assuming she had said that, I'm in the same boat and predicament. It just so happens in the public's perception, is my belief, that they put greater credence in the FBI and the federal government having determined they're going to prosecute the matter. It bolsters the case the fact that the feds have indicted him for the billing fraud.

I mean, it doesn't just mean, oh, there's probable cause again and so they're doing it. I mean, people happen to look rightfully or wrongfully that if the feds are going after something, there's something important there. So I -- I don't see that it's diminished if it would -- what the offense is. It's just the fact that he's under indictment for another crime.

MR. SANTACROCE: And, Your Honor, as far as my perspective is, if the Court doesn't declare a mistrial, I should be allowed to cross-examine her on the fact that Mr. Lakeman is not indicted for billing fraud in the federal case. I mean, it cuts both ways. If she's indicted --

THE COURT: Well, no, because --

MR. SANTACROCE: --for billing fraud --

THE COURT: -- you wouldn't have been able to do that anyway. And by saying me and Dr. Desai, it's clear that Mr. Lakeman isn't indicted --

MR. SANTACROCE: I don't think it's clear.

THE COURT: -- so I don't think that creates an

Docket 64609 Document 2014-37741 Lakeman Appeal 04310

opportunity where none existed before.

MR. SANTACROCE: I don't think it's that clear. The inference is that they don't know. And the inference is that my client is sitting here with Dr. Desai in this case.

MS. WECKERLY: Your Honor, I --

THE COURT: Ms. Weckerly?

MS. WECKERLY: This is not verbatim, but I do have in my notes that -- that Mathahs talked about the federal case. Certainly my notes are not verbatim. I'd like to look at a transcript of --

THE COURT: I'd like to --

MS. WECKERLY: -- his testimony. Sorry.

THE COURT: I'm sorry. I mean, that -- I'm just telling you my impression was that it has -- somehow there has been talk about it, and I can't remember where. I mean, this is our, what, sixth week of testimony, our eighth week of trial. So I don't really -- you know, I was left with that impression like it was -- it was kind of evident.

MS. WECKERLY: Well, and I -- I think that there was a -- if I'm remembering correctly, even with Nancy Sampson there was a reference to a federal, you know, investigation. I get that it's not the same thing. I mean, I'd mostly like to see what -- what Mathahs said and --

MR. WRIGHT: He was a --

MS. WECKERLY: I mean, we have to leave a little

early anyway.

THE COURT: What I was going to suggest is --

MR. WRIGHT: It was a joint task force. I mean, I was going to go into this with Labus. I mean, there was -- he was on it. I mean, it was a Homeland Security.

You're a federal agent or something on this, aren't you? Aren't you in the club?

MS. WECKERLY: He's local.

MR. WRIGHT: No, I thought in his task force. And so there's no question that feds were in this investigation, CDC, BLC, NSH, the FBI. Postal was in -- sitting in these interviews. When she says, the prior witness, Lobiondo, says there were five, yeah, there were five different -- the attorney general of the State of Nevada -- not the, I mean office. They were all there. That -- it was a joint massive investigation. That doesn't in any way infer, therefore, Dr. Desai is under federal indictment. I just don't even see the connect.

THE COURT: I just said the impression was, you know, there was -- there was a lot of talk about it. You know, I don't have a perfect recollection. Like I said, clearly, if this was other unrelated charges, I mean, we wouldn't even be talking about it. You know, obviously, I want to avoid granting a mistrial if there's any way to avoid it.

I mean, as I said, this is our eighth week of test -- I'm sorry. This is our eighth week of trial, sixth week of testimony. I know that that is irrelevant if there is a bell that can't be unrung. I understand that and I don't want to in any way suggest that the Court's going to do anything to step on Mr. Lakeman's rights or Dr. Desai's rights. That's not my intention. But, obviously, you know, if you can cure this in some way, that would be what the Court wants to do.

You know, it's not a case where we've started in one day and, again, you know, that doesn't -- you know, whether it's a year-long trial, that has nothing to do with if, you know, somebody's rights were violated. You know, that's tantamount to everyone else. I get that. And I don't mean to suggest in any way that I'm not being -- being mindful of that.

But if, you know -- I mean, at the end of the day, you know, what's -- what's the prejudice here? Is this something that they kind of knew about anyway or -- or is this something -- I think where Ms. Weckerly, where you were going, was to suggest adjourning for the day.

MS. WECKERLY: Yes.

THE COURT: And reviewing and giving both sides an opportunity to do whatever additional argument or whatever they want to do, and trying to see what exactly Mr. Mathahs had said, and what's been said so far on this issue, if there

were federal charges or whatnot. Because, like I -- and review the Mathahs -- we don't have a transcript. We do. We do have a transcript. Wonderful.

MR. WRIGHT: No, he wasn't indicted.

MS. STANISH: He wasn't indicted.

THE COURT: No, I know, but wasn't there a possibility that he could be indicted or --

MR. WRIGHT: No.

MR. SANTACROCE: He gave a proffer.

MS. WECKERLY: He gave a proffer, but, I mean, my notes, which I know are just notes, says that -- says like billing fraud, talked to the feds, billing fraud, and that he gave a proffer. I don't know everything else he said at that point in time in his testimony. That's what I'm saying I'd like to look at, what he said at that point.

THE COURT: I'd like to look at it, too, because I'm not saying, you know, like I said, I -- you know, if we have to declare a mistrial, we have to declare a mistrial. That's how it is. But I don't want to do that rashly, and then later look back and say, oh, wait a minute, this was said, you know, two weeks ago or three weeks ago or, you know, this was mentioned in opening statement and they all knew. You know, something that has been out there on the -- out on the floor, on the table, or however you want to put it. So that's all I'm saying.

I don't want to do this rashly. I want to do it in a considered way, evaluate everything, consider the options, consider where we are in terms of what's come out before the jury. And that's -- I think Ms. Weckerly, that's her suggestion. They would like to do that. The State would like to have that opportunity. I'm going to give it to them.

MR. WRIGHT: I agree.

THE COURT: And the defense, I'm sure, you know --

MR. WRIGHT: I want to research it.

THE COURT: -- wants to research. Yeah. I mean, research the issue. I would like both sides to please research the issue. You don't need to do any briefing, but, you know, basically find what cases you can. If there is anything that is helpful to your point of view, bring them to me in the morning. Exchange them with the other side. And then we'll be back, you know, for argument.

And, you know, obviously, the more information that you -- both sides can give the Court, the better. So, you know, if anyone thinks of anything else where you think it might -- something might have been mentioned or it might have come out, then I would ask you to please let the other side know, let the Court know, let my law clerk know. Sharry is out today, so don't let her know, but let Keith Barlow, my law clerk, know, or Janie, someone, so we can find that and I can look at that, as well.

So I think probably what we should do for the day is bring the jury back in and I'll explain to them that due to some recent events or scheduling issues, we're going to have to take our evening recess and have them come back at 10:00 a.m.. and lawyers back at 9:00.

MS. WECKERLY: Okay. Thank you.

THE COURT: Again, if anyone, Ms. Weckerly, Mr. Staudaher, both sides, review your notes. If, as you review your notes of the testimony, you find something that you think is important one way or the other, please let Janie know so we can get a draft or we can replay it here together to refresh our memory as to what that was. But if -- even if we don't have a transcript, if you tell her, she can at least maybe get that queued up and find it so when we come back at 9:00 tomorrow and we need to listen to something, she can have that all available so we can do that.

(In the presence of the jury.)

THE COURT: All right. Court is now back in session.

Ladies and gentlemen, due to some unforeseen scheduling issues, we're going to have to take our evening recess at this point. We were going to be, you know, leaving a little bit early anyway due to someone had a doctor appointment on the jury, so we're going to end about an hour earlier than we were originally going to end. We will

reconvene tomorrow morning at 10:00 a.m.

During the evening recess I must remind you that you're not to discuss this case or anything relating to the case with each other or with anyone else. You are not to read, watch, or listen to any reports of or commentaries relating to this case, any person or subject matter relating to the case. Do not do any independent research by way of the internet or any other medium, and please do not form or express an opinion on the trial.

And, Kenny, may I see you at the bench, please.

(Off-record bench conference.)

THE COURT: All right. Ladies and gentlemen, I don't remember if I said it, 10:00 a.m. tomorrow. Notepads in your chairs and please follow Kenny through the rear door.

(Jury recessed at 3:15 p.m.)

THE COURT: Before everyone leaves, I'd like, I mean, the State to be thinking about a possible curative instruction. One, something --

Is that shut? Okay.

-- that occurs to me is something like, you know, you are instructed that you are not to consider the fact that, you know, Dr. Desai is under indictment, which he might say or that's based on the same investigation that was conducted by Metro in this case, and the same evidence presented in the federal case or something like that to say basically there's

nothing different, it's no new evidence, it's no different investigation.

Or, you know, something like it is the same investigation that you've heard about in this case conducted through the joint task force of the Metro and the FBI. There is no additional evidence or something like that, and it's based on the same probable cause determination or similar probable cause determination underlying the indictment in this case or something like that to show, hey, there's nothing new here, there's nothing different, you know, or whatever. I mean, it's just a suggestion off the top of my head, but --

MR. SANTACROCE: I'd like something in there about Mr. Lakeman.

THE COURT: And -- all right. And that Mr. --

MR. SANTACROCE: That he's not indicted. He's not indicted federally and they shouldn't infer anything from what this witness said that he is. I mean, you know, the inference is out there. There's a federal indictment with Dr. Desai. My guy is married to Dr. Desai in every way, in the newspaper, in the media, and all the stories. It's always Dr. Desai and Ronald Lakeman. Dr. Desai and Ronald Lakeman. They're -- they're joined at the hip.

THE COURT: Well, it's kind of beneficial for you, Mr. Santacroce, because then to the extent there's a negative inference to Dr. Desai, there's a positive spin to Mr.

Lakeman, that, oh, the U.S. Attorney didn't think there was enough evidence against Mr. Lakeman, so they didn't indict him.

Anyway, to me that's the big issue, the idea that there's somehow different evidence or better evidence or something more credible that's before the Federal Grand Jury. I mean, so that's really what we want to nip in the bud, that it's all the same stuff. There's no new stuff over on the federal side. It's the same stuff they're hearing in this case.

So that's just something I just thought of off the top of my head, but I want you folks to use that or be thinking of what you would propose as a curative instruction. I would ask -- the defense is obviously welcome to do that, as well. But I understand the defense's position is there is no curative instruction. So, you know, that would be -- that would be my request for what I'd like everyone to do going forward. And then we'll all reconvene at 9:00 a.m.

MR. WRIGHT: The cure is worse than the malady.

THE COURT: Well, I understand you don't want the curative instruction to say the fact that Dr. Desai has been indicted for numerous charges. But, I mean, you know, you can say that -- that there's only been one investigation in connection with this case that was conducted as the -- you know, by Metro and the FBI and the joint task force, and that

there's no, you know -- all of the evidence gleaned during that or -- you know, that -- that's kind of the idea, that it's all one thing. It's not -- it's not different things.

All right. I want everyone back here at 9:00. And you have the responsibility to -- to find things, switch them, and call Keith, my law clerk.

(Court recessed for the evening at 3:20 p.m.)

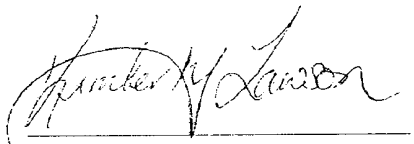
CERTIFICATION

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

AFFIRMATION

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

KARR REPORTING, INC.
Aurora, Colorado



KIMBERLY LAWSON

COPY

Electronically Filed
03/11/2014 01:04:15 PM

CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DIPAK KANTILAL DESAI, RONALD E. LAKEMAN, Defendants.	)	CASE NO. C265107-1,2 CASE NO. C283381-1,2 DEPT NO. XXI **TRANSCRIPT OF PROCEEDING**

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 33

TUESDAY, JUNE 11, 2013

APPEARANCES:

FOR THE STATE:	MICHAEL V. STAUDAHER, ESQ. PAMELA WECKERLY, ESQ. Chief Deputy District Attorneys
FOR DEFENDANT DESAI:	RICHARD A. WRIGHT, ESQ. MARGARET M. STANISH, ESQ.
FOR DEFENDANT LAKEMAN:	FREDERICK A. SANTACROCE, ESQ.

RECORDED BY JANIE OLSEN COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

KARR REPORTING, INC.

I N D E X

WITNESSES FOR THE STATE:

ANNAMARIE LOBIONDO

Cross-Examination By Mr. Wright 55

Redirect Examination By Ms. Weckerly 143

TONYA RUSHING

Direct Examination By Mr. Staudaher 167

Cross-Examination By Mr. Santacroce 225

E X H I B I T S

STATE'S EXHIBITS ADMITTED:	**PAGE**
179 through 208	224
DEFENDANT'S EXHIBITS ADMITTED:	**PAGE**
O-1	130

LAS VEGAS, NEVADA, TUESDAY, JUNE 11, 2013, 9:11 A.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: We're on the record regarding the joint motion for mistrial. We did not receive any communication to my law clerk regarding any cases or anything.

MR. STAUDAHER: Oh, we did. Well, I didn't send it to your law clerk, but I sent it to your JEA.

THE COURT: Okay. Who I told you yesterday was out, but she was here this morning. Apparently she hasn't gotten to that through her long list of emails. She was out of the office yesterday.

MR. STAUDAHER: I'm sorry.

THE COURT: In any event, I've done some -- oh, some research on my own and consulted with colleagues and whatnot. Is there anything else from the State, since apparently you did send some cases --

MR. STAUDAHER: Yes, we did.

THE COURT: -- to my JEA, which as I said, she's been out. And then she just came in this morning and I'm sure she probably had about 50 emails to go through.

MR. STAUDAHER: We went through -- we did not find any Nevada cases on this issue obviously, but we did look to other jurisdictions. And under U.S. v. Escalante, which is a Ninth Circuit case, 637 F.2d 1197 -- and we provided these to

counsel as well; Carrillo v. State, 591 SW.2d 876; State vs. Shoemaker, 638 P.2d 1098; Harris v. State, 475 SW.2d 922; People v. Devin, 444 NE.2d 102, and that one was not dealing with a curative instruction, it dealt with the court's sort of a jury instruction; State v. Banks, 961 So.2d 645; Demorez [phonetic] v. State, 797 So.2d 640.

Carrillo, although it was overruled on other grounds, actually dealt with an issue of the mention of an indictment, of the defendant being under indictment in the actual presentation.

THE COURT: Was that the same indictment or a different indictment?

MR. STAUDAHER: Different indictment, I believe.

THE COURT: Okay.

MR. STAUDAHER: I'd have to go back and double-check that.

THE COURT: Because obviously that's the issue. I mean, a lot of defendants are under indictment. The issue is a different indictment --

MR. STAUDAHER: Yes. Not for the current case.

THE COURT: -- in a different jurisdiction.

MR. STAUDAHER: Correct.

THE COURT: Whether that's federal or a different state.

MR. STAUDAHER: Correct.

MS. STANISH: And my reading of that case is different than Mr. Staudaher's.

MR. STAUDAHER: That's fine.

MS. STANISH: I thought there was an improper question by the prosecutor in that state regarding the indictment of an accomplice, not the defendant himself.

MR. STAUDAHER: That's, I believe, accurate, Your Honor.

MS. STANISH: Okay. That's different from what I understood you just to say to the Court.

THE COURT: Right. I understood it to be the same defendant. Obviously that would be pertinent for Mr. Lakeman.

MS. STANISH: Right.

MR. STAUDAHER: There was an indictment issue in that particular case.

MS. STANISH: So that had nothing to do with exposing the jury to an indictment against the subject defendant. The other cases, as from my late night reading about them, was that they primarily --

MR. STAUDAHER: Could I actually do my argument first?

THE COURT: Yeah. Why don't you let Mr. --

MS. STANISH: Oh, I'm sorry. Go ahead.

MR. STAUDAHER: With regard to those cases, although they're other jurisdictions, they're a variety of other

jurisdictions including the Ninth Circuit. In virtually all of them, with the exception of, I believe it was People v. Devin, a curative instruction was given in those cases and went up on appeal, all those jurisdictions to my recollection, in looking at the cases.

And Ms. Weckerly has actually looked at the last three of these. I was looking at the first four. Curative instructions were deemed to be sufficient to cure that. The issue raised is twofold, or it's broken down into twofold with a mistrial based on the type of thing we have before the Court. And there's nothing that we were able to find where there was a concurrent case in another jurisdiction on the same underlying facts.

THE COURT: Right.

MR. STAUDAHER: That being said --

THE COURT: And as I said yesterday, if it was a different unrelated case, for example, guns or drugs or robbery, I would see that as worse than an indictment in the same case. I don't know if the defense agrees with that, but to me, I would see that as more prejudicial than what we have in this case, where it's an indictment on the same facts, so.

MR. STAUDAHER: And it boils down, at least in my review, that it's basically a twofold approach; one, is it clearly prejudicial, two, is it of such character as to suggest that the impossibility of withdrawing the impression

produced on the minds of the jury by such a thing as a curative instruction would be sufficient.

All of those jurisdictions, as I said, or I believe all of them with the exception of the People v. Devin case, was or were in a situation where they fell into that category, a curative instruction was given, the case went forward, it went up on appeal on that issue, and it was sustained by the -- an abuse of discretion standard by the judge, and they basically upheld that decision saying the judge did the right thing.

Now, with regard to that, whether or not the impression left in the minds of the jury can be cured by a curative instruction, I would note that this whole issue of the federal case has come up in the case before. We actually, if we go back to -- we actually got the transcript of one --

THE COURT: Mr. Mathahs, I believe.

MR. STAUDAHER: Mathahs, so I can refer to that as part of the record. On a cross-examination, the issue --

MR. WRIGHT: I don't have it.

MR. STAUDAHER: It's available on Odyssey, and we said that it was filed yesterday.

MR. WRIGHT: I'm just telling the Court I don't have it.

MR. STAUDAHER: But in any case --

MR. WRIGHT: Is it free?

THE COURT: If it's on Odyssey it is.

MR. WRIGHT: Okay.

THE COURT: If it's on Odyssey --

MR. STAUDAHER: We paid for it, but certainly they're --

THE COURT: Okay. I mean, once it's been requested, as I understand -- and Janie, feel free to pipe up here if I state this incorrectly. Once it's an official transcript and it's on Odyssey, as long as you can access the filings on Odyssey, then you can print that out and download it just like you could any other filing, just like a brief or something like that. That's my understanding.

That's certainly how I would access it. Correct, Janie?

THE CLERK: Once it's been filed and it's on Odyssey.

THE COURT: Once it's been filed. Now, if it's requested, you know, by both sides or something like that, or copies are requested before it's filed, then that's when the charges accrue. But once it's filed, then it's accessible to anyone who has access to the actual briefs and filings on Odyssey.

MR. STAUDAHER: With regard to that, with that transcript, the first time that an issue of federal proffer came up in the record that we have before was on cross-examination by, I believe, Mr. Santacroce. On follow-up

cross-examination by Mr. Wright, he delved into it in quite a bit of detail as far as the relationship to Mr. Mathahs.

Starting on page 80 going into page 81 of the transcript, he talks about the fact that the federal prosecutors talked with him and that he proffered with them. He actually goes through what a proffer is in that. And probably most important is on lines -- I believe, page 81, lines 4 and 5. He's asking a question of Mr. Mathahs in front of this jury --

MR. WRIGHT: Who's he, me?

MR. STAUDAHER: You, yes.

MR. WRIGHT: Okay. I thought he was Mathahs.

MR. STAUDAHER: This is Mr. Wright's cross at this point not brought up on direct examination. He says, "And the federal prosecutors were contemplating prosecuting you for billing fraud." So the issue of what they were prosecuting, what they were contemplating bringing charges against him was brought out by defense counsel in front of this jury. So that's not an issue that's not been out there.

He then talks about the proffer agreement, and this is another point that I wanted to make. He says, "Okay. Well, something that you could go talk to them about where they would hear what you would say and they would decide whether they're going to make you a witness or a defendant, is that true"; and he says okay and then goes on.

So it's clearly, I believe, at least the impression before the jury is that there is a case, a federal case out there. Whether or not it's going to get anywhere is another story, but there is a federal case out there. It's a proffer that was given in the --

MR. WRIGHT: Read that again, where I said it's a case.

MR. STAUDAHER: You didn't say a case. You said that they were going to make you a witness or a defendant. I would say --

THE COURT: Can you read the quote directly, because Mr. Wright doesn't have the benefit of a transcript?

MR. STAUDAHER: Sure. Okay. "So do you know what a proffer agreement is, that is the question.

"A Not truly.

"Q Okay. Well, it is -- it was something where you could go in and talk to them and they would hear what you have to say, and then they would have -- they would decide whether they're going to make you a witness or a defendant; is that true?

"A Okay."

That's in the same context of what he just asked with regard to the billing fraud that he was essentially being contemplated charge -- there were charges being contemplated

against him for billing fraud.

He goes on, on that same page, and then, I believe, just make sure here, there's another reference on page 99, and he talks specific about what they discussed at the federal -- with the federal proffer, or with federal prosecutors. It had to do with the global fee and anesthesia billing specifically. He mentions that on page 99, and also going into page 100. Anesthesia bill, the global fee, it actually gives dollar amounts for the anesthesia and so forth.

So at this point, the direct questioning on cross-examination of Mr. Mathahs, and this is one witness, the issue of a proffer in federal -- federal -- the FBI being present in questioning and the U.S. attorney being involved came up with Dr. Carrera, it came up with Dr. Carrol, it came up with Dr. Vishvinder Sharma.

It came up with literally every CRNA we've had up here so far that had anything to do with any kind of a proffer agreement. And even as of last night we had a request for any proffer agreements that were in place by, I think, Mr. -- Ms. LoBionda, and there was one other. So that's a recurrent theme that has been going on throughout the entirety of the case.

I don't believe that based on that, based on just the line of questioning that I just quoted out of the transcript of Mr. Mathahs that this is a new issue before this jury, that

there's no at least inference at the very least that there is a federal case out there that is being prosecuted, and that that witness specifically was looked upon as a target of that prosecution. That's one issue.

So as far as the clearly prejudicial that in fact it has never come out before about there being any kind of a federal case involved in this, that is simply not the case. It is. The fact that we have the cases which show that a curative instruction in not that specific setting, but I would argue similar types of settings, are -- is as a reasonable accommodation.

And we actually proffered a curative instruction also to defense counsel. I know that the Court doesn't have it, but I can provide it right now.

THE COURT: If you would.

MR. STAUDAHER: May I approach?

THE COURT: You may.

MR. STAUDAHER: And we did not get anything back from counsel yesterday with regard to precedent or any other caselaw that would indicate an opposition to the things that we're talking about here, or a curative instruction that would have been proffered. So that's the only one we have. I'm going to allow Ms. Weckerly, if she will, to address maybe the other three cases, if there's any differences in those other than the ones I've cited.

THE COURT: All right. Thank you. Ms. Weckerly.

MS. WECKERLY: Your Honor, I mean, my -- the cases I read are pretty much in a similar analysis. I mean, in those cases the court was called upon to examine the prejudice given the facts of each particular case. And so in my view of those cases, this Court has to look at what's been presented in the totality of the trial to determine whether there's prejudice.

And in the cases that I read, it was a similar analysis where the reviewing court, on an abuse of discretion standard, viewed the curative instruction and whether it was sufficient and in the cases I had that they did, but the analysis of prejudice was always unique to the case.

And in -- I mean, in our case, as Mr. Staudaher mentioned, I mean, there's certainly -- I don't think it's any mystery to this jury that there was a federal investigation or a concurrent federal case. And given that the curative instructions in the cases that we cited were sufficient, it's the State's view that that would be the appropriate remedy in this situation.

The other thing that obviously is pointed out in those cases is how extreme of a remedy a mistrial is, and it's sort of like if there's no other alternative to cure the taint. So with that...

THE COURT: All right. Mr. Wright, do you wish to respond?

MR. WRIGHT: Yes, and then Margaret will discuss the cases. Correct. We didn't find any cases or a prosecutor deliberately elicited the fact for no legitimate or benign purpose, or deliberately intentionally elicited the fact that the defendant is under indictment federally for another offense. So correct, no authority. I couldn't find a case, Margaret couldn't, where that has been done. And so no authority on that.

The idea that I, I guess, waived it, waived the issue or invited them to do this because I cross-examined the witnesses regarding their immunity, I just don't get that. I don't get that listening to Mathahs's -- my cross-examination of Mathahs. There's no question there has been an investigation. FBI was there. CDC was there. BLC was there, United States Postal Service, Homeland Security, deputy attorney generals.

The whole crew of the team was there and investigating. And because of a multi-jurisdictional investigation, the State is saying it was already patently obvious to the jury that Dr. Desai is currently under indictment for other conduct, other offenses. I don't even see the connect. This was a -- when I say deliberate and intentional, I'm not saying willful. That's different.

THE COURT: Right.

MR. WRIGHT: I'm saying it was intentionally

eliciting it --

THE COURT: It wasn't a witness blurting it out, as sometimes occurs.

MR. WRIGHT: Correct. And it was done --

THE COURT: And when you say willful, no one believes, I don't think, that Mr. Staudaher intended to commit misconduct.

MR. WRIGHT: Well, not to cause a mistrial. I think he intended to bring out what he brought out, that Dr. Desai is under indictment. And it's brought out for one purpose, the inferences that it draws and what it does to the jury. There's no other reason to bring it out.

I'm not saying -- what I'm saying, I don't believe he was doing it to, you know, intentionally cause a mistrial. That whole willfulness for doing it plays into the double jeopardy analysis if there's then a mistrial declared.

THE COURT: Right. Exactly. If you were to make a motion to dismiss if the Court were to grant a mistrial, then you could seek to have the case dismissed on the grounds that jeopardy had attached because of this and other willful conduct by the prosecutor that you might refer to.

MR. WRIGHT: Correct. And I mean, as I understand it, that's when you analyze the motivation of the prosecution in engaging in it. So all I'm talking about is that it was deliberately elicited.

THE COURT: Right. He asked the question and he clearly asked it. He stated that question.

MR. WRIGHT: Right. And he wanted the answer that he got because he knew the answer that was going to come out, and that only is detrimental and harmful to Dr. Desai. And so I don't know. I can't -- the curative instruction to me is laughable, and I don't know how you cure the fact that from the jury you're asking them to disregard that he is presently indicted.

And of course I argued with you yesterday, I disagree that the fact he's being charged for the same conduct is somehow benign. I think it --

THE COURT: I didn't say it was benign. I said in my view it's not as bad as if Mr. Staudaher elicited testimony that Dr. Desai was under indictment for unrelated charges such as what the federal government would bring, firearms charges or drug trafficking charges. To me that would be worse and clear cause for a mistrial. That's my --

MR. WRIGHT: I disagree. Because I could argue about that he'll get his day in court there because the charges are bullshit. He's charged with bribery or something. But what can I argue on this? It bolsters the strength of the case on the billing fraud that the United States has indicted him for. So how do I address that with the jury?

And it was intentionally brought out. I mean, that's

why I get -- that's why I think it is more insidious when it's the federal imprimatur on the billing fraud case. And so that's why I disagree on if it was something else, because I could dance better with that. I just don't see the cure for it.

Margaret will respond to the cases.

MS. STANISH: Sure. Your Honor, as I previously mentioned, the Carrillo case does not relate to the deliberate solicitation of a pending indictment against a defendant. It related to an employee of the defendant who apparently aided and abetted. That person wasn't on trial, but they brought out that the individual was charged.

THE COURT: I see that as very different.

MS. STANISH: Yeah, exactly. And with respect to the remaining cases, as Ms. Weckerly points out, the court analyzes the improper question in the context of the entirety of the case, however those cases, for the most part, the appellate court finds no harmless error on the grounds that the solicited information was brought in for some 404(b) permissible purpose.

And so for example, I believe the State puts a lot of weight in the Ninth Circuit case of Escalante. That was a drug case where the prosecutor elicited an uncharged drug smuggling incident which the prosecutor mistakenly thought was part of the conspiracy, and upon cross-exam it was discovered

no, it wasn't. And so there was -- the Ninth Circuit said yes, it was improper, but, you know, we could have let it in under a 404(b) analysis.

And the remaining cases are similar in nature in that there was although the question was improper, not all of it -- not all these cases, by the way, Your Honor, relate to the fact that the defendant was under indictment. They relate to comments in closing arguments, 404(b) evidence, nothing to do with indictments.

But the bottom line is that the appellate courts found that given the -- those piece -- those inadmissible evidence -- that the inadmissible evidence in those cases could have been -- were not prejudicial, because they could have been in on 404(b) grounds or similar analysis along those lines. And of course, we don't have that here.

THE COURT: You don't.

MS. STANISH: The other thing that I think is quite pertinent is the Carrillo case, because it does stand for the proposition that you can cure a case and instruct the jury to disregard it unless where it appears the question was calculated to inflame the minds of the jurors, which our position is that it was.

Because there was no legitimate reason for doing that, and that the -- the inadmissible evidence was of such a character as to suggest the impossibility of withdrawing the

impression that calculated question left on the minds of the jury. In our opinion it was deliberate and, as Mr. Wright argued, has left an impression on the jurors' mind that Your Honor cannot eradicate a day after the fact.

Oh, and by the way, Your Honor, we could not find in none of these cases address poor Mr. Lakeman's issue.

THE COURT: Yeah. I mean, honestly, I'll hear from Mr. Santacroce, but I just don't see the prejudice to Mr. Lakeman at all by the facts that the jury knows that Dr. Desai and Tonya Rushing are both under federal indictment and Mr. Lakeman isn't. I just don't see the -- if anything, it's kind of good for Mr. Lakeman, because will the -- you know.

I mean, I'm sorry. That's how I see it. But certainly, Mr. Santacroce, you have a right to be heard.

MR. SANTACROCE: Thank you. Well, I strongly disagree with the Court's analysis regarding Mr. Lakeman. The fact of the matter is that a witness stood up there and testified that Dr. Desai and herself were under indictment and it's for billing fraud. And my client is directly charged in this case for billing fraud, for theft, for defrauding an insurance company. He is linked at the hip, as I told you yesterday, with Dr. Desai, and the stink of that permeates and inures to my client.

Now, my approach is more philosophical. The United

States Supreme Court many, many years ago said it's not the prosecutor's job to obtain a conviction, but rather the prosecutor's job is to justice. And if that is the case, it's certainly incumbent upon the Court to do justice. I know it's a difficult decision for this Court, but it doesn't matter if the misconduct occurred on the first day of trial or three months into trial.

THE COURT: No. Absolutely, you're correct.

MR. SANTACROCE: The Court has to preserve the integrity of the system and preserve the due process rights of these two gentlemen at all costs.

Now, with regard to the statement, the -- there's tons of California cases on the subject, as to prosecutorial misconduct and when a prosecutor asks improper questions, and most of those cases were reversed on appeal. The fact of the matter is not is there a connection between what Ms. Rushing said the indictment was and whether they were different charges or not. The question is was it an improper question, did it cross the line, and I think we can all agree that it did.

Now we have to address the remedy. There is no remedy, because the remedy, as Mr. Wright said yesterday, is more severe than what happened. The cure is more severe than what happened. If we now go into the whole issue, what do I do with my client? I have to clear up the fact that no, he is

not charged federally. I can't believe the mistaken impression in the jury, whether they have it or not, that he is attached to this federal indictment and there's no way to get out of that.

So you asked me what the prejudice is to Mr. Lakeman. I have to clear it up, Your Honor.

THE COURT: What -- I mean, let me say this. You know, it could have come out that Ms. Rushing was under indictment, and that, you know, in your view would have suggested that Mr. Lakeman could be under indictment or Dr. Desai could be under indictment. So to me the fact, you know, is the same, and I just fail to see the prejudice to Mr. Lakeman.

I mean, clearly Dr. Desai, that was an improper question and she shouldn't have answered. It happened so quickly there was no objection. I think we were all surprised by the question.

MR. SANTACROCE: But we immediately approached the bench to address it.

THE COURT: Right. But she said the answer, and it was -- I mean, I think candidly, Mr. Staudaher was surprised by the question.

MR. SANTACROCE: Let me just point out the distinction with regard to the proffer orders -- offers with Mr. Mathahs. Every witness basically that has testified has

been given immunity. This was a joint task force. At every single interview there was multi-jurisdictions represented, including the feds. Now, none of those people were under indictment. We have a right to ask about the proffer. None of those people said, yes, I was indicted, not indicted.

The distinction here is that this witness came up and said she was indicted along with Dr. Desai. There's a tremendous distinction to that, because every one of these proffer orders were multi-jurisdictional. They didn't result in indictments. None of the witness talked about indictments. Cross-examination didn't talk about indictments.

Now we have a witness coming out from the stand saying indicted with Dr. Desai. I don't think you can cure that prejudice, Your Honor.

MS. STANISH: Your Honor, if I can tag on that just to clarify the Carrillo case, because the Carrillo case factually, the prosecutor asked a witness if he knew whether the defendant's associate, and I'm saying this in connection with Mr. Santacroce's issue, if the defendant's associate was under indictment, the defense in that case had time to object before the witness blurted out the answer, and the question was withdrawn and a curative instruction was then given.

And the court found that the question itself was an improper question designed to elicit inadmissible evidence, finding that the indictment of an accomplice, which Dr. Desai

is vis-a-vis Mr. Lakeman, that that is an improper question. So, you know, the Carrillo case does stand for and support the argument that association with somebody who's under indictment is improper to bring before the jury.

THE COURT: Does the State wish to respond?

MR. STAUDAHER: Just one last thing out of the transcript of Mr. Mathahs regarding Mr. Wright. I mean, it wasn't just left that he asked about the federal proffer or that there was the issue of the very facts underlying that case being brought forth, or that there was the fact that he was either going to be a defendant or a witness in that case. Not the case. He didn't say that word, but that's clearly the implication.

But he also ends that whole line of things by -- or line of questioning by asking about the fact that, And then you were not prosecuted federally, correct; correct. So he brings up the fact that he -- the feds didn't do anything with him as well. And I'm not trying to imply that there would be an issue of -- or even a portion of the doctrine of, you know, admissibility based on the fact that there was anything improper done.

But clearly the inference there was that maybe the case was dropped federally or -- it wouldn't -- and as the Court pointed out, it wouldn't have been improper to ask Ms. Rushing if she was under indictment in the federal case

and what that was about. That information came out. It certainly would imply that it -- that other people were involved with that type of things.

THE COURT: May or may not be under indictment.

MR. WRIGHT: Your Honor, whoa. I disagree with that. I didn't know the Court thought asking her if she's under indictment was proper. I never anticipated that.

THE COURT: Well, that question was the first question which wasn't objected to.

MR. WRIGHT: It wasn't objected --

THE COURT: There's no objection there. And then Mr. Staudaher followed up with the clincher question, if you will, which was, And who is involved in that indictment. And I think we were all so --

MR. WRIGHT: I was flabbergasted.

THE COURT: Well, I know that was your word.

MR. WRIGHT: I couldn't --

THE COURT: Surprised.

MR. WRIGHT: I couldn't even remember it to tell you what had transpired. But bringing out she was indicted, I never envisioned that would occur. How do I then cross-examine her?

THE COURT: Well, and that -- that may not have come out either. All I'm saying is if that did come out, the same situation would pertain to Mr. Lakeman as pertains now. The

jury would be aware of federal charges and in fact, in my view, that would be worse for Mr. Lakeman, because now the jury's been told, even though they're --

You know, let me just put something else out there. You know, and I say this all the time. And I think we've seen with the jurors who are here that they are following the instructions and that they are conscientious jurors. And I think at some point you do have to trust the jury and believe that if you tell them to disregard evidence and you give them instructions, that they're going to do their best to follow those instructions. And I do believe that with this jury.

And so, you know, some prejudice is too great, that you can't -- you can't unring the bell as it were, you can't trust an instruction to cure it. But I think at some point you also have to have some confidence in the jurors and the belief that they are going to follow the law and they are going to diligently and conscientiously, you know, follow their duties, and not just presume that they won't follow the instructions, and that they will consider evidence and discuss and deliberate on evidence which they've been told to disregard. Just my feeling.

MR. WRIGHT: If that were so, there'd never be mistrials, because we could just cure everything by saying disregard that fire alarm that just went off, you never heard it. I mean, we have to be real about the impact of

these things and --

THE COURT: And mistrials are an extreme remedy.

MR. WRIGHT: But only extreme remedy in the state court system in Nevada, where normally every time I could have forecast the State's cases before I even got them, because it's always the same; is this reversible error, if we can get this done is that reversible error or not, never looking at does Dr. Desai get a fair trial. All we ever talk about is can we salvage this case and if we do, can it withstand appellate scrutiny. That isn't what this is about.

This is about deliberately the prosecutor -- and this is a pattern in this case. This isn't the first mistrial motion and I didn't invite any of them. And it just keeps happening, happening, happening and the Court becomes an apologist for the State each time. And what's the remedy? Nothing. They get rewarded for it. That's what's happening here.

THE COURT: Well, there have been numerous motions for mistrial and I was going to point this out. This is the second time Mr. Staudaher has asked a question which has been misconduct and has elicited impermissible testimony, the first being the Bruton issue that happened with the CDC. Some of the other motions for mistrial that have been made frankly, I didn't agree with the defense.

You know, one on the top of my head concerned

Ms. Weckerly conferring with Mr. Mathahs's attorney out in the hallway, I didn't see that as misconduct. We went over that. We don't need to go over that again.

So just the fact that the defense has made numerous motions for mistrial does not mean, in my mind, that there have been numerous instances of misconduct, because I don't agree with that. I will agree with the defense on this. This is the second time that Mr. Staudaher has asked a question that's misconduct that has elicited an impermissible answer. The first was the CDC, the Bruton issue. And this is the second.

And even if this Court does not grant a mistrial, as we all know, prosecutorial misconduct is cumulative and at some point, whether another time and, you know, while each error separately may be overcome by a curative instruction or something like that, you know, misconduct after misconduct simply can't be overcome.

And so if this Court does not grant a mistrial, you know, Mr. Staudaher, I expect you to do whatever you need to do to avoid future misconduct; meaning write your questions out, if you need to have them looked at by Mr. Lalli or Mr. Wolfson or someone else to make sure that they don't call for impermissible -- that they're not impermissible questions, then maybe you need to do that.

Because frankly, you know, again, this is the second

time that there has been a question and typically, you know, in my experience, when there is an issue of impermissible testimony, it was not directly solicited. It was, you know, spontaneously the witness says something and it's in response to a question and no one foresaw the answer, or it's an open-ended question and the prosecutor just kind of stepped, you know, asked the question not anticipating all of the answers.

But in this question as well as the other question, and I believe that it was one of the gals from the CDC, we argued about this on the last motion, that was the only possible answer and this was the only possible answer, and it was designed to elicit just the testimony that came in. So I have to agree with Mr. Wright on that.

You know, again, just the fact that they've made motions for mistrial, in my view, does not establish that there has been numerous instances of misconduct. But any instance of misconduct is too many, and certainly now two serious occurrences are way too many. That's not saying I don't believe this can't be cured by a curative instruction.

But I'm telling you if we do that, going forward I expect nothing else to occur, because you shouldn't be asking these questions. You're far too experienced a prosecutor to be asking questions like this. These might be questions a rookie would ask that frankly didn't know that it was

misconduct to ask these questions. But a prosecutor at your level in your office, I can't believe that you don't know that you're not supposed to elicit this testimony.

