3 MR. WESTBROOK: -- that shows prejudice.

4 THE COURT: -- Exhibit A --

5 MR. WESTBROOK: Okay.

6 THE COURT: -- which is attached to your offer of proof regarding defendant's
7 motion to call a computer expert to rebut --

8 MR. WESTBROOK: Yes.

9 THE COURT: -- Detective Ehlers' surprise trial testimony. So Exhibit A --

10 MR. WESTBROOK: Yes.

11 THE COURT: -- who prepared that?

12 MR. WESTBROOK: I sat down in an office with Leon Mare and we prepared it
13 together.

14 THE COURT: So you typed this up.

15 MR. WESTBROOK: Yeah, with him sitting next to me at the computer.

16 THE COURT: All right. And so, obviously, you knew that the box -- I'm referring
17 you to box 3 -- that it would be improper for an expert witness or, for that matter, any
18 witness to testify as to the credibility of another witness, correct?

19 MR. WESTBROOK: He's not talking about the --

20 THE COURT: It says --

21 MR. WESTBROOK: -- credibility of the witness.

22 THE COURT: -- that --

23 MR. WESTBROOK: He's talking about the --

24 THE COURT: -- it is implausible to the point of absurdity to believe that the
25 detective would remember whether virus definitions were updated three years after the fact.

1 How is that not a comment on another witness's credibility?

2 MR. WESTBROOK: It's a comment on the massive undertaking of looking at
3 computer code and visually inspecting it to determine whether or not there are viruses. It's
4 the process that he's criticizing. No person can do it. It's impossible. That's why we have
5 virus scanners, and that's what the next sentence explains. In fact, the process of discovering
6 that information is very complicated and would have to have been documented if it had
7 actually been done. And the reason I used the word that's completely absurd is because my
8 expert who was sitting next to me said: That's completely absurd.

9 THE COURT: But he would not be allowed to make such a comment in front of the
10 jury.

11 MR. WESTBROOK: He wouldn't be allowed to say that once the other expert said --
12 that the other expert is absurd. But he wouldn't be able to say that -- I wouldn't be able to
13 ask him a question, such as is it possible to do a visual inspection of a computer registry or a
14 computer and determine or exclude whether or not there is a virus; and he would say no,
15 that's an absurd statement; it's impossible for anybody to do that; that's the reason why we
16 have virus scanners. That's completely acceptable in my opinion.

17 THE COURT: But that's not what this says. This says, the first sentence: It's
18 implausible to the point of absurdity to believe that the detective would remember --

19 MR. WESTBROOK: No person could remember --

20 THE COURT: -- something.

21 MR. WESTBROOK: -- because he's a human being, the detective. And I don't
22 know if he would have said exactly these words.

23 THE COURT: Well, there are --

24 MR. WESTBROOK: He might have said any person.

25 THE COURT: There are human beings who could remember everything that ever

1 happened in their lives. They're a small minority --

2 MR. WESTBROOK: Marilu Henner.

3 THE COURT: -- but correct, you know. It's -- I don't know if I'd want to have such
4 a gift or -- it would be a curse, but there are people, so obviously that's why witnesses aren't
5 allowed to talk about the credibility of other witnesses.

6 MR. WESTBROOK: Then the State would have objected and the Court would have
7 sustained.

8 THE COURT: I just wanted to know whether it was your expert or you put that in, in
9 there.

10 MR. WESTBROOK: It was Mr. Mare, and the word absurd is exactly what he said.

11 THE COURT: All right. So as I said, you could file this for whatever it's worth. I
12 don't know that it's worth anything, but it's not -- I'm not allowing you to file it as part of
13 the trial record 'cause it didn't happen at trial, so I just want the record at this point to be
14 clear that the Court did not consider this at the time of trial because this didn't exist at the
15 time of trial.

16 MR. WESTBROOK: Of course. You wouldn't have been able to, but it still has to
17 be filed as a record to go up to the Supreme Court as a post-trial motion or as a post-trial
18 offer of proof. That's what it is, and it was filed here prior to --

19 THE COURT: I can -- I don't care what you do on appeal, or how you handle that.
20 That's all -- it's all gonna be part of -- the Supreme Court will decide what is appropriate for
21 consideration, the record on appeal, and I don't need to comment on that one way or the
22 other. I'm just saying that I'm not admitting this as an exhibit in the trial, a Court exhibit or
23 anything else. I'm not going to strike it from the record so that there is a full -- because I
24 don't think that -- other than the rule that allows us to strike things that shouldn't have been
25 filed in the first instance because they should not have been accepted for filing by the clerk's

1 office. We will get things that are filed that are without merit or even crazy things. It
2 happens, but you don't strike 'em so that it's not a fugitive document necessarily in my
3 opinion, but it's not an exhibit to the trial.

4 MR. WESTBROOK: Okay. Then --

5 THE COURT: Am I clear?

6 MR. WESTBROOK: It's not because I'm not sure what -- you're saying you're not
7 rejecting it, but you're not filing it.

8 THE COURT: I'm not going to strike it out of the record.

9 MR. WESTBROOK: So it's in the record.

10 THE COURT: It's in Odyssey. It's part of --

11 MR. WESTBROOK: Okay.

12 THE COURT: -- the record in this case.

13 MR. WESTBROOK: That's fine.

14 THE COURT: It's just not part of the record of the trial.

15 MR. WESTBROOK: Not a part of the record of the things the Court considered prior
16 to making your ruling, is that -- is that a correct statement?

17 THE COURT: Correct. And it wasn't -- this document is not part of the trial
18 proceedings. It's something that you filed after the trial occurred, after the verdict came in.

19 MR. WESTBROOK: Okay.

20 THE COURT: That's the record I'm making. It is what it is.

21 MR. WESTBROOK: Post-verdict offer of proof being filed as a defense exhibit or
22 something like that.

23 THE COURT: Whatever you want to call it.

24 MR. WESTBROOK: Okay.

25 THE COURT: And I am going to try and work on saying all right, since now I

1 understand that I say it way too much.

2 MR. WESTBROOK: All right.

3 THE COURT: Don't. I've already said it about 20 times this morning.

4 MR. WESTBROOK: You know, I looked it up too, and I found out that I was under
5 the impression that all right was one word, and it's not, it's two words, A-L-R-I-G-H-T. I
6 think it's been -- it's in the sort of vernacular now. I think the folks over at Oxford should
7 probably take a look at that.

8 THE COURT: It's probably in there as an alternative sense, alternative spelling.

9 MR. WESTBROOK: It might be.

10 I wanted to correct something else, Your Honor, before I went on because
11 when I do make a mistake --

12 THE COURT: Yes.

13 MR. WESTBROOK: -- as you just pointed out, Your Honor, I always correct it on
14 the record. Yesterday I said that under Wilson that there were no charges of possession, and
15 that was incorrect. There were four possession charges, as counsel stated, along with four
16 production charges. And I was inflating the fact patterns of two different cases. The point
17 though and the analysis in the brief is still correct. The issue of whether or not the four
18 possession charges had to be focused on a unit of possession was never decided by the Court
19 'cause it was never addressed, and for obvious reasons. The production count was obviously
20 far more important to trial counsel, and so the only record that they made involving
21 possession -- they didn't argue --

22 THE COURT: Mr. Westbrook, I think you're going beyond just correcting --

23 MR. WESTBROOK: Oh, I am. I'm just saying --

24 THE COURT: -- a mistake.

25 MR. WESTBROOK: -- that they --

1 THE COURT: I already -- I've ruled on that motion already.

2 MR. WESTBROOK: I'm not asking you to rerule, Your Honor. I'm just -- I'm
3 pointing out my mistake, Your Honor, that's all I'm doing.

4 THE COURT: Right, and you just said, but now you're rearguing the motion.

5 MR. WESTBROOK: I'm not, Your Honor. If I could just get two more sentences in,
6 I'll be done.

7 All I'm saying is that they didn't decide possession on the same basis that they
8 decided production, and they -- and also they didn't change production from 12 to 4, as I
9 said. They changed it from 4 to 1, determining that because it was the same unit of
10 prosecution, it can only be one charge. And the only argument they made on possession was
11 that possession was a lesser included of production, which is not true. Possession is not a
12 lesser included.

13 THE COURT: And so how is that a correction of your mistake?

14 MR. WESTBROOK: Because what I had said before was that possession wasn't in
15 the case, and that was totally wrong, and I apologize.

16 THE COURT: All right.

17 MR. WESTBROOK: I didn't have the case in front of me at the time, and I said that
18 too. I said I don't have the case in front of me, but.

19 THE COURT: I understand. Are we ready to proceed to sentencing?

20 MR. WESTBROOK: Yes, we are, Your Honor.

21 THE COURT: State?

22 MS. ANTHONY: Your Honor, I'm going to be requesting a sentence of 24 to 60 on
23 count 1, and a 24 to 60 on count 2. The remaining counts can all run concurrent.
24 Essentially, at the end of sentencing I'm going to be asking for a 4 to 10 total. That's the
25 idea of my request for sentencing. First off, the defendant still hasn't taken responsibility for

1 his possession of the child pornography. The child pornography was located on three
2 different mediums -- his USB stick, his laptop, and his main shuttle computer. In addition,
3 the defendant did possess the images of bestiality, and the reason I bring that up is because
4 those were -- he admitted those images and he admitted those images were his, and those
5 were found in the same computer where the child pornography was found, in the same
6 folders where the child pornography in this case were found.

7 Additionally, the defendant cannot follow any orders of the Court. First off, on
8 May 2nd, 2011, the defendant was ordered not to operate any computers while he was out of
9 custody, no Internet, no modem. And then again, after the verdict on July 16th, 2013, when
10 the defendant was taken into custody as part of the OR motion, the defendant himself says:
11 Well, I have a job now. It involves computers. And part of his original -- I'll give you -- let
12 you out of custody -- and not by Your Honor, it was another judge -- was no Internet, no
13 computers, no modem. He clearly didn't even follow it while he was awaiting sentencing.

14 And this case isn't a victimless crime. The children in these photographs, they
15 were children at the time the photographs were taken, and by no means am I saying that the
16 defendant is the one who took these photographs. The children in these photographs, if they
17 haven't already, they have grown up to become women, and they know that people, men,
18 such as the defendant, are looking at them, looking at them as children, and it's a feeling in
19 fact that they cannot change. They have sought counseling, and this is -- I did send a letter
20 to -- it was The New York Times of one of the victims actually in our case to defense --
21 counsel as part of discovery in this case. The victims -- they have sought counseling, and
22 they have to live with this fact every day. The fact that some of these series are the most
23 popular in child pornography that we have on the Internet, it makes it even worse. And the
24 reason these children were victimized then, and they now continue to be victimized, is
25 because of people like the defendant, people that have this, they download it from the

1 Internet, continue to look at it, which provides, you know, a demand for it, is people like this
2 defendant. He possessed it. He had it. He viewed it. And these are the women that have
3 been victimized. There were 73 images of child pornography that were located on the
4 defendant's computers. They were identified as child pornography through the National
5 Center of Missing, Exploited Children, and 21 of them were identified as serious, and we
6 have some of the most prevalent series that were in this case. Defense actually stipulated
7 that they were children because, for whatever reason, that is part of how this case played out.
8 But we know who these victims are. We contacted, spoke to detectives who identified them,
9 and there were 25 of them that were identified -- or 21 of them that were identified of a
10 series, and so that the record is clear, we only charged 15. We narrowed it down, and we
11 charged 15, and he was found guilty of all 15 of them.

12 So the most important thing in this case is that it's child pornography and it's
13 not a victimless crime, and we're gonna ask for a total sentence of the 4 to 120.

14 THE COURT: Mr. Castaneda, before your attorney argues on your behalf, would you
15 like to address the Court?

16 THE DEFENDANT: Yes, I would.

17 THE COURT: Please.

18 THE DEFENDANT: My name is Anthony Castaneda. I'm a U.S. Army Vietnam
19 veteran, trained as an EMT paramedic, a combat engineer, and an THE CLERK: -ray
20 technician.

21 THE RECORDER: Mr. Castaneda, can you just scoot over just a touch. Thank you.

22 THE DEFENDANT: Excuse me.

23 MR. WESTBROOK: And could you go ahead and start that over. I want to make
24 sure it's on the record.

25 THE DEFENDANT: Okay.

1 THE RECORDER: Think it will be.

2 THE DEFENDANT: My name is Anthony Castaneda, and I am a U.S. Army
3 Vietnam veteran, trained as an EMT paramedic, a combat engineer and X-ray technician.
4 After the Army I supported my family on the GI Bill and graduated Cal State Fresno in 1997
5 with a Bachelor of Science in industrial technology, manufacturing digital system. For the
6 last 25 years I have been a professional computer system administrator for ARCO, Walt
7 Disney, and Technicolor in the corporate world, UNISYS, the College of UNLV, College of
8 Engineering, and IBM as a contract consultant for government banking academic and
9 entertainment systems. I am sober, safe, smart, responsible, and professional. I kind of have
10 to be. I have no prior felony convictions, no history of drug or alcohol abuse, and no sexual,
11 financial, or social misconduct record. I am, Judge, nonviolent, low risk to reoffend, and
12 recommended for community supervision and probation. I still insist I am innocent of these
13 charges and plan to appeal and overturn this conviction. From the DA witness lying on the
14 stand with impunity, to contradict refiled evidence, to glaring errors by the DA and DA
15 forensic team, to my initial PD's lack of computer forensic experience, I feel I have many
16 reasons I can appeal successfully and resume my professional life. Probation would help me
17 do so.

18 I'm sorry for the victims of child porn, but they were victimized by someone
19 else, somewhere else, and at some other time. Many of the NCMEC images -- NCMEC
20 means National Center For Missing and Exploited Children -- are from other states, other
21 nations, and other cultures, and many predate the Internet and computers by decades. I had
22 no part in victimizing anyone. I joined no clubs or Web sites, never produced, distributed, or
23 traded images or videos, don't chat Online, don't take compromising pictures of myself or
24 anyone else, including the eight children who lived in my house while I was working in other
25 states and across the nation. I don't fit the profile or activity profile of a child porn felon,

1 and I believe the DA knows it.

2 Eight preteen girls and seven adults lived in my house and apartment and used
3 my home computers during 2000 -- to 2010 while I travelled to other states and cities. Each
4 of these 15 people should have seen these images every day for three years while they did
5 their homework, sent E-mails, built resumes, and visited social Web sites. None of 'em ever
6 did, including the DA's own witness, and none of 'em ever told me anything of seeing these
7 images. I tried to call two witnesses to say so. My PD asked and noticed two witnesses, and
8 I tried to produce system backups to prove these files never existed on my home systems in
9 2007, 2008, when my household did not have Internet service, and I was travelling in other
10 states. I was never presented -- I was told by letter from the PD office that under mutual
11 discovery I had to present this evidence 60 days before trial when I working in Iowa, 1,500
12 miles away, so they were never presented.

13 The Court is allowing a think venire of science provided by forensic software
14 to pretend it is fact when it is really just an illusion of fact. None of these file dates are
15 carved in stone, and falsifying them is trivial to do. They all come from the system date.
16 Change the system date to 2007 and any file you write in any device you connect is dated in
17 2007. It's that easy and requires no special software, utilities or computer skills. You can
18 Google the process of faking evidence with a computer. It's just guilt by accusation and
19 association. The only problem is my accuser admitted she lied on the stand. Her story is
20 contradicted by the evidence she supplied, and the only association is 2006 ID files, obsolete
21 in 2006, copied with 2008 child porn files on a USB stick seized in 2010, two years after the
22 last file and four years after my ID went obsolete.

23 My only crime was to come home and evict my housesitter, that's it. Seven --
24 eight days later she submitted these child porn files on a USB stick, and to me, DA forensics
25 experts managed to go through that without discovering that one of the files was written the

1 day before she handed it in to -- when only she had custody of the USB stick.

2 Since then my house was burglarized, my two cars were stolen, and rocks
3 thrown through my window and trash into my pool, most of that while I was in CCDC for 30
4 days in 2011 so Metro PD and the DA notified somebody I was under arrest. Eventually I
5 lost my house based on offering free housing to homeless people, which proves no good
6 deed goes unpunished. I support my family, extended family, my community, and church. I
7 travelled extensively at my own expense and am reimbursed at long intervals, so if you're
8 wondering where my financial resources went, that's where they go.

9 Probation would help me and many others out of a tight spot in helping
10 recover. I wanted to thank the Public Defender's Office because they've had to really go to
11 school and learn some computer forensic basics, and I think they were surprised by many of
12 the things we've learned in the process also. Mr. Westbrook and Ms. Ballou have really
13 learned a lot in a very short time, and I'm surprised that -- I will -- my main surprise was that
14 something which could be so obvious to me was so hard for everyone else to understand. So
15 I'm sorry, but I'm not gonna apologize for this because I was in other states. I was in
16 other -- I was travelling. I was -- I'm a computer professional, and the idea that I was a
17 pervert from 2007 to 2008 and not before or since is just kind of -- it ignores reality.

18 THE COURT: Thank you, sir. Of course, I don't expect you to -- you know, you
19 pled not guilty. You're entitled to a trial, and you had the trial. It's the jury who decided
20 that you were guilty, and so I don't expect you to concede at this point.

21 MR. WESTBROOK: And I know you won't hold that against him, Your Honor.

22 THE COURT: No.

23 MR. WESTBROOK: And I appreciate it. I mean, it's something that we advise
24 clients all the time. Judges want to hear you emote and to accept responsibility. But you sat
25 through a whole trial, and you know what his position is. I know you're not gonna hold it

1 against him that he still maintains his innocence and will always maintain his innocence. I
2 maintain his innocence, and I know that Mr. Castaneda just thanked us and our office, but we
3 let -- I let him down. We let him down. People used to think the world was flat, and they
4 were sure of it, and then someone pointed out that it was round, and they couldn't wrap their
5 heads around it. This computer thing is exactly the same.