You know, a first or second year deputy might ask the questions not knowing. But I mean, you either didn't know or you did it on purpose or you just weren't thinking. I'm willing to give you the benefit of the doubt at this point, but going forward, if we go forward, I can't -- you know, it's up to you.

It's your job to also make sure, you know, as Mr. Santacroce said, it's the prosecutor's job to do justice, and that means not committing misconduct, and that means not answering questions -- or I'm sorry, not asking questions that you know you're not supposed to ask and then trying to put the Court in the position of remedying your errors.

Is there anything else by either side? Anything else by the State?

MR. STAUDAHER: No, Your Honor.

THE COURT: Anything else from the defense?

MR. WRIGHT: No, Your Honor.

THE COURT: All right. I'd like to go back and review. As I said, I did my own research. I want to make sure I covered everything.

MR. STAUDAHER: Would the Court like me to bring the actual witness cites?

THE COURT: No. Security's here. I can -- I can get that, and I've been making notes. And then I'll be back in a few, in a few moments.

I will also however, say this. As I stated yesterday, my recollection and my impression was that, you know, everybody knew that there had been federal involvement, involvement by the FBI, involvement by the United States Attorney's Office, that there had been talk of prosecution by the attorney's office with respect to immunity and other things. So certainly that impression was there with the jury.

So I don't see this as being as prejudicial if it just came out of left field. I mean, the jurors knew that the United States attorney was involved in this. The jurors knew that there was talk of immunity and whatnot with the federal government, with the United States Attorney's Office. So to me it's not a big jump for them to know, oh, yes, there's also a case in the federal courts.

I don't see that as a big jump from all of the evidence that's been presented in this case, and all of the talk involving the FBI and the United States attorneys, and immunity and federal immunity and state immunities, and proffers, and a proffer with the FBI and a proffer with the metropolitan police departments.

So there has been, you know, not just with Mr. Mathahs, but with other witnesses this has come up over

and over again. It was the impression, I said, just I had been left with and we discussed this yesterday. And certainly it would be the impression that the jury is left with, you know, they were aware of the United States attorney's involvement in this.

So the fact that there is a pending federal indictment, to me, is not a big stretch from what has already been admitted and what was clearly admissible and was not objected to as part of the case thus far. So I will say that.

MR. WRIGHT: I just respond to that -- just to restress, all cross-examination, all defense activity in examining and confronting this -- these witnesses were proper and all calculated to not do what has now been done here. And none of that was invited by any of my conduct or Mr. Santacroce's. And I still disagree.

I mean, what they did with Rushing, even leaving out the indictment of Dr. Desai, to put her on the stand. This idea that he brought out the immunity on every other witness, I heard that yesterday. I bet not more than four or five of them did he bring it out, maybe Mathahs and another one or two. We brought it out.

THE COURT: Mostly the defense brought it out, that's true.

MR. WRIGHT: But then you put Rushing on the stand and you bring out the fact that she has this federal and state

use immunity by which she can testify here and she has the immunity only if she's truthful, which also violates Ninth Circuit law on vouching for a witness.

And then bring out she's under indictment but she has special license to come here and testify truthfully. And then I'm supposed -- I'm left -- I'm supposed to cross-examine her on this, which none of which should have come out? Cross -- I can't even touch the indictment, immunity or anything without her saying, well, he's indicted with me.

I mean, I don't know the motivation of it. Maybe as the Court's saying, it dawned on me if the Court's saying, gee, there was federal investigation, I mean, none of that -- I'm used to dealing with joint investigations, so to me it means nothing. The feds have their nose under every tent around here. There's nothing remarkable about it.

But I think maybe the State thought I was getting some kind of unfair advantage and leaving the inference that the feds had found nothing. So there was --

THE COURT: I certainly didn't get that impression from any --

MR. WRIGHT: Well, I thought maybe that's why they set the record straight and showed that he is indicted for it. I mean, like I was saying with Mr. Mathahs, where you didn't get prosecuted, whatever I said. I mean, maybe they thought I was unfairly leaving the impression that he was fully

thoroughly investigated and the feds did nothing. It never entered my mind on any of my examination.

But something had to have motivated him to decide to set the record straight and tell the jury he's indicted for billing fraud. Thank you.

THE COURT: Mr. Staudaher, I mean, I think you need to state what were you -- you know, colloquially, what were you thinking?

MR. STAUDAHER: Here's part of it. We had just finished with Keith Mathahs -- or not Keith Mathahs, but Ronald --

THE COURT: Ms. LoBionda?

MR. STAUDAHER: -- Ronald Chaffee.

Oh, I was thinking Mr. Chaffee.

THE COURT: All right.

MR. STAUDAHER: We just finished with Mr. Chaffee. The whole issue at the very end of his testimony was that he was given immunity and so forth, and that's clearly the impression that was left. He was never given immunity by the State. Never has been. And he's only been -- if he has immunity, he was only given that by the federal authorities.

So that was the reason to go into that with her initially, to address that issue, because she was not given immunity by the State, nor was Mr. Chaffee, nor was a lot of these witnesses. And I believe that there's --

And I know that there's been an issue with regard to semantics on immunity versus whether a proffer confers immunity to somebody, or whether that means that you just can't get into, you know, you can't use what they said in the proffer and prevents -- it has nothing to do with preventing us from prosecuting somebody down the road.

THE COURT: And we're all in agreement what that letter meant. It's just we're using disagreement of the appropriate terms.

MR. STAUDAHER: But clearly Mr. Wright is using that to at least get in front of the jury that these witnesses have been granted immunity blanketly across the board, it seems to me, when he asked the question. So that was the reason to bring it out primarily.

I will tell the Court that I did intend with that witness, before she testified, to bring out the fact that she was under indictment with the federal authorities for her activities at the clinic. The caveat question, the follow-up question was I did it intentionally at the time, but was an afterthought as I asked that question. It was something I should not have done. I acknowledge that.

It was not something I started to -- planned to do that portion of it. It just happened. I wasn't thinking on that issue. It just happened as a result of that first question, and I apologize to the Court and counsel for that.

I acknowledge that it was improper and I -- that's the issue. I did intend to elicit from the witness that she -- she was under indictment initially, and I did ask that question and for what it was involved with.

The caveat portion of that where I asked the follow-up was, I think, in frustration possibly and for what I believed was going on, and maybe I wasn't thinking clearly at the time and it came out. I apologize, but that was not a willful thing that I was attempting to conduct -- or have misconduct occur in this case. It was not my plan to do so.

THE COURT: Well, just because a prosecutor doesn't intend to commit misconduct, as you know, doesn't make it not misconduct.

MR. STAUDAHER: Oh, I realize that.

THE COURT: And as Mr. Wright pointed out, you know, if a mistrial is granted and it's for misconduct, you know, then he of course has the option of seeking dismissal and arguing that jeopardy has attached because of willful misconduct. And at that point, my understanding is Mr. Wright can go back over, you know, everything that's occurred during the course of the trial, to try to demonstrate pattern and practice of misconduct on the part of the State.

And I have no doubt that that is exactly what Mr. Wright would do. And as I just want to be clear, just because they've made motions for mistrial, this Court does not

agree that those have been instances of misconduct. The ones I agree with are the two questions that you, you know -- and I am singling you out as opposed to Ms. Weckerly, who hasn't asked these inappropriate questions. It's you who asked them.

And I do find while, you know, you didn't intend to -- I don't think you said I'm going to do something wrong here, I hope I can get away with it. I don't think you did that. I think you intended to ask the question and didn't really think it through and, you know, that's what I -- I'm giving you the -- that's what I think you probably did.

You got in the heat of the moment and it's along -- you know, and I think, like I said, I don't think you set out to do something wrong. I believe you, you know, asked the question and just didn't -- just did it without thinking.

MS. STANISH: Your Honor.

THE COURT: Ms. Stanish.

MS. STANISH: To follow up on an issue raised by Mr. Wright about the Ninth Circuit caselaw regarding vouching, I think we need to explore that as well. Because when the government raises the immunity issue, raises any agreements regarding the person's testimony and any obligation that they're going to testify truthfully, that does raise unconstitutional vouching.

And I don't have a recollection, without reviewing, what was said before this improper questioning regarding what

may also be what is likely, given this explanation we had where he wants -- he did this for the purpose of beating us to the immunity issue.

THE COURT: The punch line.

MS. STANISH: I think there's an issue of improper vouching that we need to explore, and I would ask that we review the -- again, the video of Ms. Rushing's testimony so that we can more fully explore the application of the Ninth Circuit law with respect to that.

THE COURT: Are you asking me to do that now?

MS. STANISH: Yes. Yes.

THE COURT: Janie, if you would cue that up, or do you need to take a break to have JAVS come up?

All right. As I said, I wanted to review something in chambers. Ms. Olsen needs to get that -- I'm happy to play that again -- needs to have that cued up on JAVS, and then we'll go through that portion of the testimony again. All right. If anyone needs a brief recess, go ahead and take it.

(Court recessed at 10:01 a.m. until 10:11 a.m.)

(Outside the presence of the jury.)

THE COURT: Mr. Santacroce, will you do me another favor?

MR. SANTACROCE: Sure.

THE COURT: When you were outside, did you see a sign on the door directing people to Department 8 for the morning

calendar?

MR. SANTACROCE: I'll check.

MR. WRIGHT: I was looking for my co-counsel, but I'm not allowed to go in the ladies room.

MR. SANTACROCE: Yes. There's a sign on the door.

THE COURT: Is it a prominently displayed sign?

MR. SANTACROCE: Very prominent.

THE COURT: Okay. Well, I asked Mr. Santacroce, because about eight people came in during the argument, including the chief deputy assigned to this department who wheeled his little cart in here, and --

THE MARSHAL: [Inaudible] not enough?

THE COURT: -- a P&P officer who should be trained in observation wandered in and thought we were doing -- I'm doing the morning calendar, so.

All right. Janie, have you found the area? All right. We'll go ahead and --

(Audio/video played for the Court - not transcribed.)

THE COURT: All right. That's it.

MR. WRIGHT: Did you hear how squeaky I sounded?

THE COURT: Only because I wasn't speaking, and you can't compare yourself to my voice.

All right. He didn't get into whether or not she was going to be testifying truthfully or anything like that, so I don't see an issue there. Also, it would occur to me that she

might have an expectation of benefits from -- on the federal case if she testifies. In this case, I don't know if that's --

I'm not that familiar with what happens in the federal system criminal side, whether or not that's something that's calculated in the sentencing guidelines or something like that. I assume that it is. Ms. Stanish is nodding.

So certainly that's an area that, you know, could be explored, as to her bias or motive to testify in this case and testify favorably for the prosecution, if she's expecting a benefit from the judge or the U.S. Attorney's Office or anything like that in connection with her federal case, which certainly seems likely to me.

Because of course you're left wondering, well, why on earth would she cooperate testifying if she's not getting a benefit for it, and of course she's anticipating a benefit. So I think that, you know, that's certainly a fair, I guess, subject just in that regard goes to her motive and bias. All right.

MR. WRIGHT: I had -- did she say it can be used against her? I mean --

THE COURT: Yes. She's --

MR. WRIGHT: -- she even misstated her immunity.

THE COURT: Well, she did misstate her immunity, that's true. And that may have been a slip of the tongue on

her part, or she may not understand -- she may not really understand the immunity agreement, which also then would go to the truthfulness of her testimony.

Because if she feels like her testimony can be used against her, then obviously she has a motivation to paint herself in the best positive light and Dr. Desai in the worst possible light, if she thinks that somehow her testimony can be used against her. Obviously in that situation, if that's really what she thinks and it's not a slip of the tongue, she's not going to -- she's going to say as little implicating herself as she can.

And we all know people are notoriously bad at not implicating themselves when they're trying not to implicate themselves, as I'm sure Detective Whitely would agree. But that's, I think, something that it may have been a slip of the tongue. If it's not, I think that that could be significant with her motive and everything like that.

Getting back to the issue of the mistrial, as I said, you know, the impression is out there, the U.S. Attorney involvement, people making proffers, whether or not Mr. Mathahs is going to be indicted. As I've said several times already, but I'll say it again, I don't think it's a fair, you know, stretch to conclude or to surmise that there's also possible federal charges.

At the end of the day the issue here is whether or

not Dr. Desai can have a fair trial notwithstanding what has gone on. You know, looking at a footnote in the Bruton case, you know, the Court must grant a mistrial when the defendant's chances of having a fair trial have been irreparably damaged.

So at the end of the day the question is can Dr. Desai get a fair trial notwithstanding the misconduct and the answer to the question. In my honest opinion, I believe that Dr. Desai can still get a fair trial notwithstanding the testimony of the federal indictment for the reasons I've already stated both today and yesterday.

I think that certainly a curative instruction is appropriate if the defense requests that. As you know, Mr. Staudaher and Ms. Weckerly have offered an instruction. You know, that instruction looks all right to me. The one the Court had thought of was a little bit simpler, but I'd certainly accept or consider anything offered by the defense.

What the Court had thought would be something like whether or not there is a federal indictment against Dr. Desai for the same or similar charges is irrelevant and may not be considered by you as evidence in this case.

Previously on another issue the defense had asked that the Court provide an instruction that it was misconduct. The Court would be willing, if requested to do so, to provide such an instruction to the jury, something to the effect of you are instructed that the last question by Mr. Staudaher of

this witness and her answer was improper, and the question constituted prosecutorial misconduct.

And then the instruction whether you are told to disregard it and then something like whether or not, or something to that effect, that's the Court's suggestion. I'd be willing to do something like that if requested to do so by the defense.

So, you know, going forward, what -- you know, your motion for a mistrial has been denied, understanding that going forward at this point and as I said, it is my true and honest belief that Dr. Desai can still receive a fair trial. And as I said, I just don't see the prejudice to Mr. Lakeman, so I think implicit in that is my belief that Mr. Lakeman can also get a fair trial going forward.

What, if any instruction would the defense, starting with Dr. Desai's attorneys, would the defense like the Court to give to the jury?

MR. WRIGHT: What cross-examination is Mr. Santacroce going to be allowed? I mean, I just want to know before --

THE COURT: I believe that the answer, the answer that's been given doesn't really call for cross-examination in my view, but I'll certainly hear from Mr. Santacroce on this. I know he feels differently. Because the answer was that she and Dr. Desai were under indictment, so it's obvious that Mr. Lakeman isn't under indictment.

MR. SANTACROCE: Well, it's not so obvious to me, Your Honor. It may be obvious to you, and I think I should be allowed at least one question to ask her the indictment for which she and Dr. Desai are under federally does not include Mr. Lakeman.

THE COURT: The problem with that, Mr. Santacroce, is this. We tell them it's irrelevant as to whether or not anybody's under indictment. Well, I can't tell them it's irrelevant and then ask you to bring out evidence relating to the indictment. It's either irrelevant and they can't consider it, or they can consider it.

MR. SANTACROCE: But you're the one that's saying it's irrelevant in the instruction.

THE COURT: Well, I don't have to use that word. But I mean, that's the gist of it, that it may not be considered. Now, whatever word, I'm certainly happy to accept words offered by the defense. Those, you know, that's just a suggestion, what I thought of.

MR. SANTACROCE: Well, if the Court instructs me not to do that, I won't do it.

THE COURT: You know, but I can give a different instruction. It can't be obviously considered as evidence against anybody. But, you know, my feeling is A, I don't see the prejudice to Mr. Lakeman. I think her answer was complete. She said it was her and Dr. Desai. It was she and

Dr. Desai who are under indictment.

She did not mention Mr. Lakeman in any way. So the evidence that we're going to tell the jury not to consider, so it's really not evidence. But they didn't hear anything negative about Mr. Lakeman at all, and so I just don't really see the need for cross-examination on that. But certainly I'll listen to your arguments.

MR. SANTACROCE: I don't have anymore argument with that.

THE COURT: Okay.

MR. SANTACROCE: I'll accept what the Court says. But I do have a related issue, because on this whole immunity issue, the State is saying she hasn't been offered immunity, and I am confused.

Because in the grand jury transcript, on page 55, Mr. Staudaher asks, Out of the abundance of caution, although you're not a State target in this particular case and you've made the proffers that you have in the past, out of the abundance of caution we're telling you today, from the State's perspective, that you in fact are not going to be a subject to prosecution by anything you say during this proceeding today, correct? The answer, Correct.

I don't know how they can say and elicit from her intentionally that she has no State immunity. Is that not State immunity?

MR. STAUDAHER: It was her intent -- it wasn't -- well, I mean, it is what it is as far as the transcript is concerned, but she was never conferred any immunity in the case. She felt she knew that she could be prosecuted when she came down to testify before the grand jury.

MR. SANTACROCE: But he said --

MR. WRIGHT: Whoa, whoa.

THE COURT: Did you send her a Marcum notice?

MR. STAUDAHER: No. We didn't send her a Marcum notice.

THE COURT: No. I mean, she was subpoenaed as a witness.

MR. WRIGHT: She has immunity.

THE COURT: So I mean, she didn't think --

MR. STAUDAHER: Yes, that's what I mean.

THE COURT: -- she could be prosecuted at the grand jury. That's what I heard you say.

MR. STAUDAHER: Oh, no, no, no. Not that she was prosecuted down there at the grand jury, but that she could become a target in this case. She was never conferred any --

MR. SANTACROCE: How much plainer --

MR. STAUDAHER: I mean, they can ask her.

THE MARSHAL: One at a time, Counsel. One at a time.

MR. SANTACROCE: How much plainer can that language be; she's not a target, she's not going to be prosecuted? And

he elicits the testimony from her saying you weren't given immunity, were you.

I don't understand his questioning at -- he asks questions he knows are false. Just like with Mr. Chaffee, the same thing. He asked the question about the reuse of needles when he knew it was false. They pretrialed him by Mr. Chaffee's testimony and asked him that question.

He keeps asking improper questions throughout the trial, and it's -- for him to ask the question she did not have immunity when he tells her he's got immunity at the grand jury, I don't get it.

MR. STAUDAHER: She never came before the grand jury on -- only because she would be given immunity from prosecution in the case. She knew from the time we proffered, from the time we've talked to her throughout the entirety that we hadn't made a decision in that regard yet.

THE COURT: Well, was that conveyed to her, her attorney?

MR. STAUDAHER: Yes, that she had not made a -- we had not made a decision. She agreed to come down and do the proffer. The proffer itself, nothing could be used against her. Clearly that was part of it. So her indication there was that, yes, we would not use that against her.

We had not made a decision on prosecuting her or not prosecuting her. She agreed to come down before the grand

jury and essentially give testimony, but we at that time, to the best of my recollection, did not have any agreement in place that we would give her immunity from prosecution, period.

MR. SANTACROCE: Your Honor, the State's quote, Mr. Staudaher's quote is, "We are -- quote, we are telling you today from the State's perspective that you are in fact, are not going to be subject to prosecution by anything you say during this proceedings today, correct? Correct."

MR. STAUDAHER: The grand jury proceedings.

MR. SANTACROCE: And that is his direct quote. Now for him to stand up here and say she wasn't given immunity is absolutely disingenuous at the least and misleading at best.

THE COURT: So what are you asking? I mean --

MR. SANTACROCE: Look --

THE COURT: I mean, I guess, Mr. Santacroce, what are you asking for?

MR. SANTACROCE: I am asking to clarify her immunity, and for my cross-examination, I want to get into the fact that she has been given immunity.

THE COURT: That's -- by the State, that's fine.

MR. SANTACROCE: But he -- he has to be instructed not to keep asking questions he knows are false.

THE COURT: Well, okay. To be fair to Mr. Staudaher in this regard, what you've read to me can easily be

interpreted not as immunity from prosecution, but immunity for whatever she says during her testimony before the grand jury, that --

MR. WRIGHT: She gets to commit perjury?

THE COURT: Well, that's what he says. But I'm saying it can easily be -- look, I wasn't there. I didn't tell Mr. Staudaher what to say. I'm, you know, hearing it cold like you folks. What does that mean? Well, to me what it sounds like is she has immunity for what she's saying in front of the grand jury. That's what it sounds like.

Was that your intent, Mr. Staudaher?

MR. STAUDAHER: Yes, Your Honor. I mean, when I asked the question in court today -- or yesterday rather, I asked her if she was ever conferred State immunity in this case. Her answer was no. If that's what her impression is from what we've --

MR. WRIGHT: It's false answer. She has --

THE COURT: Well, Mr. --

MR. WRIGHT: She has use immunity. Why do we keep dancing around this? She has use immunity conferred on her. It's immunity. And he keeps misrepresenting and he stands up in front of the jury and says, you don't have immunity, and it's lies. And we just keep accepting it and tolerating it. It's immunity. That's what she has. Correct?

THE COURT: She has immunity for the use of her

statements unless -- and I don't remember the exact language to the letter, unless they were found to be false or inconsistent with her prior statement or perjury, in which case --

MR. WRIGHT: Or if she changes her story.

THE COURT: I said inconsistent with her prior statement. I believe -- I don't have the letter in front of me. That's from my memory.

All right. So going forward, let's deal with one issue at a time. Going forward, what if any instruction would the defense, starting with Dr. Desai's attorneys, would the defense like me to give to the jury?

MR. WRIGHT: What you said. I want to hear it again.

THE COURT: All right. Here's what I -- all right. Here by just chicken scratch, but ladies and gentlemen, you are instructed that the last question to this witness --

MR. WRIGHT: And we have to say what it was. They aren't even going to know what the hell the last question was, Judge. I mean, we're going to have to inform --

THE COURT: Well, that, I might highlight it.

MR. WRIGHT: Well, I -- highlight it? How can it be any higher? My client's under indictment by the feds. I mean, we're not going to put --

THE COURT: Well, it'll be obvious. I mean, I'll say whatever, you know --

MR. WRIGHT: The information that --

THE COURT: Here's what I was going to say. You are instructed that the last question to this witness from Mr. Staudaher was improper and constituted prosecutorial misconduct. You are instructed to disregard the question and the answer thereto. Whether or not there is a federal indictment against Dr. Desai for the same or similar charges is irrelevant, and may not be considered by you as evidence in this case.

I'm happy to modify that as suggested by the defense. That -- I can give the State's instruction. This is what I thought of.

MR. WRIGHT: Say the last part again.

THE COURT: Whether or not there is a federal indictment against Dr. Desai for the same or similar charges is irrelevant and may not be considered by you as evidence in the case. I can give that instruction. I can not talk about the misconduct. I can only say whether or not there's a federal indictment may not be considered by you. I can call it misconduct.

I mean, if I say whether or not there's an indictment and don't call it misconduct, then, you know, the jury can also, I mean, it's maybe a little more innocuous that okay, well, why do we need to convict him here if the feds are just going to do it, you know, have their own case. I mean, so

there's different, you know, ways to think about doing this. This is something I thought of.

The other thing, you know, we can -- is Ms. LoBiondo here?

UNKNOWN SPEAKER: She is.

THE COURT: All right. Another possibility is if you want time to decide this, we can finish with Ms. LoBiondo's testimony and then decide on the instruction, and bring Ms. Rushing in after we're done with Ms. LoBiondo. And then the Court will instruct them however we decide. And I'm happy to take -- as I said already, you know, I'm not married to this. It's something I thought of.

The State, I think their instruction's okay. That's fine too. You know, I said the -- I offered to give the misconduct instruction because that had been requested previously on another issue. And so, you know, if I think this rises to that level, if the defense wants me to make that instruction and give them that instruction, I will do that.

MR. SANTACROCE: I'm fine with your instruction that includes the prosecutorial misconduct as you read it to us. I'm fine with that.

MR. WRIGHT: I'm going to need to consult with my client for a moment and the -- and I would just rather do it now, before LoBiondo. I mean, I want to address it because that was the last they heard.

THE COURT: Okay. So do you want a few moments to confer?

MR. WRIGHT: Yes.

(Court recessed at 10:33 a.m. until 10:45 a.m.)

THE COURT: All right. As soon as Mr. Wright comes back. And Ms. Stanish, did you have an opportunity, ample opportunity to confer with your client, Dr. Desai, regarding what you're requesting as an instruction?

MS. STANISH: Yes, Your Honor.

THE COURT: All right. Mr. Wright, have you had an opportunity along with Ms. Stanish to confer with your client, Dr. Desai?

MR. WRIGHT: Yes.

THE COURT: And what are the defense's wishes regarding an instruction to the jury?

MR. WRIGHT: As you stated. I want to make sure it's -- you are instructed to disregard, instead of the last witness, I want to use Tonya Rushing, I mean, just so there's --

THE COURT: Okay. So just read to me --

MR. WRIGHT: Well, I didn't -- you are instructed --

THE COURT: Well, I said that the last question to this witness, but you would like to say Tonya Rushing?

MR. WRIGHT: Correct. The last question and answer.

THE COURT: From Mr. Staudaher was improper and

constituted prosecutorial misconduct.

MR. WRIGHT: Yes.

THE COURT: You are instructed to disregard the question and the answer given by Ms. Rushing; you want that?

MR. WRIGHT: Yes.

THE COURT: Whether or not there is a federal indictment against Dr. Desai for the same or similar charges is irrelevant and may not be considered by you as evidence in this case; are you fine with that?

MR. WRIGHT: Yes.

(Pause in proceedings)

MR. WRIGHT: Yes.

THE COURT: All right. Is there anything else we need to deal with before we bring the jury in, and then I'm assuming we'll conclude with the testimony of Ms. Rushing?

MS. WECKERLY: I think that Mr. Wright wants the instruction, but to do the cross of LoBiondo.

THE COURT: Okay. So is that what you want, Mr. Wright? You want me to --

MR. WRIGHT: To instruct the jury right now.

THE COURT: Right. Instruct them immediately when they come in?

MR. WRIGHT: Yes.

THE COURT: And then you would like to finish with Ms. LoBiondo and do her cross?

MR. WRIGHT: Yes.

THE COURT: Okay.

MR. SANTACROCE: Can you just add on that instruction that it's irrelevant to both defendants, somewhere in there?

THE COURT: Against either defendant?

MR. SANTACROCE: Yes.

THE COURT: So -- all right. All right. Kenny, bring them in.

And just so it's clear for the record, that is the instruction that you would like me to give?

MR. WRIGHT: Yes.

MR. SANTACROCE: Yes.

THE COURT: All right. And Ms. Weckerly or Mr. Staudaher, what's your lineup for today?

MS. WECKERLY: We have Ms. LoBiondo, Tonya Rushing. And then if we get farther we have Ryan Cerda and Kathy Bien.

THE COURT: Okay. So Ryan Cerda is who?

MS. WECKERLY: He was the person that entered the actual billing stuff for the anesthesia records. So the other two are just very short witnesses, so I don't know if we'll -- we kind of have them coming in, in the late afternoon.

(Jurors reconvene at 10:50 a.m.)

THE COURT: Court is now back in session. The record should reflect the presence of the State through the deputy district attorneys, the presence of the defendants along with

their counsel, the officers of the court, and the ladies and gentlemen of the jury.

Ladies and gentlemen, before we begin with the testimony this morning, I must give you the following instruction. Ladies and gentlemen, you are instructed that the last question to Tonya Rushing from Mr. Staudaher was improper and constituted prosecutorial misconduct. You are instructed that you are to disregard the question and the answer given by Ms. Rushing. Whether or not there is a federal indictment against Dr. Desai for the same or similar charges is irrelevant and may not be considered by you as evidence in this case against either defendant.

I believe going forward this morning we will resume with the testimony of Ms. LoBiondo. You'll recall that her testimony was interrupted prior to cross-examination. So Officer Hocks, would you please retrieve Ms. LoBiondo, and we will resume her testimony.

ANNAMARIE LOBIONDO, STATE'S WITNESS, PREVIOUSLY SWORN

THE COURT: Mr. Wright, you may proceed with your cross-examination.

MR. WRIGHT: Thank you.

CROSS-EXAMINATION

BY MR. WRIGHT:

Q Ma'am, my name is Richard Wright, and I represent Dr. Desai. Okay.

Lakeman Appeal 04376

A Yes.

Q Have we ever met?

A No.

Q Okay. I'm going to ask you a lot of questions about your background, your years of employment at what I call the clinic, meaning working for Dr. Desai, and questions about your prior testimony, okay?

A Yes.

Q And if you have any questions, if you don't understand anything I'm saying or if you're confused on any of my questions, don't be bashful. Just say I don't understand or you're -- just speak up, okay?

A Yes.

Q Okay. Now, you are a CRNA, correct?

A Yes.

Q And as I understand your testimony here, you have a bachelor's degree in nursing?

A Yes.

Q And two master's degrees?

A Yes.

Q One in CRNA-ing, and the other was in being a nurse practitioner?

A Yes.

Q Okay. What's a nurse practitioner?

A A nurse practitioner is a nursing professional

who is -- has gone to a master's -- through a master's program, a master prepared professional who specializes in a certain area of patient care. My specialty was pediatrics, so in the care of children, and well children, sick children --

Q Okay.

A -- children in all aspects of development.

Q And you did that first, before becoming a CRNA, correct?

A Yes, I did.

Q All of your education was in the New York system?

A Yes.

Q Okay. And your employment before moving to California was in the New York system?

A Yes.

Q Okay. And that's --

A In CRNA also.

Q Oh, correct. And in that system often you're working in like teaching hospitals?

A Yes.

Q Okay. And so you are around other CRNAs or anesthesiologists and students, correct?

A Yes.

Q Okay. And that is dissimilar from the practice here in Las Vegas, correct?

A Yes, very much so.

Q Okay. And you moved first to California, correct?

A Yes.

Q And you practiced how long in California as a CRNA?

A From 1992 until 1994.

Q Okay.

A Sometime during that year.

Q Right. Approximately though, we're looking at, just for a time frame. And the -- do you recall when propofol came onto the scene --

A Yes.

Q -- year-wise?

Was it like while you were in California, or back in New York?

A Well, they were developing it when I was in New York, but we were not using it yet at our hospital. We were still using other sedative hypnotics. When I went to California, I began using it at the hospitals that I worked in there.

Q Okay. And so when propofol first came available in the '90s, you started utilizing it in your practice?

A Yes.

Q Okay. And you were -- in California you worked

in what kind of practice?

A I worked at the VA Medical Center in Long Beach, which was affiliated with -- I can't -- all the sudden I'm [inaudible] blank.

Q That's all right. A practice group?

A Sorry. Of the VA Medical Center in Long Beach, Kaiser Permanente Hospital system, and all throughout California. I would rotate to different hospitals. I worked for what they called a resource network, where I would rotate to different hospitals for Kaiser. And I also worked for two private practice anesthesia groups, where I would go into offices throughout Los Angeles and Orange County and do various procedures in office based practices.

Q Okay. And by that time, in California, you were using a full range of anesthesia products including propofol?

A Yes.

Q Okay. And when you -- propofol, when it first became available, was a new type of anesthesia, correct?

A Yes.

Q Okay. And do you remember how it first came --

A It came in a glass vial.

Q Okay. And when it was in the first glass vial, were there issues about whether, what do you call it, bacterial preservatives in it or something?

A Yes. It had a preservative, but because it's a

lipid substance, lipid base, you have to be very careful with -- with how you use it.

Q Okay. The -- and --

A Sterile technique.

Q I'm sorry. Did you finish your answer?

A Yes.

Q Okay. A lipid substance, I don't know what that means. But let's talk like with Demerol, that's -- were you using Demerol?

A Yes.

Q Okay. Is that a less fragile substance? I don't know the correct terminology.

A Well, it's -- there's not -- we were very careful with propofol because it was new and because of the -- it was a what they call a cremophor. It was a lipid. Because of its properties you had to be extra careful. And also because it came in a glass vial, that was another precaution you had to take. Demerol is not like that. It's -- usually comes in a -- it could come in a glass vial too, it didn't really matter.

It's just the property of the substance is different than --

Q Okay.

A -- in the -- there wasn't as much of a chance of -- I mean, you're still careful with everything. You

weren't less careful with any other substances, so.

Q Okay. With propofol, is there a greater chance of bacterial growth?

A Yes.

Q Okay. And did it have -- see, I don't know on the others. Are there some anesthetics that once you're using it you could use it the next day?

A It had been practiced for years and everywhere that there are vials that, you know, were opened that you were label and be able to reuse the next day.

Q Okay. Because they had sufficient antibacterial preservatives or something that allowed that?

A Yes.

Q And as long as you were clean in your handling of it, that was permissible?

A For years everywhere, even in doctors' offices with vaccines. It was always done like that.

Q Okay. And when propofol came along, it has a shorter when opened shelf life?

A Yes.

Q And that is like how long?

A Six hours. However, if you had a small vial, it -- I don't know of an occasion where it's going to be out that long.

Q Okay. And it's basically once opened, use

rather quickly or you're going to throw it away because it cannot be preserved?

A Yes.

Q Okay. Now, you came to Las Vegas and you explained you worked a couple of places before going to work for Dr. Desai in 2000, correct?

A Yes.

Q So you were here, I think you said you came to Las Vegas in 1994, so you worked about six years before starting employment with Dr. Desai's clinic?

A Yes.

Q And you worked for several different places you said, like Lake Mead Hospital, which is now North Vista, correct?

A Yes.

Q And at -- then -- and during those times you were CRNA-ing?

A Yes. I was not employed by the hospital.

Q Okay. You were employed by a group?

A Yes. Well, that's the way it works in Las Vegas. No anesthesiologist is employed by any hospital here. It may be changing now, in 2013. But at that time I worked with a group.

Q Okay. And the group you work with have an anesthesiologist plus yourself?

A In every group?

Q No.

A Are you asking -- can you be more specific?

Q Yes. The -- did you practice -- before you went to work with Dr. Desai, did you practice at times with an anesthesiologist?

A Yes.

Q Okay. And was that in bigger longer procedures?

A Usually, yes.

Q Okay. And so a CRNA and an anesthesiologist, an MD anesthesiologist would be working at the same time?

A It depends on the facility or the -- or the case.

Q Okay.

A There were times when I would work alone.

Q As a CRNA?

A Yes.

Q Okay. And when you did that --

A And do my own cases.

Q And when you did that it was perfectly lawful, permissible and within your realm and proper?

A The Nevada state law states that a CRNA is allowed to practice with a -- any licensed doctor, podiatrist or dentist.

Q Okay. And so when -- if you are -- a

procedure's being performed by a podiatrist, dentist or doctor in which he needs a patient to be put to sleep and uses you for the services, then he is the physician that you are working under --

A Yes.

Q -- correct?

A Yes.

Q And when you -- during your six years in Las Vegas before Dr. Desai's clinics, were you doing the full array of anesthesia including propofol?

A Yes.

Q Okay. And so you come and are -- how did you get to Dr. Desai?

A I was working in a physician's office doing anesthesia, plastic surgery cases, and a doctor came in, an anesthesiologist came in and asked me if I was interested in working for Dr. Desai.

Q Okay. And the -- so this was -- was this an anesthesiologist who knew Dr. Desai?

A Well, I would imagine he knew Dr. Desai. I did not know him.

Q Okay. Do you know if that anesthesiologist worked -- so he's an anesthesiologist. He said are you interested in working for Dr. Desai's clinics, and so you responded and went and were interviewed?

A I did not know Dr. Desai prior to that, but I did agree to go and meet with him for an interview.

Q Okay. And so were you interviewed by Dr. Desai?

A Yes.

Q Okay. And at that time there was no CRNA practicing in Dr. Desai's clinic, correct?

A I did not know of one.

Q Okay. Well, you were hired as the first CRNA is your understanding?

A Yes.

Q Okay. And when you were hired in 2000, were there also anesthesiologist MDs working at times in Dr. Desai's clinic?

A There were MD anesthesiologists who would work there and cover when I could not be there.

Q Okay. Because at the time you were the only one?

A Yes.

Q And there were times you were off on vacation or whatever?

A Yes.

Q And so at that time an MD anesthesiologist would work there is your understanding?

A Yes.

Q Do you know who they were? Do you recall any of

them?

A Pardon me?

Q Do you recall any of the MD anesthesiologists?

A Dr. Yee was one of them.

Q Yee, Y-e-e?

A Yes.

Q Okay.

A There were -- I don't how many and I'm sorry I cannot recall their names. There were doctors who came from Southwest Medical Associates group, I believe. I don't recall their names right now.

Q Okay. And I ask you questions, if you remember them, fine. I mean, because I've never been able to interview you or talk with you, so at times I'm just fishing and trying to get information that you know or don't know.

Okay. Now, you start -- when you started work, what -- and I'm talking about at the clinic now, did you start at Shadow Lane?

A Yes.

Q Okay. And it was at that time one procedure room, correct?

A Yes.

Q Okay. And did you work exclusively there or elsewhere for Dr. Desai at the beginning?

A I -- at the beginning I worked exclusively

there.

Q Okay.

A Although I did sometimes go to North Vista to do procedures with -- pain procedures, anesthesia for pain management procedures at North Vista Hospital with Dr. Maduka [phonetic].

Q Okay. And what -- what anesthesia was being utilized, when you were hired at Dr. Desai's clinics, for the procedures?

A At first we were using Demerol and Versed.

Q Okay. And then while you were there on what I'd call your first stint, your first period of employment, which was 2000 to 2004, correct?

A Yes.

Q Okay. That first period you evolved into propofol; is that correct?

A Yes.

Q And do you recall why the transition?

A We decided to use propofol because it's a great anesthetic. Patients can be comfortable and rest during procedures. It's a sedative-hypnotic with a little bit of amnesia, and it -- patients were able to tolerate the procedures and wake up nicely, quickly. They were not nauseous, or they didn't have that hung-over feeling that you get with Demerol. And Demerol, many people could not tolerate

Demerol.

Q Okay. So propofol, quick-acting, quick recovery, no -- no -- not the same side effects as some of the other anesthesias?

A Yes.

Q Okay. And the -- so propofol was tried and became the standard at the clinics; is that correct?

A Yes.

Q Okay. And your injection practices pre, pre-propofol and when you started using propofol, were your practices the same working for Dr. Desai in the administration; the way you did your job, was it the same as you had been doing?

A I'm trying to understand exactly what you mean by "the same."

Q Okay. The -- you had been administering anesthesia for 15 years when you went to work for Dr. Desai, correct?

A Yes.

Q Okay. And so you had certain procedures, your standard policy. Like how you drew up Demerol, how you drew up propofol, how you injected it, you had standards that you had developed and followed, correct?

A Yes.

Q Okay. And so when you went to work for Dr.

Desai, like first day 2004, you're there, what I'm asking is did you continue with your same standards and procedures?

A Yes.

Q Okay. So there wasn't any change or someone at the clinic said, whether it's Dr. Desai or anyone else, someone said, no, we're going to do it this way or that way?

A I would never let anyone tell me how to do anesthesia. It's --

Q Okay. And your --

A Followed my standards of care.

Q Okay. And you're adamant about that, correct?

A Yes, I am.

Q And you're vociferous, loud, whatever you want to call it, you state your mind is what I've been told; is that correct?

A I wouldn't -- I would not let anyone interfere with the way that I take care of my patients. I have a standard of care and I keep to it, yes, and I would not allow anyone to tell me what to do otherwise unless it were in the patient's best interests.

Q Okay. And the -- while you were working first, first stint at Dr. Desai, 2000-2004 period, did another CRNA come?

A Yes.

Q Okay. And so that's the second one, correct?

A Yes.

Q Okay. And who was that?

A That was Keith Mathahs.

Q Okay. And anymore come while you were there --

A During the --

Q -- first time?

A -- 2000 to 2004, no.

Q Okay. So when Keith Mathahs came, it was still a one -- one procedure room?

A Yes.

Q Okay. When you left in 2004 and returned about a year later in 2005, is that correct?

A Yes.

Q Okay. When you returned in 2005, just for the time frame, was it then a different bigger facility, two procedure rooms having moved like across the -- into -- across the hall?

A Yes.

Q Okay. So when you left, still one procedure room and one CRNA other than yourself, Keith Mathahs?

A Yes.

Q Okay. Had anyone -- did you ever go work Burnham?

A I can't remember if I did during that time period, but during -- definitely during the second time

period --

Q Okay.

A -- I worked at Burnham, and also at the North Vista Hospital.

Q Okay. And did -- do you -- did you know Mr. McDowell, Ralph?

A Yes.

Q Did he -- was -- do you know when he came to Burnham?

A I don't remember.

Q Okay.

A I know it was when it was the old Burnham, the one room. So he probably was the first CRNA at Burnham, I believe.

Q Was that -- is the old Burnham the upstairs?

A Yes.

Q Okay. And then ultimately Burnham moved downstairs and had more procedure rooms?

A Yes.

Q Okay. Now, when you were at Shadow Lane first time, single procedure room and Keith Mathahs is there, would you two work at the same time, rotate?

A Yes.

Q How did it work?

A He would do one patient and then I would do the

next.

Q Okay. Same procedure room?

A Yes. Unless I went to the hospital, or he or I went to Burnham.

Q Okay. And the -- when you would work with Keith Mathahs, and if you are both working on a given day at Shadow Lane, okay?

A Yes.

Q And there are colonoscopies and upper endoscopies going on, would you rotate each patient?

A Yes.

Q Okay. And so would you like start the assessment history with one patient while Keith is doing a patient in procedure?

A Yes.

Q Okay.

A I would go speak with my patient and take the history and make sure they had an IV.

Q And then when your patients -- when Keith Mathahs is done with a procedure, your -- the patient you had just assessed and was going to be yours would go into the procedure room?

A Yes.

Q And you would do all of your own assessment, charting, history, questioning of the patient?

A Yes, always.

Q Okay. The -- and did -- did you -- when you came to the work as the first CRNA at the clinic, 2000, okay, I'm going back a little bit, they didn't have CRNAs then and didn't have anesthesia billing, are you -- is that correct?

A I -- I don't know. I don't know what you're say -- what you're -- I'm not clear on that question.

Q Okay. Did you do anything like bringing the forms with you, like your anesthesia form, charting, charts or whatever? I'm not sure I'm using the correct terminology.

A Yes. The anesthesia record.

Q Okay. And you had anesthesia records you were utilizing?

A Yes. I got them from -- adapted it from previous facilities that I had worked in. I think I actually had one from -- which was similar to the one that they used at one of the hospitals in Las Vegas.

Q Okay. So you brought those. And did you deal with -- who did you deal with when you first came to work? I mean, you were hired by Dr. Desai, correct?

A Yes.

Q And he was one of the physicians doing the procedures and he ran the clinic and was a majority owner, you understood all that?

A Yes.

Q And there were other physicians in the group that you were -- that were performing procedures, partners?

A Yes.

Q Okay. And then who -- who was your initial -- who did you work with who was like the charge nurse?

A The charge nurse --

Q I'm not sure --

A -- was Betty.

Q I'm not sure of the terminology. The head nurse.

A I believe it was Betty.

Q Betty?

A But I can't remember her last name.

Q Okay. Were the -- did you deal with Tonya Rushing?

A Oh, Tonya is -- always been the office manager.

Q Okay. Did you -- you brought -- when we talked about the form that you brought, is that we're talking about the anesthesia chart that you actually fill out for a given patient, correct?

A Yes.

Q But and on that would be all of the relevant information that you keep, time, amount of -- personal history, blood pressure, everything you do with that patient, interview, all is charted by yourself?

A Yes.

Q Okay. And then that chart becomes a part of the nursing record?

A It becomes part of the patient record, I believe.

Q The patient record.

A Yeah.

Q Okay. And you brought that -- do you recall referring Tonya or talking to anyone at the clinic about billing, anesthesia billing, and like who had been doing your billing?

A I don't remember. I mean, I had billers that I used when I was working on my own, but that --

Q Was it Lizmark [phonetic] or something?

A I had used them, yes.

Q Okay. Is that -- okay. Do you recall when you first started work who was doing the billing at the clinic involving anesthesia?

A I -- I don't know who they used.

Q Okay.

A I have nothing to do with their billing.

Q I understand.

A I had nothing to do with that.

Q Okay. But you knew -- I mean, you came to work as an employee, correct?

A Yes.

Q Okay. And you weren't a -- working for yourself as a CRNA?

A No. I was employed with a salary.

Q Okay. And you knew like if an anesthesiologist came to the clinic because you were off, so an anesthesiologist MD came to the clinic, okay?

A Yes.

Q And he performed anesthesia services on a patient, okay, how was that billed?

A You know, again, I have no idea how they billed. You know, I -- I don't know what -- you know, what their arrangements were. I cannot even -- I can't even, you know, say that I had nothing to do with anyone's billing, you know. But I -- especially I cannot say what their billing was and how they did it.

Q Okay. The -- and when you previously, if you were working like an independent CRNA you would do your own billing for your services?

A In different --

Q Here.

A -- places where I worked.

Well, in Las Vegas, when I worked with Southwest Medical, I did not do the billing. When I worked with the plastic surgeon in their office, they just tell you how

much -- you know, that's different because it was private pay. They tell -- the surgeon would tell you how much you were going to make.

Q Okay.

A So again I didn't bill. The only thing I had to bill for was when I did -- when I did pain management procedures. That would be the only time.

Q Okay. So when you're working with Dr. Desai first time period, you're an -- a salaried employee with benefits, correct?

A Yes.

Q And you got bonuses?

A The first time, from 2000 --

Q Correct.

A -- to 2004, I was salary.

Q And so at that time your payment, your salary had nothing to do with the number of procedures you did or anything else, you were a salaried employee?

A Absolutely not, it did not have anything to do with that.

Q Okay. And your bonuses had nothing to do with --

A I don't know what they had to do with, because they went away --

Q Okay.

A -- the longer I worked there.

Q Okay. Well, they went -- when you came back as a per diem employee, no longer a salaried employee, there were no bonuses, correct?

A Yes, there were no bonuses. I was working per hour.

THE COURT: I'm sorry. Finish your answer.

THE WITNESS: I'm finished.

THE COURT: All right. The jury needs a break.

So we're going to take a quick ten-minute break, ladies and gentlemen. During the break you're advised you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on this case, any person or subject matter relating to the case, and please don't form or express an opinion on the trial.

Notepads in your chairs, and follow the bailiff through the rear door.

(Jurors recessed at 11:27 a.m.)

THE COURT: Ms. LoBiondo, during the break, do not discuss your testimony with anyone else.

THE WITNESS: I'm allowed to go out?

THE COURT: This way.

(Court recessed at 11:27 a.m. until 11:43 a.m.)

(Outside the presence of the jury.)

THE COURT: You can -- Mr. Staudaher, would you retrieve the witness, please.

MR. STAUDAHER: Certainly.

THE COURT: The bailiff's in the back with the jury.

(Pause in proceeding.)

(Jurors reconvene at 11:45 a.m.)

THE COURT: When the witness comes out of the restroom, just bring her in.

(Pause in proceeding.)

THE COURT: We'll get started as soon as we locate the witness.

(Pause in proceeding.)

(Annamarie LoBiondo resumes the stand.)

THE COURT: Mr. Wright, you may resume your cross-examination.

MR. WRIGHT: Thank you.

CROSS-EXAMINATION (continued)

BY MR. WRIGHT:

Q You left in 2004. Did you go to work somewhere else?

A Yes.

Q Okay. Where did you go to work in between?

A Nevada Anesthesiologists and Pain Specialists.

Q Say it again.

A Nevada Anesthesiology and Pain Specialists.

Q And what type of work was that?

A It was doing anesthesia for an anesthesiologist who was doing pain management procedures.

Q Okay. And you then came back 2005, worked your second period with Dr. Desai, correct?

A Yes.

Q Why did you come back?

A I had to leave the other facility due to personal reasons.

Q Okay.

A Health reasons and because I have two children. I had to -- something that was a -- could be a little more flexible to my schedule, so I could spend more time with my children.

Q Is that why you came back as per diem?

A Yes.

Q Okay. So that you were working no longer salaried, but would come, I think you said, like work two to five days a week?

A Yes.

Q Okay. And so there was more flexibility on your children?

A Yes.

Q And you weren't working Saturday, Sundays, night, late nights?

A Yes.

Q Okay. Is that the practice in some other jobs for CRNAs?

A In most of them, when you do anesthesia, you're working until that surgeon that you're working with is done, which could go into the night and on weekends.

Q Okay. Now, when you returned, the practice was the clinic, patients, physicians, two procedure rooms, it was bigger, correct?

A Yes.

Q Busier?

A Pardon me?

Q Busier?

A Yes.

Q Okay. And the -- when you returned, had the -- who was in charge? Was Betty still there?

A No.

Q Tonya Rushing still there?

A Yes.

Q She was there throughout, correct?

A Yes.

Q As the -- on the management side?

A Yes.

Q Okay. How about Jeff Krueger and Katie Maley?

A They were there. They were RNs.

Q Okay. And were -- what were they, head nurses, chief of nurses? What do you call them?

A At one time Jeff was an RN, just an RN, but he was then promoted to -- I don't know what his title would have been. And I guess he was in a supervisory nursing position and Katie was also in a supervisory maybe administrative nursing position, I believe. I'm -- I don't know exactly what their -- I don't remember exactly what their titles were.

Q Okay. And you as a CRNA, both when you were there as an employee the first time and then coming back CRNA per diem, you were within the chain of command, okay, you worked for Dr. Desai, correct?

A Yes.

Q Okay. And you were under the supervision of any physician who was doing a procedure at the time of the procedure?

A Yes.

Q Okay. And the -- if you had any issues, complaints or anything, who would you go talk to?

A Whomever I was working with at the time, which you mean a physician.

Q Right. If it's a physician, you're talking to the like Dr. Carrol or Dr. Desai or Dr. Carrera?

A Yes.

Q Okay. And if you had some issue with management

side or something, would you go through Dr. Desai, Tonya Rushing, Katie Maley, Jeff Krueger?

A It depends on what the issue was.

Q Okay. Were they your superiors, Katie Maley, Jeff Krueger?

A No.

Q Okay. You were independent of them; is that fair?

A Well, they may have had supervisory or administrative roles in the facility, but that does not include my anesthesia care. They cannot tell me how to do what I do. They're not anesthesia experts. They're not certified to do anesthesia. So they can administrate the facility or supervise certain issues, but not to interfere with what I do with my patients.

Q Okay. And you would totally completely look out and do what is proper and correct for your patients, correct?

A Yes.

Q And if someone told you to do something that like leave the room, go tend another patient while your patient was asleep, you wouldn't do it?

A Of course not. You would never abandon a patient --

Q Okay.

A -- during an anesthetic.

Q And the -- if you saw things wrong in the procedure room, you would point it out?

A Yes.

Q Okay. And I think some of the things you testified to on direct examination for the State, I think some of this all runs together. But were you asked about bite blocks?

A Yes.

Q Okay. The reuse of bite blocks after they're cleaned and sterilized?

A When I first came to work for Dr. Desai, I had never worked in a gastroenterology facility before, so I -- I did question it, that they were not re-sterilized. And I -- I believe Betty, the supervising nurse at the time, was not happy with that, that it was a concern, and so I also became concerned about that.

Q Okay. And you complained about it?

A Yes, I did.

Q Okay. And I think you also mentioned the first time, your first period there forceps reuse, do you recall?

A Yes.

Q Okay. And were forceps being cleaned, whatever they did with them, and then reused when you were first there?

A Yes.

Q Okay. And when you returned like second time,

third time, was that occurring?

A You know, I really have to maintain that my area of expertise is anesthesia and I cannot be -- I'm not an expert in how they sterilize the equipment. I mean, I understand if I have a piece of equipment how that is supposed to be sterilized. But I am not -- I am doing anesthesia and that's my area of expertise. I cannot be an expert in other areas.

Q Fair enough. But I have to ask the areas that you've testified about. Okay. I mean, that's why --

A Okay.

Q -- I'm asking you about them.

A Okay.

Q I understand you don't know whether the reuse of forceps, whether they were being cleaned, sterilized properly in the Medivator, not in the Medivator, you just don't know, correct?

A Correct.

Q Okay.

A I would be concerned because others were talking about it, saying that they were not.

Q Okay. But they -- it may have been sterile or not, but you -- it was a topic of conversation and something that caused you concern?

A Yes.

Q Okay. And you voiced your concerns anytime you had them?

A Yes.

Q Okay. And on the forceps reuse when you returned to work, they were not reusing them anymore; is that my understanding?

A That's what I understood, yes.

Q Pardon?

A Yes. I believe that they were not.

Q Okay. Now, on anything like -- I've read your interviews and testimony. So like if you saw a scope that had something on it, a colonoscope, okay?

A Yes.

Q You would point it out and tell the tech, correct?

A Yes.

Q And you recall having done that, correct?

A Yes.

Q And the tech would then take and go back, send it back for reprocessing and get another one?

A Yes.

Q Okay. And your determinations to cancel a procedure, okay, I want to go there. You testified about the time when a lady was not NPO-ing, drinking water, and so you did not want to go forward. Do you recall that?

A Yes.

Q Okay. I want to talk about -- generally about that and that incident, okay?

A Okay.

Q Now, you're responsible when you interview the patient, new patient comes in, anesthesia is your territory, and you're going to make an independent determination of your own whether it is safe to anesthetize that patient, correct?

A Yes.

Q And that's your realm of responsibility?

A Yes.

Q And that's why you go through all of those questions, hook them up, take all those readings, find out their -- what their allergies are and if they are healthy and fit enough to undergo the anesthesia, correct?

A Yes.

Q Okay. And there were many occasions where your -- you would do your assessment and say no, correct?

A Yes. If I didn't feel they were -- that they were fit for an anesthesia that day or for what I would say no for in that facility.

Q And it could be for an entire array of reasons, like blood pressure? I mean, you tell me. What are the various reasons where you'd say it's no go today?

A Someone who's unstable for any reason, any

medical reason. If they have an unstable condition that cannot be safely handled in an outpatient facility like that, they sometimes would need to have their anesthesia done in a hospital. Sometimes they would need to see a specialist, a cardiologist first to be cleared for anesthesia. They had a recent heart attack or severe coronary artery disease where you felt they were unstable.

Q Okay.

A Many issues or a combination of.

Q Okay. And at times you made the determination the patient should -- the procedure should take place in hospital rather than outpatient --

A Yes.

Q -- correct?

And when you made those determinations, you would discuss it with the physician who was going to do the procedure?

A Yes.

Q And because that -- they -- the physicians weren't always happy with canceling something on the schedule because they're there and they're ready to do it; is that fair?

A Yes. I mean, you would -- most of the time you would explain that to them and they would agree with you.

Q Okay. And the -- also the patients weren't

always happy with the determination, correct?

A Correct.

Q And you would have to explain it to the patients and/or their family, why it wasn't going forward today but they had to reschedule; is that correct?

A Yes.

Q Okay. But once you made the determination, it -- were you ever -- did you ever go ahead and like do it anyway?

A No.

Q Okay. I mean, you were never overruled in the sense that you did it despite your best judgment; is that --

A No, I would not be overruled. If I didn't believe something was safe, I would not do it.

Q Okay. When I read your interviews or testimony, I saw that when as the clinic grew this would come up like -- you estimated like one time a day that someone out of like 60 patients may not be qualified to go forward?

A Yeah. Again, I don't remember that exact estimate, but I -- it may be fair.

Q Okay. And on those, it would then be canceled and that's the CRNA's call, correct?

A Yes. Again, you would discuss it with whoever their physician is or who's going to perform the procedure and I would not do it.

Q Right. And you want everyone on board on the decision, correct?

A Yes.

Q And --

A That's the way you do it. You decide together. You work together.

Q Okay. On the -- there was one incident with Dr. Desai where you saw a lady drinking out of a jug of water, right?

A Yes.

Q Okay. And the -- so you said that's a no go, correct?

A Yes.

Q Okay. And that's a no go because she's not following the NPO. What's that mean?

A It's a Latin word meaning nothing to eat or drink after midnight.

Q Okay. And so nothing to eat or drink after midnight, and she's sitting there drinking out of a jug of water --

A Right.

Q -- right before --

A She had other compounding factors.

Q Okay. And this resulted in an argument between yourself and Dr. Desai?

A Yes.

Q Okay. And the -- do you recall that the lady was also upset?

A Yes.

Q Okay. She wanted it done, correct?

A Yes.

Q Is that correct?

A Yes, that is correct.

Q I didn't hear you. I'm sorry.

A I'm sorry. Yeah, I did say yes.

Q And that incident, was it -- is it fair to say that you and Dr. Desai butted heads on that?

A I believe we disagreed, yes.

Q Okay. Well, did it get blown out of proportion, in your judgment?

A It was a long time ago.

Q Yes.

A I mean, I don't remember it getting blown out of proportion. I remember other individuals becoming involved in it that it was not their jurisdiction to make that decision or voice their opinions.

Q Okay. Well, go ahead and say it. I mean, because I don't know. I wasn't there.

A Yeah.

Q I mean, the other -- Tonya Rushing?

A She was one of them, yes.

Q Okay. And the -- in other words, you said I'm not doing it and Dr. Desai wanted to do it, correct?

A Yes.

Q And the patient wanted to do it?

A Yes.

Q And you said, not me, I'm out of here?

A Yes. I didn't feel that it was safe to proceed.

Q I understand. And you said, I'm out of here, correct?

A Well, when it --

Q You tell me. I'm not --

A When it became that much of an issue, yes. The only way to proceed was to -- to leave, to not do it.

Q Okay. So you left, right?

A Yes. I left.

Q Okay. And were you -- did you quit, were you fired, did you come back?

A At that time I just knew I was leaving. I didn't intend to quit and I did not get fired.

Q Okay. And then you came back and --

A Tonya said, We're going to get the lawyers if you leave.

Q Okay. So you're leaving and she says, We're going to get lawyers, here come the lawyers, right?

A I never saw the lawyers.

Q Okay. And the -- did anything but -- do you know if the patient had the procedure?

A I do not know.

Q Okay. You don't know if our -- you don't know if the patient waited -- I mean, what are the options for patients at times like that, I mean in those situations?

A I think that she should have waited until the next day or another time when she could go through proper, you know, preparation.

Q Okay. Are there times --

A But I don't know what happened to her.

Q Okay. All you know is you didn't do it and you left?

A I wasn't comfortable with doing it, so I did not do it.

Q Correct. And then you didn't get -- you never heard from the lawyers, you didn't get fired or anything?

A No, I did not.

Q You came back to work?

A Yes, I did.

Q Okay. And you continued doing your work exactly as you had done it?

A Yes.

Q So if there was anyone else you thought isn't

anesthesia-able, you would say no?

A Yes, I would.

Q And did -- did Dr. Desai ever -- did any incident like this ever come up again with Dr. Desai?

A Oh, I believe there were other instances where patients were not a good candidate for an anesthesia there, and yes, those incidents -- incidences did come up again.

Q Okay. And would you -- and what happened? Did you do them?

A No, I didn't. I would discuss it with Dr. Desai or whoever was the physician at that time and not do them.

Q Okay. Are there -- is the patient given the option of having the procedure without anesthesia?

A It depends on the reason for saying that they're not able to have anesthesia. It depends on the reason. If they're an unstable diabetic and their blood sugar is not acceptable, then they're not going to have any procedure that day. It depends on the patient, individual case.

Q Well, I saw that -- I mean, I think I read that in your statement or testimony.

A Mm-hmm.

Q I mean, were there times where the person would opt to not have anesthesia and have the procedure?

A There were patients who did not want to have an anesthetic and would do it without.

Q Okay. I don't want to mislead you, but I thought I read that.

(Pause in proceeding.)

BY MR. WRIGHT:

Q Showing you page 32 of an interview, 7/3/08. Just read that to yourself.

A Okay.

Q Okay. And then -- and as much as you want of it, and see if that refreshes your recollection.

A From -- from here?

Q Yeah. Whichever -- whatever you need to read to put it in context here.

A Okay.

Q Were there times when a person, because -- opted to have the procedure without anesthesia?

A There were times when patients would opt to do that, yes, but they had to be patients that were not -- that were still physically good candidates to have anesthesia that day at that facility.

Q All right. So I mean, if I -- I mean, you give an example of the reasons by which I'm not -- I'm not okay today for anesthesia, but I'm going ahead and have like an upper endo anyway. Is that feasible?

A It depends on the reason why. I can't generalize.

Q Well, you tell me. I don't know the reason why.

A I -- if someone is not stable because they've recently had a heart attack or they have arrhythmias, they're not stable to be there at all and have a procedure.

Q Okay. I mean, that procedure -- so are all procedures canceled for medical reasons and nothing to do with the --

A Okay. Yes. If it's a medical reason, then they should not be having any procedure, not just --

Q Okay. But I --

A -- an anesthetic.

Q I thought there were patients that just couldn't undergo anesthesia --

A Yes.

Q -- or otherwise were eligible for the procedure.

A Yes. And there were patients who opted to go without anesthesia.

Q Okay. That's --

A They just didn't -- maybe they were afraid of anesthesia.

Q Okay. That's what I was asking you.

A Okay.

Q And that's what you had said, correct?

A Okay. Yes.

Q Okay. We're on the same page. And the -- look

at page 34, if that refreshes your recollection that that one incident with Dr. Desai was blown out of proportion. I think that's where I got that. Was that your view of it?

A That it was blown out of proportion?

Q Yes.

A I -- I think if it were blown out of proportion it would be because he was insisting that I still continue with the procedure, and I -- I did not feel comfortable with that.

Q I understand.

A And there was a risk of aspiration, so I did not want to do it.

Q Okay. Is that what you --

A So I don't feel it was blown out of proportion in that --

Q Okay.

A Okay.

Q I'm not sure I have the right page. Did you say it was blown out of proportion and ridiculous?

A Oh. Well, what I meant by blown out of proportion and ridiculous, that there -- it -- in most cases, the surgeon or the physician, whoever it is, would just agree with you and the case wouldn't be done. Why it was blown out of proportion, because an argument ensued to try to get me to change my decision and I -- I don't think it had to go that

far.

And I, you know, usually the physicians don't disagree with you that strongly that it has to involve other -- other people and the patient.

Q Okay.

A Most of the times you would tell the -- explain to the patient why that wasn't safe and that would be it.

Q Okay. Now, would you butt heads with Dr. Desai on occasion?

A Yes.

Q Okay. And would you --

A I mean, we would have disagreements, yes.

Q Okay. You're a strong personality? Little in size, strong in personality for a characterization?

A I -- I don't know.

Q Okay. Well, you weren't a shrinking violet?

A No.

Q Okay. And you would argue with Dr. Desai?

A If I felt necessary or -- yes. If that was appropriate at the time I would, yes.

Q Right. I mean, there isn't any complaint that you would not voice? I'm not criticizing you for it, ma'am. I'm just --

A If I felt there was an issue, yes, I would be voice -- vociferous about it. I would be outspoken, yes.

Q And stand up for the patient?

A Yes, always.

Q Okay. And your view is, from having worked there and with the other CRNAs -- when you came back Keith Mathahs was still there?

A Yes.

Q I'm talking about the second time, okay?

A Yes.

Q More CRNAs were there?

A Yes.

Q Was Linda Hubbard there then?

A Yes.

Q Okay. Ron Lakeman?

A Yes, I believe. I can't remember the dates that everyone joined or --

Q Okay. But you were working with them --

A Yes.

Q -- correct?

A Mm-hmm.

Q And when you came back per diem, I think you said you'd come in like -- or that you'd go to North Vista or come in at 11:00, or come in and work until the end of the shift or what?

A I would do -- go where -- you know, it would vary.

Q Okay. So --

A I would have had to maybe go -- I was flexible. So one date I might start somewhere and then come there. I might go to the hospital first and then come to the facility, or I might just start later in the day and work until the end of the day.

Q Okay. And were there times there would be three of -- three CRNAs working two rooms for a period of time --

A Yes.

Q -- like at Shadow Lane?

And the -- and then there were times where you would come to Shadow Lane and you would just be one of two CRNAs?

A Yes.

Q Okay. And at that time you were working with Linda Hubbard, Keith Mathahs, Ron Lakeman? Am I leaving anyone out you can think of?

A There were two others that -- a woman, Bobbie and Vince.

Q Okay. I didn't hear you. I'm sorry.

A Bobbie, and I can't remember her name.

Q Bobbie, another lady?

A Yes.

Q Okay. And a Vinnie?

A Vinnie.

Q Okay. And in your working with them at all times when you were there, your experience with them, the other CRNAs, was they stood up for the patients the same as you did?

A I can't speak for them.

Q You can't?

A I mean, I believe they would.

Q Okay.

A But I -- you know, and I do remember instances where they would also not feel comfortable. But I -- again, I can only -- I can only answer for what I did and how I do my anesthesia.

Q Okay. I know. But the way I phrased the question was from anything you experienced there that you would -- well, on the practices of the other CRNAs, okay, you worked with them side by side so to speak [inaudible], right?

A Different rooms.

Q Okay. But you would interact with -- like with Keith Mathahs, you knew him, correct?

A Yes, I knew him.

Q Trust him?

A I mean, that's -- I don't know how to answer that question. I --

Q Well, talk about your -- I mean, he's --

A Trust -- don't trust anybody.

Q As much as you're able to trust someone, did you --

A When I would have discussions with him, you know, yes, if -- you know, we're both anesthesia experts, so I would imagine. But again, I can't speak for anyone else's practice.

Q Okay.

A Doctors won't speak about other doctors. I don't think that's...

Q I only ask you these questions because I've already read your statements. Okay. I think you said -- I think you were asked by either the interrogators or prosecutors, did you think the other CRNAs would cut corner. You said, Keith Mathahs, I don't think, would compromise a patient's safety whatsoever. Do you recall that?

A No, I don't, but I can see that I said that. Okay.

Q Okay. But I mean, do you disagree with that?

A Don't disagree. Okay.

Q Are you all right?

A Yes. I'm fine.

Q Read page [inaudible] to yourself.

A [Complies.]

Q Does that refresh your recollection?

A Yes. But I don't like the way this is -- that's

not how I even -- first of all, this -- these papers I didn't get until right before I was subpoenaed, and I didn't get a chance to read them over. Five people in there asking me questions and if I had a time to read them over, I would have corrected that. That's not even proper sentence structure, and I don't -- that doesn't reflect what I meant.

Q Okay.

A Okay.

Q I'm going to try to unravel this. Okay. Is this your statement?

A Well, you know, they are my statements. Okay.

Q And the -- your interview -- I'm going to back up for a minute. Okay. Go backwards. If there's something wrong, all I want is for you to testify accurately and truthfully to the jury, okay?

A And I agree.

Q And so, and I'm not intending to mislead you in any way or -- okay?

A Okay.

Q Whatever it is it is. We'll hear it.

A Mm-hmm.

Q Okay. You were interviewed at length by an investigator, correct?

A Yes.

Q Okay. And that -- that's a transcript of your

interview, and there were prosecutors there, detectives there, people from attorney general's office. Do you recall that?

A Yes.

Q Okay. And you had your lawyer there, correct?

A Yes.

Q Okay. And after -- that was a very lengthy, hours and hours interview, correct?

A Yes.

Q Okay. And then after that you went to a grand jury a first time, correct?

A Yes.

Q Okay. And then after that you went to a grand jury again a second time, correct?

A I believe I only went to one grand jury.

Q Well, have you been -- copies of your statement?

A Yes.

Q Okay.

A I do have them now.

Q Okay. Did you just get them?

A I received them before I, you know, when I was subpoenaed.

Q Okay. But up until then, I mean, you were -- that interview was in 2008, a long time ago?

A Yes. I did not receive it then. I received it in 2013.

Q Okay. And then you went to the grand jury. This long interview was July 30, 2008.

A Okay.

Q And then a month later, August 28, 2008, you went to a grand jury.

A Yes.

Q Okay. And did you receive a copy of this?

A Yes, I have a copy.

Q Okay. And then you went to a grand jury two years later, in 2010. Did you --

A I don't remember two grand -- can I see that?

Q Sure.

A I'm not really sure.

Q It's a little tiny --

A Because I have this one, and -- oh, the -- was that when -- who was the prosecutor then?

Q Scott Mitchell.

A Oh, okay. Yes, I remember it. I don't have a copy of that.

Q Okay. You don't have this --

A I don't think so. I mean, I'll check my records, but --

Q That's all right.

A I could be wrong. I'm not sure. But now I do remember that.

Q Okay. But the chronology was long police interview?

A Yes.

Q Then grand jury and Scott Mitchell, and then grand jury with Mr. Staudaher?

A Yes.

Q Okay. And on getting back to your interview, I was asking you if you had given your opinion regarding the other CRNAs you were working with and whether they stood up for patients. Do you recall?

A I recall being pressured to do that, yes.

Q Okay.

A But I don't --

Q I'm not pressuring you.

A And that's not what I meant either.

Q Okay.

A I meant I knew Keith better. I had worked with him longer. That's all I meant.

Q Okay. I want to for the record just make it clear, when you said you didn't disagree -- or you disagree with something, because we have to make a record of all this.

A Yes.

Q And so just to -- the underlining obviously [inaudible]. Why don't we, just for the record, kind of go through these two pages, okay?

A Okay.

Q And then you tell me what --

A Okay.

Q -- you disagree with.

Can you see that up there?

A Yes.

Q The question, "Were you worried that other CRNAs maybe were compromised in any way, or that the pressure was getting to these people so they were having to cut corners in any way?" Then A-L, that's yourself, "The first CRNA that they hired that I had contact with, I didn't think that he would compromise patients either. I mean, there are worse situations where --

"Q Who was that?

"A The first one was Keith Mathahs. He was the first one that was hired.

"Q After you?

"A I think Ralph McDowell was hired next to work at Burnham. Okay. Then Keith came and he worked with me at Shadow Lane facility."

A Mm-hmm.

"A And then I was able to go to the hospital at that time, and I was going, you know, Lake Mead or North Vista or whatever.

"Q What about the subsequent CRNAs, did

you worry about any of them -- did you worry that any of them were less?

"A No. Because, you know, most of the time they were pretty open about it, you know, telling the doctors too bad you have to wait. Like, you know, I would have a patient history on every patient and, you know, if they didn't like it, I would just continue on with what I was doing and do the right thing.

"I would never -- it's my patient. I'm responsible. I have malpractice. I have a responsibility to the patient, and I would take their full history and what medications they were on and whatever amount of time that took, if I had to stop and get a blood sugar or check their blood pressure, I would do everything I had to do.

"I would not compromise, you know. I would do it efficiently. And even though the other -- some of the other CRNAs, I mean, I would hear them complaining to some of the doctors. But, you know, I believe they really did their job, you know. I don't know what they did in their rooms with their patient.

"But, you know, when I first started working and it was Keith and we would switch off, and that was kind of -- you know, that was good because we had time to go and interview our patients before, and that would keep things running more smoothly.

"Q What does that mean, switch off? What do you switch off?

"A I would do one patient, he would do the next.

"Q So it was only one room at the time?

"A At the time when -- you know, so this is Shadow Lane, until I left, you know, in 2004."

Now, is there something in there not accurate?

A There are a lot of you knows.

Q You know.

THE COURT: You should read my transcripts.

THE WITNESS: No, there is not anything in there that is not accurate.

BY MR. WRIGHT:

Q Okay. On the -- maybe I'm misunderstanding something. I mean, you weren't pressured in any way to say this exchange here [inaudible]?

A No.

Q Just this issue here.

A No.

Q Okay. Later you felt pressured to say certain things?

A Well, I didn't feel I should speak about others. That's not my place.

Q Okay. Let's go to propofol administration, okay?

A Okay.

Q The -- I want to go through the way you -- the way you did it, and then ask you if you were instructed to do various things like reuse syringes and that kind of stuff. Okay. So first of all, there were 20s and 50s is my understanding, when you returned like second stint.

A Yes.

Q Okay. And then just to fill it out, after your second time, 2005-2006, if I understand your chronology, mid 2006 you left for about four months and then came back until mid 2007; is that fair?

A Yes. I don't have my exact time, but if --

Q Okay. So --

A I believe it would be close.

Q When you were back and they were using 50s and 20s, we're talking about cc bottles of propofol, right?

A Yes.

Q Okay. And so first of all, starting with a 20, okay, a 20 cc vial of propofol.

A Yes.

Q You're going to -- what would you normally do? Just tell us your normal practice with a 20, and you're starting the first patient.

A I would open up two 10 cc syringes and two new clean syringes out of the package, two clean needles out of the package, and open the bottle of propofol, wipe it off with an alcohol wipe and remove, draw up or remove two 10 cc amounts in each -- one 10 cc in each syringe, each of two syringes so I would have -- the bottle would be empty and I'd have two brand new syringes.

Q Okay. And they're full and they're separate, new and clean, using my terminology, right?

A Mm-hmm.

Q And propofol bottle empty, throw it away, right?

A Yes.

Q Okay. Now you're going to inject the first patient. Okay. And the patient has heplock in, right?

A Yes.

Q And so you would inject what normally first time, if there is any such thing as a normal, 50 to 100 --

A Yes, depending on their weight and medical condition.

Q Okay. And if there's --

A If they're elderly you use less obviously. You know, there are conditions that you -- you make that decision, watch the patient as you're injecting.

Q Okay. I just jumped over all that you did.

A Sure.

Q But I mean, the patient came in, you hooked them up to the blood pressure machine, the oxygen thing, the EKG, all of that stuff, they're all hooked up ready to go and you're ready to inject. Okay.

A Yes.

Q So then you inject anesthesia. And just assuming it's an upper endoscopy and it's a short procedure, it could be that the patient gets 80, what do you call those, milligram?

A Milliliters or cc. They're equal.

Q Okay. 8 cc, right?

A Mm-hmm.

Q And so theoretically that could be all the anesthesia a patient needs?

A Yes.

Q Okay. And so then with that patient you'd be done and you still have some in the syringe, right?

A Yes.

Q Okay. And you do what with that?

A Throw it in the -- throw it away in the sharps container.

Q Okay. And you still have a clean 10 cc syringe of propofol, right?

A Yes.

Q Okay. Next patient comes in and you've done everything, interviewed, all okay, hook them all up, time to give anesthesia again. Use the same -- use the -- the unused needle and syringe full of propofol for next patient?

A Yes.

Q Okay.

A The totally new clean syringe, yes.

Q Right. That's all proper and correct?

A Yes.

Q Okay. And if let's just say 50 cc vial of propofol, your normal practice starting first thing in the -- first time you're working that day, you go into a room and there is 50 cc vials sitting there. Okay. Would you oftentimes put together a bunch of needles and syringes?

A If it's a brand new bottle and I'm taking the top off, I would -- I could -- if there is 50 cc in the bottle, I would take five 10 cc syringes sterilely out and lay them out.

Q Okay. And so they're all sterile and clean --

A Yes.

Q -- and so you would --

A That way there's no question of going in and out of a vial. You have them out.

Q Okay. And so you laid them out. You've got 50 cc, and then you would draw up all five of them?

A Yes.

Q Okay. So you then have five full syringes, 10 each?

A Yes.

Q Okay. And then toss the propofol vial, correct?

A Yes.

Q Okay. And then you would use those five on whatever number of patients then came through, never reusing a needle and syringe on another patient; is that --

A Never.

Q I mean, is that a fair --

A Yes. Absolutely never.

Q Okay. And that is -- that is how you practiced, correct?

A Yes.

Q Okay. And if a patient is -- let me give -- give you a hypothetical of a patient. Let's say we have a 20 cc vial. Okay. And you have given the patient his 10 cc, okay, and 10 cc are still in the vial, okay?

A Yes.

Q Now the patient needs more propofol, okay?

A Mm-hmm.

Q Would you go back into the propofol vial with the same syringe that you had used on that patient already?

A If it's the same patient --

Q Yes.

A -- and the same bottle --

Q Yes.

A -- and no one else has touched that bottle, that's your patient, you can use the same syringe. Because we had heplocks, you would change the needle. In some facilities you have needleless. We didn't have needleless. We had needles. But that's -- so yes, I would be able to do that if that was not used on another patient.

Q Okay. And the -- I just want to walk through that. The -- you've already injected the patient once. Okay. Brand new propofol vial, draw up and inject patient, same needle and syringe, need -- patient needs more. You would take, remove the needle, put on a brand new sterile needle, and because it's the same patient, same vial, no one else has used either, go back in with same syringe, new needle, draw up, inject patient?

A Yes. You could do that. That's that patient's bottle.

Q Okay.

A That patient's syringe.

Q And then with the caveat that that -- that vial's going in the trash and --

A Even if there's 2 cc left, 5 cc left, you cannot use them in another patient at that point --

Q Correct.

A -- because you've gone in there with their syringe.

Q Yes. Okay. And so then with that hypothetical I gave you, the needle and syringe and the propofol vial are tossed --

A Yes.

Q -- correct?

A Yes.

Q And the -- if you want -- if someone wants to call that reuse of a syringe, it -- in that limited circumstance with new needle, you would -- could reuse it, correct?

A Well, it's not really reuse. It's reuse on the same patient. It's their --

Q Okay.

A -- syringe. You don't change the IV tubing every time you put some -- put a medicine in there. You -- it's that patient's syringe. You're not going to use it on anyone else. You're not going to use that bottle on anyone

else.

Q Okay. So the -- so right. And so that -- you are using the same syringe on the same patient with a new needle, and you aren't going to use that needle, that syringe or that propofol vial on anyone else?

A Absolutely.

Q Okay. And that -- that is proper procedure and the way you have always done it?

A Yes. That's the way it's done everywhere. It...

Q Okay. And not just at the clinics, but everywhere you worked?

A Everywhere else I've ever worked, anyone else I've ever worked with.

Q Okay.

A Any anesthesiologist anywhere.

Q Okay. And on setting aside needles now and syringes --

A Pardon me? I'm sorry.

Q Setting aside needles and syringes, just talking about propofol vial, okay?

A Okay.

Q It's -- are you aware propofol vial says single use on it?

A Yes.

Q Okay. And the -- under the hypothetical I gave you at the beginning, you know, which was using propofol on more than one patient, like drawing up five out of the --

A Separate syringes, yes.

Q Right. You are using the propofol on more than one patient cleanly, aseptically, correct?

A Yes.

Q Okay. Yet the propofol vial says single use, right?

A Yes.

Q Okay. How do you reconcile that?

A Well, again, it's always -- I mean, if you're -- you have to do anesthesia on five patients and you have one 50 cc vial, you're -- the way to make that work in a sterile fashion is to draw them up individually separately prior to violating the integrity of the bottle, prior to going into it with anyone's -- you don't break sterility by drawing up five separate syringes. So if that's what you're presented with, that's how you use it. That's what we had.

Q And that's the way --

A You know, it's different when you do a procedure in the hospital. When it's a long surgical procedure, you're just dealing with one patient for a long period of time. These are shorter procedures, so that's how you -- that's how you can do it.