6 The State will present people who will come up here and sit on the stand and
7 they'll say that because their software says something, that it's the truth, and they'll exclude
8 any other explanations or options that disprove their thesis, just like people used to do when
9 the world was flat. But it's just not reality, and we didn't do a good enough job of displaying
10 that reality to the jury. We didn't present a case, and I know we're not supposed to have a
11 burden of proof, but I feel like in this case the jury wanted us to prove it, and I think we
12 should've prove it, and, furthermore, I think we could've prove it.

13 So Mr. Castaneda may be thanking me, and I appreciate it, but I screwed Mr.
14 Castaneda, we all did, because we didn't do our job properly. We didn't do enough to
15 present a defense to show that what was being said on that stand by Detective Ehlers was not
16 accurate. That's the reason why I made offers of proof and I filed them, to show that there is
17 another option here, an option that shows that he's not guilty. And what Mr. Castaneda says
18 is true.

19 THE COURT: Mr. Westbrook, I -- you'll be able to file your post-conviction
20 motions, appeals, but really you need to address sentencing.

21 MR. WESTBROOK: I'm getting to that, Your Honor.

22 THE COURT: Okay. Thank you.

23 MR. WESTBROOK: And what Mr. Castaneda says is absolutely true. I think we've
24 all seen enough cases where this kind of a charge is made to know that people don't just
25 wake up one day and then change proclivities, they don't. Somebody who has this type of

1 material hoards it and views it a lot. There's no evidence of that happening. It doesn't just
2 sit on -- if someone is actually putting it there on purpose for their own use, it doesn't just sit
3 on a hard drive untouched for a long time. I mean, the only real direct evidence of access
4 that we have is the access that could have only have occurred when Tammy and Michael had
5 the thumb drive because you had a file changed on that day. I mean, that's it, and so I don't
6 believe that Mr. Castaneda is a threat to anybody. I don't believe he'll download any child
7 pornography because I don't believe he did it in the first place. I think this -- there's
8 numerous explanations and numerous different people who could have been responsible
9 from this -- for this stuff, from 2007 through 2010, and I don't think it was Mr. Castaneda.

10 So in determining whether or not to give somebody probation, which is what
11 we're asking you to do, we're asking you to follow the recommendation of P&P as far as
12 probation goes, although I think that their recommendation of 15 consecutive sentences was
13 grossly out of line. But we're asking you to give him probation because he is the ideal
14 candidate for probation. First of all, I don't think he's a danger to anyone, and never has
15 been. As P&P pointed out, this is a nonviolent offense, and as P&P pointed out, he's a good
16 candidate because he's employable. He's a veteran. He is trained in multiple disciplines,
17 including computers, but also as an EMT, a paramedic. He's somebody who is employable,
18 will pay his fees on time, and will follow the instructions of P&P. He doesn't have to
19 divorce himself from all of his, you know, ex-felon relatives 'cause he doesn't have that; it's
20 not an issue for him.

21 He is somebody who can succeed and will succeed. It costs us \$130 a day last
22 time I got an estimate to put somebody in prison and keep 'em there. It's important if
23 somebody is a danger. He's not a danger, and I think he deserves an opportunity, Your
24 Honor.

25 As far as the terms of his probation, I know that Your Honor doesn't want to

1 stop him from working, and if he has some kind of computer job, I know that there are
2 exceptions that can be carved out with working with P&P for him to be able to do a
3 computer job and still be properly supervised.

4 But if it turns out that he needs to take a job as an EMT or something else, this
5 is a man who can and will work. And it's true, he doesn't have any money right now
6 because when you're fighting a case like this, you tend to lose things, especially when you're
7 in jail, and he was in jail for 30 days during which time his entire financial situation was
8 thrown into ruin, and then he's recently been in jail as well since the conclusion of his trial.
9 But he will start over and he will succeed because he's a hard worker and always has been.
10 So I'm asking this Court to put him on probation and give him that chance to succeed as
11 closely supervised and with whatever terms the Court deems necessary.

12 I appreciate your view on his proclamations of innocence, and I appreciate that
13 you realize that he is going to work and that he needs to continue to work. I believe that we
14 had a long discussion about his need to be able to work. Ms. Anthony referred to it a second
15 ago, but I -- my recollection of that discussion was that the Court wasn't trying to keep him
16 from working, and I think that's still the correct choice right now. He doesn't do society any
17 good in prison, but he actually does society good when he's out. He works. He pays taxes.
18 He helps people. I'm gonna ask him to stop helping people, like taking homeless people into
19 his house because I think that's a bad choice, unfortunately. But as far as working and
20 paying taxes, I'd appreciate it if he does that, and I think the Court would too, and I know the
21 taxpayers would. He's not a danger to anybody, and I'd ask you to give him the opportunity
22 that he deserves. Thank you.

23 THE COURT: All right. So when I'm looking at this case -- and of course there was
24 the evaluation as well, which deemed him to be a low risk to re-event, I also took into
25 consideration the testimony of the investigating detective in the case who -- and I can't

1 remember whether it was on direct, or maybe it was cross, but she indicated that there was --
2 she had -- there was no evidence that she found that the defendant was engaging -- trying to
3 contact children, that he was acting on any pornography, child pornography, that was found.
4 I also want to make clear that my consideration of the sentencing is as to the evidence that
5 was presented at trial and to the charges and not to things that I never saw, that weren't
6 charged, you know. I -- this isn't similar to a case where he's got other charges that are --
7 he's plead guilty to, and he's got a package deal, and I would take something like that into
8 consideration; that's not the case.

9 So I just want to be clear that my sentencing decisions don't have anything to
10 do with arguments by the State that there was more child pornography than was charged
11 because I didn't see any of that, I don't have any evidence of that, and, frankly, I didn't see
12 any of the Exhibits, save the first one when we first started the trial and then had to continue
13 it. I saw one image. Otherwise, because of the stipulation, I never saw any of those images.
14 Seeing one was plenty, and, of course, both counsel all through the trial described those
15 images as horrible, admittedly, both sides, okay, so that's a concession.

16 And as I think I said last time we were in court and talking about the purpose
17 of the statutes that make it a crime to possess child pornography alone, just possession alone,
18 is exactly what I stated at that time, to cut the demand so as not to victimize children in the
19 production of pornography because that's the thing we're really aiming to stop, all right, and
20 that is why the possession of child pornography is not a victimless crime. But I also don't
21 see -- and the detective indicated that she saw no evidence -- that he was producing
22 pornography, that -- child pornography that, in fact, she admitted that the images that were
23 found were extant images, well known on the Internet, et cetera, et cetera.

24 So I take all those things into consideration, as well as the defendant's prior
25 lack of record, as well as his service to our country as a veteran. But I think that the -- I do

1 think that the jury did have sufficient evidence to convict him as they did. So I took all of
2 those things into consideration, and so by virtue of the guilty verdict by jury of counts 1
3 through 15, possession of visual presentation depicting sexual conduct of a child, I hereby
4 adjudge you guilty of those offenses, and in accordance with the laws of the State of Nevada,
5 in addition to the \$25 administrative assessment fee, \$150 DNA testing fee, and the
6 psychosexual fee of \$760, as to count 1 I hereby sentence you to -- and all of the -- all of the
7 remaining counts are the same sentence, and that is 28 to 72 months in the Nevada
8 Department of Corrections, that will be suspended, all counts will run consecutive to count 1.
9 Special conditions of probation -- term of probation will be a fixed term of five years, and
10 the special conditions of probation will, of course, include those mandated by statute NRS
11 176A.410, which I will not enumerate here, but I will be sure is correct in the judgment of
12 conviction because in probation cases we prepare those. I make sure those are prepared
13 correctly.

14 I will also order that if Parole & Probation is approached for the purpose of if
15 you find a job that requires some type of Internet connection or possession or usage, then the
16 Division will need to come back to court and we will set as similar as we did for the
17 provisions if you had been released on bail. We will fashion an appropriate remedy for that.

18 THE DEFENDANT: Your Honor.

19 THE COURT: Yes.

20 THE DEFENDANT: I just wanted to comment that we had spoken before that I
21 couldn't talk -- that I couldn't be on the Internet, and my industry is banking and industrial
22 technology, and they don't allow -- our VPNs don't allow connection to the Internet.

23 MR. WESTBROOK: That's right. It's a virtual private network and not necessarily
24 the World Wide Web --

25 THE DEFENDANT: Yeah.

1 MR. WESTBROOK: -- but we'll cross that bridge when we come to it.

2 THE COURT: We talked all about that, but that was when --

3 MR. WESTBROOK: Yeah.

4 THE COURT: -- in the context of your --

5 THE DEFENDANT: Yeah.

6 THE COURT: -- the job that you thought you had, and I don't what really happened
7 there. But -- and we tried -- we fashioned conditions for that bail that took those things into
8 account. And all I'm saying is that should you have the opportunity or a job offer for such a
9 job that would require you somehow to need changes to this school, we'll cross that bridge
10 when we come to it.