Q Okay. And these procedures being short like back to back procedures, there isn't any issue on bacterial growth or keeping it over six hours, correct?

A It's not opened for that long.

Q Okay.

A You're going to use it and --

Q And this multi-use of a propofol vial, meaning used on more than one patient, that is standard practice when it is cleanly properly done?

A Yes. I think -- okay. Yes.

Q Is that -- do you have a caveat?

A No, I guess. No.

Q Okay. I mean, is it correct --

A Yes.

Q -- what I stated?

Okay. Now, you mentioned on direct examination about a propofol -- pardon me, saline flush directive --

A Yes.

Q -- at the clinic. Do you recall?

A Yes.

Q Okay. And are we -- and we're talking about your second -- or your third time back at the clinic?

A I believe that's when it was, yes.

Q Okay. And at that time there was an idea of Dr. Desai, as you understand it, to inject 5 cc of saline

after the first patient injection of propofol; is that right?

A Yes.

Q Okay. And the -- and you stated you did not do that, correct?

A I would not do it because I didn't draw up or prepare the 5 cc syringe myself.

Q Okay.

A So I would not give it to the patient.

Q Okay. And that's part of your standard practice, you're not going to give your patient anything where you don't know where the syringe or the vial came from and you can't attest to the integrity of it?

A Yes.

Q And so this, you were being presented -- who was telling you to do this, the best you recall?

A I don't know who exactly told us to do it. I don't remember if --

Q Okay.

A I remember being told it was an idea of Dr. Desai's.

Q Okay.

A And everyone would ask me, the other doctors would ask me why I didn't use it and I said that's -- I didn't prepare that, I didn't draw that up and I'm not going to push it into my patient. I don't know where they came from.

Q Okay. Because to implement it, you were being given like a box of prefilled 5 cc saline syringes --

A Yes.

Q -- right?

And you didn't know -- you didn't draw those syringes of saline, correct?

A No, I did not.

Q And you don't know the integrity of how they were drawn, correct?

A Exactly.

Q Okay. And so would nurses and various people in the procedure say, hey, you forgot to give 5 cc of saline?

A Yes, I would hear that.

Q Okay. And what would you say?

A I'm not giving that because it's not mine. I didn't draw it up. I didn't prepare it. I'm not -- I don't know what that is.

Q And you said that to doctors, correct?

A Yes.

Q Okay. Did you get in an argument with Dr. Carrol about it?

A Well, I asked him. He asked me why I wasn't giving it, and I said because I didn't prepare it and I think it was -- it was done after that.

Q Okay. And when you were doing procedures for

Dr. Desai, okay, you didn't give saline right in front of Dr. Desai, correct?

A Correct.

Q Okay. And did he admonish you, order to do it or anything?

A He may have. If he did, I -- you know, it didn't escalate. It never escalated into an argument. Even with Dr. Carrol it never escalated into an argument. It was just I made the statement I didn't give it, it wasn't done. It never -- never became a huge issue.

Q Okay. And the -- as far as like the saline, I mean, the problem, you weren't going to use saline syringe you hadn't drawn up on your patient, correct?

A Yes. I was not going to use it --

Q Okay. As far as like --

A -- period, the end.

Q As far as like saline going into the patient when your patient's getting propofol, just setting aside the drawing up issue, saline does go into the patient when a patient's getting propofol in other settings, correct?

A Yes. Usually it's in a running IV bag with IV tubing and...

Q Okay. So and you've dealt with those and have experience in that, correct?

A Yes.

Q Okay. So in an -- where, like at North Vista Hospital?

A Well, yes. And if you're going to do a surgical procedure, the patient usually has a -- always has a running IV for fluids and other medications, so.

Q So the saline going in with the propofol, I mean, there was nothing peculiar about that?

A No.

Q Okay. And --

A That was not unsafe.

Q Okay. And the -- you understood that the idea was this would make the propofol work faster? Did you know?

A I believe that was the idea, yes.

THE COURT: May I see counsel at the bench, please.

(Off-record bench conference.)

THE COURT: Ladies and gentlemen, we're going to -- we're not going to finish with this witness before a reasonable time for lunch, so we're going to go ahead and take our lunch break now. We'll be in recess for the lunch break until 2:00 o'clock.

During the recess, you're reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries of this case, any person or subject matter relating to the case. Don't do any independent

research, and please do not form or express an opinion on the trial.

Notepads in your chairs. Follow the officer through the rear door.

(Jurors recessed at 12:57 p.m.)

THE COURT: Ms. LoBiondo, during the recess, again of course, I have to admonish you not to discuss your testimony with anyone else. Okay. And you're free to go to lunch so long as you're back at 2:00 o'clock.

THE WITNESS: Thank you.

THE COURT: Be back a couple minutes early if you can so we can start right up at 2:00, okay?

THE WITNESS: Okay. Thank you.

THE COURT: So you also have, you know, essentially an hour. And ma'am, you exit through that door.

THE WITNESS: Yes.

THE COURT: The back door is only for the jurors.

THE WITNESS: Thank you.

(Court recessed at 12:57 p.m. until 2:03 p.m.)

(Outside the presence of the jury.)

THE COURT: All right. Is everyone ready? Do you want to just grab the witness then?

Ms. Stanish, can you or somebody grab the witness? Kenny will do it.

MR. WRIGHT: I want to maybe ask her a question

Lakeman Appeal 04445

outside of the --

THE COURT: Oh.

MR. WRIGHT: It's just a question about --

MS. WECKERLY: That's fine.

THE COURT: Okay. So why don't you guys go do that.

MR. WRIGHT: Sorry to be innocuous. I just don't get it.

THE COURT: Okay. That's fine.

(Pause in proceeding.)

(Annamarie LoBiondo resumes the witness stand.)

(Pause in proceeding.)

(Jurors reconvene at 2:11 p.m.)

THE COURT: Court is now back in session, and obviously you're still under oath.

And Mr. Wright, you may resume your cross-examination of the witness.

MR. WRIGHT: Thank you.

CROSS-EXAMINATION (continued)

BY MR. WRIGHT:

Q Ma'am, are you currently employed as a CRNA?

A No, I am not.

Q Okay. Have you been employed since the last five years as a CRNA?

A I was work -- now, I have been working as a nurse practitioner a short period of time.

Q Okay. Now, on the -- we went through your uses of a needle and syringes with propofol. Okay. Were you ever at any time at the clinic, 2000 up through 2007, when you left, at any time were you ever ordered, directed, advised to reuse syringes, needles and syringes?

A No.

Q Okay. You have no knowledge whatsoever of any orders, directions or anything that you should reuse needles and syringes, correct?

A No. We had plenty of them.

Q Okay. And if someone had ordered you to reuse a syringe or reuse needle and syringe on some other patient or something, what would you do?

A I would not do it.

Q Okay. And if you were asked when you were interviewed by investigators if you weren't ordered to reuse syringes why would someone at the clinic contend that there were orders to reuse syringes, do you recall that?

A I don't recall it, but I know what I would have answered.

Q Very well. What would you have answered?

A I never heard that.

Q Okay. Do you recall saying -- I'll just -- and this doesn't contradict your answer.

A I know it doesn't.

Q You're right about that.

(Pause in proceedings)

BY MR. WRIGHT:

Q [Inaudible] of page 40 and on to 41, and just read that to yourself.

A [Complies.]

Q Does that refresh your recollection as to what I'm talking about?

A Yes. I remember that.

Q Okay. And what was -- when you were asked why someone at the clinic would say such a thing, what did you answer?

A I'm sorry. Can --

Q When you were asked by the investigators why someone at the clinic -- what -- why would --

MS. WECKERLY: Excuse me. I have a hearsay objection if you're intending to read the answer into the record, part of it.

THE COURT: Okay. I don't know what the answer is.

MS. WECKERLY: Well, it looked -- I mean, I'm not sure he was going to read it, but if he is...

MR. WRIGHT: I was going to. Maybe we better approach.

THE COURT: Maybe you better, because I don't know what you're looking at there.

(Off-record bench conference.)

BY MR. WRIGHT:

Q Do you know what the term "precharting" means?

A I guess I do. I've never heard of precharting, but I can imagine it means charting before charting. I don't know.

Q Okay. The --

A It's not a common term.

Q And you were asked about prechart -- page 20, 21, second [inaudible].

A Okay. Yes.

Q Yep. You were asked do you know what precharting means, and you answered it the same way. "I don't know. I guess it means charting ahead of time," right?

A I guess that's what I said I thought.

Q And then did you explain what you would do on your chart as far as precharting ahead of time?

A Well, I wouldn't prechart. You could write -- I mean, I could write the date and my name on the bottom of my records. That's all you could prechart as far as I would do it, and I don't know how else you could prechart anything else other than the date and your name.

Q And is there anything wrong with what you were doing? Let me put it that way.

A I don't see how that could be wrong.

Q Okay. And if they call that precharting, is anything that you did by starting to fill out the chart the way you did, any impropriety whatsoever --

A Those were my records that I was going to use for that day and they had my name on it and the date. I don't see anything wrong with that.

Q Okay. Now, you received prior to your interview proffer agreements [inaudible] before you [inaudible]; is that your understanding?

A Yes.

MR. WRIGHT: Approach the witness.

THE COURT: Mm-hmm.

MR. WRIGHT: Exhibit zero, one, look at that and tell me if that looks like your --

THE COURT: I think that would be oh, one.

MR. WRIGHT: Oh, one?

THE COURT: Letter O.

MR. WRIGHT: Oh, all right.

THE WITNESS: Okay.

BY MR. WRIGHT:

Q Does that appear to be a copy of the proffer use immunity letter between yourself and the district attorney?

A Yes.

Q And that -- that happens to be an unsigned one, but does that look like your agreement?

A Yes.

Q Thank you.

MR. WRIGHT: I move [inaudible].

THE COURT: Any objection to O-1?

MS. WECKERLY: No, Your Honor.

THE COURT: All right. O-1 is admitted.

(Defendant's Exhibit O-1 admitted.)

BY MR. WRIGHT:

Q When you were interviewed, that agreement was in the -- like that's dated July 14, 2008, and then you were interviewed with those five people --

THE COURT RECORDER: I'm sorry. I didn't hear that.

THE COURT: You need to keep your voice up.

BY MR. WRIGHT:

Q Interviewed by those five people, do you recall that?

A Yes.

Q Okay. And did you feel pressured to say certain things?

A I -- I think that I did --

Q Okay.

A -- feel like I had to -- I'm not sure. I mean, everything about this is pressure. I don't know how to answer that. But yes, I felt like I --

Q Would they interrogate you?

A Well, I -- questions like that are interrogation, I would imagine, trying to find out information. But I didn't -- I felt like there were too many people asking me questions at the same time. You know, I felt that that was an uncomfortable situation for me definitely, having not just one person ask you questions all the time. I mean, having several people asking you questions.

Q You were questioned about how fast Dr. Desai performed colonoscopies. Okay. Do you recall that?

A Yes.

Q And you answered that he was the fastest physician in the clinic, correct?

A Yes.

Q Okay. And they would press you to put times on it and lower times when you did not want to; is that fair?

A Yes. I felt uncomfortable with estimating times. I didn't have any actual records.

Q Okay. And --

Do you recall being asked -- I'm on page 46.

THE COURT: I'm sorry. Can you -- I didn't hear that. Can you --

MR. WRIGHT: I'll say it again. I turned around to give a page number. Page 46 of first transcript.

BY MR. WRIGHT:

Q "Was Dr. Desai slow or fast? What was his

average time?" You answered, "If he needed to be, umm, I don't know."

"Q Guesstimation?

"A Ten minutes meaning fast, you know, I don't know. I'm not sure exactly. I don't want to say times that are wrong.

"Q Which part is he fast at, the going in part or the coming out?

"A The coming out part.

"Q Okay. Another question. But he would also start before people were anesthetized, you've already said that.

"A At times, and I would, you know, and everyone would tell him.

"Q What's the fastest you've seen him do it?

"A Oh, I don't know. You know, I usually didn't really time his procedures because I'm busy with the patient. I really can't say a really good estimate of time, you know. It wouldn't be fair to anyone. I really can't guess. I don't know."

That was true and an accurate statement and testimony, correct?

A Yes.

Q Now, when you were called to the grand jury a month later, August 28, 2008, the first grand jury, do you recall being pressed again regarding the time?

A Yes.

Q I'm on page 30.

"Q Okay. In fact, would you say that Dr. Dipak Desai did procedures faster than the other doctors?

"A Definitely.

"Q How fast did he typically do the average? Acknowledging that the average is maybe hard to determine, but let's say a colonoscopy where nothing remarkable happens, it just goes the way you expect it to go, how long would you think it would take and how long would it take for Dr. Desai?

"A Okay. You're talking about colonoscopies, not upper?

"Q Right. I'm talking about colonoscopies for use of a hypothetical, yeah. I'm just talking about a colonoscopy.

"A You know, I didn't mark his time on my record and mark my anesthesia time, but I can estimate. And this is just an estimate, that he would do it in as little as four

minutes to, you know, ten. And, you know, if there were polyps and if there were, you know, things that had to be done, you know, he would do it, you know. He would do the thing -- he would do the right thing in that case."

That's a correct testimony; is that right?

A Yes.

Q Okay. And when pushed, it's four to ten minutes?

A But again, I felt uncomfortable saying a minute time, and I can't -- how can I? I --

Q I understand.

A I don't feel that I -- I didn't like being pressured to say an exact time.

Q Okay. And then let me go to your second grand jury. Okay. It's on page 37, May 6, 2010, like 18 month -- almost two years later. Okay. You're called in to a different grand jury to give testimony again, and at the time you're still under your use immunity letters, correct?

A Yes.

Q Question, "Who was the fastest? Dr. Desai.

"Q Just a little bit faster or a lot faster?

"A A lot faster.

"Q Typically for him to do an upper

endoscopy, how much time are we talking about to do the procedure roughly on average?

"A I wish I knew an average and I would say it's very -- I wish I knew an average and I would say it's very fast though, maybe.

"Q Well, all -- are we talking about ten minutes or are we talking about two minutes? What are we talking about?

"A Maybe five minutes. I'm not sure exactly.

"Q What about a colonoscopy, did you do more of those with him?

"A I don't know more, but I did, yes.

"Q How much time did it take him on average to do a colonoscopy?

"A Well, those were always longer. Your colon is longer and it depended on what was found. If there were polyps to remove, biopsies to take, if the patient was well-prepped or not, I mean. But generally he was faster than any of the other physicians."

Then the prosecutor says, "I'm going to ask you that question one more time." Do you recall that?

A Yes. It's -- yes.

Q "Roughly how long did it take him to do a

Lakeman Appeal 04456

procedure? And I'm talking about a colonoscopy type procedure, are we talking about 20 minutes or less or more? Are we -- what are we roughly talking about?

"A I would say less, much less.

"Q Do you remember telling people that you thought the low end or the fastest --"

Pardon me. I say it again, these little transcripts blow me off.

"Q Do you remember telling people that you thought the low end or the fastest end was around four minutes or so that he might do a procedure, a colonoscopy?

"A He might have done that -- he might have done one in four minutes.

"Q So you on -- so on average was it around that time, a little longer?

"A On average, I think it would be a -- be longer than that."

And then on page 62, same transcript. "And specifically, did you tell other investigators that you believed the colonoscopies for Desai were for the most part in the four to five-minute range?

"A I said that's how short. I believe that's what I said, that's how short he could do one."

Do you know how you got down into the four or five-minute range for a colonoscopy?

A Again, I don't feel I should have had to give a minute range or an average, because I don't think that that can be accurate. I did so many procedures over the years. Let's go back to my charts and start averaging it out. I don't know.

Q Okay. And isn't that --

A I don't think it's fair to ask me that.

Q And isn't that exactly what you told them --

A That's what I was saying --

Q -- the first time you were --

A -- it's not fair to ask me. I don't -- I shouldn't have given a time, because --

Q Okay. But who kept pushing you to do that?

A Whoever was asking me the questions. I was also, you know, told by my attorney to give specifics.

Q Okay. I don't want to hear -- I can't ask you about your attorney. I want to hear it, but I can't ask it.

THE COURT: We're not allowed to ask about conversations --

THE WITNESS: Okay.

THE COURT: -- private conversations you had with your lawyer.

BY MR. WRIGHT:

Q Regarding the colonoscopy anesthesia times, okay, the -- as I understand your direct testimony, when you came back like the third time, 2006 to 2007, okay?

A Yes.

Q The -- it was your understanding that you needed to bill 31 minutes or above 30 minutes; is that correct?

A I heard -- heard it said.

Q Okay. And you heard Dr. Desai say that at times?

A Yes.

Q Don't forget 31 minutes --

A Yes.

Q -- on this procedure, correct?

A Yes.

Q Okay. And the -- and did you -- were you also told that by Tonya Rushing?

A I asked Tonya why we were doing that.

Q Okay. And do you recall what her answer was?

A She didn't have --

MS. WECKERLY: Objection. Hearsay.

THE COURT: And sustained.

(Pause in proceedings)

BY MR. WRIGHT:

Q I'm talking about the directive, make sure your

anesthesia time was over 30 minutes.

A Yes.

Q I'm on page 6.

"Did anybody else ever talk to you about doing that, everyone -- anybody else from the clinic? Did Tonya Rushing, did Dr. Carrol, did anybody else say?

"A I --"

MS. WECKERLY: Objection. Hearsay.

THE COURT: Let me see the...

(Off-record bench conference.)

THE COURT: All right. Mr. Wright, please continue.

BY MR. WRIGHT:

Q "Did anybody else talk to you about that?

"A I believe Tonya said it at times.

"Q Said it to you personally?

"A Yeah.

"Q Could you give us the context of those conversations?

"A Dr. Desai wants the anesthesia time to be over 31 minutes. I mean, I --

"Q How many times? Where would that -- go ahead. How many times would she say that to you?

"A Umm. I don't know. You know, all that much time to walk -- to talk to Tonya or

to anyone else. Dr. Desai would usually say that to us right there in the Endoscopy Center.

"Q Back to Tonya. What about Tonya Rushing --"

I'm on page 7.

"Q -- how often would she do it, once a day, once a week?

"A I sometimes didn't even see her once a day, but I mean, I could hear her, you know, saying that.

"Q But what was it, like a don't forget thing --

"A Yeah.

"Q -- you know, kind of?

"A Remember it's got to be over 31 minutes."

Q Okay. Do you recall that?

A I -- I recall it now. It's been a long time.

Q I understand.

A And I didn't actually review that --

Q Okay.

A -- part of that, but okay.

Q But that would be Tonya Rushing we are talking about, correct?

A Yes. I understand.

Q And she is saying the anesthesia time needs to be more than 31 minutes, as directed by Dr. Desai; is that a fair characterization of it?

A Yes.

Q Okay.

A It's been a long time. I don't remember a lot of exactly. I don't remember how I said that.

Q Okay. Did you also talk to Dr. Carrol about it?

A Yes. I asked Dr. Carrol.

Q Okay. And the it I'm talking about is the anesthesia time.

A About the anesthesia time.

Q Right. And what conversation was that, do you recall?

A I believe he also did not have an answer for me.

Q Okay. You asked him like why am I doing this at 31 minutes?

A Why do you want it this way. I didn't say why I am doing it, because I wasn't doing it.

Q Okay. You weren't, correct. Okay. Why am I being instructed to do that, and he didn't have an answer for you?

A Correct.

Q Okay. And this would have been -- and when did you leave --

A In 2007.

Q -- in 2007?

Like May, June?

A Yes. The end of May or...

Q Okay. Now, in any of the explanations, did you -- were you ever told about anesthesia time including recovery room time?

A No one ever specified there, but I don't think I would have asked it. I know how anesthesia time is done in just the way I -- you know, because of the way that I have always done it since --

Q Okay.

A -- since anesthesia school. Your time is your time in the room. Your time out is the time that you leave the patient and you're satisfied with their vital signs and that they're in their recovery in the recovery room. That's the ending time.

Q I understand.

A So --

Q Start time, where you first --

A -- I don't think I would have asked them.

Q Okay. So what I asked you is did you ever get any explanation from Dr. Desai or --

A No details.

Q -- or Tonya Rushing or Clifford Carrol regarding

the calculation of the anesthesia time?

A No. I never did.

Q Okay. Thank you very much, ma'am.

THE COURT: All right. Thank you, Mr. Wright.

Mr. Santacroce, cross.

MR. SANTACROCE: Your Honor, I don't have any questions, but I'm going to reserve my right to recross depending on Ms. Weckerly's redirect.

THE COURT: All right. Ms. Weckerly, redirect.

MS. WECKERLY: Just briefly.

REDIRECT EXAMINATION

BY MS. WECKERLY:

Q At the end of cross-examination you were saying that you wouldn't have asked Dr. Desai, Tonya Rushing or Dr. Carrol about how to define anesthesia time essentially?

A Yes.

Q What is -- and I think you said that the reason is you have your own understanding of what that is.

A Yes.

Q What is your understanding of the time?

A Okay. Anesthesia time is when you take your patient into the room, the CR, the procedure room. Generally you look at the clock with the nurse in the room. Because everyone's watches and clocks are different, you look at a common clock and say 2:55 is our time in. Right. Then the

time out is when you're done with the procedure, you unhook the patient, you take them to recovery room, you rehook them up with monitors, check their vital signs, and you and the nurse in the recovery room say this is the time out. That's how you do it in most -- in the hospital.

Q Okay. Can you start another procedure, like with a different patient?

A Well, you couldn't.

Q Right. I mean, well, that's my question.

A You can't be in two places at once.

Q Are you allowed to start another procedure and still be counting your time on the first one?

A No.

Q And my understanding is you were directed by three people to do 30 -- essentially over 30 minutes? Or I mean, I just want to clarify that. Did Dr. Desai direct 31 minutes or over?

A Yes.

Q And then my understanding is you said Tonya Rushing would tell you that too?

A Right now I'm -- it's hard for me to remember, but if I said that at that time -- I don't remember right now, but I know I remember asking her about it.

Q So you had a conversation at least with her about it?

A Yes.

Q What about the conversation with Dr. Carrol, how would you characterize that?

A I asked him why we were doing that, why.

Q It's my recollection of your answer on cross was that you didn't get much of an answer.

A I didn't get an answer.

Q Were you -- if you were asking about it, was it something that you were uncomfortable with?

A I was uncomfortable with it.

Q Thank you.

THE COURT: Any recross, Mr. Wright --

MR. WRIGHT: No, Your Honor.

THE COURT: -- based on that?

Mr. Santacroce, anything based on Ms. Weckerly's questions?

MR. SANTACROCE: No, Your Honor.

THE COURT: Any juror questions for this witness? No. All right. Ma'am, thank you for your testimony. Please don't discuss your testimony with anyone who may be a witness in this case.

THE WITNESS: Okay. Thank you.

THE COURT: You are excused.

State, call your next witness.

MR. STAUDAHER: May we approach, Your Honor?

THE COURT: Sure.

(Off-record bench conference.)

THE COURT: Ladies and gentlemen, we're going to take a real quick recess. Just about 10 minutes, or as long as you need.

During the recess, you're reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch or listen to any reports of or commentaries on this case, person or subject matter relating to the case by any medium of information. Don't do any independent research, and please don't form or express an opinion on the trial.

Notepads in your chairs, and follow the bailiff through the rear door.

(Jurors recessed at 2:57 p.m.)

THE COURT: All right. Mr. Staudaher, you had approached the bench to indicate that the next witness had some testimony relating to upcoding.

MR. STAUDAHER: That's correct, Your Honor.

THE COURT: And upcoding again, is what? When they code a procedure higher --

MR. STAUDAHER: Than it should be.

THE COURT: -- than it should be, and that they get paid at a higher reimbursement rate?

MR. STAUDAHER: And Desai's direct involvement in

that process. So we want to make sure that everybody's on board with that, because in her transcripts that's essentially all she talks about is the upcoding. And she really, she's not one who does the anesthesia billing directly, but because they've raised this as an issue, there's a direct --

THE COURT: How are they upcoding? I mean, by how --

MR. STAUDAHER: Dr. Desai walks in -- well, she mentions some doctors, but then Dr. Desai apparently walks into a room while she's there and directs a person next to her with the stack of forms from other doctors to code them at the highest amount or something, and she refused to do that. She wouldn't do it.

THE COURT: And then what happened?

MR. STAUDAHER: As soon as he leaves the room she tells the person not to do it because it's illegal.

THE COURT: I mean, did she get like fired or...

MR. STAUDAHER: No. She eventually quit because of that and other issues about the clinic. I mean, she has some direct observation. It's not just the billing. She had -- where she's positioned she can kind of look into the clinic. She's on the medicine side but she can see what's going on in the clinic, and she --

THE COURT: So what else is she going to testify about?

MR. STAUDAHER: Just about the billing stuff and

about her observations of the flow of traffic through the clinic and how that disturbed her to the point that she felt that she had to leave.

MR. SANTACROCE: Who is this witness, Your Honor?

MR. STAUDAHER: It's Kathy Bien.

THE COURT: Kathy Bien?

MR. STAUDAHER: Bien.

MR. SANTACROCE: What is her position?

MR. STAUDAHER: She was a biller.

MR. SANTACROCE: Well, I'm going to object to anything that -- anything that she's going to testify as to the medical end of the clinic. She can testify all she wants to the billing, but the medical end --

MR. STAUDAHER: These are direct observations.

THE COURT: Well, I think what they mean about the medical end is she's sitting there looking down the hallway and seeing people come and go and she thinks what, it's too many people?

MR. STAUDAHER: That's the problem, yeah. And the other issue is not only that, but --

THE COURT: That's kind of cumulative, I --

MR. STAUDAHER: -- she deals with -- she deals with the -- on the medicine side, the procedures themselves. I mean, she has firsthand knowledge of what the length of those procedures should be. Not procedures, but the times that are

attributed to sort of a short visit, a medium visit and a long visit. And so when he comes in to tell her that or tell her compadre that, that is clearly something --

THE COURT: Is she -- I'm sorry to interrupt you, because I just am trying to understand. Is she billing for the medical side of the clinic or the procedure side of the clinic?

MR. STAUDAHER: She bills for the medicine side and I think the other side with exception of the anesthesia billing. She doesn't bill for that.

THE COURT: Okay. So she bills for the procedures?

MR. STAUDAHER: Yes. And she bills for things that relate to the office visits themselves, that's my understanding.

THE COURT: Okay. So she's -- you want her to come in and say I billed for the procedures and Dr. Desai told me to upcode, or what do you --

MR. STAUDAHER: I'm going to ask her this. It's open-ended. What did you bill for. So if there's any -- you know, if it's just the medicine, then she can tell us it's just the medicine. If it's medicine and procedures, it's the procedures. But I know for a fact that she did not bill for anesthesia because they asked her that directly in the state --

THE COURT: Okay. And then what's she going to say;

Dr. Desai told me to upcode, or Dr. Desai --

MR. STAUDAHER: Doctor --

THE COURT: I mean, I want -- I guess what I'm asking, Mr. Staudaher, is specifically what's she going to say? Like, you know, we did a colonoscopy and he told me to bill it as a polyp removal, or what's she going to say?

MR. STAUDAHER: There's essentially just one statement from him or one event where she directly has contact with him.

THE COURT: Just tell me what it is.

MR. STAUDAHER: He walks in with the --

THE COURT: I don't have -- as you know, I don't have the benefit of discovery.

MR. STAUDAHER: I understand.

THE COURT: I don't have the benefit of everybody's statements and transcripts. So I don't know what she's go -- I -- you know, I'm sitting here, I don't -- you know, if she testified in the grand jury, I read that transcript months ago. I don't -- I honestly don't know what you're going to ask her, so I need to know.

MR. STAUDAHER: She did not testify to the grand jury.

THE COURT: Okay.

MR. STAUDAHER: And she references in her statement other doctors. But there's one incident with Dr. Desai where

he doesn't directly tell her, but she's sitting next to the person that he comes up to and says this.

THE COURT: Okay. So just tell me. She's going to say --

MR. STAUDAHER: Walks in with the stack --

THE COURT: -- I'm sitting in the office and Dr. Desai walks in and he says, hey, Barbara, you need to upcode, or what's she going to say?

MR. STAUDAHER: Hands a stack of -- or a stack of sort of encounter forms from other doctors and says that he wants all of those coded to the highest level, wants the coding changed on that and to the highest level.

MS. STANISH: Would you cite for me, please, the page you're referring to with regards to this one minute?

MR. STAUDAHER: This one minute?

MS. STANISH: I'm sorry. This one encounter with Dr. Desai, could you, please --

MR. STAUDAHER: It's not -- it's not referenced by name in there.

MS. STANISH: Oh, it's not?

MR. STAUDAHER: She says the doctors in places that -- in pretrial she told us this on Dr. Desai. So we want -- that's why we're raising it in advance, to make sure that everybody's aware of it, so.

THE COURT: Okay. And these are, these sheets are

Lakeman Appeal 04472

other doctors' sheets for --

MR. STAUDAHER: They're called Encounter Forms.

THE COURT: And what does that mean?

MR. STAUDAHER: That means that when the doctor has an encounter with a patient and the patient's -- and they're in there for five minutes or ten minutes or half an hour or whatever, they basically put down it's a low level visit, it's a medium level visit, it's an upper level visit. A low level visit is like 15 minutes or less. Medium, I don't know where it ranges, but --

THE COURT: Right. I get it. I know.

MR. STAUDAHER: So she knew that the flow --

THE COURT: Like an initial visit would be -- tends to be a high level visit or whatever.

MR. STAUDAHER: Correct. And that the stack that was brought in essentially was code all of them at the highest level. So that's the one issue that would come out with her, so I want to make sure everybody's on board with the -- knows what's coming and that there's no issue with this woman. Because the only thing she has other than her observations of the clinic itself and the volume going through the endoscopy side was this coding issue.

MS. STANISH: Your Honor --

MR. WRIGHT: I'm --

MS. STANISH: -- this matter is not --

MR. WRIGHT: Wait.

MS. STANISH: Just to clarify, this matter is not in the statement. It sounds like it's something you learned in pretrial.

MR. STAUDAHER: That is. She does reference doctors doing this. She doesn't specify who in her statement, but in pretrial she referenced in her statement.

THE COURT: Okay. And then how does she know and then what happens after that? The other woman says, oh, these are all -- I mean, how does she get involved then in this --

MR. STAUDAHER: She then tells the person not to do that because she would get in trouble for doing that, something to that effect.

THE COURT: Okay. And then they code them correctly after that, or...

MR. STAUDAHER: My understanding -- I didn't get into the details of what she did afterward. I just know that that one event occurred.

THE COURT: And she didn't get retaliated against or fired or disciplined?

MR. STAUDAHER: She ends up quitting subsequent to then.

THE COURT: But I'm saying nobody said, hey, these aren't being upcoded, you know, you're fired, or, you know, you don't get a lunch break or whatever?

MR. STAUDAHER: Not to my knowledge.

MR. SANTACROCE: Is this upcoding part of the indictment?

THE COURT: No.

MR. SANTACROCE: Then why are we doing this?

MR. WRIGHT: Right. This is --

MR. SANTACROCE: I don't get it.

MR. WRIGHT: This is other bad acts for which there was no notice of and for which we haven't had a hearing on. We don't -- and I mean, the only part of this indictment which has any clarity and precision in charging is the billing part, and every billing count specifically says the 31 minute anesthesia time. And it says nothing about any other upcoding, any other fraudulent billing of any type.

And this apparently is billing out of the other side of the business and it is not charged. So it's either going to be a variance, if it's coming on, on the medical fraud case. I mean a variance of the indictment, which we didn't have notice of, or it's other bad acts and we didn't have notice of them.

And we're not prepared to defend an upcoding case. I have no idea whether you're upping a polyp to a snare or whatever, and I have no experts to counter it.

THE COURT: Well, I think what it is, is I mean, we've all seen it on our bills. It'll say, you know, a high

visit, medium visit. I know it exactly, like an initial visit with a physician typically would be a high visit, and then, you know, if you just go in and they renew your prescription or whatever, that might be a low visit. I mean, I'm familiar with what you're talking about.

MR. SANTACROCE: If it's not --

THE COURT: The problem is how is this not other bad acts evidence, number one, and number two, you know, you can say, well, it goes to his intent or motive, which is still bad acts, and maybe they should have known or filed a motion in limine. But if the statement says doctor said this, then it's not even foreseeable that they would have raised this as an objection, if the statement didn't even say Dr. Desai said. So I'm concerned --

MR. STAUDAHER: Well, I think they say he. And she keeps referring to the doctor throughout her testimony and then doctors, so.

THE COURT: How is this not other bad acts evidence? I mean, I get it. It's -- I mean, I get why it's relevant. It's relevant to his motivation and trying to rip off insurance companies and --

MR. STAUDAHER: Well, and his knowledge, and it's --

THE COURT: Knowledge of what?

MR. STAUDAHER: Knowledge of the fact -- I mean, what the question we just had through the last witness was, that

there were other people that were directing this 31 minute thing, that it maybe it was not Desai who's involved --

THE COURT: Yeah, but this isn't about the 31 minutes.

MR. STAUDAHER: I know that, but --

THE COURT: But even so, even if it goes to knowledge, intent, motive, I see it relevant to all those things. I see it relevant to all of those things, as I just said. How is it not a bad act? How is it not uncharged misconduct that you're using to try to prove motive, opportunity, intent?

MR. WRIGHT: [Unintelligible.]

MR. STAUDAHER: Well, I mean, I believe that it could be viewed as a potential bad act, but I think it's also res gestae. I mean, we've got a couple -- we're charging billing issues as far as the jury is concerned.

THE COURT: No, I'm sorry. First of all, even civil fraud has to be pled with particularity. I mean, that's, you know, basic rule even for civil fraud.

We're talking about a criminal indictment that sets forth what you're going to prove. And to me, I would say, yes, the evidence itself is relevant, but I think there should have been a prior bad act motion. And I think that that's compounded by the fact that from what you tell me in the statement, which again, I have not seen, I don't have the

benefit of that, which is as it should be, because of course I don't get the discovery. That's not unusual.

But it sounds like there's some ambiguity as to even which doctor she's talking about. So the fact that there should have been a bad acts motion, I think, is compounded by the fact that there's ambiguity in her statement, and so it wasn't foreseeable for the defense necessarily that this person would be called as a witness. And so for those reasons I think it's bad acts evidence. I think it would be relevant. I certainly would have had a Petrocelli hearing on it based --

MR. STAUDAHER: But we can't have one. I mean, she is here.

THE COURT: Well, I don't think it's fair frankly, to spring this evidence on the defense and say, well, let's have our hearing now.

MR. STAUDAHER: But Your Honor, it's not springing on the defense. She -- the things I just mentioned, the upcoding issues are in her statement. They've had her statement. Not necessarily related directly --

THE COURT: Well, that's why I mentioned the statement. That's why I mentioned --

MR. STAUDAHER: -- to Dr. Desai.

THE COURT: -- the statement and the fact that it sounds to me by your own admission the statement is she says doctor, she never said Dr. Desai said this. So what I'm

saying is, okay, even if we should, could say, well, yeah, there's notice and if they were going to make an issue out of it they maybe should have said something.

I find that the notice doesn't seem complete to me. It seems deficient to me because -- and frankly, upcoding is a different billing issue and, you know, I don't think on a fraud indictment you can say, oh, well, this is fraud too and so let's all lump it in together and prove all these different kinds of fraud that are related by billing. I mean, I just don't see it. I don't see it as sufficiently --

It's very clear you're talking about anesthesia fraud and the 31 minutes and that's a specific kind of billing practice. And so, you know, if it was part and parcel even, I'd let it come in together under a doctrine of completeness idea. If -- and I think we had this in another witness, where I said okay, it can come in for -- I don't remember exactly the reasoning.

You know, for example if he said, okay, these anesthesia bills are wrong and I want this other stuff upcoded and it's part of the same conversation, I might say, okay, well, it's all together, you know. But this sounds like it's a completely different thing, where he's talking not just about a different kind of fraud, but fraud, you know, now we're talking about clinical office visits as opposed to procedures.

And so it's different in those two ways, right. It's the clinical office setting, it's not the procedure setting, and it's a different type of billing fraud. And I think it's been very specific. I mean, I can look at the indictment again, but I think it's very specific that we're talking about anesthesia fraud.

And A, I think there should have been a bad acts motion. B, I would have said, yes, I think it would be relevant, I would have had a Petrocelli hearing. But I don't think it's sufficient notice and I don't think it's fair to suspend everything, have a Petrocelli hearing, you know, right now in the middle of the trial and tell them, okay, you got to, you know, anticipate defending on this.

You know, if the motion had been filed in writing and I had said, okay, we're going to have a hearing at some point, then at least they know so, you know, maybe we have the hearing a Monday before we start, or a morning, or in the evening when the jury's gone, whatever. But I think just to spring it like this and have the hearing, I'm sorry. It's not sufficient notice.

Now, if you want to call this woman and, you know, since she traveled here I'll let you put on the evidence, what she observed as the crowdedness, which truthfully, I think is getting very repetitive and very cumulative. But since this woman had to travel, if you want to do that, you can do it.

MR. STAUDAHER: Two things. We're not going to call --

THE COURT: Because that's percipient --

MR. STAUDAHER: -- her for just that one issue.

THE COURT: Okay.

MR. STAUDAHER: We would call her in rebuttal. They're on notice of this.

THE COURT: Okay. That's fine. You can call anybody in rebuttal as long as you're rebutting something.

MR. STAUDAHER: However, I will say this, and this is in part because we're trying -- I'm doing this proactively so that we don't get into a problem with the witness --

THE COURT: And I appreciate that.

MR. STAUDAHER: -- based on what the Court -- you know, it's not my intention to do anything wrong here, so that's why.

THE COURT: No. I appreciate that.

MR. STAUDAHER: So here's part of the issue. That witness has been known since the beginning of the case. That witness has been known to coming in to testify for at least a week that we've told them that we are actually going to call this witness, and we gave them -- we give them the witnesses' notices up front, including Tonya Rushing and things like that. We told them that these people are going to testify.

THE COURT: And I appreciate that as well --

MR. STAUDAHER: They've got --

THE COURT: -- and I said last Friday, I said that I felt that the State had gone above and beyond what they were required to do in accommodating the defense, much of which is being done because of Dr. Desai's stroke issues. And I have said and I will say again, I believe the State is going above and beyond to make accommodations here. So I don't want to seem that I'm critical in that regard at all, because I'm not.

MR. STAUDAHER: With that being said though, with regard to this witness, and this is not a long transcript and it's not a long witness, but probably 80 percent of what's here, or at least a good portion of what's here relates to the issues of upcoding.

Now, there's not been a motion in limine to limit her testimony or to prevent her testimony. There's not been anything raised with this witness that, hey, that we know what this witness is going to come in and say, it's about upcoding with doctors, the clinic, whatever.

So right now, when we go forward with the witness, there's no -- I mean, they know what the statements are. They know what the witness is going to be in advance, and yet we don't have any issue with regard to, oh, we need to limit this witness's testimony.

So in part it's almost -- and I'm not accusing them of laying in wait, but it's like come on, if you know that

something's coming that's objectionable in your eyes, then they need to let us know so we can litigate it before those witnesses hit the stand and we end up with a problem.

Another person beyond Ms. Bien who's going to testify after her, or if she was going to testify, is Tonya Rushing. I mean, she has a lot of stuff that we don't even know about. I don't know exactly what's going to come out of her mouth, because she had --

THE COURT: Well, then don't -- okay. You know what. We're not going to go down the same road. If you don't know the answer to the questions --

MR. STAUDAHER: That's not what I'm saying.