11 Additional conditions of probation, you are to abide by any curfew the
12 Division of Parole & Probation deems necessary. You are to engage in counseling.

13 MR. WESTBROOK: Could I help with the rest though, Your Honor?

14 THE COURT: I know that's a mixed bag, but --

15 MR. WESTBROOK: What's gonna happen though is he's gonna go in and say he's
16 innocent, and they're gonna say: You failed counseling. That's my only concern.

17 THE COURT: Well --

18 MR. WESTBROOK: I understand that --

19 THE COURT: -- I know that, but he can, nonetheless, go through, and that's a
20 recommendation, in fact, by this psychologist who evaluated him, that he enroll in a
21 counseling program that's designed to address his issues. And so that's going to be the order
22 as a condition of probation, is that he'll be -- he'll have to undergo counseling. He'll be
23 signed up for counseling. He's already undergone an evaluation, so I don't think it's
24 necessary for him to undergo an evaluation. Of course, I note, whenever I look at these
25 evaluations, that really all of this is based on what a defendant tells the evaluator. They

1 don't do any independent research to determine whether there are things that are told to them
2 are accurate or not, and so that, of course, may affect the recommendations they make, et
3 cetera. But it is what it is, and he has been convicted by a jury whose found him guilty at
4 this point in time. So I don't think it would hurt him to learn about the issues concerning
5 child pornography, and so I'm gonna order that he undergo such counseling.

6 And, let's see. I addressed -- I'm not going to impose a fine, but I am going to
7 impose a \$150 Public Defender -- what do they call it, the --

8 MS. BALLOU: Indigent defense.

9 THE COURT: Yes, fund, exactly.

10 MR. WESTBROOK: For the record, we would ask that he be relieved from the
11 ability to pay that or the requirement to pay that fund or fee. It's on us. We're fine.

12 THE COURT: Well, he's not relieved. I mean, he's relieved from --

13 MR. WESTBROOK: I understand.

14 THE COURT: -- paying any fine, but he can pay \$150 towards the Public Defender
15 Fund, which, you know, he has, as he is entitled to, participated in representation and will
16 continue to participate and the legislative branch has determined that it's appropriate to
17 assess such a fee, and so that will be done. And he has credit for time served.

18 MS. BALLOU: I calculated 160 days based on the 143 that they had found in
19 additional days that we've continued to sentencing.

20 THE COURT: Let me see 'cause I had calculated as well. They had 143 days, today
21 is the 30th, so I thought that would be another additional 16 days.

22 MS. BALLOU: I had that that was an additional 17; that's why I came up with 170.

23 MR. WESTBROOK: We were including today, so.

24 THE COURT: I'm including today. Am I doing my math wrong?

25 MS. BALLOU: I might be -- you know, I always have to check, and you guys always

1 have to check me. My math was --

2 THE COURT: I think it's 16 because it would have -- the next day after the 14th,
3 'cause they had included it through the 14th, so the 15th --

4 MR. WESTBROOK: The basis for mine is that he's not getting out 'til 2:00 in the
5 morning probably, but that's just me, Your Honor. 159 or 160, whatever the Court's
6 preference.

7 THE COURT: It'll be 159.

8 MR. WESTBROOK: All right.

9 THE COURT: And we'll hope for the best. I just would also like just to say for the
10 record that, had he not been in custody, I probably would have made this amount of jail time
11 a condition of his probation. But since he's already served it, that's why I'm not imposing
12 any additional jail time as a condition of his probation.

13 MR. WESTBROOK: Okay. And, Your Honor, did you say that the underlying
14 sentence is consecutive or concurrent?

15 THE COURT: Concurrent.

16 MR. WESTBROOK: Concurrent. I thought you said consecutive.

17 THE CLERK: You did say consecutive.

18 THE COURT: I did? Well, see --

19 MR. WESTBROOK: Concurrent, okay, good.

20 THE COURT: See how things come out of your mouth that you don't mean. So --

21 MR. WESTBROOK: All right.

22 MS. BALLOU: So they're all concurrent?

23 THE COURT: All concurrent to each other. I'm sorry I did not make that clear.

24 MR. WESTBROOK: Okay.

25 THE COURT: It was my intent to give him the maximum sentence on count 1 and

1 run -- and all the consecutive -- all the counts thereafter, but to run them all concurrent to
2 count 1.

3 MR. WESTBROOK: Thank you, Your Honor.

4 THE COURT: So thank you. Any further -- anything further?

5 MR. CHEN: Not from the State.

6 MR. WESTBROOK: No, Your Honor. Just for the record, I would move to strike
7 my own motion that miscited to the NRS and withdraw it. I recognize that it's the incorrect
8 citation now that the Court's pointed it out. That's all.

9 THE COURT: Since I've already ruled on it --

10 MR. WESTBROOK: Yeah.

11 THE COURT: -- I'm not gonna allow you to withdraw it. We've corrected the
12 record, so thank you.

13 MR. WESTBROOK: Fine.

14 MR. CHEN: Thank you.

15 THE COURT: There being no matters, further matters, before the Court, Court is in
16 recess -- oh, wait, one thing. We're not in recess. Sorry. One other thing, and that is that
17 last week my court recorder received a call from Las Vegas Metropolitan Police Department
18 asking for a transcript of the trial in this matter because they were going to -- they were
19 conducting a, quote, internal investigation. That is all I know about it. I'm just putting it out
20 there because I -- theoretically, it could be some type of Brady material or it could be
21 nothing, but I have no idea, but I feel the Court has an obligation to disclose it, and so I have.

22 MR. WESTBROOK: And then my position would be Metro has an obligation to
23 disclose it since that's also Brady material, if they're investigating something, so. They're
24 investigating themselves, or --

25 THE COURT: Do with it what you will. I don't know. They said internal

1 investigation, so it -- I don't know. That's all I know, but.

2 MR. WESTBROOK: Bizarre. I guess I'll file -- something. I was kinda hoping I
3 could stop filing stuff, as per all of you. Thank you.

4 THE COURT: Thank you.

5 [Proceeding concluded at 11:11 a.m.]

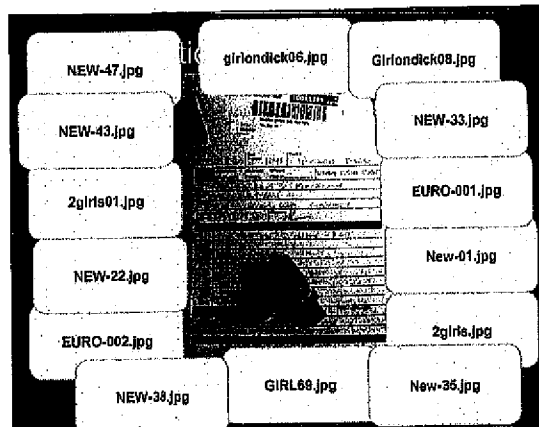
6 * * *

7 ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I
8 acknowledge that this is a rough draft transcript, expeditiously prepared, not
9 proofread, corrected, or certified to be an accurate transcript.

10 

11 FRANCESCA HAAK
12 Recorder/Transcriber
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State of Nevada
V.S.
Anthony Castaneda



Tami and Michael contacted law enforcement the next day

- Contacted Parole and Probation Officer Worthington
- Officer Worthington put them in contact with Detective Tooley
- Detective Tooley takes possession of the USB stick

On the flash drive

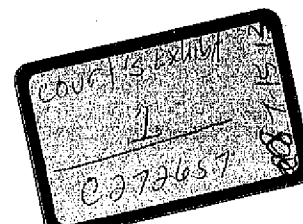
- Many images of pornography
- 9 images of child pornography
- Certificates belonging to Anthony Castaneda

Detective Tooley's investigation

- Get and confirm address of the Defendant
- Has the flash drive forensically analyzed
- Obtain a search warrant to search for additional child pornography at Defendant's house

2205 Beverly Way (Defendant's home)

- Child pornography found on a Shuttle
- Child pornography found on a HP laptop



1699

Defendant's living situation

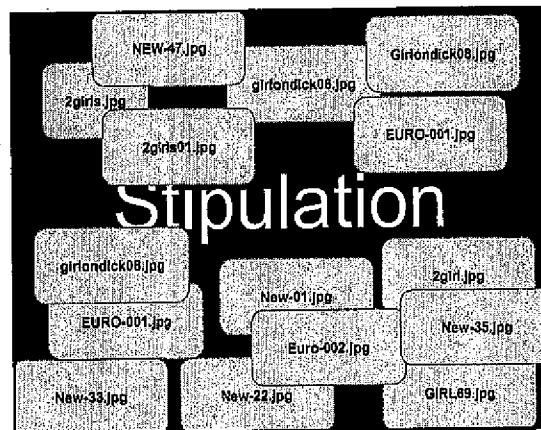
- Mostly lived solo
- Son Craig only lived in the residence for a short period before the house was searched

Every criminal case, the State must prove...

- 1.) Crimes charged
- 2.) Defendant committed the crimes

Crimes charged

- 15 counts of Visual Image Depicting Child in Sex Acts
—aka Child pornography



Exhibits 1 through 15

- Count 1 – 2 girls.jpg
- Count 2 – girlondick08.bmp
- Count 3 – girlondick08.jpg
- Count 4 – NEW-22.jpg
- Count 5 – 2girls.jpg
- Count 6 – euro-002.jpg
- Count 7 – new-01.jpg
- Count 8 – new-35.jpg
- Count 9 – GIRL89.jpg
- Count 10 – new-43.jpg
- Count 11 – New-47.jpg
- Count 12 – EURO-001.jpg or EURO013.jpg
- Count 13 – new-33.jpg and/or girlondick32.bmp
- Count 14 – carved image and/or new-38.jpg
- Count 15 – new-44.jpg

Counts 1 through 15

- Count 1 – 2 girls.jpg
- Count 2 – girlondick08.bmp
- Count 3 – girlondick08.jpg
- Count 4 – NEW-22.jpg
- Count 5 – 2girls.jpg
- Count 6 – euro-002.jpg
- Count 7 – new-01.jpg
- Count 8 – new-35.jpg
- Count 9 – GIRL89.jpg
- Count 10 – new-43.jpg
- Count 11 – New-47.jpg
- Count 12 – EURO-001.jpg or EURO013.jpg
- Count 13 – new-33.jpg and/or girlondick32.bmp
- Count 14 – carved image and/or new-38.jpg
- Count 15 – new-44.jpg

The only question left...

- Did the Defendant knowingly and willfully possess the child pornography?

Possession defined

- Actual v.s. constructive
- Actual = has direct physical control over a thing
- Constructive = has power and intention to exercise dominion and control

Where was the child pornography found?

- On a flash stick from his house
- On a Shuttle desktop computer at his house
- On a HP laptop in his house

- Fou
- Re
- cor

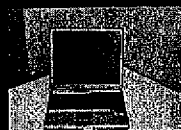


Defendant's own statement

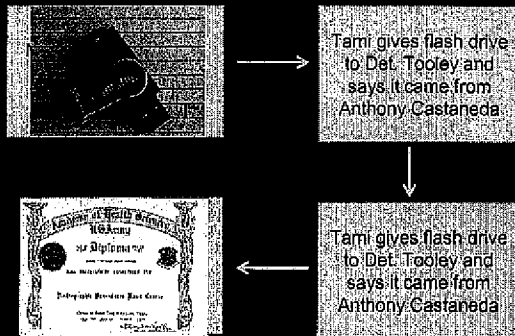
- 6:02
 - Q: Which computer do you mainly use in the house?
 - A: I mainly use the one that's against the wall... The one against the north wall.

Possession of the HP laptop

- HP found in the Defendant's home
- Defendant says he owns



Possession of the Flash drive



Tami and Mike both saw the flash drive with Defendant

- Tami said she had seen the flash drive with Defendant's keys
- Mike also said he had seen the flash drive around the Defendant's house

Credibility of Tami

- 1. Tami gave a statement to police
- 2. Tami testified at a preliminary hearing
- 3. Tami testified here

On cross examination

- Tami asked if she told a different story before
 - Characterized as a "lie"
- The discrepancy was over seeing the flash drive before

At the preliminary hearing

Q: Did you know *right away* that it belonged to Mr. Castaneda?

A: No.

* Then she testified at the preliminary hearing that it was Michael who found the flash drive

She clarified

At the preliminary hearing she was asked...

Q: Do you know how that flash drive got into your tote when you had left Mr. Castaneda's residence?

A: No but my daughter used to take Mr. Castaneda's keys...

1702

What does even the Defendant have to say about it?

- Defendant's statement (1:10:37):
 - A: I have been a source for thumb drives.
 - Q: A source for thumb drives?
 - A: For all the teenagers.
 - Q: They –do they take 'em with them or something?
 - A: Oh yeah.

Defendant's own statement

- Admits the USB drive must be his – never denies it. Says it's reasonable.
- Admits that he would have pornography and his personal documents on a USB drive
 - Mere coincidence???



Knowledge

An act is done knowingly if the Defendant realized what he was doing and did not act through ignorance, mistake or accident

Knowledge

- Direct and circumstantial evidence.
- The evidence shows that the Defendant knew what was on his computer.

Evidence of creating a file folder

- Thumb drive:
 - C:\Adult\girl pics
- Computers
 - Documents and settings/Tony/My Documents/downloads/Adult/girl pics/

All the same folder



- Adult\girl pics



- Adult\girl pics



- Adult\girl pics

Last modified/written date

- The day the image was first introduced/downloaded/obtained
- Detective Ramirez and Ehlers both said in general, last modified/written date stays the same absent a change in the operating system
- Example: downloading an image today would have a last modified/written date of July 12, 2013

File created date

- The day the image was introduced to that computer/USB drive
- Example: I put the image I downloaded on a USB drive tomorrow. Last modified/written would stay the same (July 12, 2013). File created would be July 13, 2013.

Last accessed date

- Date that a file was last used/opened

Child porn on the HP laptop

File	Created date	Modified date	Last Accessed date
2girls01	8/9/07	8/9/07	3/24/10
Girlondick05	8/13/07	8/13/07	3/24/10
Girlondick08	8/13/07	8/13/07	3/24/10
2girls	8/9/07	8/9/07	3/24/10
Euro-002	8/11/07	8/11/07	3/24/10
New-01	8/11/07	8/11/07	3/24/10
New-35	8/11/07	8/11/07	3/24/10
Girl68	8/9/07	8/9/07	3/24/10
New-43	8/11/07	8/11/07	3/24/10
New-47	8/11/07	8/11/07	3/24/10
Euro-001	8/11/07	8/11/07	3/24/10
New33	8/11/07	8/11/07	3/24/10
New-44	8/11/07	8/11/07	3/24/10

Child porn on USB drive

File	Created date	Last written date	Accessed date
2girls01	11/25/08	8/9/07	2/7/10
Girlondick05	11/25/08	8/13/07	2/7/10
Girlondick08	11/25/08	8/13/07	2/7/10
NEW-22	11/25/08	8/11/07	2/7/10
2girl	11/25/08	8/9/07	2/7/10
New-01	11/25/08	8/11/07	2/7/10
GIRL68	11/25/08	8/9/07	2/7/10
NEW-47	11/25/08	8/11/07	2/7/10
EURO-001	11/25/08	8/11/07	2/7/10

1704

Child porn on the Shuttle

File	Created date	Modified date	Last Accessed date
2girls01	12/10/08	8/9/07	4/1/10
Girlandick08	12/10/08	8/13/07	4/1/10
New-22	12/10/08	8/11/07	4/2/10
2girls	12/10/08	8/11/07	4/2/10
Euro-002	12/10/08	8/11/07	4/2/10
New-01	12/10/08	8/11/07	4/1/10
New-35	12/10/08	8/11/07	4/1/10
Gir189	12/10/08	8/9/07	4/2/10
New-43	12/10/08	8/11/07	4/2/10
New-47	12/10/08	8/11/07	4/2/10
Euro-001	12/10/08	8/11/07	4/2/10
New33	12/10/08	8/11/07	4/1/10

Detective Ehlers told the significance of the dates

- Child pornography was downloaded in 2007 – to HP laptop first



- Child pornography was copied to USB in November 2008



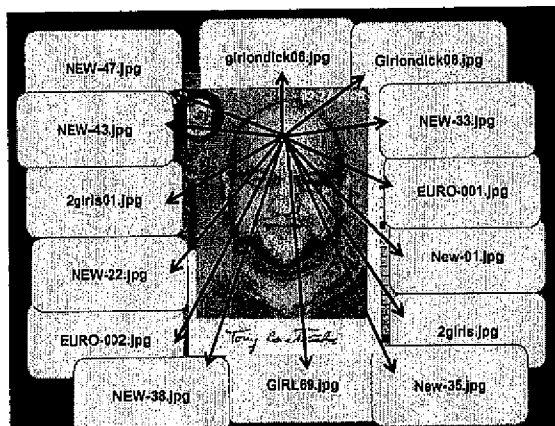
- Child pornography was copied to Shuttle in December 2008

The dates show active use

- What does moving files between computers and flash drive show?
 - Knowledge

Carved images and unallocated space

- Images were deleted.
 - Again shows knowledge

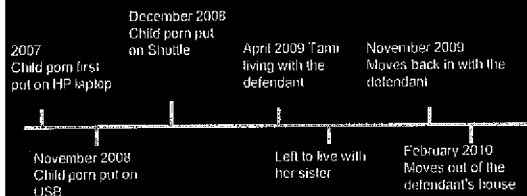


What about Tami?