THE COURT: -- okay, then don't ask the question.

MR. STAUDAHER: What I'm saying is that she has an intimate knowledge of Dr. Desai and based on questions that come out from either side, there could be things that come out that we don't know about. I mean, I clearly have ideas of where I'm going to go with her and what I'm going to try to elicit. But there's -- the defense also knows some of the issues that might come up that they might have concerns about.

THE COURT: Well, if the defense elicits testimony that is improper or something like that, then it's not your worry for another motion for a mistrial. And as I said, misconduct is cumulative and -- you know, don't -- I'm just warning you, Mr. Staudaher, don't ask a question unless you

know the answer, and don't elicit testimony that may be improper.

MR. STAUDAHER: That's not what I was saying.

THE COURT: And if you think, if you think that you may ask her a question -- I just want to be clear on this, because we've had this issue twice, the Bruton problem. We've had this last thing with the federal indictment. So I want to be very clear, very up front with you to the extent I can be, and that is this.

If you think that there is something Ms. Rushing may say that she shouldn't be saying, then you need to, you know, direct her don't say this, or you need to ask focus questions. Now, if the defense then starts objecting as leading and then you have to, you know, ask them a little more open-ended and she blurts something out, well, then you're protected, you tried.

But, you know, I just -- you know, going forward, I don't want these issues cropping up again and again, because at some point in time it's cumulative, Mr. Staudaher.

MR. STAUDAHER: I know. But my concern is this. If there's something that defense knows that is an issue with a particular witness like Ms. Bien, and they're aware of it in advance, we would like to hear about it so we can litigate it outside the presence, so it's not an issue.

THE COURT: And I think that's -- I don't think

that's unreasonable, Mr. Wright, but --

MR. WRIGHT: I'm flabbergasted about it because --

THE COURT: -- you know. Well, you've been flabbergasted.

MR. WRIGHT: -- most of the statement -- no. The statement, 75 percent of what Tonya Rushing says in her voluminous interviews are inadmissible and improper. I mean, there's accusations of obstruction of justice. There's accusations of misconduct by lawyers. I have no -- I'm not dreaming that they're going to bring in inadmissible stuff. If I started moving in limine on what they ask every witness...

THE COURT: Here's what I'm saying, Mr. Wright. First of all, it's not Mr. Wright's obligation to make a motion to preclude them from, you know, testifying to inadmissible evidence. That's not -- I don't think that that's what Mr. Staudaher was suggesting.

I think what Mr. Staudaher was suggesting is if they give you the name of the witness like Ms. Bien, and the only thing that witness could possibly testify to is something which you think is not admissible, then please, do us all a favor and let them know. And if you can't resolve the issue between the two of you, then give me a heads up before, you know, ten minutes before the witness is supposed to testify, so that they don't waste time and money bringing people out

here and housing them, which they now have to --

And, you know, it's not their money. It's tax money that they now have to house this woman to have her in the wings as a rebuttal witness, or fly her home and fly her back. So I don't think that's unreasonable for Mr. Staudaher who, as I said, has been -- and Ms. Weckerly, who have been extending courtesies to the defense that they're not required to extend.

I don't think it's unreasonable for them to expect that in return, and to save them the time and the money and everything like that in bringing out people if you're going to object to their testimony, and it's going to be 100 percent objectionable.

Now, with respect to Ms. Rushing, who has evidence testimony that certainly is going to be admissible, I agree with you, Mr. Wright, you don't have to make a motion saying please preclude Ms. Rushing from, you know, disparaging defense counsel, Ms. Stanish or, you know, whatever there might be in her statement.

So going forward, is Ms. Rushing then going to be next?

MR. STAUDAHER: Yes. She will be next.

THE COURT: All right.

MS. WECKERLY: Can we -- can we talk to -- tell Ms. Rushing --

THE COURT: Yes.

Lakeman Appeal 04486

MS. WECKERLY: I mean, I know she's on the stand, but in terms of like what like not to talk about obviously.

MR. WRIGHT: Yes.

THE COURT: Are you fine with letting Ms. Weckerly do that?

MR. WRIGHT: Yes.

THE COURT: Okay. For the record, Mr. Santacroce, are you also fine with Ms. Weckerly and Mr. Staudaher giving --

MR. SANTACROCE: If they give an admonition, fine. But if they start getting into particular testimony and coaching her --

THE COURT: Do you have any objection to them --

MS. WECKERLY: They can witness it.

THE COURT: -- walking out there with you and standing there --

MS. WECKERLY: That's fine.

THE COURT: -- to witness what you're doing?

Why don't you do that. Then there's no issue.

MR. SANTACROCE: Okay.

THE COURT: Okay. If anyone needs to take a restroom break, do it now, and we'll bring the jury back in.

(Court recessed at 3:20 p.m. until 3:26 p.m.)

(Outside the presence of the jury.)

THE COURT: The jury's ready. Kenny's bringing

them in. Ms. Weckerly, the jury's coming in, in a minute, so I didn't know if you wanted to get Mr. Staudaher or not.

MS. WECKERLY: Okay. I'll get him.

UNKNOWN SPEAKER: [Inaudible.]

THE COURT: Kenny's bringing the jury in. You can bring -- if you'd get the witness, is that what you asked? Yeah, I appreciate it. Thanks, Detective.

(Pause in proceeding.)

(Jurors reconvene at 3:27 p.m.)

THE COURT: Court is now back in session. Ms. Rushing, you are still under oath. Do you understand that?

THE WITNESS: Yes.

TONYA RUSHING, STATE'S WITNESS, PREVIOUSLY SWORN

THE COURT: Thank you. Mr. Staudaher, you may proceed.

MR. STAUDAHER: Thank you.

DIRECT EXAMINATION (Continued)

BY MR. STAUDAHER:

Q When we left off, I think one of the questions that I had asked you was about your background, and kind of got you to -- maybe if I didn't, I'm asking you now. Will you tell us a little bit about your background that got you in the position you were at, at the Endoscopy Center?

A I started off as a medical assistant working for

practices. And I went to -- I worked for Hogan clinic, and I was promoted to front desk manager and started doing that type of thing, and then clinic manager. And then I worked -- I was recruited by Mr. Preston to come to work for his company as a practice manager. And that was in 2000 and -- or 2000.

Met Dr. Desai. Larry -- Mr. Preston hired me. So I worked under Professional Medical Consultants for two years until 2002, and then Dr. Desai and the other physicians asked me to come aboard and work with them full-time.

Q Now, at the clinic, you said practice manager; is that what you were at the Endoscopy Center?

A I wasn't a practice manager with the -- I was hired with Gastroenterology Center of Nevada.

Q And so what is the difference?

A The endoscopies are separate entities. Endoscopies is where like procedures, everything else. That's clinical. I was more with the office staff, front desk, PBX operators, that type of stuff.

Q Did you work at all in the clinical side of things?

A I'm not a clinical person, so I'm not -- no, I didn't do any kind of patient care or anything like that. Is that what you're asking?

Q What was your job title at the clinic?

A Towards the end it was COO, chief --

Q COO as what?

A Chief operating officer of Gastroenterology Center of Nevada, and it plays a dual role for endoscopies as well.

Q Now, did you have more of a personal role though, as with Dr. Desai beside just your work at the clinic?

A Yes. I worked with Dr. Desai on fundraisers, personal plan events, on if he wanted to take out referring physicians to dinners or whatever.

Q What about the hiring and firing of physicians, things like that?

A I could never hire a physician. All the physicians were recruited in and Dr. Desai and the other partners would have the final say of who they were going to hire.

Q Did you have any limitations on what you could do independently in the practice?

A Absolutely. I mean, Dr. Desai was the businessman. He was the one who set the parameters of what we could and couldn't do.

Q So did he give you your parameters by which you were to work?

A Yes. He would quite often dictate to me what he wanted me to do, what physicians he wanted me to see, who he would want me to meet with, if he wanted a facility billed,

where, so forth.

Q So when you say he would dictate to you, how would that information come? Was it face-to-face meetings, memos, what?

A It could be either/or, face-to-face verbally, a lot of memos were written to me giving me instructions. Especially if he was gone he would write and dictate memos through the transcription service that would get delivered to me.

Q Who did you answer to?

A Dr. Desai.

Q Is there anybody that was in the practice that you -- that he delegated sort of supervisory responsibility for you?

A It depends on what it was. I mean, if it was political communications or communications that were needing soft-spoken physician, that, it would be Dr. Sharma. If it was endoscopy stuff, it might be Dr. Carrol. But overall he would see what I would do and make sure that I did what he asked me to do, or the other physicians.

Q And again, I just want to be clear on this. What -- when I asked you what independent sort of information or ability you had in the group, I mean did you have any authority within the group?

A No.

Q So even though you have this position as COO, does that not mean that you could really do anything, or what?

A Well, COO is given because he was having me meet with a lot of hospital administrators and so forth. So he thought that it would be better if he had a COO. I was never on corporate papers. I was never on anything like that, but it would give the illusion that I would.

Q Now, I'm going to -- how long was your tenure at the clinic? I mean, how long did you work there?

A Well, I started working with the group in 2000, and I became employed by the group in 2002.

Q Were you there when CRNAs started working at the clinic?

A Initially there was -- yes, but initially there was anesthesiologists. And then the first CRNA, which was Annamarie LoBiondo, came aboard.

Q Now, as far as -- well, coming -- the decision making within the practice, who made the decisions?

A Dr. Desai was the business head between all the physicians and everybody.

Q How deep into the practice would those decision processes go? I mean, what would he immerse himself into?

A He knew every facet of the practice, from front desk people to scheduling to physicians to contracting, everything. He's a very intelligent person.

Q Was billing part of that?

A Absolutely.

Q So was he aware of the billing and how it worked and so forth?

A Absolutely.

Q As far as the anesthesia portion of it, did you end up -- not you I know. We'll get to that in a moment. But was the anesthesia billing when it came to CRNAs, was that run through the practice?

A No. Initially Annamarie LoBiondo was our first CRNA. She came in on kind of like an independent contractor working, and she brought her billing company, Lizmar, with her, and they performed the billing for the CRNAs. Then the next CRNA came on board, which was, I believe, Keith Mathahs, and he wanted us to grow the CRNAs, because we were having problems with getting anesthesiologists to cover the Endoscopy Center.

Q Was there more -- was there a secondary benefit also with having CRNAs there beside just scheduling?

A Well, yes. There was financial gain.

Q And who was in control of the finances related to the CRNA billing?

A Dr. Desai had the CRNA account set up.

Q And whose -- who controlled that account?

A Solely Dr. Desai.

Q Now, as far as setting policy within the organization, who did that?

A At the endoscopy centers?

Q Wherever you worked. I mean, you worked for all entities within a group, correct?

A Well, the endoscopy centers, they had a nurse director, a nurse manager, and then the physicians. So the clinical stuff would be set by the nurse managers and the director of nursing, and oversaw by the physician and Dr. Desai.

Q As far as the schedule though, I mean as far as doctors and how the schedule ran and who was in control of that?

A Dr. Desai was very much in control of that at the Shadow Lane office. At the --

Q And why do you say that?

A Because he would want to maximize the patients. So he knew which physicians worked best with other physicians, which physicians were slower and faster at performing endoscopies.

Q Would he give you direction on who to schedule with whom essentially, or how did it work?

A Yeah. Yes, he would. He put it in writing. He was very vocal about it.

Q Did he indicate how many numbers he wanted to

hit on a daily day -- day-to-day basis in the clinic as far as patients go?

A Yes.

Q And that's -- I guess I should have broken that down. There's a medicine side and there's also a sort of a procedure side at the Shadow Lane facility, correct?

A Right. The clinic office, Gastroenterology Center of Nevada was adjacent, next to the Shadow Lane office.

Q Did you ever become aware at some point that Dr. Desai wished to sell the business?

A Yes.

Q Can you tell us about that?

A In, I want to say, and I don't have the exact dates, approximately in 2007, '6, he had mentioned that he was going to have Chip Wallace [phonetic] and another gentleman investigate selling the facilities. I know AmSearch [phonetic] was one of the surgery companies that were looking at purchasing the facility.

Q Was there -- can you tell us about how, if you know, there was a determination of how much to sell the business for?

A It was multiples --

MR. WRIGHT: Foundation, please.

THE COURT: All right. Sustained.

MR. STAUDAHER: When you --

THE COURT: And --

MR. STAUDAHER: That's fine.

BY MR. STAUDAHER:

Q When you were eventually talking, you said 2006, '7 was when this was going on?

A It was the end of 2006, I believe, yes.

Q Were you present at any -- with Desai during any discussion? I mean, did he talk to you, did he talk to the people in your presence, that kind of thing?

A He talked to the physicians and he talked to myself.

Q Okay. And the times that he talked to you, when was that and where was it?

A Most of the time it would be in his office downstairs.

Q At Shadow Lane?

A At Shadow Lane.

Q And roughly is it when in this time period is he telling you these things?

A I'm sorry. You mean like time and year, or time in the days?

Q Well, time of the year.

A Time of year, like I said, I'm approximating end of 2006.

Q Okay. So you're having these conversations.

Was there more than one?

A I was present once just with him myself, and then once with Chip Wallace.

Q During the time that you were --

MR. WRIGHT: Who?

THE WITNESS: Chip Wallace.

MR. STAUDAHER: So during --

MR. WRIGHT: Chris Wallace?

THE WITNESS: Chip, C-h-i-p.

MR. WRIGHT: Thank you.

BY MR. STAUDAHER:

Q Let's talk about the time when it was just you and he, meaning you and Dr. Desai. Tell us about the discussion.

A He discussed that he was getting older, that surgery centers were becoming more and more in demand because the insurance companies didn't want to pay the hospitals, and that the surgery center would be more valuable for him to sell eventually and that he was looking seriously at selling the facility, the Shadow Lane office at least.

Q Have you ever heard the term "multiples," things like that?

A Yes, because he had explained it to me because I didn't understand. I never have sold a business before, so apparently it's the bottom line, whatever the profits were and

they would take it by five times, three times or whatever. And I think that the multiple that they were talking was anywhere like six or seven.

MR. WRIGHT: They?

THE WITNESS: I'm sorry. Dr. Desai was talking about obtaining the six or seven.

BY MR. STAUDAHER:

Q So he wanted six or seven times the multiples of the -- was this the gross or net profit of the business and how did it work?

A The net.

Q The net. So after expenses, whatever --

A After expenses.

Q -- was there?

Now, in doing that, did he structure how salaries were paid out of the clinic for example, I mean, where the expenditures for the clinic were [inaudible]?

A I'm not understanding the question. I'm sorry.

Q I said salaries. Did he do anything to structure how payments and sort of liabilities in the clinic were minimized, anything like that?

A Well, yes. Jeff and Katie were on Gastro payroll, and the reason that he gave us was is because they --

MR. WRIGHT: Objection. Foundation.

BY MR. STAUDAHER:

Q And when you say he, who are you talking about?

A I'm sorry. Dr. Desai explained that Katie --

MR. WRIGHT: Who?

THE WITNESS: To me. I'm sorry.

THE COURT: To you?

THE WITNESS: To me.

THE COURT: And when did this happen?

THE WITNESS: Same time, around 2000 -- I mean, they were on payroll like that for 2006, '5, right in that area.

THE COURT: So in other words, they were taken from -- if I understand correctly, is that they were taken from the payroll of the procedure side and put on the payroll of the sort of office visit side; is that what happened?

THE WITNESS: I believe -- I don't know if they ever were on -- initially on Endoscopy payroll.

THE COURT: Okay.

THE WITNESS: I think that they were always on the Gastro payroll.

THE COURT: Okay.

THE WITNESS: And the reason being is because they --

MR. WRIGHT: Foundation.

THE COURT: Does that explain to you -- don't speculate about the reason, only if Dr. Desai explained to you what the reason was.

THE WITNESS: Cost sharing is the reason he explained to me.

THE COURT: Okay. All right.

MR. WRIGHT: Okay. Foundation as to that.

THE WITNESS: Okay. Cost sharing.

BY MR. STAUDAHER:

Q Cost sharing. This was a -- was this part of this same time frame that you're talking about or what, that he's telling you these things? Is it during that conversation or is it [inaudible]?

A This would have been before.

Q Okay. So how long before roughly?

A I can't remember.

Q But he was talking about the issue of selling the business, or at least why he was putting people on different sort of areas of the practice; is that correct?

A Yes.

Q And when you say cost sharing, what does that mean, or what did he explain to you that that meant?

A Well, the reason being is because --

MR. WRIGHT: Objection. Can we approach the bench?

THE COURT: Sure.

(Off-record bench conference.)

THE COURT: Ma'am, don't speculate, you know. If someone asks you a question and you're not sure what the

reason was, or Dr. Desai didn't give you a reason, don't, you know, try to guess or speculate as to what the reason might have been or what reason makes sense to you. Do you understand?

THE WITNESS: Yes.

THE COURT: Okay. Go on, Mr. Staudaher.

BY MR. STAUDAHER:

Q Okay. And again, we're talking about Dr. Desai. Your either being present when he was saying this to someone else, or you actually having the conversation yourself with him. Okay. Or being directed by him, he gives you a memo, some communication with Dr. Desai or you in his presence, okay?

A Yes.

Q Now, selling the practice, let me go back to the issue of the cost sharing thing. When did that first come up roughly, as far as that as an explanation for why things were structured the way they were?

A I can't remember the date.

Q Well, without giving us an exact date, can you give us in a general ballpark?

A Probably 2005, 2006, around in there.

Q And during the times when that was brought up, who was present?

A Myself.

Q You and Dr. Desai?

A Mm-hmm.

Q Anybody else?

THE COURT: And you have to -- I'm sorry.

THE WITNESS: I'm sorry. Yes.

THE COURT: You have to answer yes or no --

THE WITNESS: Yes.

THE COURT: -- because everything's recorded, and mm-hmm, that, you know --

THE WITNESS: I'm sorry.

THE COURT: -- we don't know what that means in the tape.

THE WITNESS: Yes.

BY MR. STAUDAHER:

Q So just so we're clear, you and Dr. Desai, no one else?

A Yes.

Q Did that happen on more than one occasion?

A Yes.

Q So let's talk -- how many occasions were there roughly?

A I can think clearly of two.

Q So let's talk about those two. And the first one, are we still talking about the same general time frame?

A No. One was after, like I said, like the first

time we got triple AHC, so it was the second time when Katie Maley came back aboard.

Q Okay. So let's talk about the first one. What -- tell us what happened during that conversation, or what was discussed.

A He felt that Jeff was a charge nurse and he oversaw both facilities, so he wanted to have Gastro pay for his time and services. I believe that's how it went.

Q Did Dr. Desai explain to you why he wanted Gastro to pay it?

A Just because he didn't want all of it to come out of Shadow.

Q What about the second conversation you had with him?

A That's when he was more interested in selling the facilities and getting us recertified for AAAHC.

Q So talk to us about that. Again, was this just you and he present during this conversation?

A There could have been another physician there. I don't remember.

Q Okay. But you know specifically Dr. Desai was there?

A Right.

Q And roughly in the time frame, this is when he's more interested in selling?

A Right.

Q And when roughly are we talking about here?

A 2000 -- in 2006, 2005, I think that's when we got our -- the next certification was 2000 -- 2000 -- whenever that second certification was.

Q Tell us about that portion of the conversation.

A Well, we rehired Katie Maley as the director of nursing, because she had a bachelor's degree and Jeff only had an associate's degree. And so he wanted to have us recertified for AAAHC because it made more value for the facility. And we would have both Katie and Jeff paid out of the Gastro centers, I believe.

Q Did he explain why he wanted to do that? Was it the same reason?

A In that conversation, I don't think he went into detail about it.

Q So this is what he told you before you're just implementing it?

A It was understood.

Q Okay. Now, as far as the clinics themselves, there's the medicine clinics, there's the endoscopy clinics at different locations; is that fair?

A That is fair.

Q Initially the corporate structure of those, were they all combined as a group, or did they change names? How

did it work and did that -- did that vary over time?

A Gastroenterology Center of Nevada was the clinic portion. So that's the portion that saw the patients, diagnosed the patients and so forth.

Then there was two endoscopy units, and they did change names and I don't remember the time. One was endoscopy -- it used to be Endoscopy Center of Southern -- or Endoscopy Center 1 and Endoscopy Center 2. One was located at Shadow Lane, two was at the 4275 Burnham Avenue. It was changed to have two separate entities, two separate LLCs for legal purposes, for liability purposes, and it would make it easier for Dr. Desai to sell. They did have different ownership structure.

Q And was that -- I mean, was this a conversation that he had with you at some point about that?

A Yes. I mean, when we had to do the re-credentialing and everything else for the facilities.

Q Okay. So did he indicate to you that it had anything to do with selling the practice?

A Yes, and the other physicians knew that as well.

Q So after you are working there for a period of time, at some point do you get involved with the anesthesia billing portion of things?

A Correct.

Q Can you tell us about that?

A As I said, in 2000, and when Annamarie first came aboard and we had Lizmar billing, and then we had another billing company. And in approximately November or something like that of 2003, Dr. Desai introduced me to a person named Rebecca Duty [phonetic], who was Dr. Nemec's administrator and biller. And he -- she had already had experience. She already had a billing company, and he had asked her and I to join together --

MR. WRIGHT: Foundation, please.

THE COURT: The letters -- you can go back over it after. He meaning Dr. Desai had asked?

THE WITNESS: I'm sorry. Dr. Desai had introduced us and asked Rebecca and I to form a company for the anesthesia billing.

BY MR. STAUDAHER:

Q So roughly when is this?

A In 2003. October is probably when we met, November is when we started solidifying things, and I believe the contract was signed in December of 2003.

Q You were present with Dr. Desai. Anybody else during this time?

A Rebecca, myself and Dr. Desai.

Q So you were going to take over that portion of things?

A Yes, sir.

Q What was your understanding of what you would -- what your role would be in that regard?

A My role, as I already was, was working with physicians doing credentialing and helping them do practice management and so forth, so I would maintain that section of the business. Rebecca has a company called Paragon -- I can't remember what the whole name was. She would take over all of the anesthesia billings since she had experience in it. And Dr. Desai wanted me to just make sure that she got everything as far as the charge tickets or anything like that. And that's what I did.

Q So you then just start working at that exclusively?

A No. I still maintained full-time employment with Gastroenterology Center of Nevada.

Q Did you have any employees for your practice then, this sort of billing company?

A I didn't until 2006. Rebecca sent me a memo saying that she was overworked, stressed and had some personal issues going forward and she needed to stop having her billing company do it. And so I went to Dr. Desai, showed him the email, talked to him, told him I'm not qualified to do this.

He had made the suggestion to me that I -- he, Dr. Desai, made the suggestion for me to hire Ida Hansen, which is Gastroenterology Center of Nevada's billing manager,

she would know how to do this. So I did. I hired Ida as an independent contractor.

We then recruited billers. I got a little two-space area off of 7000 Smoke Ranch and we put the billers in there. We connected to Gastroenterology Center of Nevada's billing system, because he didn't want to use an outside billing system anymore. So --

Q When you say he, you're talking --

A Dr. Desai --

Q -- Dr. Desai?

A -- did not want us to use an outside billing system's software. He basically wanted to make sure that it was all his information. So I was fine with that and Ida knew the system, so I was fine with that. So we hired four billers and then hired some part time. Ida trained them and we started like that.

Q So did you have direct involvement in going over there on a daily basis to oversee operations, anything like that during that time?

A No. The billers basically are data entry persons. They receive a charge ticket, an anesthesia form filled out by the CRNAs which has the patient's name, the date of birth. They make a copy of the insurance cards. And it has the information that they need to put the data into the software to create a claim.

Q So how did this work? When you got the money that came in for the claim, I mean, how did it get back to Gastro?

A The mail went to Gastroenterology Center of Nevada. The billing -- the billers upstairs, Bonnie Hepler [phonetic], received the money, prepared the deposits, made copies of the EOBs, made copies of the checks.

MR. WRIGHT: Could you explain EO -- explain what --

THE COURT: Don't interrupt. I mean, you can --

MR. WRIGHT: Okay.

THE WITNESS: Explanation of benefits that told the biller what the insurance paid and allowed or disallowed. Then a courier would go over to Shadow Lane and pick it all up and then take it to my billing office, and they would apply and post the payments and so forth.

BY MR. STAUDAHER:

Q How did you get your cut out of this?

A I got my cut off a percentage of what was received.

Q So you would bill it out; whatever came in, you got a percentage of that?

A Yes, sir.

Q Now, as far as the billing that came in, where did that money go?

A It went to Gastroenterology Center. Is that

what you're asking me?

Q Which account or accounts did it go into?

A And Bonnie would deposit it into the CRNA account.

Q So and again, is that the one that Dr. Desai had control of?

A That's the one that the money was for the CRNAs. That's the one he wanted the money to go into.

Q Any question that -- I mean, he was the one that took and wrote checks. Did anybody else do that in any way during the time you were there --

A Wrote checks?

Q -- out of that account?

A Out of the CRNA accounts?

Q Yes.

A No. Only Dr. Desai wrote the checks out of the CRNA account.

Q Now, at some point down the road, I mean, how many employees do you end up with? Does it fluctuate over time, or was it stable during the time you had the company?

A No. Actually, after Rebecca had left and we started performing billing services in 2006, we grew. We performed billing services for other physicians and other physician types. And so then we moved over to the 7365 Prairie Falcon Road and we hired our own internal billing

managers. We had two of them -- three of them, I'm sorry, and went forward.

Q So you're still over -- your primary location where you're working is where now, during this time?

A I'm still employed at Gastroenterology Center of Nevada.

Q And are you still doing the kinds of things you described earlier there?

A Yes.

Q So this is just a side type business it sounds like?

A It was a side type business where I was planning on leaving and going full time to work.

Q Now, as far as the whole issue of selling the business, and I'm talking about Desai selling his business, were there any conversations that he had to you about trying to maximize profits, anything like that in the business?

A Maximize profits?

Q Try and get the -- so he can -- this multiples that you described so that they would be worth something.

A Well, not specifically as you just asked that question, no.

Q Well, maybe I asked it improperly or -- I mean -- and so you don't have it --

A Well, I don't mean it to be --

Q So as far as you're concerned, explain to me what you're talking about. Was there something there, some -- some interaction?

A Dr. Desai wanted the numbers up. I mean, he always wanted high volume at the Shadow Lane office. I mean, that is widely known.

Q And the reason that he gave for that?

A Because it would make a bigger bottom line for him when he sold the practice.

Q Now, was he ever -- did he ever discuss with you anything about trying to control costs at the clinic, anything like that?

A He discussed cost controlling consistently.

Q And is that -- I mean, is this more than a single event that you talk about?

A Well, he -- can I give you an example, because I don't know how else to explain it.

Q What is the example going to be about?

A Yes. Yes, he would make sure --

THE COURT: If you don't know what the example is, don't -- everybody's afraid to say yes.

THE WITNESS: Okay. Well, it would be like this. It -- we -- the staff there worked long hard hours. Okay. I'll give you an example. Something like orange juice. Okay. We went to AAAHC and we -- and it wasn't mandatory, but it was

just a nice gesture. He flat out said no. So the nurses would buy the orange juice, or we'd put it in the nursing staff orange juice, and I guess it was used for diabetics or hypoglycemic patients or something. I'm not really sure.

We -- he also, one of the things that was recommended, blanket warmers. So we priced out blanket warmers.

BY MR. STAUDAHER:

Q Is this -- are these recommendations after the AAAHC comes in and they recommend you have things on --

A We hired a consult -- right. We hired a consultant to come in --

MR. WRIGHT: Foundation.

THE WITNESS: I'm sorry?

MR. WRIGHT: Foundation.

THE COURT: When was the consultant hired? I mean, and we don't expect you to say, oh, that would have been on June 12th at noon. I mean just as near as you can remember. And if you don't remember --

THE WITNESS: It was the first time we were AAAHC certified, which I believe was what, 2004, 2000 -- I can't remember. Whenever it was the first time.

THE COURT: Okay. So at some point they came in and made recommendations?

THE WITNESS: Right. We hired a lady that came in on

site, gave us recommendations for like little bags that said, you know, the company's name, have booties in it for the patients so their feet were warm or whatever. A blanket warmer was suggested. And Dr. Desai flat out said no.

THE COURT: Did he say -- did he convey -- communicate that to you, no, I'm not going to get this?

THE WITNESS: Oh, yes. I mean, sometimes Dr. Desai could be very volitable and use language that was inappropriate.

THE COURT: What's a blanket warmer? Like a plate warmer, you stick the blankets in it --

THE WITNESS: It's like a box that you put --

THE COURT: -- and it heats them up?

THE WITNESS: -- like the blankets in there to stay warm. Because the endoscopy units are fairly cold, patients are just wearing a gown, and so it would kind of cover them up.

THE COURT: Makes them nice and toasty?

THE WITNESS: Right. So --

THE COURT: All right. Go on. I'm sorry, Mr. Staudaher.

BY MR. STAUDAHER:

Q So beside those kinds of -- and those were recommendations by the accrediting agency or whatever [inaudible]?

A The independent consultant that came out because the first time, we have never been AAAHC certified, so he had us go to North Carolina, learn about it, come back. We hired a consultant. She gave these recommendations.

Q Was there ever an issue that you were involved with regarding anesthesia billing specific times, 31 minutes, anything like that?

A It was never stated a specific time. It was always explained to me that --

Q By whom?

A By Dr. Desai.

Q And when did that happen?

A From day one when the CRNAs came on, so whenever Annamarie LoBiondo started.

Q And so he's explaining this to you. What is he saying?

A The start time is the time that we start interviewing the patient, I say hello, how are you, my name is so and so and then they start asking various questions. End time is when the patient is discharged safe and the airways and all that other stuff is done.

Q Did he give you a time period that that -- that it had to be above a certain amount?

A Not at that time, no.

Q Eventually did you get a time period that that

had to be above?

A I knew he was saying it should be 30 minutes.

Q Did he ever explain that to you, as to why he wanted it to be that?

MR. WRIGHT: Foundation.

THE WITNESS: I'm sorry?

THE COURT: Well, she has to answer the -- that's overruled. She has to answer the question, and then Mr. Staudaher, depending on the answer, can proceed to try to lay a foundation.

So ma'am, you can answer the question. I think it was did he ever explain that --

Was that your question?

MR. STAUDAHER: Yes.

THE COURT: Did -- it's a yes or no question. Did he ever explain that to you?

THE WITNESS: Like I said, himself, the CRNAs, the way it was explained to me was from the time they interviewed the patient --

MR. STAUDAHER: But that's not my question.

BY MR. STAUDAHER:

Q My question was regarding the specific 30, it had to be above 30 minutes. What did he -- did he explain to you why [inaudible]?

A He said it because the time the patients come in

and they are discharged and ready to go, that's the time it should be.

THE COURT: And when? When did that happen that he told you that?

THE WITNESS: It was probably more so reinforced after the second CRNA. Annamarie really was the one who taught everybody in the beginning.

BY MR. STAUDAHER:

Q Did you ever go to Annamarie and actually say to her, hey, look, you need to make sure these are 31 minutes or more, or did you ever do that?

A No. I wasn't in the facility that much.

Q So if, I mean, Annamarie said that you did that, would that be accurate at all?

A No, sir.

Q Do you recall this at all?

A No.

Q When you say you weren't in the facility, are you talking about the facility where the procedures are being done?

A Right. I wasn't -- I mean, I would drop something off. I would be at the other five locations. I would be busy, I mean, working with the bookkeeper or whatever. I mean, I wasn't -- I'm not a nurse. I'm not a doctor. So I don't have a reason to be down there unless he

called me down there and wanted something addressed.

Q I'm going to show you what's been admitted as State's 97. Have you ever seen anything that looks similar to this before?

A Yes.

Q What are we looking at here from your perspective?

A It is a organizational chart.

Q Now, I see that your name appears right in the middle of it.

A Mm-hmm.

Q It looks as though the PAs, the CRNAs in part sort of have a connection to you; is that right?

A They would. They would turn in -- Mr. Lakeman would prepare, at the end, the CRNA schedule, so I would get that and I would give it to Dr. Herrero. And Dr. Herrero would coordinate the physician time off schedule, and then Dr. Desai would look at it to make sure that we had every office covered, every endoscopy covered, and then I would send it out.

Q So this also places you below the staff and partner physicians --

A Yes.

Q -- is that accurate?

A Yes. I -- the partner physicians obviously,

they own the facility. And the staff physicians would be the non-partners, Dr. Mukherjee, Dr. Wahid. And then the PAs would really go to the doctors, but if they had a scheduling or something like that, then they could come to me.

Q Is that why there's a double line for the PAs?

A Yes, sir.

Q And the same thing for the CRNAs?

A Yes, sir.

Q Now, did -- did the doctors answer to you at all?

A No.

Q So you, as this depicts you below the doctors, you weren't essentially having authority over them; is that right?

A No. I did not have authority over the physicians.

Q Overriding this is one individual at the very top. Is that how you viewed it?

A It was definitely a hierarchy. Doctor -- like I said, he's a very smart intelligent businessman.

Q And we had gotten into a moment ago at the very outset the issue of whether you had any authority or control or who had that in the practice. Do you remember that?

A Mm-hmm.

MR. STAUDAHER: May I approach, Your Honor?

THE COURT: You may. You may move freely.

MR. STAUDAHER: Thank you.

MR. SANTACROCE: What are you showing?

MR. STAUDAHER: Exhibits 179, the memos. And they're not all of them, but there's [inaudible].

BY MR. STAUDAHER:

Q I'm going to show you some things here, and I'm going to give you the Bates numbers on them so we have them. First of all, I just want you to flip through these and tell me -- this is State's 179 through it looks like --

MR. STAUDAHER: What is it?

THE CLERK: 208, proposed.

MR. STAUDAHER: 208 proposed.

BY MR. STAUDAHER:

Q Can you just flip through those, if you would? Tell me if you recognize [inaudible] seen them before.

A Yes, sir.

MR. WRIGHT: Why don't you give me the top stack, Mike, so I can --

THE COURT: When she's done, you mean?

MR. WRIGHT: The one -- right. The one she's already flipped over, so I can start numbering that.

MR. STAUDAHER: The Bates numbers are at the top.

MR. WRIGHT: Thank you.

BY MR. STAUDAHER:

Q Do you recognize those documents?

A Yes.

Q And they appear to be memos and various [inaudible] documents; is that right?

A They're directives given to me, what Dr. Desai expected done.

Q So illustrative of a direction that you received from him at the clinic?

A Yes.

Q There was one in there in particular, and I -- I think there's actually a duplicate of it I want to show you. This one here, and this is actually State's Exhibit 81, and the highlighting on this is something I wanted to ask you about. This one has your name on it as being from you.

A Mm-hmm. Which wouldn't --

Q Do you see that?

A Which wouldn't be unusual. He would have me write memos for him.

Q So explain that to me. How would that occur?

A He would either tell myself, Charlene or Shannon that he wants patients scheduled this way, or he wants a directive, and we would write the memo. It mostly would come from me. Even if it was dictated from him or advised from him, it would come from me. I mean, he was very busy.

Q So this memo here that's got -- it has a copy to Dipak Desai, but it's got -- it says --

A I always copied him --

Q -- from Tonya Rushing --

A -- so he knew that it was completed.

Q So when it says from Tonya Rushing, this is my question, is this one of the memos that you generated at his direction?

A Yes.

Q Okay. So the information contained in here is coming from Dr. Desai, not from you?

A Yes.

Q Can you explain to us what -- what's contained in this document, what this is about?

A Basically it's telling this Endo 1 and the schedulers, I would hand it to the schedulers, that he wanted a minimum -- or he wanted 42 patients in the facility scheduled, and if they were double-booked it would tell them, example, HPN PacifiCare Aetna PacifiCare.

Q Specifically that portion that you just mentioned, do you see where PacifiCare is separated by other insurance companies at the bottom --

A Yes.

Q -- down here?

Was there any issue with regard to PacifiCare and how

For example, if a vendor sold them alcohol pads or syringes, or if they were an insurance company or a government agency they might have paid taxes or something to. So I put all of those in an Excel spreadsheet and I marked that those were vendor files from the search warrant.

Q Okay. So you had gotten records from the search warrant?

A Mm-hmm.

Q And I'm talking about the vendor type records, not the financial ones we just talked about. The vendor records, and you put those into a spreadsheet; is that right?

A Yes.

Q Okay. What did you do with those? Was that what you worked with?

A I could sort them by vendor name. I wanted to make sure, because I was going to use these records to look at the syringe orders, the bite block orders and the propofol vial orders. I wanted to make sure that I had every source identified.

So after I went through the search warrant, I went back through the bank records to identify checks that were paid to vendors, and I put those, those vendors also in my spreadsheet, and I marked another column that that information was from the bank records.

Q Did you find anything when you did that work --

Docket 64609 Document 2014-37741 Lakeman Appeal 04085

and I assume you're using the bank records just to find out the vendors then; is that correct?

A That's correct.

Q So when you did that work, did you pick up any additional vendors that you may not have had during the original sort of review of the search warrant materials that were recovered?

A I don't recall offhand if I did or not.

Q But it was a double sort of check; is that right?

A Right. Right.

Q So after you have the total -- I mean, you've looked at everything and you've got what you believe the vendor list is, what do you do?

A I was very worried that I would have missed something, so I got a subpoena for the custodian of records for the endoscopy center. It was Mr. Charles Kelly, and I asked him to provide a vendor list and he did. And on that, off of his list I also included those vendors in my schedule.

Q So now you've got the custodian of records of the clinic, the clinic records recovered in the search warrant, and the actual ones you got out of checks and things that were paid to vendors; is that right?

A That's correct.

Q After you gather all that together, did you feel

that you had a complete list of the vendors that were used by the clinic?

A I did.

Q And what was the -- why would you want a complete list? What was the issue?

A I didn't want to have a source of propofol out there that I didn't know about.

Q You mean that there may have been a place where propofol was purchased from and product in the facility that you wouldn't be tallying up?

A That's correct.

Q Did that go for the other things you've talked about, like the alcohol pads and the bite blocks and the like?

A I specifically looked at the propofol, the syringes and the bite blocks.

Q Those were the three items that you specifically looked at?

A Those were the three items, yes.

Q So what did you do in relation to those items?

A Once I identified the vendors, I got subpoenas to get their records of the supplies they had sold at the clinics.

Q And what do you do with that information?

A I set up another spreadsheet and I put the information on a spreadsheet that I'd prepared for that.

Q Now, did anybody double-check any of the stuff that you were doing, or was there some way to determine that the entries that you were making were in fact accurate?

A I double-checked those. I didn't have anyone else double-checking the numbers.

Q But you put them in and then you went back and checked them again?

A Right. I checked them against the vendor information that had been sent.

Q Tell us how that goes, and what do you develop as a result of doing those kinds of compilations of data?

A I sorted them. I entered the dates that they had ordered the supplies. I ordered what -- I sorted what kind of supply it was. So I had spreadsheets for the bite blocks, spreadsheets for the syringes, and spreadsheets for the propofol. I had who the vendor was on the spreadsheet, so I could sort by all of those different topics.

I sorted -- they also had on the vendors' information what clinic it had been sent to, so whether it was the Burnham clinic or the Shadow clinic. So I sorted by date. I sorted it by clinic. I sorted it by vendor, I believe. And then because I had the dates, I was able to tell how much went to each clinic for a particular year. I looked at 2006, 2007 and 2008.

Q Well, wasn't it possible that there could have

been some -- you said you looked at 2007 specifically, correct?

A Mm-hmm. Yes.

Q Did you look at 2006?

A Yes, I did.

Q What was the purpose of that?

A I wanted to see if there was any existing inventory that could have been applied to 2007.

Q Are you talking about leftover propofol and syringes and bite blocks and the like from 2006 that may have actually been in inventory in 2007?

A I did.

Q What did you find?

A That they didn't have enough of propofol, bite blocks or syringes to apply to 2007 if they had used each item for each patient. And what I mean by that is one propofol vial per patient, one bite block per upper endoscopy procedure, one syringe per injection.

Q So you end up starting off with 2007 with what, and there was no prior inventory?

A Well, I determined they didn't have -- they couldn't have had anything left over if they had used -- if they had used it appropriately.

Q So you end up then looking at 2007?

A Right.

Q Did you know how many patients they went through in the year and how many things they ordered and what they used or documented that they used, that kind of thing?

A I did know how many patients they had, because I counted them out of their logbook.

Q You actually counted them?

A I sat and counted them.

Q And we're talking about these, these green books over here; is that right, or is there some other [inaudible]?

A No, those were the books I used.

Q And we've got a couple of cases of those books over there. Is that all of them, or are there more?

A I'm not sure if you have all of them in here, but I had all of them from the clinics.

Q So when you went through and you counted each one of those, what kind of information were you taking off of them to put into your spreadsheets to come -- to compile this information?

A I took the dates of the page, that was written on the page. I took how many upper endoscopy procedures were performed, how many colonoscopy procedures, because those were marked in the books with an E or a C. I noted how many other procedures there were, because those were also marked. And I also noted the totals at the top of the page that the clinic had written in there.

Q Did you double-check those numbers with what you were coming up with?

A They were generally off, but I had someone proof my work.

Q So you have somebody else actually looking over this part of it; is that correct?

A Yes. They looked over my spreadsheet.

Q When I say looking over, I said that they're looking over your work that -- the inputted work that you've done?

A That's correct.

Q Okay. So you go through all of that. Did that take a while to do?

A Yes.

Q When you get to the end of the year of 2007, did you have a total number of patients?

A Yes.

Q Do you know what that number was?

A Not off the top of my head.

Q Do we have -- is that part of the compilation of data that you used at some point?

A Yes.

Q Okay. We'll get to that in just a second. So you at least came up with a number?

A Yes.

Lakeman Appeal 04091

Q Did you do the same thing for the amount of propofol that was ordered and documented as being used?

A I did it for the propofol that was ordered. I did it for the two days of the propofol vials that were checked out from the propofol logs.

Q When you say checked out, does that mean checked out and not returned?

A Well, the propofol logs had how many vials of propofol were checked out, how many were returned for each day and who checked them out. So I used those logs that were maintained by the clinic.

Q And this binder here, it has controlled substances records, and it's 45 --

MR. STAUDAHER: May I approach again, Your Honor?

THE COURT: Mm-hmm.

BY MR. STAUDAHER:

Q Forty-five A, can you tell us what that is?

A This is their records for their controlled substances, including propofol, for their daily sign-out logs.

Q So it includes other drugs, but propofol is included in this as well?

A Yes.

Q So is this one of the things that you looked at in addition?

A Yes.

Q Did that make it into your analysis at some point?

A Yes.

Q With regard to the bite blocks and so forth, where did that information specifically come from?

A Once I identified the vendors from the vendor files who had provided bite blocks, I subpoenaed their records so that they would tell me how many they sent to the clinics. And that was compiled the same way I did the syringes and the propofol.

Q Now, when you're -- let's move to the other aspect. I'm going to leave the vendor files for a moment and go to the third category, which I think you said were patient files.

A Okay.

Q Tell us about those. What did you do with those? How did you analyze them?

A I took the patient files from the two days of the infections and I scheduled them. I set up an Excel spreadsheet and I took the information from the green procedure files and entered that in categories on my spreadsheets, and those are the ones that you showed me.

Q Okay. Let's go to those as we -- as we talk about this. I'm going to start off with -- actually, let's start off chronologically. We'll go with the 25th of July.

Lakeman Appeal 04093

I'm showing you what's been admitted as State's 157. And I can zoom in on that a little bit if you need to, but for right now I just want to get more of a perspective. As I slide this across on the top, there are various columns that have headings. Do you see those?

A Yes.

Q I'm going to go back to the beginning of this now, and I want you to tell me what those mean across the top starting from left to right, if you would.

A Okay.

Q And you know that you can write on this screen, correct?

A No, I didn't know that.

Q Let me show you. If you need to, you can draw on the screen with your fingernail, then you can just tap it down here to clear it, okay?

A Okay.

Q So walk us through what we're looking at specifically as the headings. And are they the same for both sheets, both --

A Yes.

Q Okay. So if we know it for this, we have at least the general outline for the next one; is that correct?

A Yes, that's correct.

Q Okay. So walk us through what we're -- what

we're looking at here.

A Okay. The first -- the first one -- oops.

Q And I'm going to zoom in on it just since we're going to go across, just the top of this for a moment.

A The first column, patient number, is just a numbering system so we would know how many patients there were that day. So you can see that they go down to the end. The patient file number here relates to the patient file number from the procedure file, and each procedure file was filed by this number.

Q Is this the clinic's number?

A This is the clinic's number, and then the patient's name.

Q Now, I want to ask you a question about that. As you can see, there's a designation that says Patient 1, 3, 5, 7. It goes in sort of an order here. Do you see that?

A Yes.

Q When you produced this chart originally, and I'll represent to you that it's been redacted, did it actually contain the names of the patients off of those files?

A Yes, it did.

Q So that's -- this is not the way it looked when you actually produced this chart, that is the difference; is that correct?

A That's correct.

Q So as we go across, and if you can just clear that screen again.

A The next column says Hep C, and if it was marked on the patient file, the procedure file that the patient had hepatitis C, I marked that in here.

Q What about for a patient that turned out to be, well, infected or genetically matched, did you mark that person also?

A No.

Q Now I'm going to go down and show you at least along those lines, because I want to make sure that this isn't a change that has been made to the thing as well. Do you see the name here, Ziyad, Sharrieff and Michael Washington?

A I do.

Q And you know Michael Washington is a genetically linked patient?

A Right.

Q And do you see that box that's marked under hep C?

A I do.

Q Is that something that you put on this record, or do you think that that may have been a change as well? I'm just trying to make sure we don't have anything different than what you originally did.

A You know, I don't know if I put that on or not.

Lakeman Appeal 04096

I may have.

Q Well, in this case, at least the highlighted lined versions, all of them indicated [inaudible]; is that correct?

A That's correct.

Q [Inaudible] get down to the very last one?

A Yeah.

Q So all of those are hep C positive?

A If -- when we look at the next chart, if there's X's on that, I probably did those.

Q Okay. So let's move over. So we've got the next thing that says Medicine, and I want to spend just a minute with that particular column. First of all, can you tell us what it is?

A Yes. I put down the medication that they used, which was propofol. And I marked off of the anesthesia records, that's where this column came from, the doses that they had written.

Q So when we look and see propofol and then we see a Number 100, what does that indicate?

A That was the first injection.

Q So 100 milligrams of propofol?

A Milligrams, yes.

Q And then there's a slash and it says 40. What does that mean?

A That would be the second injection, the 40 milligrams.

Q So according to the record you're looking at, if I understand you correctly, this shows two separate injections according to the record?

A That's correct.

Q Now, what record did you glean that information from?

A From the anesthesia record.

Q And I notice it's just on the ones that are visible on the screen here, that they vary. Some are a single -- it looks like a single injection of 100, some are three separate injections, some are two, and it varies as it goes down this sheet, correct?

A That's correct.

Q Again, the information that is contained in this spreadsheet, where does that come from?

A It comes from the green patient procedure files.

Q So directly out of the files themselves?

A That's correct.

Q To the best of your ability, did you double-check these numbers when you were putting them in?

A I did and I had someone else proof them with me.

Q So the numbers themselves, are they accurate to what is contained in the actual chart itself?

A Yes.

Q Does that mean that the information that's in the chart is accurate?

A I wouldn't know about that.

Q In fact, was that an issue for you when you were doing your analysis?

A Yes, it was.

Q We'll get to that in a little bit. Now, as we move across, the next category, if you can tell us for the next column, can you tell us what that is?

A On the anesthesia chart, they had the chart procedure time written in and the chart ending time. And these, these times were taken from those charts.

Q So is this actually something that was on the chart? And I'm talking about -- I'm pointing to the highlighted yellow column. Was that on the chart, or was that something that you calculated yourself on the spreadsheet program or whatever from the information that you put in pertaining to the anesthesia record?

A I calculated that.

Q So this is something that was not contained on the chart?

A That's correct.

Q As we move across, and if you could just clear that one more time. The next category here, p-r-o-c, what is

Lakeman Appeal 04099

that?

A That stands for procedure.

Q Various -- there's various letter designations. They all appear to be either C's or E's. Do you know what those mean?

A The E's are an upper endoscopy procedure. The C is a colonoscopy.

Q Again, was that gleaned off the charts themselves?

A Yes.

Q Did you -- beside the calculated columns that as we get to them, did you put any information of your own sort of that you just kind of guessed at on these records, or did they come directly from the patient files?

A There's a column at the end, it says comments.

Q Actually, that column is gone. We haven't gotten to that one yet, but that's another place that I was going to talk to you about a change.

A Okay.

Q But beside that one, anything else on here that you may have changed or [inaudible]?

A No, other than the calculations.

Q So the next column?

A Lists the doctor who performed the procedure.

Q And that was according to the record, correct?

A That's correct.

Q Next one?

A The nurse.

Q And when we say nurse, what kind of nurse are we talking about?

A I'm not real positive.

Q Was it on the procedure record itself?

A Yes.

Q Okay. So you don't know what kind of nurse they were, but it was on that record that you took the information from?

A That's correct.

Q The next one is -- it looks like the technician; is that correct?

A Technician, yes.

Q Again, same information, just who was appearing on the record itself?

A That's correct.

Q The next one?

A The CRNA.

Q The next one?

A The nurse logged procedure start time. There was a nurse log in the patient file.

Q Okay. And so you took the -- is there -- it says end time for the next column; is that right?

A That's correct.

Q So where did that come from? Did it come from that actual record in the file?

A Yes.

Q And this yellow column, is this another thing that you calculated?

A Yes. That's one I entered formulas in and calculated.

Q So it's the difference between these numbers here in the start time and the stop time column?

A That's correct.

Q And moving across to the next column, right here, what is this?

A They made a note of what scope was used in the procedure, so I included that also.

Q And then there's a line that has nothing in it right next to it, just a spacer line, but then the next thing with anything in it appears to be something that says [unintelligible] bed, what is that?

A That's the physician at bedside, and that's from the -- one of the forms also, and they would mark the time.

Q Okay. And then the discharge time?

A The same thing.

Q And then is this your calculation, all these 30-minute windows?

A That is my calculation.

Q Of those two times?

A Yes.

Q Patient [sic] at bedside discharge time?

A Yes.

Q Or excuse me, physician at bedside. I misspoke. Coming across, the next column, what is this?

A The nurse who signed off on the form, and I don't know if I -- I don't remember if it was the discharge time. I can't remember from this view.

Q You mean the nurse who would sign the discharge form? If you saw the record, if I -- and I'll show one to you later, would that refresh your memory?

A Yes, that would help.

Q Okay. But at least this came from the medical record of the patient?

A Yes.

Q And the next one, there's two different ones here and I've got both of them on the screen. One says, Tape read 1, both start and end time, and the next one says, Monitor read 2, both start and end time. Can you tell us what the difference is between these two?

A There were two -- two things that were printed off and taped or stapled to a piece of paper. One looked like a tape and one looked like a monitor, and so that's what I

labeled them as.

Q So the monitor one, did that contain like a tracing of an EKG, like a heart rate thing?

A I don't -- I would have to see it.

Q Okay. And as a matter of fact, before I go any further I need to show you, I will, this draft over here. I'm going to show you Ziyad, Sharrieff's file. This is Exhibit No. 1.

MR. STAUDAHER: Can I come up, Your Honor?

THE COURT: [No audible response.]

BY MR. STAUDAHER:

Q As we go through this, get to the page, and do you see this page 6?

A Yes.

Q Okay. I'm going to show this to you now on the screen, because I just wanted to go through that. But there are two -- we may not be able to get the whole thing on in this without me zooming back in and making everybody sick, but do you see that there appears to be a strip with what appears to be a heart tracing on it?

A Yes.

Q And then there's one that is just a -- whoops. I guess I got it upside down. Just a sort of a tape -- I know this is photocopied onto this page; is that correct, or the tapes were put on and then a photocopy made?

A Yes.

Q And then another strip here?

A Yes.

Q Which one is the one with the heart tracing on it?

A This is the monitor.

Q So the one that's over here that says monitor?

A Yes.

Q And the other one that I showed on that exhibit, which was the tape or what appears to be just a tape without a trace on it is which one, the other one?

A The tape, yes.

Q Now, tell us again when you say start and stop time, is that directly off of the machine read recording, where it says start, where it has the different increments listed?

A If you could show me that again? I'm pretty sure it is, but I -- but I don't know if it was handwritten or if it was printed off there. Yes. Okay. It's right off the -- it's right off the tapes.

Q And then the next one?

A Yes.

Q Okay. So those numbers came off of the actual machine readout, correct? Is that right?

A That's correct.

Q All of these are listed in sort of a descending, or at least it looks to be chronological based on that, correct?

A Yes.

Q Both columns?

A Yes.

Q And then these yellow columns for both the read tape, which would be we understand is the recovery room just so we can keep it straight for us, and the procedure room over here. Do you see that?

A Yes.

Q And so your calculations of this column here come from these tapes, tape Read 2, end time tape, or end tape Read 2 start time?

A Yes. I put that column in and did the calculations.

Q When we move over to the last columns --

MR. STAUDAHER: And I believe as soon as I get done with this, Your Honor, it might be -- that might be a good place, but...

THE COURT: Okay.

BY MR. STAUDAHER:

Q We've got one last set of columns here which says report time or report. Can you tell us what that is?

A There was a report prepared that was a

computerized report. I believe that's what this is from. And I would have calculated the minutes from those start and end times.

Q And just so we are clear on that, I'm going to show you page 1880 of Exhibit No. 1, and do you see this record? I'll zoom out on it now so we can have a better piece for it. The very first page of that record, and it shows some actual, some pictures of -- snapshots during the procedure?

A Yes.

Q And then we go to the second page, a continuation of that, but it also has some times down here.

A That's correct.

Q Is that where this came from?

A Yes.

Q So on the section here where it says, Report time, the record we just looked at is what generated those times --

A Yes.

Q -- those time differences; is that right?

A Yes, that's correct.

Q Now, I notice in this column again, it looks like it's a calculation based on the differences between the start and stop times; is that right?

A That's right.

Q Now, you mentioned that the very last column was

a comments column that you put some comments into, right?

A Yes.

Q I'll represent to you that that's been removed from this and as you can see, what it's been replaced is just the patient numbers like they are the other side of the chart.

A Yes.

Q Okay. And the last thing before we stop for the day, the next one of these, which is the September 22 chart, it appears to be laid out in the same way; is that correct?

A That's correct.

Q Same way with the comments side on this end being changed to the patient numbers?

A Yes.

Q And on this side you asked about the -- I think it was the hepatitis portion right here, do you see that?

A Yes.

Q And in this case it says Y or N. Do you see those?

A Yes.

Q One last thing on that. Do you see some of those say N and some of them say Yes?

A Yes.

Q Is that something you put on there, or was that something different?

A No. I would have done those.

MR. STAUDAHER: Okay. Your Honor, this may be a good time to stop.

THE COURT: Okay. We'll go ahead, ladies and gentlemen, take our evening recess. We'll reconvene tomorrow morning at 11:00 a.m.

During the evening recess, you're reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch or listen to any reports of or commentaries on the case, person or subject matter relating to the case. Don't do any independent research by way of the Internet or any other medium. Please don't form or express an opinion on the trial.

Notepads in your chairs, and follow the bailiff through the rear door.

(Jurors recessed at 4:56 p.m.)

THE COURT: And ma'am, please don't discuss your testimony with any other witnesses during the break.

Lawyers, 9:00 o'clock.

MS. STANISH: Pardon me?

THE COURT: 9:00.

MS. STANISH: Okay.

THE COURT: All right.

(Court recessed for the evening at 4:57 p.m.)

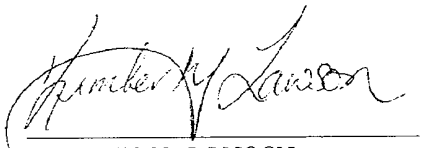
CERTIFICATION

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

AFFIRMATION

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

KARR REPORTING, INC.
Aurora, Colorado



KIMBERLY LAWSON

COPY

Electronically Filed
03/11/2014 01:02:44 PM

CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DIPAK KANTILAL DESAI, RONALD E. LAKEMAN, Defendants.	CASE NO. C265107-1,2 CASE NO. C283381-1,2 DEPT NO. XXI **TRANSCRIPT OF PROCEEDING**

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 32

MONDAY, JUNE 10, 2013

APPEARANCES:

FOR THE STATE:	MICHAEL V. STAUDAHER, ESQ. PAMELA WECKERLY, ESQ. Chief Deputy District Attorneys
FOR DEFENDANT DESAI:	RICHARD A. WRIGHT, ESQ. MARGARET M. STANISH, ESQ.
FOR DEFENDANT LAKEMAN:	FREDERICK A. SANTACROCE, ESQ.

RECORDED BY JANIE OLSEN COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

KARR REPORTING, INC.

I N D E X

WITNESSES FOR THE STATE:

ROD CHAFFEE

Cross-Examination By Mr. Wright (Continued) 54

Cross-Examination By Mr. Santacroce 117

Redirect Examination By Mr. Staudaher 139

Recross Examination By Mr. Wright 154

Recross Examination By Mr. Santacroce 157

ANN MARIE LOBIONDO

Direct Examination By Ms. Weckerly 162

TONYA RUSHING

Direct Examination By Mr. Staudaher 182

LAS VEGAS, NEVADA, MONDAY, JUNE 10, 2013, 9:09 A.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: We are now on the record out of the presence of the jury.

And, Mr. Santacroce, you may make your first motion.

MR. SANTACROCE: It's a bail motion, Your Honor. As I told you the other day, Mr. Lakeman has two bails posted, one for the murder charge, one for the other counts. The murder charge doesn't -- bail doesn't expire until August. The other charges the bail expires this week on that. I'm just going to ask you to exonerate the portion of that -- the bail. I've talked to the bail company. They won't write a partial bail. He'd have to pay the whole year's premium for that bail.

THE COURT: Which is what?

MR. SANTACROCE: It's a $50,000 bail.

THE COURT: And what's the premium?

MR. SANTACROCE: $7,500.

THE COURT: Okay. And as I understand the bail was set by Judge Miley on the murder charge at $50,000; is that correct?

MR. SANTACROCE: Correct.

THE COURT: So he's paid $7,500 towards that bail. That's -- that'll be good.

MR. SANTACROCE: Yes. You know, he's -- you see him here --

THE COURT: Through the end of the trial.

MR. SANTACROCE: -- every day.

THE COURT: I'm sorry?

MR. SANTACROCE: I said you've seen him here every day. He's always early. He's not taking off.

THE COURT: No, he is very -- I mean, he's always here on time. He's -- that is true, and I've even commented that that's the case. So he has to re-up the $7,500 for the other $50,000 bail; is that correct?

MR. SANTACROCE: Yes.

THE COURT: State?

MR. STAUDAHER: Well, I mean, we -- he did have the benefit of a very significant bail reduction early on in this case. He's down to now combined $100,000 bail on a murder charge, as well as all of the other charges. We would oppose it, but we will submit it to the Court's discretion.

THE COURT: I'll think about it further, but honestly, I mean, yes, it's true Mr. Lakeman has always been here, he's always been on time, but he has had the bail hanging over his head. We're now in the middle of the trial, and I think, you know, some of the more compelling, if you will, evidence towards Mr. Lakeman directly I think is just maybe now coming out.

You know, as you know, Mr. Santacroce, one of the things we look at is the, you know, likelihood of conviction and the, you know, likely punishment and all of those things. So that would be my reluctance to --

MR. SANTACROCE: [Inaudible].

THE COURT: -- to reduce the bail. Well, it's to guarantee that they show up.

MR. SANTACROCE: Right.

THE COURT: And as I said, I did acknowledge, you know, Mr. Lakeman, he's never been a problem with showing up. He's always early; he's always early after the breaks. I can see that and I agree with you completely on those points. Let me think about it. When does he have to re-up his bond?

MR. SANTACROCE: I think by the end of the week.

THE COURT: Okay.

MR. SANTACROCE: The other issue, too, is that, you know, in bail consideration does he pose a risk to society, danger to society.

THE COURT: Yeah, I don't think he poses a danger to society whatsoever. Obviously, whatever danger he posed was as a direct function of his work as a nurse.

MR. SANTACROCE: Right.

THE COURT: And he's not working as a regular nurse or a nurse anesthetist at this point.

MR. SANTACROCE: Correct.

THE COURT: He doesn't have any -- I don't have a scope, but -- or his NCIC, but he doesn't have any other --

MR. SANTACROCE: He's never been in trouble in his whole life. This is a first incident.

THE COURT: Okay. Let me -- let me consider it further.

MR. SANTACROCE: Thank you.

THE COURT: All right. The next issue was the juror Pomykal. I've got those. We can discuss that more fully, but I can give you the transcripts for you folks to look at if you'd like. No?

MS. WECKERLY: Yes.

MS. STANISH: Yes.

THE COURT: Mr. Santacroce doesn't want his.

MR. STAUDAHER: I can get it.

MR. SANTACROCE: I was going to get it if you were handing them out. But I just -- you know, I think it was just an issue of how she answered the one question I asked her about --

THE COURT: Yeah. And just for the ease of the lawyers -- also, you know --

MR. STAUDAHER: Do want me to just --

THE COURT: Yeah, would you, please?

The other issue, of course, was her health which Kenny has been monitoring. That's another reason she could be

excused, if her health becomes more of an issue.

She did complain of, what, numbness and --

THE MARSHAL: Numbness and cramping.

THE COURT: -- and cramping. So you're going to see how she's doing today; correct?

THE MARSHAL: Yes.

THE COURT: And we'll see where we are then. And just for your -- the ease of the attorneys, I think the relevant part starts at about pages 19 and 20. So we can move on to that at a subsequent time.

The next issue was the testimony of Ms. Sampson. And, Mr. Wright, you had made a motion for your testimony to be stricken in its entirety. The Court isn't inclined to strike her testimony. I mean, there was a lot of relevant testimony, a lot of perfectly good foundations laid, the charts, and everything else. The only -- so I'm not inclined to strike the totality of her testimony because, again, a lot of it was relevant, a lot of the charts were fine. Do you have a motion or do you wish to make a motion as to striking a portion of her testimony?

MR. WRIGHT: Yes. She's -- she's called presumably as an expert. I mean, that's the only way I could classify her, meaning she has expertise from having looked at everything to give an opinion, whether it's a lay opinion or an expert opinion. Other than that, she would have nothing.

She wasn't a percipient witness, so, I mean, she's like an expert.

And then she wandered off into this -- in her testimony, this number of propofol vials and the number of syringes that should have been used, but weren't used, in 2006 and 2007. But here's what they should have done if they were following a hyper -- if they were following a procedure even CDC wouldn't recognize, which would be every single dose is a new syringe.

Even CDC would recognize one syringe, two 50 doses is okay. She didn't. Each of those doses is a syringe. Then she kind of changed and went to a different calculation, then she came back around to the same calculation to come up with her formula by which she's going to multiply two point something, 2.4 I think --

THE COURT: I thought, then, the end -- I agree -- I don't mean just to -- I agree with you. The calculation that the number of required syringes based on the doses was clearly wrong. As I said, you know, she's not competent, a, to make that dose. And after hearing from every single medical and scientific witness in the case, we know that that's not true. You can have, you know, two injections from a single syringe containing 100 ml, so we know she's incorrect in that.

And so any conclusion based on that, I would agree, would have to be stricken. But the calculation she did, I

thought was based on the number of patients and the number of syringes ordered and the ratio of patients to syringes ordered or something like that, that that was that 2.54 or 2.64. So I think that was the number she came up with.

MR. WRIGHT: Okay.

THE COURT: That's how -- is that right, State? I mean, it's your witness.

MR. STAUDAHER: Yeah, I mean, I don't have any issue with the -- with what counsel said with regard to the doses and things like that. I mean, that's --

THE COURT: Yeah. I mean, we can craft some kind of an instruction telling the jury to disregard her testimony regarding how many syringes would be needed per dose, that that calls for a medical conclusion which would need to be given by a medical or a nursing expert or something to that effect.

MR. STAUDAHER: The State has no issue with that --

THE COURT: Okay.

MR. STAUDAHER: -- Your Honor.

MR. WRIGHT: And as far as her testimony, I have no further comment about it. Regarding the exhibits, the graphs, there were four of them --

THE COURT: Right, the --

MR. WRIGHT: I don't have the numbers in front of me.

THE COURT: Right.

MR. WRIGHT: But that's what -- that's what I really have the problem with and am moving to correct and/or strike from evidence and/or leave them as --

THE COURT: Demonstrative.

MR. WRIGHT: -- non-evidence demonstrative. Because if they're admitted under the summary witness Rule 1006 in the federal system, then they're admitted as the actual evidence.

THE COURT: Right.

MR. WRIGHT: And the -- I -- I truly think they're demonstrative. You only use 1006 -- I mean, every -- everything that's on there she has testified to, meaning the total number of patients, total number of syringes ordered, total number of propofol vials ordered, total number of bite blocks ordered. All of that is already in evidence through her testimony. So then the question becomes do you then introduce an exhibit to summarize her testimony and make that the evidence? And that -- that's what's improper, especially when it is misleading on the portions -- I'm only talking about the three dealing with annual. The -- the --

THE COURT: Right.

MR. WRIGHT: The July 25 --

THE COURT: You're fine with that, the patients to the vials of propofol?

MR. WRIGHT: Right. That's just an absolute

calculation of those two dates.

THE COURT: So you're fine with that. That's Exhibit 153.

MR. WRIGHT: Correct.

THE COURT: Okay.

MR. WRIGHT: On the other three --

THE COURT: Which is the patients to syringes, and I said that should be syringes ordered because it's kind of misleading, and then propofol vials, that should be propofol vials ordered. And then the upper endoscopies compared to bite blocks -- actually, they did this one correctly, to bite blocks ordered.

MR. WRIGHT: Right. And -- but my problem is the first two columns, which talk about those ordered for a facility --

THE COURT: Because of the --

MR. WRIGHT: -- are misleading because they switch -- they share supplies. And -- and so it -- it has -- and it's -- it's giving a false impression that -- that like Shadow used so many and Burnham used so many. And if they want to use that for demonstrative purposes, I don't have a problem with it. But making it evidence, I don't -- I don't understand.

I could create some charts here for the Court. I could create some charts on the CRNA practices using the

testimony we've had and leave Mathahs out of it, and just put up a chart on CRNAs. And it will all have been in evidence. And then say I want to admit this because this is a summary under 1006 and it's my view of the case.

I don't get that into evidence. I mean, that -- that's all this is. I mean, this is argument by graph that they want into evidence to go into the jury room and that being the evidence itself. I just think it's -- it's prejudicial, it's misleading, and it's an improper use of 1006. So I move to strike it in its entirety.

THE COURT: Does the State want to respond?

I mean, I'd just say I think on the misleading because of the two locations -- I said this already and then it was testified to by the witness. I mean, I said it out of the presence of the jury to be clear and then the witness said it in front of the jury in her testimony, but the total shows, I think, both locations and accounts for the movement back and forth.

MR. STAUDAHER: Correct.

THE COURT: And I think if you put order, that relieves the confusion. The only issue is whether or not a summary type graph like this is admissible as substantive evidence, or whether you're required to use it as demonstrative evidence in your argument or through the witness's testimony, which you did already, using it as

demonstrative evidence.

MR. STAUDAHER: And in this case we believe it is not only an accurate summary -- this isn't something we're just summarizing testimony that's before. This -- this is actually physical documents and -- and tabulated numbers and records that have gone into the production of those. The actual graphs themselves are just a reproduction or a summary of that, which I think is completely valid. There's no analysis that she went into. She took straight numbers off the records.

Now, the second part of this is that counsel met with Ms. Sampson and went over the records which comprised the supporting information that went into those themselves and had ample time to look into that. It was agreed to by all counsel that the supporting information that went into those charts would not go back to the jury because there was other things in it.

So to that extent, it was stipulated that that would be -- that those were reasonable representations of the summary of the information that was contained that was not going to go back to the jury. If it doesn't go back substantively as a summary of that information, then that undermines the issue of the summary information, of the stuff that was already agreed to that would not go back to the jury.

So they've got to have one or the other or both.

And we think that in this case they could have both, but we stipulated and agreed that we would not give them the underlying data with respect to the propofol vials and -- and the syringes and so forth, the medical supplies analysis in a sense that we were arguing about earlier. So it's summary information.

It's -- and the last questions I asked of the witness where did you do any analysis or is this just straight numbers on a chart. And if we change the things that the Court has issues with, I think it's not misleading. Certainly the totals compensate for any issue of materials going back and forth. And so I think that that is reasonable and valid and should come in substantively.

THE COURT: All right. Well, I think it's --

MR. WRIGHT: May I respond?

THE COURT: Sure.

MR. WRIGHT: It -- it is in her testimony. Most 1006 witnesses don't use a chart. I mean, in a tax case you look at all the records and then the agent gets on the stand and testifies --

THE COURT: And says this is --

MR. WRIGHT: -- to it. It is --

THE COURT: -- what was --

MR. WRIGHT: -- in substantively. Every number on there is in evidence substantively for the -- for the truth of

the matter. And -- and the chart adds nothing to getting it into evidence. So it -- it is already in. And it's solely a question of why do I get to use a summary chart, which is my argument and theory of the case, as evidence to put into evidence. I can make charts like that.

THE COURT: Yeah, but you're talking about summarizing testimony as opposed to the summary of records. If you have records that your expert is going to -- financial records and other things that they were going to summarize, for example, you know, money going into the CRNA account, bonuses paid to the nurse anesthetists or, you know, whatever and you had an accountant person come in, I would say, okay, well, that's a summary of the bank records, which is different from just a summary of, you know, Nurse A said this, Nurse B said that. I mean, this is a summary of records that are too cumbersome for the jury to review themselves. So, I mean --

MR. WRIGHT: She testified to them. I mean, it is in substantively. She has given everything that's on those charts. A summary witness testified I looked at all the bank accounts and here is what I found and -- and the totals are this, the deposits are that.

THE COURT: Yeah, but they're --

MR. WRIGHT: And then --

THE COURT: -- allowed to prepare a written format deposits.

MR. WRIGHT: A report? And you think the report becomes admissible?

THE COURT: No, I'm not admitting her report. We've already been over that.

MR. WRIGHT: Okay. Well, why is this -- this summary substantively admissible when she has already testified to it?

THE COURT: Well --

MR. STAUDAHER: I mean, right now they can't go back and look at all those records because we've stipulated to them and -- and that's the whole purpose of having that is because you have a summary of records that are too voluminous, as the Court said, for the jury to pour over every document to look at. There's not been an issue to my knowledge where they say that her calculation on the totaling of the number of syringes ordered for the year was wrong.

THE COURT: You're not -- right. They're not saying her calculation is wrong. They're saying that, a) it's an irrelevant calculation because it doesn't account for preexisting inventory, and b) it doesn't account for both locations. But I think it does account for all three locations, actually, one the one as the Rainbow location. And, you know, the jury was told this was an exhibit. So some people may not have written it down when they would have if they knew it wasn't going to be an exhibit.

You know, again, I don't think the location issue -- I think that that's reflected in the total. I think she testified it's reflected in the total. And common sense would tell you it's reflected in the total. I think as long as you say syringes ordered, propofol vials ordered, and it says already bite blocks ordered, you know, and have a note not accounting for existing inventory, then I think that that takes away any confusion or misleading problems of potentially misleading the jury.

I mean, I think you brought that out thoroughly on cross-examination, but I think if you want that added to the charts, then I think that that's fine and then that reflects, again, that it doesn't account for existing inventory and that --

MR. WRIGHT: Well, are the first two columns going to be gone?

THE COURT: No, because, again, I think Shadow, Burnham in total. So people can -- you know, first of all, whether -- look. Either one, there's -- I mean, this is the one you look at, but this accounts for movement back and forth. I mean, I think that that's all it was required to do.

And I -- she testified that, well, the total would account for the movement back and forth because I don't know if we actually know what the movement was back and forth, but that that would account for that. Now, if you would like, Mr.

Wright, I'll reserve ruling, but that's my inclination.

MR. WRIGHT: Okay. It sure --

THE COURT: If you would --

MR. WRIGHT: It sure seems --

THE COURT: Yes?

MR. WRIGHT: It sure seems like demonstrative evidence to me. I mean, I -- that's all I --

THE COURT: As opposed to summary evidence?

MR. WRIGHT: Correct. I mean, it's demonstrative. I could make ten charts summarizing her testimony and the records she saw. I could go into the banking and things just using my theory of the case. And so, what, just because it came out of the records and it's a summary of what she said and it puts my spin on it, then it becomes admissible as substantive evidence? I just don't comprehend this.

THE COURT: All right.

MR. STAUDAHER: The State actually has no problem with him taking -- if he actually uses the numbers and the actual records of coming up with any kind of summary chart of the material that's in -- sort of in evidence, but not going back to the jury because the jury has got to have something. They just can't have the testimony. They've got to be able to look at the evidence themselves, and that's why we have the charts so we don't have to look at box after box after box.

THE COURT: Finally -- the jury is maybe here so

we'll get started.

But finally, Mr. Wright, on the issue of where she went beyond the parameters that she should have, meaning vial equals dosage, like I said, if you would like me to give an instruction to the jury telling them to disregard that portion of her testimony, I will give that instruction.

So if that's what you would like, I would ask that you craft such an instruction, run it by the State, and if I don't agree with it or there is opposition, then I'll write my own. But Mr. Staudaher is agreeable to that. So do you want me to do it or are you requesting it or do you want to take a stab at writing it yourself, or what would you like to have happen with respect to that? Nothing or --

MR. WRIGHT: I'd ask the jury be instructed to disregard it at the beginning of our session today.

THE COURT: I'm sorry?

MR. WRIGHT: That the jury be instructed to disregard her testimony about her syringe calculations on what should have -- however we want to characterize it.

THE COURT: Well, that's why I'm asking if you want to take a stab at writing it because it's just -- it's not syringes ordered. It's dosage equals necessary syringes which, like I said, I would say that's medical evidence and that's beyond -- you know, that's something a physician or a nurse would have to say and it's wrong. Something like that.

MR. STAUDAHER: Yeah, what -- what the Court just said is fine with the State.

THE COURT: Okay.

MR. STAUDAHER: You know, there is one issue and -- oh, I'm sorry.

MR. WRIGHT: I just wanted to respond. He -- he said I can craft some charts out of the records, but he doesn't want them going to the jury.

MR. STAUDAHER: No, I didn't say that. That was part of what we talked about, which was -- and the whole purpose of their meeting with Ms. Sampson because they were concerned about extra things in those records so that they wouldn't go back to the jury. That was the reason she came over here was to go through that information. The fact that -- if he wants to take actual numbers out of those records and things like that like Ms. Sampson did, I don't think that there's a problem with it as long as we see them and can look at them to see if they're accurate.

MR. WRIGHT: And then -- then they're put into evidence.

MR. STAUDAHER: Well, they're already in evidence as far as a Court's exhibit.

MR. WRIGHT: No --

MR. STAUDAHER: They're not going --

MR. WRIGHT: -- as a chart.

MR. STAUDAHER: Yes, if it's an accurate rendition. If you have somebody come in and say that they did that, that's fine.

MR. WRIGHT: I don't have to have someone come in to say that they did that.

MR. STAUDAHER: Well, you do too because that's the person who is on the stand needs to testify they did it accurately. We can't have you get on the witness stand.

THE COURT: We're waiting for two jurors. And on an unrelated juror issue, may I see counsel in the back.

MR. STAUDAHER: And before -- well, maybe we can just address that.

THE COURT: And --

MR. WRIGHT: We need to address something --

THE COURT: Oh, okay.

MR. WRIGHT: -- before --

THE COURT: We'll do the legal on the record, and then I just want to advise in chambers of a new issue.

MR. WRIGHT: Did you have something else?

MR. STAUDAHER: I did.

THE COURT: Okay. So --

MR. STAUDAHER: Not related to --

THE COURT: -- any legal matters --

MR. STAUDAHER: -- this issue.

THE COURT: -- or anything we have to do on the

record before the jury, let's do that right now.

MR. STAUDAHER: It doesn't have to be on the record.

MR. WRIGHT: Oh, okay.

MR. STAUDAHER: We can just do it all in the --

MR. WRIGHT: This -- this is on Rod --

THE COURT: Mr. Chaffee?

MR. WRIGHT: -- Chaffee. I think Mr. Staudaher knows better than I the statement of Rod Chaffee that is -- that he references in his interview with Metro, when he says, just so I'm clear on it, he says -- police officer Levi --

MR. WHITELY: Hancock.

MR. WRIGHT: -- Hancock says I know you prepared the statement that you gave us previously. And that's -- that's what I was questioning about, wanting that statement of his.

THE COURT: And then when we left Friday, Detective Watly -- Whitely --

MR. WHITELY: Whitely. Yes, ma'am.

THE COURT: -- Whitely said that he would look for it to see whatever there was.

MR. WRIGHT: And as I understand it, there -- there was a statement --

MR. STAUDAHER: So I -- I was --

MR. WRIGHT: Oh, okay.

MR. STAUDAHER: -- I was just parroting part of what I heard --

MR. WRIGHT: Okay.

MR. STAUDAHER: -- from him, so --

THE COURT: Okay. Well, let's get hear from --

MR. WRIGHT: I thought there was something about it's privileged, his lawyer wrote it.

MR. WHITELY: Yes, there was --- there was two statements that we're talking about that we did. There was one back, I think, in May, and then one later, and that's the one that Mr. Wright is referring to. And in that one Levi kind of refers to a previous statement, which I believe is to be the one back in May.

THE COURT: Was that an oral statement or a written statement?

MR. WHITELY: It was a recorded statement.

THE COURT: Oh.

MR. WHITELY: And then there is another statement that was made between Mr. Chaffee and his previous attorney. He's got Kim Johnson right now. There was a previous attorney before that. He had made a statement at the request of his attorney.

THE COURT: To who?

MR. WHITELY: To the attorney, and then the attorney released that as part of civil discovery.

THE COURT: Okay. Released what? Did the attorney like write it out, or did the attorneys, you know, tape the

statement or --

MR. WHITELY: I'm not sure how he released it. It just got released in civil discovery.

THE COURT: And did you -- did Metro get that ever?

MR. WHITELY: No.

THE COURT: Okay. So Metro doesn't have this whatever attorney thing is?