- Did she set this all up?
- What evidence is there of that?

1705

Timeline



February 7, 2010

File	Created date	Last written date	Accessed date
2girls01	11/25/08	8/9/07	2/7/10
Girldick08	11/25/08	8/13/07	2/7/10
Girldick08	11/25/08	8/13/07	2/7/10
NEW-22	11/25/08	8/11/07	2/7/10
2girl	11/25/08	8/9/07	2/7/10
New-01	11/25/08	8/11/07	2/7/10
GIRL68	11/25/08	8/9/07	2/7/10
NEW-47	11/25/08	8/11/07	2/7/10
EURO-001	11/25/08	2/7/10	2/7/10

Defendant's statement

April 7, 2010

How Defendant says things

---2:01

Q: Do you have any idea why we'd be here today?

A: Nope.

Q: None whatsoever?

A: None whatsoever.

---10:30

Q: When they're searching through, are they gonna come across a lot of adult porn or just a little bit? There's nothing wrong with that.

A: They're gonna—they're gonna- they're gonna come across a good amount, but nothing involving children

Doesn't dispute

---15:21

A: On my USB, ah, devices, I -- I -- I have typically had one of those stored that (personal documents) information

Q: Ok. Well I know that because I have one of your USB devices.

A: Ok.

Q: Ok? And on that USB device it not only has child pornography -- ok --

A: Mm-hm

Q: -- images of child pornography but it also has all of your information

A: Ok.

Q: Your certificates, driver's license

A: Ok.

Q: Your UNLV rebel card

A: Ok.

Q: Your social security card

A: OK

Admit what you can't deny, and deny what you can't admit

• When confronted with USB

-- I have no concept of where it came from 16:34

-- They're not from me. 19:51

-- Just my, ah downloading of, ah, ID information would identify it as me. 24:59

-- I did copy my license onto it. 25:18

1700

Defendant's statement corroborates Tami

- Defendant interviewed April 7, 2010
- 4:10
 - Q: Were they (Tami and co.) planning on living here for a long time?
 - A: No. They had a period of about 2 months where they were waiting for a disability check
 - Q: So most part you're living by yourself
 - A: Most part I was living by myself

Tami's credibility

- At no point does the Defendant tell Detective Tooley that Tami set him up
- At no point does the Defendant tell Detective Tooley that Michael set him up

In fact...

- Despite all the times that Detective Tooley asks the Defendant about the USB drive, he does NOT even ask where she got it from

Question throughout: Where did the child pornography come from?

- "As far as I know it's never been a peccadillo for me" – 23:11
- "As far as I know, I haven't—I haven't even looked— or gone looking for—or— accidentally clicked onto a chil— a child being abused. 23:33
- "I don't even download that "as far as I know." 24:36

Question throughout: Where did the child pornography come from?

- "But as far as I know—I mean I've—I've even loaded a folder of um—of, ah,ah, adult stuff on USB cards. I don't think I've—I don't think it's ever been an interest for child porn. 27:09
- "As far as I'm concerned, that's never been a problem with me either in the physical sense or in the logical sense. 29:34

Defendant's "explanations"

Mistaken download?

- Defer from 1-10 his
- "I y awc at files I do
d ad" 30:00
- S. doesn't like c "ing fr
pea er programs

A:--

- "I do sit
which on will downlo
dor " 36:01
- C across dor
- "I know exactly tem dor
37:25
- Says .3
times. 3b..

Downloaded by individuals

- Michr do not know 907
- T
and Son,
any 13
cca 6
- C "dren?
- A.
- His son C
- Just moved into prior

What about that "virus"?

---1:03:58

Q: So a reasonable person would have to believe that the only way there would be child pornography was that it was downloaded from the internet.

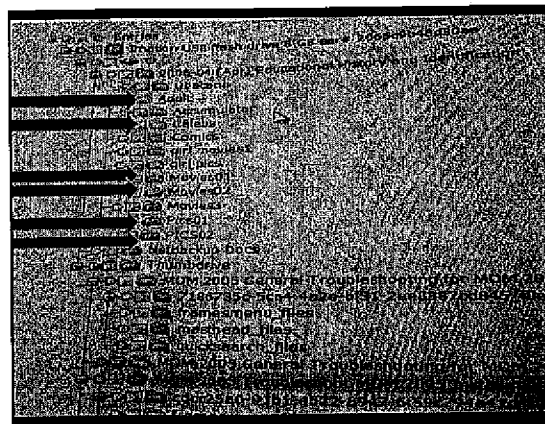
A: Right.

Q: Is that safe to assume at this point?

A: mm-hm

Defendant's knowledge

- Knows the files that are on the USB drive
- Q: What would be some of the names you'd put on 'em?
- A: Just like movie folders, movie one, movie two, pic one, pic two. 44:00
- A: I have an adult folder. I might have a celebrities folder. 1:15:34



1709

What's reasonable?

- Not merely possible...



1710

State of Nevada
vs.
Anthony Castaneda

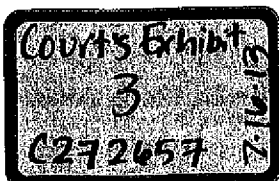
Credibility (#9)

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Tami Hines

- Told Det. Tooley Feb. 8, 2010
 - USB stick belonged to Defendant.
- Prior Hearing:
 - Did you immediately recognize? No.
 - Yes, she knew the USB stick was Defendant's.
- From the witness stand
 - the USB stick belonged to the Defendant.
- The USB images were accessed 2/7/10.
- CONSISTENT!



MIKE

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Difference between lie and a mistake.

That USB stick belonged to the Defendant.

8GB

He found the USB stick/ Last access 2/7/10.

Defendant himself says he copied his Driver's License → USB drive.

Defense wants you to believe:

- Defendant, a computer expert:
 - Didn't know what was located on his USB.
 - Didn't know what was on his Shuttle.
 - Didn't know what was on his HP laptop.
- 25 years of experience
 - Many, Many certificates
 - Network Engineer
 - Internet Engineer
- Works from home on that computer!
- A man who's life is computers.

The Trustees of the California State University
in Recognition of the Faculty of
California State University, Fresno

Honors conferred upon
Anthony Castaneda

the Degree of
Master of Science

in
Industrial Technology/Manufacturing Industries

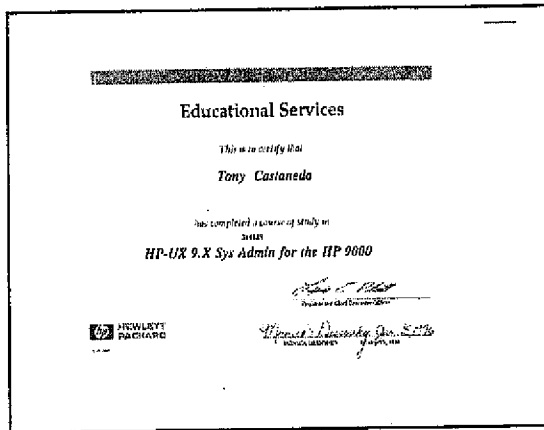
With all rights and privileges pertaining thereto.
Given at Fresno, California, on the twenty-third day of November,
nineteen hundred eighty-seven.