MR. WHITELY: And that was litigated as attorney-client privilege, which according to Kim Johnson, his current attorney, said they had won several times.

THE COURT: Because -- I'm laughing, Mr. Wright, because it's not privileged once it's turned over --

MR. WRIGHT: Right.

THE COURT: -- to other lawyers, so --

MR. WHITELY: Well, Mr. Chaffee didn't agree for that --

THE COURT: There have been --

MR. WHITELY: -- to be turned over.

THE COURT: -- some -- well, perhaps if he didn't agree or something like that, but once it's been, you know -- there are some, let me just say, curious rulings. If that was the universal ruling by Judges Israel, Silver, and Walsh, then I would say, okay, maybe there is something there because those have been the three trials that went forward, I believe, on the pharmaceuticals, and there was one trial, I think, with

Judge Wiese that went forward on the HMO and maybe one in front of Judge Williams.

So if all five of those judges said, oh, yes, this is privileged, then I would be inclined to say, okay, there's something here that I'm not aware of and it's probably privileged. If one or two of those five said it was privileged and the others didn't or only one or two it was litigated in front of, then I'm inclined to say, you know, maybe there might be -- you know, there may be an issue, but I might not agree with it. But if all five of the civil judges said that, then that may be something. But, you know, at this point you don't know and I don't know.

Here's the other thing. With respect to the first taped statement with Metro, has that been turned over to the defense?

MR. WRIGHT: Yes, it's a transcript. It's not a statement. And let -- and let me read what the --

THE COURT: It's an interview.

MR. WRIGHT: -- officer says. I know you prepared the statement that you gave us previously. Now -- now, how do you turn that into a transcript of an oral interview which he doesn't have? I mean, this is the detective. I know you prepared the statement that you gave us previously. And then the -- the witness Mr. Chaffee says, and as I said in my statement, there was a lot of profanity involved in there, why

using so much of my fucking supplies.

Well, there's nothing like that in the prior oral interview. I mean, he's talking about a statement he turned over. And if it's the lawyer's statement that was given to Detective Hancock, I want it. I want both the lawyer's statement and I want whatever statement this was because he has read both, and I have the right to it.

THE COURT: I agree. If there was a statement, you should get it.

Detective, did --

MR. WHITELY: I asked --

THE COURT: -- were you at the interview?

MR. WHITELY: I was at the interview, yes, ma'am.

THE COURT: Okay. When Detective Hancock is talking about that statement, did you know what he was talking about?

MR. WHITELY: I called him and asked him. He doesn't --

THE COURT: No, no, I mean back when the interview happened.

MR. WHITELY: No, I don't know what he was talking about in the interview.

THE COURT: Okay.

MR. WHITELY: I don't know if that was a misprint in words or if that's exactly what he meant.

THE COURT: Okay. So what did you do going forward

when you left here on Friday?

MR. WHITELY: So I contacted Detective Hancock and I asked him if he knew anything about that statement that was made or if we had a statement that I'm not aware of. He said he wasn't aware of it. He said he'd look it over, but he didn't think that there was any additional statements.

I contacted Kim Johnson, I asked her was there any additional statements that your client made that we're not aware of or we don't have, and she said other than the one that we talked about with the ten questions or whatever from his prior attorney, there was no other statements. The -- and then that would be it.

Oh, there was the Brian Labus statement, which was what he made with Brian Labus. There was notes that was turned over to the defense on that, which he could have been referring to that. I don't know.

THE COURT: Well, it's obvious from the statement that Detective Hancock and Mr. Chaffee seem to be on the same page about this prior statement. So while you may not have known what they were talking about, it's obvious to me from the content that Detective Hancock knows and, you know, it seems like they're understanding one another about some prior statement.

MR. WHITELY: Well, the two different statements that Mr. Wright is talking about was in two different sections

of the report. There was the one where he talked about the prepared previous statement. That was in the first part. And then there was the part that talked about the -- the -- the fact that he was -- there was profanity used or whatever and that was later on down in the report. And that's when Levi agreed.

THE COURT: So you're saying that --

Is Detective Hancock ever going to be a witness here or --

MR. STAUDAHER: We hadn't --

MS. WECKERLY: He might be, but --

MR. STAUDAHER: I mean, we --

THE COURT: Okay. Well, he can --

MR. STAUDAHER: I mean, he's available.

THE COURT: -- come in and he -- right.

MR. STAUDAHER: He's just --

MS. WECKERLY: Yeah.

THE COURT: He's available at any time. I mean, poor Detective Whitely is here kind of holding the bag and Detective Hancock is really the one, it sounds like, that maybe has more knowledge on this. In terms of --

Let me ask you this, Detective. Did you -- I mean, I'm assuming you have a file for each witness or do you --

MR. WHITELY: Yes, ma'am.

THE COURT: Is it organized that way?

MR. WHITELY: Yes, ma'am. I double checked.

THE COURT: Did you go and check the file to see if there's anything else in it?

MR. WHITELY: Yes, ma'am, it's just the two statements that we had from those days.

THE COURT: Nothing else? No written statement or anything, no letter from a lawyer, nothing?

MR. WHITELY: Well, there's a 302. I could double check. I'll go back and double check right now, but I didn't see anything that --

THE COURT: Okay. Why don't you just bring the file or bring everything that's in the file if you don't --

MS. WECKERLY: It might be electronic, but --

THE COURT: Oh, okay. If it's electronic then -- and I don't know how --

MR. WRIGHT: And I'm still assuming it's a different statement than the lawyer's statement that Mr. Chaffee read. I mean, I -- I still want both. I mean, I don't accept this it's privileged when it's a statement or a recollection of his facts that he reads and then -- I don't get it.

THE COURT: Yeah, I mean, it's possible, too, that what happened was -- well, he's not actually -- I don't know.

MR. WRIGHT: I think it's the same -- I think we're talking about the same statement. It was a different lawyer the first time.

THE COURT: Who was the lawyer --

MR. WRIGHT: The first interview.

THE COURT: -- the first time?

MR. WHITELY: I don't remember the name of the lawyer off the top of my head. I can get that for you. Kim Johnson was the current attorney that he has right now. I don't recall the name.

THE COURT: Because Kim Johnson may not even have this statement and can --

MR. WHITELY: She does.

THE COURT: Oh, she does?

MR. WHITELY: Yes.

MR. WRIGHT: It was a -- it was a -- he first had a first lawyer for first interview.

MR. WHITELY: Right. And I think that was --

MR. WRIGHT: And -- and my -- I mean, this is just instinct to me, intuition. I think the first lawyer made that statement available, and then the second lawyer has asserted privilege and won't turn it over. I mean, that's just my intuition on the thing. I think we're talking about one written statement.

MR. STAUDAHER: We -- we don't have whatever it is, whether it's that or something else.

THE COURT: And I believe the DAs don't have it. I just want someone at Metro --

MR. WHITELY: I don't believe we --

THE COURT: -- to check and --

MR. WHITELY: -- have it, either. I can double --

THE COURT: -- make sure it's --

MR. WHITELY: -- check, though.

THE COURT: -- not in the file.

MR. WHITELY: Yes, ma'am.

THE COURT: If you come back and you tell me you looked in the file and it's not in the file, then I believe you.

MR. WHITELY: And I'll contact Kim Johnson. I'll see if she'd be willing to give us a copy for [indecipherable].

THE COURT: All right. Anything -- we'll deal with this juror issue at another break. Let's -- if anyone --

MR. STAUDAHER: Before the witness comes in, we have not talked to the witness, but apparently when Ms. Weckerly walked out to --

THE COURT: Just now I saw he was like hovering in the vestibule --

MR. STAUDAHER: Yes.

THE COURT: -- and you went to tell him --

MS. WECKERLY: That he has some issue --

THE COURT: -- he can't come in or something.

MS. WECKERLY: Right. He -- and I don't know if

it's with regard to this statement or whatever, but he said he had an issue with his testimony. And I just said I can't talk to you and -- but I don't know if maybe everyone, you know, defense counsel wants to go see with Mr. Staudaher what the issue is because it may shed some light on this stuff.

MR. SANTACROCE: Put it on record.

MR. WRIGHT: Put him on the stand.

THE COURT: Okay. That's fine.

MS. WECKERLY: Or whatever.

THE COURT: That's fine. I mean, just -- that'll be in front of the jury. And then there was one final matter.

Detective, I believe you were sent on several sort of errands to see what happened with the guy that killed the wife, and there was one other I don't remember. I think that was the only one.

MR. WHITELY: That was the only one.

THE COURT: That was the only one.

MR. WHITELY: There was the issue with the drugs and stuff like that.

THE COURT: Oh, right. That was the other one.

MR. WHITELY: I produced that. We've got that and we go that settled.

THE COURT: Right. We got that straightened away. But there was --

MR. WHITELY: But the latest one was the issue with

the wife, and we pulled those records and there was a charge. The defendant which was the, I guess, boyfriend or whatever, he pled guilty to willful wanton disregard with substantial bodily harm or death. And he was --

MS. WECKERLY: He got probation.

MR. WHITELY: He got probation.

THE COURT: Okay. So that's consistent with what he was saying. I don't think that opens the door to impeachment that it was a homicide because he was charged criminally and actually convicted of causing her death. So I don't find that his statement that it was homicide, while gratuitous, I don't find that that was untrue in any way, and I don't think that that opens the door to any kind of impeachment about the facts of the circumstances which I think are more -- far more prejudicial than probative and somewhat distracting.

So if anyone needs to use the facilities, let's do that now, and then come back and go with the jury.

MR. SANTACROCE: Are we going to do his outside the presence of the jury to see what his problem was?

THE COURT: Oh, I thought you wanted to do it in front of the jury.

MR. WRIGHT: No.

THE COURT: Oh, okay.

MR. WRIGHT: No.

THE COURT: Kenny, go het him.

I misunderstood.

MR. WRIGHT: Sorry.

THE COURT: I thought you were saying let's just put him up in front of the jury. And that's -- that's why I said okay, you know, proceed at your own risk.

MR. STAUDAHER: And, Your Honor, if he's going to be outside the presence, we could just even ask him about this statement issue.

THE COURT: Well, they want it on the record.

MR. STAUDAHER: Well, it would be on the record, but it would be outside the presence of the jury.

THE COURT: Right. Right now.

MR. STAUDAHER: Okay.

THE COURT: That's what we're going to do. Oh, I see what you're saying.

MR. STAUDAHER: We can ask --

THE COURT: Right.

MR. STAUDAHER: -- him, as well.

THE COURT: Remember, he didn't remember, though. We asked him about the statement and he didn't remember.

(In the presence of Rod Chaffee)

Come on back up here because you're going to have to come up back to the witness stand anyway, Mr. Chaffee. Just have a seat. And, of course, Mr. Chaffee, you understand that you're still under oath.

THE WITNESS: I do.

THE COURT: Okay. The reason we brought you back in is apparently Ms. Weckerly, Mr. Chaffee, had tried to contact you and indicated there was an issue or something with your testimony; is that correct?

THE WITNESS: On Friday. Correct.

THE COURT: Okay. And then Ms. Weckerly, you know, knows that she can't talk to a witness in the middle of his testimony, so she did the correct thing by saying that she can't talk to you about it. So we called you in to find out is what is the issue or what were you trying to tell Ms. Weckerly about?

THE WITNESS: Well, and if -- if what I read in the paper matches my testimony, I stated on Friday that I witnessed Ron Lakeman reusing needles and syringes. I've never witnessed that. I've witnessed him accessing vials, but I was never aware that he was reusing needles and syringes.

THE COURT: Okay. And you're talking about the article in the RJ by Mr. German?

THE WITNESS: Correct.

THE COURT: Okay. Ms. Weckerly, any questions on that?

MS. WECKERLY: He's Mr. Staudaher's witness.

THE COURT: Oh, I'm sorry.

MS. WECKERLY: But I don't think -- I mean, I don't

know.

MR. STAUDAHER: Not related to that issue.

THE COURT: Okay. Anything from the defense?

So basically you went home and read it on -- read the paper, read the internet, and you saw the article and you were concerned that that was inconsistent --

THE WITNESS: Correct.

THE COURT: -- with what you understand your testimony to be?

THE WITNESS: Correct.

THE COURT: Okay. Thank you for bring that to everyone's attention. Thank you.

MR. WRIGHT: Have you been reading the news articles all along?

THE WITNESS: No, I haven't.

MR. WRIGHT: Okay. Why did you go home and read the article?

THE WITNESS: Because I knew I would be in it. I figured I'd be in it.

THE COURT: The same reason I read the RJ articles every day.

MR. WRIGHT: Okay. And in the article -- I didn't read the article. In the article it says you testified what?

THE WITNESS: That -- that Rod Chaffee witnessed Ron Lakeman reusing needles and syringes or something to that

effect.

MR. WRIGHT: Okay. And you're saying you did not testify to that?

THE WITNESS: No, on Friday I did testify to that, but that is not consistent with my previous statements. My previous --

MR. WRIGHT: Okay.

THE WITNESS: -- statements are --

MR. WRIGHT: Okay. So the news story is correct, correctly states your testimony?

THE WITNESS: Correct.

MR. WRIGHT: Okay. And what you're doing -- saying is I want to change my testimony?

THE WITNESS: Correct.

MR. WRIGHT: Because?

THE WITNESS: Because I answered yes to the question when I should have answered no to the question.

THE COURT: So let me make sure I understand. So the true -- I mean, obviously, all we want is the truth. So the truth is that you -- I mean, what is the truth, that you did witness him reusing the needles and syringes or you never witnessed him?

THE WITNESS: I -- I saw him re-accessing, you know, the single-dose vials.

THE COURT: Right.

THE WITNESS: So I saw him accessing those vials when they were opened. I was never aware that he was reusing needles and syringes.

THE COURT: Okay. Anything else?

Anything, Mr. Santacroce?

MR. SANTACROCE: I'm going to make a motion --

THE COURT: All right. Sir --

MR. SANTACROCE: -- his presence.

THE COURT: -- thank you. I am going to ask you, because we all need a break here, too, I am going to excuse you and make you --

THE WITNESS: Okay.

THE COURT: Sorry I made you walk --

THE WITNESS: No, that's fine.

THE COURT: -- all the way --

MR. STAUDAHER: Your Honor?

THE COURT: -- up here.

THE WITNESS: Thank you, ma'am.

MR. STAUDAHER: Do we want to ask about the statement issue --

THE COURT: Oh, yes.

MR. STAUDAHER: -- again just to --

THE COURT: I'm sorry.

MR. STAUDAHER: -- make sure.

THE COURT: I thought we had covered that.

MR. STAUDAHER: I just want --

THE COURT: But you can ask.

MR. STAUDAHER: -- to make sure.

Mr. Chaffee, the issue of -- you know, I think Mr. Wright, when he was starting to ask you some questions about a statement that you had supposedly made or written or produced to the detectives or at least -- or something during one of your interviews, do you remember that?

THE WITNESS: I do.

MR. STAUDAHER: At least reading that portion of it. Do you know what statement that was that -- or what it was you would have --

THE WITNESS: I don't --

MR. STAUDAHER: -- possibly written?

THE WITNESS: I don't recall at all.

MR. STAUDAHER: Now, there was some issue with something you had given to your attorney at some point; correct?

THE WITNESS: Correct. But that was well after that statement was given.

MR. STAUDAHER: Okay. So it would not have been that item?

THE WITNESS: No. No, sir.

MR. STAUDAHER: Now, you know that you gave two statements to the police and one to the FBI; correct?

THE WITNESS: Correct.

MR. STAUDAHER: Is it possible you were referring to one of those exchanges?

THE WITNESS: It must have been because, to be honest, I really don't recall what statement I was referring to.

MR. STAUDAHER: Now, in both of the ones that were taped that transcripts were done, there was no profanity per se in that with the exception of the reference to the prior statement? And that's what -- I guess that's what the issue is, is the -- if there were some profanity used before the FBI or some other entity, that did -- none of this -- none of that appeared in those -- those three records with the exception of your reference to it.

THE WITNESS: Okay.

MR. STAUDAHER: Does that spark your memory as to what that might have been about?

THE WITNESS: It doesn't.

MR. STAUDAHER: Do you remember actually going to Detective Hancock or Detective Whitely or any Metro person and handing them a statement that you had written or prepared?

THE WITNESS: I never -- I never wrote a statement. All my statements were verbal.

THE COURT: Okay. Who was your first attorney when you first went to the police or were first --

THE WITNESS: Jason Weiner.

THE COURT: Jason Weiner?

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Do you -- did you ever -- like did he ever have a list of questions for you to fill out or did you ever go to his office and he asked you questions like interrogatories or anything like that for --

THE WITNESS: There were some --

THE COURT: -- for you to answer?

THE WITNESS: There were some of that, yes, ma'am.

THE COURT: There was. Okay.

THE WITNESS: Yeah.

THE COURT: And do you know if that -- those questions were in connection with one of the civil cases or if it had something to do with the criminal investigation? Do you remember?

THE WITNESS: It would have been with the criminal investigation because I have a civil attorney, as well.

THE COURT: Okay. So Mr. Weiner was your criminal attorney?

THE WITNESS: Correct.

THE COURT: And then who was your civil attorney?

THE WITNESS: I -- I -- I have it in my phone --

THE COURT: Okay.

THE WITNESS: -- if you want me to look.

THE COURT: And were you sued in connection with all of this?

THE WITNESS: I was, yes.

THE COURT: Okay. And was that your like malpractice carrier gave you a civil lawyer, is that how that happened?

THE WITNESS: Yes, ma'am.

THE COURT: Okay. And did you ever with him meet and complete, you know, what's called interrogatories or anything like that where there's a list of questions and, you know, sometimes they send them to you at home and you're supposed to fill them out and then you go meet with the lawyer? That never happened?

THE WITNESS: Not with her, no, ma'am.

THE COURT: Okay. So the only thing where you answered some questions was with Mr. Weimer?

THE WITNESS: Weiner.

THE COURT: Weiner. I'm sorry. And then do you know if Mr. Weiner ever turned over your answers to those questions to anybody like the police or the civil lawyers in the other cases or anything like that?

THE WITNESS: I do not know.

THE COURT: You don't know. Okay.

Does anyone have any follow up based on those last questions from the Court?

MR. WRIGHT: Yes. Your attorney at your first interview was James Miller.

THE WITNESS: James Miller?

MR. WRIGHT: Yes. Do you know who James Miller is?

THE WITNESS: I do not.

MR. WRIGHT: Okay. Mr. Weiner --

THE WITNESS: Unless -- unless he was somebody that Jason Weiner had -- had stand, you know, in for him.

MR. WRIGHT: No, Jason Weiner was your attorney at the FBI interview and with what we call the second Metro interview --

THE WITNESS: -- Okay.

MR. WRIGHT: -- okay. But James M. Miller was your lawyer at the first interview, and that interview took place at the law offices of Hall, Prangle, and Schoonveld. Do you recall that?

THE WITNESS: I recall having a meeting in a -- in a -- in a lawyer's, you know, office, but I don't recall who was there. I always thought it was Jason Weiner that was with me.

THE COURT: FYI, according to the attorney listing, the only Jim Miller works at the DA's office.

MR. WRIGHT: No, it's James M. Miller. I think it's a different Jim.

THE COURT: No, no, I'm not -- he could have been a paralegal or something. Or are you familiar with Mr. --

MR. WRIGHT: No, it's an attorney, Bar Number --

THE COURT: Oh, okay.

MR. WRIGHT: This is --

THE COURT: Okay.

MR. WRIGHT: The interview I'm talking about is --

THE COURT: You don't know who this Mr. Miller --

MR. WRIGHT: -- May 28th --

THE COURT: -- fellow is?

MR. WRIGHT: -- 2008.

THE WITNESS: No, ma'am.

THE COURT: Okay. No recollection if he worked at that law office or anything like that?

THE WITNESS: No, he's not -- I don't believe he's one of the partners. I --

THE COURT: Okay.

THE WITNESS: I don't recall, to be honest --

THE COURT: Okay. That's fine --

THE WITNESS: -- but I don't think he is.

THE COURT: -- if you don't remember.

MS. STANISH: Judge, the interview was in 2008, so the directory probably could have not had him in it.

MR. STAUDAHER: He's got a bar number, too.

THE COURT: Okay.

MR. WRIGHT: Did you give a statement --

THE COURT: What if -- unless he's retired.

MR. WRIGHT: -- or interview with -- with James M. Miller?

THE WITNESS: No. Well, you mean, was he present during one of those --

MR. WRIGHT: Yes, he is your lawyer at your first --

THE WITNESS: Sir, I don't -- I don't recall that name.

MR. WRIGHT: Okay. In that first interview or in your interviews you talk about reading the statement of Brian Labus; correct?

THE WITNESS: Correct.

MR. WRIGHT: Okay. What statement of Brian Labus did you read?

THE WITNESS: I stated that on Friday. It was a -- it was a typewritten statement where it was -- it was B.L. for Brian Labus, it was initials, and then it was some -- some other initials from an interviewing detective, I imagine. And it was -- like I said, it was a poorly -- poorly typed out, you know, interview. It was not a well formatted type document --

MR. WRIGHT: Okay.

THE WITNESS: -- that Metro would -- would create.

MR. WRIGHT: And who gave -- who gave that to you?

THE WITNESS: I got that through Jason Weiner.

MR. WRIGHT: Okay. And is it that document that

tells you what Brian Labus claims you told him?

THE WITNESS: Correct.

MR. WRIGHT: Okay. And it's in that document that Brian Labus says you told him that you witnessed reuse of needles and syringes and -- correct?

THE WITNESS: No.

MR. WRIGHT: Okay. Brian Labus doesn't say that?

THE WITNESS: No, Brian Labus says that, but I never said that to Brian Labus.

MR. WRIGHT: Okay. So that's how you know what Brian Labus was claiming you said?

THE WITNESS: Correct.

MR. WRIGHT: Okay. No further questions.

THE COURT: I'm sorry?

MR. WRIGHT: I'm complete.

THE COURT: You're done?

Anything, Mr. Santacroce?

MR. SANTACROCE: No, Your Honor.

THE COURT: All right. Sir, thank you. I do need to ask you to step back to the -- oh, let me clear this up for us. Do you have -- before I let you leave, do you have the card of your civil lawyer in your wallet?

THE WITNESS: I don't have the card, but I --

THE COURT: But you have the name? Can you just tell us who that is? That may get to the bottom of --

THE WITNESS: It's Kim Johnson.

THE COURT: Okay. She's your civil lawyer?

THE WITNESS: She is.

THE COURT: Oh. Okay. Do you know what law firm she works at?

THE WITNESS: Not off the top of my head anymore, no.

THE COURT: Okay. All right. Thanks.

THE WITNESS: But I have her phone -- do you want her phone number?

THE COURT: No, that's okay.

THE WITNESS: Okay.

THE COURT: We can look her up through the State Bar of Nevada.

(Outside the presence of Rod Chaffee.)

THE COURT: In any event, just to -- I thought I could -- Jim Miller, James M. Miller works at Hall Prangle, which does civil work. So that's why I thought maybe Kim Johnson worked with this James Miller. So we'll see what we can find out through the Bar. That might -- might or might not clarify something. If anyone needs to use the restroom, please do it now and then we'll bring the jury in.

MR. SANTACROCE: Your Honor, I want to make a motion on this witness.

THE COURT: Oh, yes. Okay.

MR. SANTACROCE: I'm going to move to strike his entire testimony. I'm going to move for a mistrial. The fact that he had changed his testimony saying that needles and syringes, he never witnessed Mr. Lakeman do it when he testified on Friday that he did. It was such a damaging piece of evidence, the jury went home with that evidence for the weekend, they mulled that over.

It was such damaging evidence that it made it to the newspaper and said witness provides damaging testimony. You yourself, when I made my bail motion, said that one of the things we consider is the likelihood of conviction and you said now we're starting to see the evidence against Mr. Lakeman.

THE COURT: I did say that.

MR. SANTACROCE: There's the evidence right there against Mr. Lakeman is one witness. This Mr. Chaffee, this nut job who comes in here and he went home, he read his statement because he says here, well, my answer wasn't consistent with my previous statements. Absolutely none of his answers are. I'm moving for a mistrial or in the very least strike his entire testimony.

MR. WRIGHT: I join.

THE COURT: State?

MR. STAUDAHER: First of all the characterization of a witness as a nut job, I think, is unprofessional and

unreasonable by the defense counsel to even say such a thing in court. Secondly, this witness came in and tried to correct what he believed was an error in his testimony. That is reasonable for anybody to do, and anybody has a right to do that. They can impeach him, they can cross-examine him, they can do whatever they want to do with him, but it's not -- his testimony is not wholly inconsistent as counsel has said with his prior statements and so forth to the police.

So with regard to that, the jury can certainly weigh his evidence in light of the things that get brought out on -- on cross-examination, as well as direct examination when they, the triers of fact, can determine for themselves whether or not to believe a portion, any portion, all or none of his testimony. So we don't believe there's any basis whatsoever that counsel has alluded to that indicates this witness's testimony should be stricken.

MR. SANTACROCE: You know, Your Honor, he sits up here and says my conduct is unprofessional. He put this witness on. He solicited perjured testimony. He knew that the statements --

MR. STAUDAHER: I object to --

MR. SANTACROCE: -- the prior statements --

MR. STAUDAHER: -- the fact --

MR. SANTACROCE: -- Your Honor, were inconsistent and he let that go before the jury for the whole weekend. And

that evidence is so damaging and prejudicial to Mr. Lakeman that there is no remedy outside of a mistrial.

MR. STAUDAHER: And secondly I -- I take umbrage at the fact that anybody would indicate that I or any from the prosecution side has suborn perjury in this case. The issue with this witness, and I don't know that that even came out in the words that he said, if that's an accurate representation. We'd have to look at the transcript to see so. But he said he saw access to a vial. He said he did not know if it was the same syringe.

THE COURT: Here's what I remember from his testimony, and my memory may be faulty. I remember his testimony as being inconsistent because first he said, no, he never saw -- never saw reuse of needles and syringes, couldn't see what was going on essentially. My words, not his. Then he said, oh, yes, he was -- he did see them reusing the needles and the syringes, which I was kind of surprised when he said that, that's why I remember it, because that was inconsistent with what he had previously testified to. So he testified to both things as I remember on Friday.

Look, I don't think -- I mean, I don't think it gives, you know, rise to the level of a mistrial. I don't -- you know, there was other -- there were other things in his testimony which, you know, may or may not, depending on the weight to be given that the jury may consider that are

appropriately before the jury. So I'm not going to strike his testimony in its entirety. The fact that he's read the paper and now realizes, oh, my testimony is wrong or he realizes his testimony is wrong and he's going to be testifying inconsistently I think can be brought out.

And I think at the end of the day the jury is going to be left knowing he never saw him reusing the needles and -- he never saw Mr. Lakeman reusing the needles and the syringes. At the end of the day that's going to come out, and it's going to come out, oh, you know, he's all over the board.

I would -- just on a bigger theme here of cumulative evidence, I wondered this last night as I was failing to sleep, wondering how we can speed this along. You know, he is -- I didn't really get quite the point of Mr. Chaffee's testimony because it's so cumulative of everything else that we've heard. And the only things that were probative, a) now he retracts, and b) was the statement of Dr. Desai yelling at everybody hurry through, Dr. Carrera, and all of that, which nobody knew about until he blurts it out on the stand.

So on a kind of broader theme, you know, let's be mindful not -- again, I understand, you know, State is worried, you know, mindful of beyond a reasonable doubt, wants to present everything they have, and I understand that, and I -- and I have not, nor do I want to get in the way of the State's case. And that is not my intention. But just, you

know, to be mindful because, you know, really was Mr. -- was Mr. Chaffee more -- you know, did he really add anything for all of the issues that Mr. Chaffee has created?

MR. SANTACROCE: Well, he added a lot of prejudice to my client.

THE COURT: Well, now, but he said that was all wrong and that wasn't in his statement, which is what I'm saying.

MR. SANTACROCE: Okay.

THE COURT: So we have to --

MR. SANTACROCE: I wasn't privy to your admonishment to him. I don't know how you admonished him when we left.

THE COURT: Just now?

MR. SANTACROCE: No, when we left on Friday. Did you admonish him not to look at newspapers or --

THE COURT: No, I don't admonish the witnesses of that.

MR. SANTACROCE: Okay.

THE COURT: My standard admonishment of it is if it's in the middle of the testimony I tell them not to discuss their testimony with anyone else. If it's at the end of their testimony, I tell them don't discuss it with anyone who may be a witness. So I told him no one else, and I told him a couple of times because we took -- I think we took a break. So that was -- that's what I always say, but I don't admonish them

about the media because --

MR. SANTACROCE: Can either I or Mr. Wright cross-examination him as to the fact that he read the paper --

THE COURT: Of course.

MR. WRIGHT: Sure.

MR. SANTACROCE: -- and changed his story?

THE COURT: Sure. Sure. Of course. Absolutely. And, again, the only thing you can't do is -- is create some kind of inference that that was inappropriate for him to read the paper because that's not the admonishment I give the witnesses.

MR. SANTACROCE: That's why I inquired of that.

THE COURT: Okay. Other than that, certainly. Okay.

MR. SANTACROCE: Okay.

THE COURT: If anyone needs to use the restroom, let's do that and then get -- get started.

(Court recessed at 10:06 a.m., until 10:10 a.m.)

(Outside the presence of the jury.)

THE COURT: All right. Kenny, bring them in.

Just to let the lawyers know, Ms. Setco [phonetic] hurt her back on the weekend and has to go to the chiropractor at 4:45, so we'll try to break at like 4:20.

Who is in the lineup for today?

MS. WECKERLY: Mr. Chaffee, Ann Lobiondo, and Tonya

Rushing.

THE COURT: Okay. And Ann Lobiondo was another CRNA?

MS. WECKERLY: Yeah. She's here, so we're ready whenever.

THE COURT: What's she going to say?

MS. WECKERLY: She has statements from Dr. Desai about billing 31 minutes.

THE COURT: Okay. Good.

Mr. Staudaher, would you get Mr. Chaffee, please.

MR. STAUDAHER: Yes.

(In the presence of the jury.)

THE COURT: All right. Court is now back in session. The record should reflect the presence of the State through the Deputy District Attorneys, the presence of the defendants and their counsel, the officers of the court, and the ladies and gentlemen of the jury.

And, Mr. Chaffee, you are still under oath. Do you understand that, sir?

THE WITNESS: I do, ma'am, yes.

THE COURT: All right. Mr. Wright, you may resume your cross-examination.

ROD CHAFFEE, STATE'S WITNESS, PREVIOUSLY SWORN

CROSS-EXAMINATION (Continued)

BY MR. WRIGHT:

Q Mr. Chaffee, did you have any testimony you wish to correct from last week?

A I do.

Q And what is that testimony? What did you say last week?

A I answered yes to a question.

Q Okay. And what was the question?

A Have you witnessed Ron Lakeman reusing needles and syringes?

Q Okay. And the question was asked by Mr. Staudaher on Friday?

A Correct.

Q And you answered yes?

A Yes.

Q And then afterwards what causes you to now want to correct that for the jury?

A I read the paper and I realized after going over my testimony what the question was and how I answered it and how it was not consistent with my prior statements.

Q Okay. And the -- you went home Friday, read the paper Saturday, is that fair? Online or --

THE COURT: Or did you read it online?

THE WITNESS: No, I -- I read the paper. I believe it was on Saturday, yes.

BY MR. WRIGHT:

Q Okay. The paper that comes to the door?

A Correct.

Q Okay. And in the paper that comes to the door, it related your testimony stating that you witnessed Ron Lakeman reuse needles and syringes?

A Correct.

Q Okay. And then when did you realize that that statement was inconsistent with your prior interviews with the police?

A At that moment. I -- I didn't really realize I answered that question the way I did until after I got home and got a chance to go over my testimony.

Q Okay. What do you mean a chance to go over your testimony?

A You know, a moment to go home and be away from the court and to go over the testimony that I had -- I had given on Friday.

Q Okay. Just reflection?

A Reflection. Correct.

Q Okay. I mean, you didn't go home and like reread your statement?

A No, I reflected. Correct.

Q Okay. You reflected, read the paper, and then thought, gosh, I've said something that's incorrect?

A Correct.

Q Okay. And so your -- your true recollection as you sit here now regards what on what you observed with Mr. Lakeman on use of propofol and/or needles or syringes?

A I witnessed Ron Lakeman accessing open bottles of propofol with a needle and syringe, and that's -- that's as far as I can take it.

Q Okay. So the -- and you're -- you're talking about propofol vials that were being -- you knew they were being multi-used --

A Correct.

Q -- correct?

A Correct.

Q By that meaning used on different patients until empty, throw them away?

A Correct.

Q You were aware of that?

A Absolutely.

Q That was the practice in the clinic; is that correct?

A Correct.

Q Okay. And then what you're saying is on -- you witnessed Ron Lakeman anesthetizing a patient; correct?

A Correct.

Q And you saw him drawing propofol; correct?

A Correct.

Q And injecting a patient with a needle and syringe?

A Correct.

Q And are you saying you saw him re -- re-dose the patient, in other words give more propofol?

A Certainly.

Q Okay. And you're saying he used a needle and syringe, but you don't know if he was using -- reusing same needle and syringe?

A Correct.

Q And that's because you did not pay attention?

A Exactly.

Q Okay. You're doing your own job. This would have been at a time when you were a nurse working in the procedure room?

A Correct.

Q Okay. Now, any other clarifications come to mind on your testimony?

A No, sir.

Q Okay. So I want to go back to you started work, I believe, you testified in 2003 at the clinic on Shadow Lane?

A Correct.

Q Okay. And did you know -- did you know Mr. Krueger already?

A I did not.

Q Okay. And so you went, applied for a job as a nurse?

A Correct.

Q And were interviewed, you testified, by Tonya Rushing and Jeff Krueger?

A Correct.

Q And what was Jeff Krueger?

A He was the charge nurse.

Q Okay. You were hired?

A Correct.

Q And you testified that you worked initially in the recovery -- what we've called the recovery room, and you were calling patients the next day after their procedure to see how they're doing. Is that --

A No.

Q Okay. I got that wrong.

A I was working at the -- at the desk in which we called patients the next day. The recovery area is the recovery area where they would come out of the rooms and recover from the propofol.

Q Okay. I misunderstood. So you just started at the desk doing follow up with the previous day's patients?

A Correct.

Q Calling and saying how do you -- how are you

doing, any problems type thing?

A Correct.

Q Okay. At that time were you taking any patient satisfaction surveys?

A Those were -- I believe were mailed.

Q Okay. You -- you weren't on the phone at that time?

A Correct.

Q Okay. And then you went to procedure room?

A Yes.

Q Okay. And then ultimately from procedure room you -- you last worked in the pre-op area; is that correct?

A Correct.

Q And then you were terminated in approximately April 2007 --

A Correct.

Q -- correct? And you stated that was because of something you said to an employee regarding a bomb; is that correct?

A Correct.

Q And had you -- you had already had other disciplinary problems at the clinic; correct?

A Nothing that was -- I had behavioral issues, but I had no disciplinary actions taken against me.

Q Okay. The behavioral issues you spoke about

was after your wife died?

A Correct.

Q And you indicated that was July 1, 2006?

A Correct.

Q And so that -- thereafter July 1, 2006, up until your discharge, you talked about your emotional problems over the events, leaving the facility, uncontrollable crying?

A Correct.

Q Okay. That's the behavioral issues you're talking about?

A Right.

Q Okay. Were you disciplined for talking inappropriately to employees?

A Oh, yes, I was.

Q Okay. What -- what's that about?

A There was an employee that kept giving me a back rub all the time and I -- I would consistently ask her to stop doing that. And she -- she continued to give me backrubs. And so one day I asked her if she wanted to see my penis, and she said yes. So I showed her a picture of me flipping the bird, giving the middle finger. And I told her now stop rubbing my back, I don't want anything to do with you. And she reported it that I showed her an inappropriate picture.

Q Okay. And do you know when that was in the

time frame?

A I don't. I don't recall.

Q Do you -- do you recall being admonished for telling inappropriate stories because you had told fellow employees you brought a vagrant into your home that you shared with your wife and child to try to rehabilitate the vagrant?

A No.

Q Do you recall telling employees that contrary to your -- your goal of rehabilitation, the vagrant used your computer to online order components to build a meth lab in your house?

A After my house was raided, yes.

Q Okay. Let me back up. I'm talking about what -- do you recall being disciplined for --

A No, I was never disciplined for any of that.

Q Okay. Do you recall telling the employees that the police reportedly arrested you and the vagrant?

A Okay.

Q And you were let go once the vagrant explained that it was his meth lab in your bedroom?

A Not my bedroom, no.

Q Okay.

A In my home.

Q In your home?

A In his bedroom.

Q Do you recall that the center employees were alarmed by the story and Tonya met with you and said don't have inappropriate conversations in the workplace?

A That never happened, no.

Q That never happened?

A No.

Q Did Jeff Krueger talk to you about it?

A No.

Q And Tonya Harding [sic] didn't?

A No.

Q Okay. But the never happened is the incident or the discipline at the workplace?

A The discipline.

Q When -- when you were terminated, is -- is the employee that you made the bomb threat to, do you recall who that was?

A I do not.

Q Janine Drury?

A Sounds familiar, yes.

Q Okay. And did you tell her you were in a kill mode?

A I may have.

Q Okay. Did you tell her that you had been to the recent gun show and had -- and were angry because you bought a gun but the police wouldn't give it to you until a

background check was completed?

A No.

Q No that never happened, or no you didn't say that?

A I did not say that.

Q Okay. Did that happen?

A If I didn't say it, it didn't happen.

Q No. Did you go to the gun show and buy a gun?

A During that period of time, I don't -- no. The only -- the only gun I bought from a gun show was during the time that my wife was still alive.

Q Okay. Did you stated you purchased a new gun at the most recent gun show and were upset because you could not take possession of the gun upon purchase and the state wanted to check your background?

A No.

Q You never said that?

A I don't recall ever saying that, no.

Q Okay. And the person that you showed your cell phone pictures to, is that Kathy Grindell?

A That was Kathy, correct.

Q And did she complain about sexual harassment?

A Apparently she did.

Q And did you threaten another employee named Josh Cavett?

A No.

Q Okay. Do you know who Josh Cavett is?

A I do know who Josh is.

Q Okay. And is this at the same time of the kill mode bomb threat?

A No, this was during the same time that I was being accused of having inappropriate pictures and --

Q Okay.

A -- and he was showing inappropriate pictures, and I complained that there was a double standard.

Q Okay. What was -- what -- who is Josh Cavett?

A He was a tech, I believe.

Q Okay. And he was showing you inappropriate pictures?

A Not me. He was doing it to other female employees and they were complaining about it.

Q Okay. And so you threatened him?

A I never threatened anybody.

Q Okay. Did you -- did you understand that he had made a complaint that you had threatened him?

A No.

Q Okay. Do you understand anything, any disciplinary action involving Josh Cavett?

A No.

Q Now, when you made the bomb threat, that was

on April 20th, your last day of work; is that correct? Do you recall that?

A Yes.

Q 2007.

A I don't -- I don't recall the actual day, but I remember that was my last day of employment, yes.

Q Okay.

A I was called and asked not to return to work.

Q Okay. And you were taken out in handcuffs; correct?

A Correct.

Q By the Metropolitan Police Department?

A Correct.

Q Okay. And when they came, how -- how did you get arrested?

A I was asked by Jeff Krueger to come to a little antechamber between two offices, and there was a Metro officer waiting there for me.