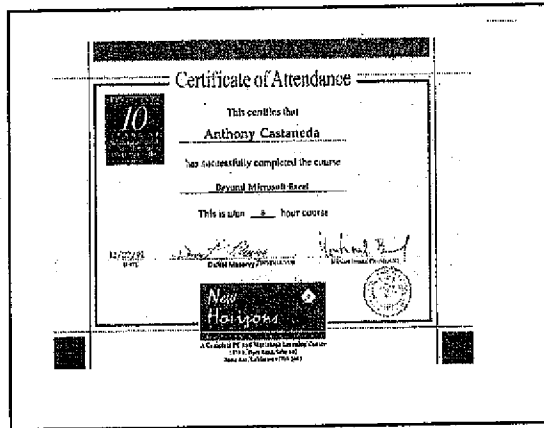


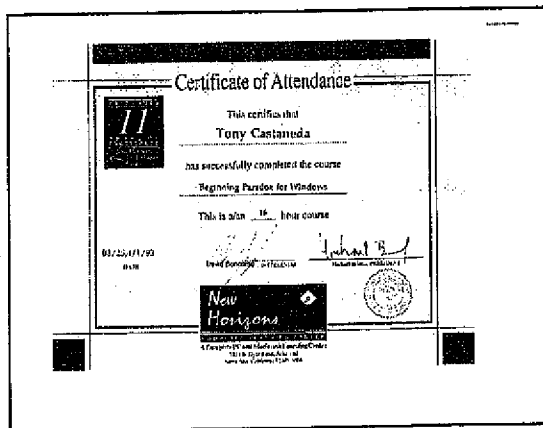
Anthony Castaneda
Vice President

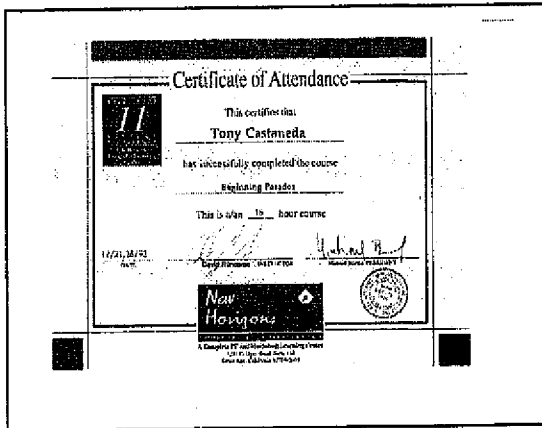
W. Ann Reynolds
President

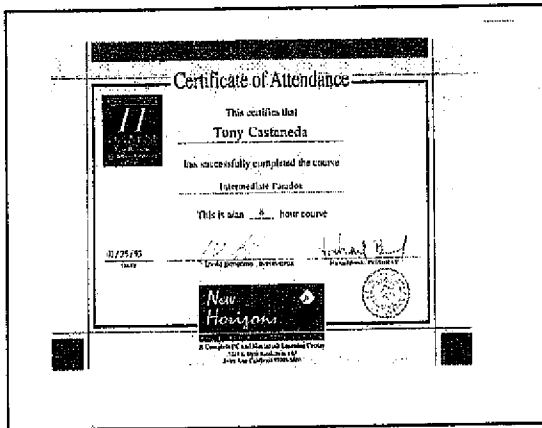


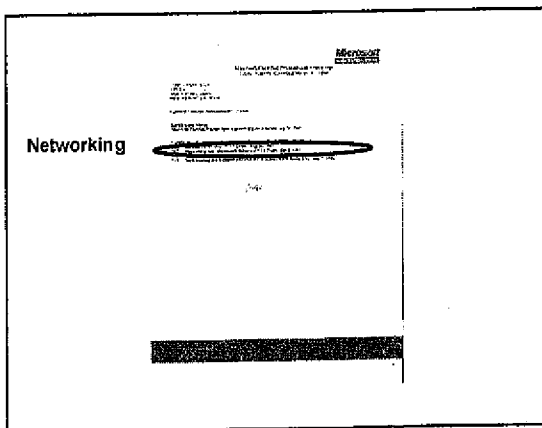




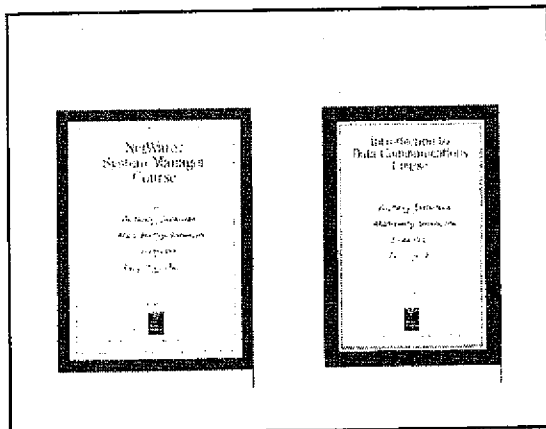








1714



NOT REASONABLE

Reasonable Doubt (#6)

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

Doubt to be reasonable must be actual, not mere possibility or speculation.

What does no evidence mean?

- It doesn't apply in this case.

Det. Ehlers

- Judge his demeanor
- He had difficulty understanding technical questions on both sides
- He was trying to educate the meaning of the data.
 - Can I explain that to you?

1710

Speculation/ Not Reasonable

- Virus Theory: NO EVIDENCE
 - Computer Expert (Defendant)
 - Worked in Computers 25 years
 - Scale of 1 - 10 = 10 highest
 - "I'm an internet engineer."
 - "I'm a network engineer."
 - Had computer protected from virus
 - Virus scanner up and running
 - The Child Pornography was dated back in 2007.
 - This would mean a virus would had to have been on his computer for 3 years
 - Viruses do not delete images
 - NOT REASONABLE → No evidence

Speculation/ Not Reasonable

- Zip File Theory: NO EVIDENCE
 - Computer Expert (Defendant)
 - Worked in Computers 25 years
 - Scale of 1 - 10 = 10 highest
 - Unzip a document
 - Not know where it came from
 - Not look at the contents
 - Defendant says he doesn't use zip files.

- Q: But based off everything you're telling me, you know, obviously the items are not gonna be in clear view that we're looking for. Okay?
- A: Well they should be. I don't, ah, hide any kind of files --
- Q: And we'll --
- A: -- or anything like that or --
- Q: Well and -- and it's not that I don't believe you. But obviously --
- A: Okay.
- Q: -- I have to be a skeptic because of what I do.
- A: I understand.
- Q: Okay.
- A: But there are nothings like compressed file folders or anything like that.

Speculation/ Not Reasonable

- Zip File Theory: NO EVIDENCE
 - Even the Defendant says he doesn't use compressed files/ Zip files

Speculation/ Not Reasonable

- Music Theory: NO EVIDENCE
 - The computer automatically plays music and searches out Child Pornography to go with that music.
 - What type of music would seek out girlondick06.bmp
 - Girlondick08.jpg
 - NOT REASONABLE! → No evidence

Defendant's Interview

- The only way something gets on the thumb drive is if someone puts it there.

Speculation/ Not Reasonable
NO EVIDENCE

- Conspiracy Theory: Tami put the Child Pornography on the Shuttle, HP Laptop and USB
 - Why would she put it on a USB and have it in her possession if she was setting Defendant up?
 - Why not just call the police and tell them he has it on his computers?
 - Why say at Preliminary Hearing she didn't know the USB belonged to Defendant?
 - Why not put it on every computer?

Speculation/ Not Reasonable
NO EVIDENCE

- Conspiracy Theory: Tami put the Child Pornography on the Shuttle, HP Laptop and USB
 - Why go through all of the trouble to:
 - Change dates, change times
 - Put different items on different computers
 - Change the names

	USB	Shuttle	HP Laptop
1.	2girls1.jpg 11/25/08	2girls01.jpg 12/16/08	2girls01.jpg 8/8/07
2.	girlendish08.bmp 11/25/08		girlendish08.bmp 8/13/07
3.	girlendish08.bmp 11/25/08	girlendish08.bmp 12/16/08	girlendish08.bmp 8/13/07
4.	new02.jpg 11/25/08	new02.jpg 12/16/08	
5.	2girls.jpg 11/25/08	2girls.jpg Created 12/16/08	2girls.jpg 8/9/07
6.		new-002.jpg 12/16/08	new-002.jpg 8/11/07
7.	new-001.jpg 11/25/08	new-001.jpg 12/16/08	new-001.jpg 8/11/07 new-005.jpg
8.		new-35.jpg 12/16/08	new-35.jpg 8/11/07

	USB	Shuttle	HP Laptop
9.	GRL55.jpg 11/25/08	grr66.jpg 12/10/08 Carved	grr66.jpg 8/30/07
10.		new-43.jpg 12/10/08	new-43.jpg 8/11/07
11.	NDW-47.jpg 11/25/08	new-47.jpg 12/10/08	new-47.jpg 8/11/07
12.	Euro-001.jpg 11/25/08	Euro-001.jpg 12/10/08	Euro-001.jpg 8/11/07
13.		new-33.jpg 12/10/08 G:\new-332.bmp 12/10/08	new-33.jpg 8/11/07 G:\new-332.bmp 8/11/07
14.		new-38.jpg 12/10/08	Carved
15.		new-44.jpg 12/10/08	new-44.jpg 8/11/07

Speculation/ Not Reasonable
NO EVIDENCE

- Conspiracy Theory: Tami put the Child Pornography on the Shuttle, HP Laptop and USB
 - Why delete images if you are setting someone up? (Carved Images)

Speculation/ Not Reasonable
NO EVIDENCE

- Conspiracy Theory: Tami put the Child Pornography on the Shuttle, HP Laptop and USB
 - Wouldn't you say you saw the Defendant looking at Child Pornography?

File Created Date

- It's like a birthdate
- Introduced to the media the first time

Last Written/ Last Modified

- Usually, date taken from original location
 - Doesn't get updated unless modified
 - OR another way to say it
 - Stays the same unless modified

It all started with the laptop

- Created date/modified date are the same
 - Either 8/9/07, 8/11/07, 8/13/07
 - Means downloaded onto this device



Moved from laptop to USB



- Last written/modified date doesn't usually get updated
 - Birthdate on USB 11/25/08
- Last written/ modified date doesn't usually change.
 - 8/9/07, 8/11/07, 8/13/07
 - Exception Euro-001.jpg = 2/7/10
 - Remember the MD5 value was still the same.
 - Same picture.

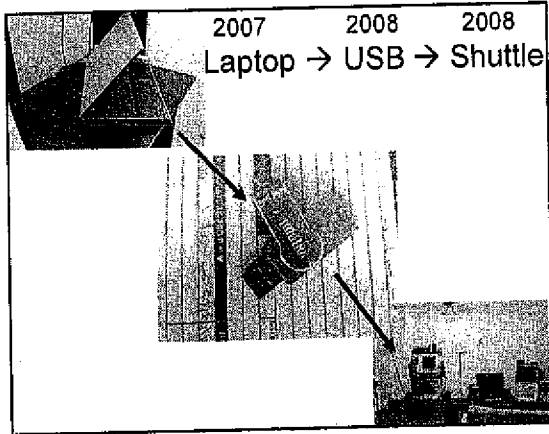
Moved from USB to Shuttle



- Last written/modified date doesn't usually get updated
 - Created date/ Birthdate on Shuttle
 - 12/10/08
- Last written/ modified date doesn't usually change.
 - 8/9/07, 8/11/07, 8/13/07
 - Even the Euro-001.jpg = 8/11/07
 - Shows the USB was placed in Shuttle and files copied prior to Tam and Mike finding the USB stick.
- Updated operating system and placed Child Pornography on 12/10/08

Child Pornography Placed on:

- HP Laptop
 - 8/9/07, 8/11/07, 8/13/07
- USB Stick
 - 11/25/08
- Shuttle
 - 12/10/08
 - Same date as last operating system installation
 - He upgraded his system and installed Child Pornography.



Tami and Mike were not living
with Defendant at any time when
these items were placed on the
devices.

If he knew Defendant's interview
would have been different.
Does it matter which child is
pictured on the images?

1703

DEFENDANT'S INTERVIEW

Defendant's Interview

- Q: "...like what type of sites were you downloading those images from?"
- A: "You -- that would be sort of random because, ah, um, -- or, ah, that would, ah, I -- I really can't, ah, um, clarify what kind of sites I might have downloaded from because it was never a major interest or something I went looking for, you know."

- Um, ah, um, I may have chosen someone because they were pretty, not because they were young."

- Pretty vs. Young
 - He still chose them!
- His word in the interview = Young.
 - Search term Young was placed in websites
 - Pornsunami.com, FUQ.com,
 - Lemmingtube.com, VideosBang.com,
 - XVideos.com, XTubmovies.com,
 - ChronoTube.com

It wasn't a MAJOR INTEREST!
That means it was an interest!

Defendant's Interview

- "It's never been a peccadillo of me."

Looking at child pornography is not a
small problem (peccadillo)!

If you didn't look at Child
Pornography the answer is NO!

Defendant's Interview

- Q "I don't know how old the girls look."
- A "It might have been – yeah. And so, ah – so yes. Ah, the only thing I – is that's how I would acquire them, by surfing through multiple web pages and – and – and saving what I thought was interesting."

State's Exhibits 1-15
Defendant found interesting and
he saved them!

Defendant's Interview

- Q "Okay. Well obviously it's the Internet 'cuz –"
- A "Yeah."
- Q "– the- these images – like I said, I know these images. I know they're on the internet –"
- A "Yeah."

1726

Defendant's Interview

- Q "– just based off my experience. But, you know, it's how you went and got – got them. Like I said, most people use file share programs. It's the most common and quickest way."
- A "well –"
- Q "Now I don't know if you did that"
- A "– I typically don't. I just go to the internet webpage." (m)

Detective told Defendant that the images were Child Pornography and his response was I typically don't use file sharing programs I just go to the webpage.

You go to the internet webpage =
You know what is on the internet
webpage.

Not some unknown downloaded
file.

Defendant's Interview

- Q "Any of this making any sense?"
- A "Sure. Mm-hm. I understand. But as far as I know -- I mean I've -- I've even loaded a folder of, um -- of, ah, ah, adult stuff on USB cards. I don't think I've -- I don't think it's ever been an interest for child porn."

If you have never looked at Child
Pornography the answer is no!

How can you not know if you
have an interest in child
pornography?

Circumstantial Case

Dog got into the pantry.
Ninja Poodle
Dog can't talk

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence, direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court, and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

Common Sense (#17)

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

Reasonable Doubt (#6)

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

1729

IT IS REASONABLE AND IT
MAKES SENSE THAT
DEFENDANT KNEW THE CHILD
PORNOGRAPHY WAS ON HIS
COMPUTER.

Defendant KNEW

- He's admitted he loaded his DL on the USB stick.
- He's admitted he loaded an Adult folder on the USB stick.
 - Folders Movie 01, Movie 02, Pic 01, Pic 02, celebrity.
- He knew the child pornography was also on that USB stick.
- Loaded DL after Child Pornography

Defendant's documents loaded
12/1/08

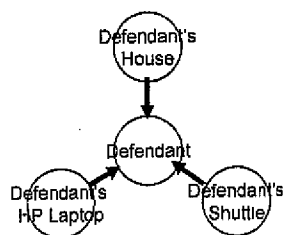


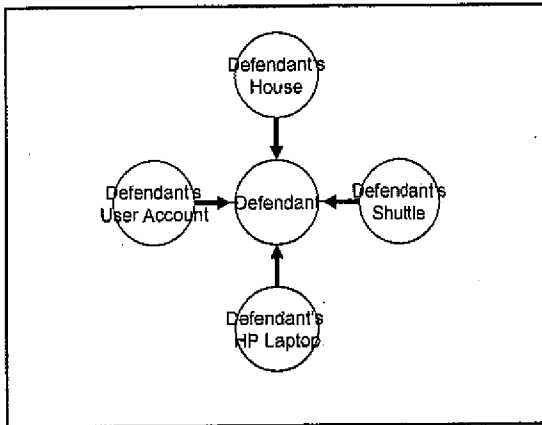
**I would access it
(Knowingly)**

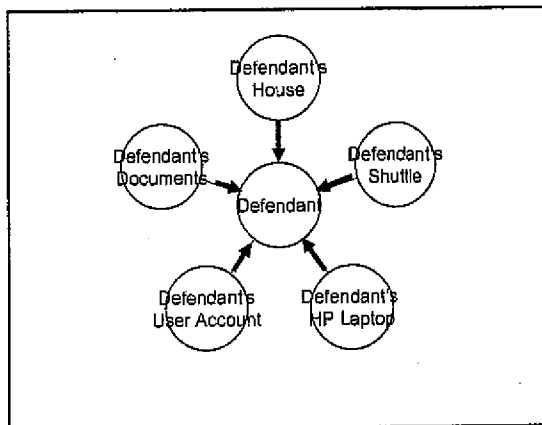
- Q: Okay. Well I'm just trying to try to think of possibilities as to where you would have got any child pornography. Okay?
- A: Well I do – I do that because for awhile there I did not have house wide networking.
- Q: Okay.
- A: So when I would – and I was using a – a USB dongle 'cuz I was traveling.
- Q: Right.

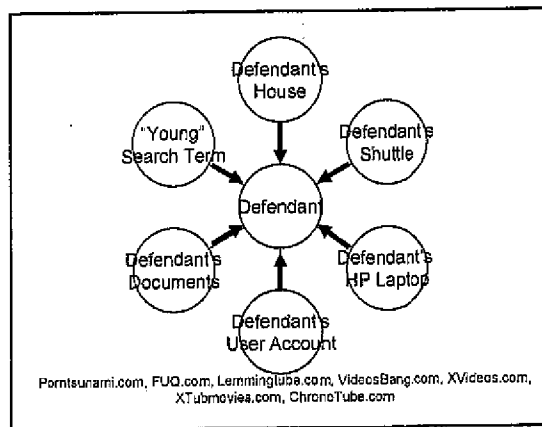
- A: Yeah. So I – I would go online, um, let it download during the night, and then I would access it whenever I was active during the day.

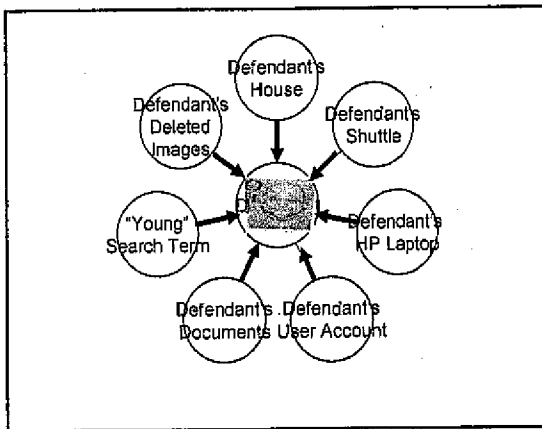
**Chain of Facts and Circumstances
All Point to the Defendant**











Guilty

15 Counts
Possession of Visual
Presentation Depicting Sexual
Conduct of a Child

- 1
- 2
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ANTHONY CASTANEDA,) No. 64515
)
Appellant,)
)
vi.)
)
THE STATE OF NEVADA,)
)
Respondent.)
)

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