Q Okay. And at that point you were arrested and taken to jail?

A Correct.

Q Okay. And you resent Jeff Krueger over that; correct?

A No.

Q You stated that he --

A I mean, I -- I didn't appreciate being blindsided, but I didn't resent anybody.

Q Okay. Did you call him a bully?

A He's always been a bully, yes.

Q Okay. What else have you called him?

MR. STAUDAHER: Objection. Relevance, Your Honor --

THE WITNESS: Yeah, I mean --

MR. STAUDAHER: -- as to what other names he may have called Jeff Krueger.

THE COURT: Only if it was in the workplace or to Mr. --

BY MR. WRIGHT:

Q Was it within the workplace?

A Yes, but, I mean, I call him a lot of names. He was an asshole, he was a bully, he was a jerk, he was overbearing, he was arrogant. I called him all of those names.

Q Okay. And this is during -- this was before your termination; correct?

A Correct.

Q Okay. And so obviously from your characterization, you don't like Mr. Krueger.

A I don't like his behavior.

Q Okay.

A I have nothing personally against Mr. Krueger.

I didn't like the way he was a charge nurse. I don't like the way he managed his subordinate stuff.

Q Okay. Well, when you were interviewed by the FBI do you recall telling them that he is a person that could not be trusted and he would lie to law enforcement?

A I may have said that.

Q Okay. And why did you say that?

A Because I believe that he was very loyal to Dr. Desai.

Q Okay. And he was loyal to Dr. Desai and so that irritates you; correct?

A It doesn't irritate me. It's just something I thought the FBI should know.

Q Okay. Now, after you were terminated, you never went back to the clinic?

A I did not.

Q Okay. And so then your next involvement with the clinic was when the investigation commenced by the Health District --

A Correct.

Q -- is that correct?

A Correct.

Q Okay. And you at that time, and this would be -- when did you become aware of the investigation? Let me put it that way.

A When I got a phone call from one of the employees.

Q Okay. And which employee was that?

A Maggie Murphy.

Q Okay. And you learned there was -- did you learn there was an investigation involving transmission of hepatitis C at the clinic?

A No, I was told that there was an investigation about practices at the clinic.

Q Okay. And then when -- when did you call the Health District?

A The day after I got the phone call from Maggie Murphy.

Q Okay. And at that time was the investigation public yet?

A No.

Q Okay. So it's still in the time of the investigation, but no press conference?

A Correct.

Q And who did you call at the Health District?

A Brian Labus.

Q And how did you know Brian Labus was the chief epidemiologist investigator?

A I was given his name and number by Maggie Murphy.

Q Okay. So you call -- do you remember what day it was you called him?

A No, I do not recall at all.

Q Okay. And you called Brian Labus because why?

A Because Maggie mentioned that, you know, I was -- that there was problems in the procedure room and that -- that I was a procedure room nurse, you know, the longest and she thought I might have some insight.

Q Okay. Did you view this as a chance to get your dignity back?

A Somewhat, yes.

Q Okay. Do you recall saying that?

A Now that you say that, yes, I recall saying that.

Q Okay. And get your dignity back because this was your chance to set the record straight because you had been terminated for what you call a bullshit terroristic threat thing?

A No. If I had a problem with my termination, I would have went to the labor board. I never -- I never had a problem with my termination.

Q Okay.

A It was a -- they terminated me, but it was time for me to go. It was a mutual -- a mutual thing. I was happy to be gone.

Q Did you call it a bullshit terroristic threat thing?

A I may have, yeah.

Q And so this was your chance to get your dignity back; correct?

A Correct.

Q And this is my chance to make a difference; correct?

A Correct.

Q Okay. So you call Brian Labus and what did you tell Brian Labus?

A I told him about the reuse of the 60 cc syringes.

Q Okay. I'm going to stop you on each one.

A Okay.

Q Okay? You call him and tell him -- well, did you tell him who you were?

A I did.

Q Okay. A former employee; correct?

A Correct.

Q And did you tell him you had been fired and why?

A No.

Q Okay. And you told him about the reuse of 60 cc syringes; correct?

A Correct.

Q 60 cc syringes is a big syringe used to flush the scope, the colonoscopy scope during the procedure, the colonoscopy, if like the lens gets cloudy or it's dirty or something?

A Correct.

Q And when you worked there, those 60 cc syringes were being used on more than one patient to flush the scope; is that correct?

A Correct.

Q Okay. And so what else -- that's -- what else did you tell Brian Labus?

A I mentioned biopsy forceps.

Q Okay. Biopsy forceps, an instrument used during the procedure?

A Correct.

Q Okay. And when you worked there, were -- were biopsy forceps being reclaimed, sterilized, reused?

A Yes, they were.

Q Okay. During what time frame?

A From my -- from my initial employment up until probably 2005 sometime.

Q Okay. And so from when you started until 2005 there was a practice of the cleaning biopsy forceps, sterilizing them in the Medivator, and reusing them?

A Correct.
Q Is that correct?
A Yes, it is.
Q And they would be reused how many times?
A Three times.
Q Okay. And then did that practice come to a stop?
A I believe so, yes.
Q Okay. And did that practice come to a stop when new scopes -- do you recall new scopes --
A I do.
Q -- a new supplier of scopes?
A I do.
Q Okay. And what -- what happened which ended the practice, if you recall?
A Repeat the question.
Q What happened which ended the practice of reusing biopsy forceps, if you recall?
A The -- the salesman was told about the reuse of the biopsy forceps and he put an end to it.
Q Okay. That would be the salesman of what?
A Of the scopes, so either the Fuji or Olympus, I forget --
Q Okay.
A -- which was -- which was what.

Q So these scopes like cost -- I mean, these are expensive, the scopes we're talking, like $30,000 or something.

A Something.

Q Okay. And so the -- the salesman, whether it was Fuji or Olympus, the changeover of new scopes is when it stopped --

A Yes.

Q -- is that correct?

A As best to my knowledge, yes.

Q Okay. So you told Brian Labus about the biopsy forceps and the 60 cc syringes. What else did you tell him?

A That when scopes were hanging after being cleaned through the Medivator we would see residue, you know, dark brown residue dripping out the tips of the scopes.

Q Okay. And what else?

A That's all I really recall.

Q Okay. And you understand that Brian Labus contends you told him additional things; correct?

A Correct.

Q Are you aware of that?

A I am.

Q Okay. Are you aware that Brian Labus says you told him that you witnessed reuse of needles and syringes?

A I am aware of that.

Q Okay. You are aware that Brian Labus contends that; correct?

A That he what?

Q Contends that.

A Okay. And I dispute that.

Q Okay. Because did -- did you tell him that?

A I did not.

Q If -- if Brian Labus says that you told him that Desai ordered the reuse of needles and syringes, that's a lie; correct? A Correct.

Q You did not say that?

A I did not.

Q And it never happened; correct?

A What never happened?

Q Dr. Desai ordering you and others to reuse needles and syringes.

MR. STAUDAHER: Speculation, Your Honor.

THE COURT: Well, that he knows of.

THE WITNESS: Yeah, I -- I can't answer that. I don't know.

BY MR. WRIGHT:

Q Okay. Well, you didn't -- you never saw it?

A Never saw it.

Q Never heard of it --

A Never --

Q -- correct?

A Correct.

Q And did not tell Brian Labus that?

A Correct.

Q And if Brian Labus said that this order to reuse syringes and needles, you complained about it to Dr. Carrol, Tonya Rushing, and Jeff Krueger.

A I complained about the reuse of 60 cc syringes, not reuse of needles and syringes.

Q Okay. So if -- if Brian Labus says the reuse of needles and syringes for propofol -- propofol injections, that you complained to Dr. Carrol, Tonya Rushing, and Jeff Krueger about Dr. Desai ordering the reuse, that would be false; correct?

A He would be mistaken.

Q Okay.

A We were talking about two different things.

Q Okay. Well, you didn't say that, and Brian Labus may have misunderstood you?

A That's -- yes.

Q Okay. The -- you did tell him about reuse of 60 cc syringes?

A Correct.

Q Okay. And did you go talk to Dr. Carrol,

Tonya Rushing, and Jeff Krueger about the reuse of the 60 cc syringes?

A Yes.

Q Okay. Did you also -- can you think of anything else you told Brian Labus?

A I think I mentioned bite blocks, the reuse of bite blocks.

Q Okay. And bite blocks were being reused; correct?

A Correct.

Q And they were being cleaned, put in the Medivator, and used an additional time; is that correct?

A Correct.

Q Anything else you told Brian Labus?

A No. You know, I never told Brian Labus. He asked me questions and I responded, you know. So he would ask me things about what his investigation unfolded, and then he would ask me questions and I would answer them.

Q Okay.

A I never volunteered anything.

Q Now, you were -- who did you next talk to about the investigation?

A It would have to be Metro.

Q Okay. And did -- did Brian Labus, when you called him -- or did Maggie Murphy give you like his cell

number or something?

A Something like that, yeah.

Q Okay.

A I don't know if it was office number or cell number.

Q Okay. But you called him directly?

A I did.

Q Phone call?

A Correct.

Q Have any meeting with him?

A Never.

Q Okay. Ever provide him a written statement or anything?

A Never.

Q Okay. Did you ever see a written statement of Brian Labus contending what you told him?

A Well, yeah, that's the statement I was -- I've talked about that I -- that I've read.

Q Okay. So you read a statement of Brian Labus regarding a conversation with you?

A Not a statement, no. I've read a copy of a telephone interphone from Brian Labus with a Metro detective, I imagine.

Q Okay. And that telephone interview by a Metro detective with Brian Labus, the subject of it, of the

interview, was your phone conversation with Brian Labus; correct?

A Some of it was, yes.

Q Okay. And who provided you that Metro transcript?

A My lawyer.

Q Okay. And that lawyer would be who?

A Jason Weiner.

Q Okay. And do you know when he gave that to you? You don't have it; correct?

A I moved during this time period, and a lot of my stuff is in storage. So I may have it, but it's in storage.

Q Okay. And do you recall did he give you that, Jason Weiner give you that in preparation for your interview with the police?

A I believe so, yes.

Q Okay. Now, other than Brian Labus, did you talk to any other investigators --

A Never.

Q -- other than Metro police first interview?

A Never. Well, I believe in one of the -- I believe in one of the interviews there was other agencies there --

Q Okay.

A -- that were -- that were witness to my testimony.

Q Okay. Now, your first interview was on May 28, 2008. Have you seen a transcript of that interview?

A I believe so.

Q And you received immunity; correct?

A Correct.

Q And you received a letter that says that; correct?

A Correct.

Q And that letter requires that you maintain the same testimony as you give in the interview or the immunity is off; correct?

A Correct.

Q Now, you're -- that -- have you reviewed your transcripts of your interviews?

A I've reviewed one transcript, so I have not reviewed all three, no.

Q Okay. What -- just chronologically we have interview by Metro. That's -- that's what I call it. We call it the Metro interview --

A Okay.

Q -- May 28, 2008. And then you were interviewed by the FBI; correct?

A Correct.

Q And then an interview by Metro on December 15, 2008. Does that sound correct?

A Yes.

Q Now, when you were interviewed the first time, May 28, 2008, that was with your attorney James M. Miller; correct?

A I don't recall a James Miller, but I'll take your word for it.

Q Have you ever heard of James Miller?

A Not until today, I don't believe.

Q Let me show you --

MR. WRIGHT: Can I approach the witness --

THE COURT: Sure.

MR. WRIGHT: -- with his transcript?

BY MR. WRIGHT:

Q Look at the first page or two. Read it to yourself --

A Okay.

Q -- and see if that refreshes your recollection.

A It does not.

Q It does not? Do you recall being at that --

A I recall being in a private law office. The only -- the only lawyer that I ever recall being involved with this was Jason Weiner.

Q Okay. Well, Mr. Weiner was present on September 22nd when you were interviewed by the FBI, and then again in December when you were interviewed again by Metro. Do you recall anything about who represented you at your first interview?

A I didn't -- apparently I do not.

Q Okay. Now, do you recall being asked at that first interview about heplocks, insertion of heplocks, and saline flush and how that takes place?

A I've been asked about that before, yeah. I don't know if it was in the first one, but I do recall those questions, yes.

Q Okay. And is that saline flush of the heplock after insertion?

A Yeah.

Q Does that take place in the pre-op room?

A It does.

Q Okay. Did you ever do that?

A On occasion.

Q Okay. And would you just briefly describe to the jury your procedure?

A My procedure was I would -- I would explain to the -- to the patient what I was about to do. I would gather my equipment, put on gloves, cleanse the site, usually using a 20 gauge needle I would access a vein either in the hand or in

the bend of the arm. Once I got a good blood flow I would -- I would pinch off the flow and I would cap the -- I would cap the -- what's called the angiocath. I would -- I would cap it and then tape it.

Q Okay. And then you would flush it with saline?

A Not always, no.

Q Okay.

A I flushed infrequently.

Q Pardon?

A I flushed infrequently.

Q Okay. You infrequently did a saline flush of the heplock or the IV after you inserted it; correct?

A Correct.

Q And the law enforcement was questioning you about your saline flush practices, and you told them you infrequently do it; correct?

A I believe that's what I would have said because that's the truth.

Q Okay. Now, the asked you about the size of propofol vials and when the clinic went from 20s to 50s. Do you recall that?

A I do.

Q Okay. And when you began 20s exclusively were being used?

A Correct.

Q And at some time while you worked there, 50s, big ones, were added; correct?

A Correct.

Q And thereafter 20s and 50s were available?

A I don't -- I don't recall 20s and 50s --

Q Okay.

A -- being available at the same time.

Q Okay. So you -- your belief was it was 20s, then exclusively 50s?

A It may be 20s and 50s together. I don't recall that because, you know, propofol wasn't my area of expertise. But what I remember is 20s and then 50s.

Q Okay. And then they -- they asked you why the change from 20s to 50s, and you told them I have no idea why; correct?

A Correct.

Q And that's correct?

A Yes, it is.

Q Okay. They asked you if the propofol was used on multiple patients, and you said, yes, every day; correct?

A Correct.

Q And that was true?

A True.

Q They asked you if there was reuse of syringes

involving propofol administration, and you answered no; correct?

A Correct.

Q And that's true?

A Yes, it is.

Q They asked you if snares were ever reused.

A Correct.

Q Snares are another device used in a procedure; correct?

A Correct.

Q And you told them that snares were never reused; correct?

A Correct.

Q And that's true during the entire time you were there?

A Correct.

Q They asked you about CRNA anesthesia times and asked if you thought those times were ever exaggerated. And you said no because they were true professionals; correct?

A Correct.

Q Okay. And that's a true answer and that's what you believe; correct?

A No.

Q Okay. So did you say this, what I just represented you?

A If -- I must have, yes.

Q Okay. And so you're saying now that they were exaggerated?

A They were.

Q Okay. Do you know why you told the police in May that they were not?

A I don't.

Q Do you recall telling the police that you did not look at the anesthesia log of a CRNA other than to get the amount of propofol used?

A Can you repeat that one more time for me?

Q The -- does the nurse anesthetist keep a propofol sheet? Pardon me, an anesthesia sheet.

A You mean like of bottles used?

Q No.

A Or -- or during the procedure?

Q The procedure. During the procedure does the nurse anesthetist fill out an anesthesia sheet?

A They do.

Q Okay. I'm asking you about that anesthesia sheet --

A Okay.

Q -- and the use you would make of it as the nurse in the procedure room, okay.

A Okay.

Q Did you state that the CRNA prepares that anesthesia sheet and I didn't look at it other than for the total propofol?

A Correct.

Q Okay. Is that true?

A That's true.

Q Okay. And for the total propofol, you want to know the amount given and the individual dosage units; is that correct?

A No, I -- the only thing I needed to know was the end amount used.

Q Okay. End amount. And then you were going -- you would enter that into your nurse's charts --

A Correct.

Q -- for that procedure; is that correct?

A Yes.

Q For the start time, you being the nurse in the procedure room is where I am now, start time you would take off of the strip and put onto the nursing chart?

A Correct.

Q Okay. And are we talking about the rhythm strip --

A The rhythm strip, correct.

Q -- of the EKG starting?

A Correct.

Q Okay. And that start would be the first blood pressure reading?

A Yes.

Q Okay. You were asked what the most accurate time for the procedure from beginning to end, and you said the strip off of the blood pressure monitor, the rhythm strip; correct?

A Correct.

Q Because that is on throughout the procedure?

A Correct.

Q You were asked if you ever saw a physician start a procedure before the anesthesia was effective, okay.

A Okay.

Q You said, yes, sporadically. Propofol is an interesting drug. One person can be sedated with a 120 and another might take 220 milliliters?

A Milligrams.

Q Milligrams. I get these mixed up. I just use a number. You said not every time you give this does it, ten seconds later, are they asleep; is that correct?

A That's correct.

Q You were asked how often that happened at the clinic, and you said maybe five times in the whole time I was there, okay.

A Okay.

Q You were asked who, and the answer was Dr. Desai as starting before the patient was fully sedated; correct?

MR. STAUDAHER: Your Honor, are there questions, or is he just going to read the transcript in? Because I don't have a problem with us just admitting the transcript if that's what we need to do.

THE COURT: It's fine for right now. Just --

BY MR. WRIGHT:

Q Is that correct?

A That's correct.

Q Okay. That's what you told them?

A Correct.

Q Okay. You were asked if you thought that was because he, meaning Dr. Desai, was in a hurry. And did you answer I don't know, he wouldn't be looking at the patient, he would look at the monitor and start? The patient would rise up --

MR. STAUDAHER: Your Honor, I'm going to object to this. Again, he can --

THE COURT: I'll see counsel --

MR. STAUDAHER: -- ask the question --

THE COURT: I'll see counsel up here.

(Off-record bench conference.)

THE COURT: Is everybody okay without a break? Does

anyone need a break? No? Okay.

BY MR. WRIGHT:

Q And did you say patient -- the patient would rise up and say hey, and then it would stop? Do you recall that?

A Okay. You know, that was five years ago. I don't recall word for word of anything I said.

Q Okay. Look at page 31. I have the wrong page. It's page 32, the bottom portion. You can read on as much as you'd like.

A Okay.

Q Am I stating it accurately?

A You were.

Q Okay. And is -- is that correct what you are saying?

A Yes.

Q Okay. Did you state I think he, meaning Dr. Desai, just calculated it was long enough, and lo and behold the guy needed 15 seconds rather than 10, and the colonoscopy had started?

A Sure.

Q When questioned about those five times involving Dr. Desai, did you state I don't think it was purposeful, it was just a robotic kind of behavior, lights were out, he's looking at the monitor, and he starts the

procedure?

A I did state that, yes.

Q Okay. And is that correct?

A Partly.

Q Do you recall being asked about Dr. Desai's quickness on colonoscopies?

A I do.

Q And do you recall saying that it was 50/50 whether Dr. Desai came out faster than he went in?

A That's sounds like something I would have stated, yes.

Q Okay. Is that accurate?

A Yes.

Q Okay. Do you recall questions were asked about him pulling the scope, colonoscope -- what do you call that thing?

A Colonoscope.

Q Colonoscope out quickly, and you answered he didn't just pull the scope out when he got to the end of the colon. What everyone complained about was when he was in the last six inches and he pulled it out quickly. When you pull it out quickly, it gets messy.

A Yes, it does.

Q Is that accurate?

A Yes.

Q So it was talking about the last -- the end, the last six inches of the scope coming out; correct?

A Correct.

Q Do you recall being asked about the number of procedures, number of patients being processed, treated at the clinic?

A In this interview here?

Q Yes.

A I was asked that in every interview, so, yeah, I recall that.

Q Do you recall that you didn't like 60 procedures in a day because of the customer service aspect?

A Yes.

Q Is that true?

A That's true.

Q Did you state that the procedure itself wasn't an issue. It's not like they were doing shortcuts with the procedures. They were not doing that. It was the customer service that annoyed me. Is that correct?

A Partly, yeah. But, yeah, that's correct.

Q What do you mean partly?

A Well, I mean, you know, having time to reflect this, as I -- as I progressed in these interviews and I had more time to think about all of this, you know, certain aspects of these procedures started to come to mind and some

of my views have changed.

Q Okay. And it has changed as you progress in the interviews and learn more about what other people have said?

A No, no one -- they never -- I don't know what anyone else said.

Q Okay.

A I never talked to one person.

Q So what -- what is the partly on that answer? I mean, because you were interviewed by the police and said there were no shortcuts, you just know 70 people are scheduled. You knew there were going to be 40 miserable people; right?

A Right.

Q Okay. That part of it is correct?

A Correct.

Q Okay. But there were going to be people that had to wait too long, and that's the customer service aspect?

A Correct.

Q And now you're saying upon reflection you think they, physicians and employees, were taking shortcuts?

A I think -- I think a five minute colonoscopy is -- you're required to take shortcuts.

Q Okay. And this is upon reflection after your interviews?

A Correct.

Q You were asked did you notice any unsafe practices. You told the police no; correct?

A Correct.

Q Was that true?

A Yes.

Q Okay. Did Brian Labus promise you confidentiality?

A I requested confidentiality, but he didn't -- and he did state that it would be a confidential conversation, yes.

Q Okay. I'm talking about that first -- when you call -- Maggie asked you to call; correct?

A Correct.

Q And Maggie told you Brian was expecting your call?

A I don't recall if she said she's expecting it.

Q Okay.

A She called me saying would you mind calling -- would you mind calling him.

Q Okay. And so you requested anonymity?

A I did.

Q And you were promised anonymity?

A I was.

Q Okay. And then you found out he just breached

his representation and turned it over to Metro; correct?

A Something to that effect, yes.

Q Okay. Well, is that -- do you see it differently?

A I don't know if he turned it over to Metro or if Metro interviewed him, but --

Q Okay. And you have stated several times in your interviews that pretty much after July 1, 2006, when your wife died, your memory is a mess; is that correct?

A It is, yeah.

Q And you viewed yourself as unstable?

A Correct.

Q And unreliable?

A Correct.

Q And you told police in the interview you couldn't remember what you knew or didn't know until you read what Brian Labus said in a report.

A Okay.

Q Is that right?

A I -- I imagine it is, yes.

Q You say for awhile there, you know, I'm getting things from so many angles I was losing track of what I really knew and didn't know.

A Okay.

Q You were getting so many angles from where if

you aren't talking to anyone?

A Just my own thought processes.

Q Okay.

A Talking with my lawyer.

Q Were you also --

A The questions from Metro. You know, I mean, I would -- you know, they were using the typical you ask me three -- you know, the same question three different ways.

Q Remember saying at one point I just really had myself convinced that I didn't know what was true anymore until I read the interview with Brian Labus and what he told?

A Okay.

Q What are you -- what are you talking about reading and reviewing?

A His statement.

Q Okay. Until I read Brian's statement, then I realized everything I've been saying all along is true.

A Correct.

Q But really you have no independent recollection of all of that. It's just confirmed through reading things in the newspaper?

A No, it's just -- you know, again, as time goes by and you -- and you reflect on things, things start to solidify. I mean, the -- what -- what I was referring to there was my comment about the syringes.

Q Okay. And -- and you would read everything in the newspaper; correct?

A That's not correct, no.

Q Did you read the newspapers about the investigation?

A No, not really.

Q Okay. Do you recall telling the FBI --

MR. WRIGHT: Page 8.

BY MR. WRIGHT:

Q -- Chaffee has read the local newspapers and knows that the hepatitis C outbreak generated at the ECSN is being blamed on reuse of needles and syringes.

A Okay.

Q He advised that needles and syringes were not reused.

A Okay.

Q Vials were reused, but it is common in healthcare to reuse the vials even though marked as single use only.

A Okay.

Q Okay? So were -- were you reading the newspapers?

A I must have read it on that occasion. I mean, you know, it was -- it was front -- it was front page, you know, news for quite awhile there. So it was pretty common

knowledge that this was a big national event.

Q Right. And this was your chance to make a difference and get your dignity back; correct?

A Sure.

Q Now, aside from your immunity, did the State forgive prosecution --

MR. STAUDAHER: Objection. State has not given immunity to Mr. Chaffee.

THE COURT: It was already testified to.

MR. STAUDAHER: Well, I believe he was talking about --

THE COURT: It's his under --

MR. STAUDAHER: -- a proffer that --

THE COURT: It's his understanding that's relevant and the jury will consider it as the witness's understanding.

So, Mr. --

BY MR. WRIGHT:

Q Do you think you don't have immunity?

A To be honest with you, I thought that was federal immunity. I didn't know it was state.

Q Okay.

A Because that -- the proffer was given to me in a federal attorney's office.

Q Okay.

A And so I thought that was -- I thought that

was on federal -- I thought that was federal immunity, not state.

Q Okay. December 15, 2008, it's your understanding that we're conducting this interview under a proffer agreement with the District Attorney's office; correct?

A Okay.

Q And you believe you have immunity as we sit here?

A I do.

Q And you believe you also received a dismissal of a criminal case against you?

A No.

Q No?

A No.

Q Okay. You -- you were arrested in 2010.

MR. STAUDAHER: Objection, Your Honor.

THE COURT: Yeah, I'll see counsel up here.

(Off-record bench conference.)

THE COURT: Ladies and gentlemen, we're just going to take a quick recess. And during -- I needed a recess -- during this recess -- whether you folks do or not.

We're going to just take a brief recess. And, of course, during the recess you're reminded you're not to discuss the case or anything relating to the case with each

other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on the case, person, or subject matter relating to the case by any medium of information. Don't do any independent research, and please don't form or express an opinion on the trial. Notepads in your chairs, and follow the bailiff through the rear door.

(Jury recessed at 11:23 a.m.)

THE COURT: Mr. Chaffee, during the break you are admonished you are not to discuss your testimony with anyone else.

THE WITNESS: Yes, ma'am.

THE COURT: Do you understand that, sir?

THE WITNESS: I do.

MR. WRIGHT: Or read the paper.

THE COURT: Yes, and you're -- or read the paper. That was not part of the earlier admonition. And you're free, sir, to also exit through the double doors.

We're going to take a couple of minutes. If you folks need a couple of minutes, take it, and then we'll come back and we can put the conference that occurred at the bench on the record.

(Court recessed at 11:24 a.m., until 11:30 a.m.)

(Outside the presence of the jury.)

THE COURT: All right. We're on the record.

Do we need to wait for Ms. Stanish? No? Okay.

Basically the State had objected to the line of questioning regarding the 2010 arrest, which as I understand it was possession of a meth pipe and dangerous drugs without a prescription.

And then what was the outcome of that case, Mr. Staudaher?

MR. STAUDAHER: Actually, we have provided that. I believe the -- one of them was -- I believe the prescription drug one was dismissed and --

THE COURT: Dismissed out of screening?

MS. WECKERLY: It doesn't show the date.

THE COURT: Probably they never got a chem on it and --

MS. WECKERLY: I think he showed a script, but -- the way it looks to me, but I don't know that.

THE COURT: Okay.

MR. STAUDAHER: So there's no -- at this point --

THE COURT: And what happened with the meth pipe, which is only a misdemeanor, in my view, to begin with?

MR. STAUDAHER: And Mr. Whitely is going to go out and get the --

THE COURT: Okay.

MR. STAUDAHER: -- actual information, but to our -- the best of our recollection the case didn't go anywhere.

MR. WRIGHT: Well, why -- I mean, I am also going to

ask him about his methamphetamine use and its effect on his testimony.

THE COURT: Or his memory.

MR. WRIGHT: Right.

THE COURT: Here's the thing.

MR. WRIGHT: I mean, there's a good faith basis for that. He had a meth lab in his house and then he's arrested with --

THE COURT: I don't think he had a meth lab. Didn't he have -- just they were ordering the stuff for --

MR. WRIGHT: No.

THE COURT: -- a meth lab?

MR. WRIGHT: It was a meth lab. In fact, he said, yeah, I guess I should have been suspicious when I saw all those gas cans and tubes in the vagrant's room.

THE COURT: All right.

MR. WRIGHT: And then he's arrested with -- the lady and he are arrested in 2010. She's high on meth and there's the meth pipe sitting there.

THE COURT: All right. Mr. Staudaher, Ms. Weckerly, when you approached the bench you indicated as officers of the court that Mr. Chaffee had received no benefit on his case, the 2010 cases, in exchange for his testimony or cooperation; is that correct?

MR. STAUDAHER: That is absolutely correct.

MS. WECKERLY: That's correct.

MR. STAUDAHER: We had even no knowledge of the extent of whatever he had as far as those individual cases were concerned.

THE COURT: Okay. And then Mr. Chaffee, for the record, never approached you to ask for a benefit or help of any kind?

MR. STAUDAHER: No. As a matter of fact, the first contact that I ever had with Mr. Chaffee was in pretrialing him for this case. We attempted to have him come before the Grand Jury. We had communication with his attorney Jason Weiner. Jason Weiner, at least at that instance when he would have been coming before the Grand Jury, had lost contact, couldn't contact, I guess, for some reason, and he never came before the Grand Jury. I never talked to him. So --

THE COURT: Okay.

MR. STAUDAHER: -- there was nothing, no indication of a benefit given to him and him coming to us or doing anything like that.

THE COURT: Okay. If there was no benefit and no attempt to gain a benefit, then I don't see what the relevancy is other than to further sully his character.

MR. WRIGHT: The relevance --

THE COURT: I think you've done a good of this far. But I don't see what the relevance. If they stand there as

officers of the court and tell me that there was no benefit, and it seems to me they're learning about all of this as we're all learning about the facts and circumstances surrounding the dismissal and whatnot. So to me, I don't see the relevance of it.

You know, yes, if there was some motivation or he had even approached them for a deal or something like that, then I would say, yes, I think that it is relevant. But there was no talk even, as I understand it, with these prosecutors about, you know, his case.

And just to make it clear for the record, no prosecutor like a team prosecutor ever approached you to say do you want to give this guy a deal or anything like that, nobody else in your office in other words; is that true?

MR. STAUDAHER: That's true.

THE COURT: Ms. Weckerly?

MS. WECKERLY: That's true.

THE COURT: Right. So, I mean, I just don't see the relevance of it.

MR. WRIGHT: It's relevant. I accept their representations. What matters --

THE COURT: Well, you didn't at the bench.

MR. WRIGHT: -- is whether Jason Weiner told him you need to keep on the State's good side or these cases can be refiled. It matters all the time. Informants -- witnesses

continue to cooperate knowing they have cases and it's going to inure to their benefit. And the only way I can examine any witness about them is his motive, his knowing he got arrested and it was with the meth pipe. And then he knows by continuing to cooperate, the probability is he's going to get favorable treatment because he's a State's witness.

THE COURT: Well, okay.

MR. WRIGHT: That's proper cross.

THE COURT: I think you can say did you at any time believe you needed to continue cooperating --

MR. WRIGHT: In order to get rid of your pending case.

THE COURT: -- you know, with the District Attorney's office, and if he says no, that's consistent with the fact he never called them. And Mr. Weiner, his lawyer, never called them to say ---

MR. WRIGHT: I don't know that.

THE COURT: Well, if they tell me they never -- he never --

MR. WRIGHT: No. You saying I know Mr. Weiner didn't call them.

THE COURT: Well, that's why I said --

MR. WRIGHT: I don't know that Weiner didn't say to the DA this guy is a witness in your case.

THE COURT: Well, typically --

MR. WRIGHT: I don't know that.

THE COURT: That's why I asked them did a track deputy approach them to say, hey, I got this guy on a case on the team, do you care what I do with him? Typically, I'm assuming, that's --

MR. WRIGHT: They would have nothing to do with this. They would have nothing to do with the dismissal of his case.

THE COURT: Well, the track --

MR. WRIGHT: I tell --

THE COURT: -- deputy isn't just --

MR. WRIGHT: I tell deputies on cases, hey, this guy is a witness in an upcoming case.

THE COURT: And typically I'm assuming, unless it's a really piddly case, which this one kind of is, but they're going to approach Mr. Staudaher, the police officer, and say, hey, do you care what we do with this guy? Do you care? Is he really an important witness?

That's -- I mean, I know whenever people approach the bench and the defense attorney says, oh, he's working with Metro or he's a witness in a case, and it's usually a team deputy down here and it's an MVU case or something like that, the team deputy typically will say, well, I don't know if that's true or not, this is an MVU case or this is a special victims unit case. And then I tell them, okay, you need to

check with Metro or you need to check with, you know, the team that's doing the case and see if this is all true.

Because, typically, the track deputies will say, oh, I don't know anything about this, you know, I'm just a track deputy. So I would assume that if there is this big promise and all of that, somebody would have approached these prosecutors and said is Mr. Chaffee a witness for you, do you care what we do with this case? And they're telling you that never happened.

Correct?

MR. STAUDAHER: That's correct.

MS. WECKERLY: Correct.

MR. WRIGHT: And I don't dispute that. I'm saying his motivation to curry favor. I'm caught. I've got two felony counts pending against me. I remained in custody. I had to get Good Fellow Bail Bonds to bail me out. And then is it -- I can't ask him did you think by continuing to be cooperative this may inure to your benefit and the case will go away?

If you don't think defendants, witnesses are motivated to do that, you just spent too long the DA's office and weren't out in private practice. I'm telling you, this is fertile ground.

THE COURT: Mr. Staudaher?

MR. STAUDAHER: I still -- I mean, the interviews

that he's talking about all took place before any of this stuff is happening. The one single case that could have been potentially an issue, the one he's referring to now, nobody ever approached us, did anything about it. We had no involvement in it and it got denied.

Now, there's not even a plea deal where it could be shown that he got it kicked down to something else and maybe that there was potentially any negotiation. If the case gets denied or gets dismissed, usually if that's because of someone being a witness, there is some communication with the people who he is a witness for as --

THE COURT: Okay.

MR. STAUDAHER: -- the Court articulated.

THE COURT: Here's the deal. All right. I mean, I think you can say, you know, did you have contact with law enforcement in 2010 and you thought you had to cooperate.

MR. WRIGHT: No, but --

THE COURT: And if he says no, then I think you're done. Because otherwise, I just don't see the relevance of it other than to further sully his character.

MR. WRIGHT: Did you -- no, but it isn't did you have contact with law enforcement. The question is with a felony case pending did you think it would inure to your benefit on how you continued to cooperate and testify. It doesn't matter if he talked to no one --

THE COURT: Although --

MR. WRIGHT: -- about it.

THE COURT: Okay. Let's --

MR. WRIGHT: I'm entitled to explore his motivation to curry favor because he has a felony case pending.

THE COURT: He doesn't have a felony -- okay. And had he maybe testified in 2010, then that would be relevant. This is, what, 2013.

MR. WRIGHT: Same --

THE COURT: So, I mean, it's not hanging over his head. If it was still pending, then I would say, okay, sure.

MR. WRIGHT: Okay.

THE COURT: Does the State want to say anything about this?

MS. WECKERLY: I mean, right. It's just -- we have no leverage on him. He -- it's done. It's over.

THE COURT: I mean, it's done. He's testifying in 2013. There's no cases hanging over his head. There's -- you know, I don't know off the top of my head what the statute of limitations is.

MR. STAUDAHER: On these charges, I mean, he's --

THE COURT: I don't know what it is. What is it?

MR. STAUDAHER: Well, the theft charges are four years. The -- the other charges are three years.

THE COURT: Well, the misdemeanor is one year.

MR. STAUDAHER: Oh, you're talking about that -- that case?

THE COURT: Yes.

MR. STAUDAHER: Oh, yeah. Yes. I thought --

THE COURT: I mean, what's --

MR. STAUDAHER: -- you meant these cases.

THE COURT: -- the drug charges? What's the statute of limitations on the drug charges?

MR. STAUDAHER: It would be three years.

THE COURT: It's probably already run. I mean, so it's not hanging over his head now. He didn't testify --

MR. WRIGHT: Nope, it hasn't run yet.

MS. STANISH: No, it hasn't.

THE COURT: Oh, it hasn't?

MR. WRIGHT: No.

THE COURT: I mean, I think you can say, you know, is there anything --

MR. WRIGHT: Oh, yes, it has.

THE COURT: It has. So, I mean, there's nothing hanging over --

MR. WRIGHT: 4/16/10.

THE COURT: -- his head. He didn't testify in 2010 when it was hanging over his head. He gave his statement in 2008. So I don't see the relevance of these charges to any statement he made in the past.

MR. WRIGHT: Five years federally, I was just reminded.

THE COURT: For dangerous drugs without a prescription?

MR. WRIGHT: For meth.

MS. STANISH: Meth.

THE COURT: Oh, you're talking about the meth lab again? You already asked him that.

MR. WRIGHT: No, his meth. He was smoking meth. He picks up a meth head. They're in the car.

THE COURT: I thought it was a pipe and --

MR. STAUDAHER: No.

MS. WECKERLY: No.

MR. STAUDAHER: That's not right.

THE COURT: -- it's a --

MR. WRIGHT: No.

THE COURT: -- paraphernalia.

MR. WRIGHT: He just happens to say he's known the girl for a year and a half, and then says I just met her.

MS. WECKERLY: She's -- she's the one with the drug --

MR. STAUDAHER: With the meth pipe.

MS. WECKERLY: -- paraphernalia.

MR. WRIGHT: In his car.

MR. STAUDAHER: And he's the one with --

MS. WECKERLY: And he's the one with --

MR. STAUDAHER: -- the prescription drugs.

MS. WECKERLY: -- the prescription.

THE COURT: Okay. First of all --

MR. WRIGHT: Okay. Well, I'm just going to ask about his circumstances of meth use. I won't say --

THE COURT: Okay.

MR. WRIGHT: -- he was arrested.

THE COURT: And just to complete the record, the reason I find it to be irrelevant is because it wasn't hanging over his head when he made the statements to police that we've talked about. It's not hanging over his head now here in 2013 when he's testifying at trial. Not hanging over his head by the State. He didn't contact them, attempt to resolve the matter for his testimony, no one else contacted them, not him, not his lawyer.

Right, Detective Whitely? You weren't contacted, hey, can you help me out? Did anybody at Metro call you and say, hey, this guy a witness in your case or anything like that?

MR. WHITELY: No, ma'am. This is even a separate -- this is Boulder City, so --

THE COURT: So, I mean, to me it's not relevant. But you can get into his meth use, if he was using meth. If he says no he didn't, then, you know, you've already brought

out the vagrant and the equipment in the bedroom and the ordering of that, so --

MR. WRIGHT: Okay. But --

THE COURT: Bring them in.

MR. WRIGHT: But if he says, no, I didn't, I just don't have to leave it at that.

MR. STAUDAHER: Well, yeah, you've got to have --

MR. WRIGHT: I do not.

MR. STAUDAHER: -- some basis.

MR. WRIGHT: I can say --

MR. STAUDAHER: If anything --

MR. WRIGHT: -- okay, explain why you -- why you're --

MR. STAUDAHER: He was never charged with meth --

MR. WRIGHT: -- with a lady who's smoking meth.

MR. STAUDAHER: Okay. But it doesn't --

THE COURT: Well, you can --

MR. STAUDAHER: -- mean that he's using it.

THE COURT: -- ask him that, and then if he says I was giving --

MR. WRIGHT: Okay. He can --

THE COURT: -- her a ride or she went --

MR. WRIGHT: -- explain it.

THE COURT: -- to my church and I didn't know what she was doing --

MR. WRIGHT: Whatever his --

THE COURT: -- then you're done.

MR. WRIGHT: Correct. But, I mean, I just don't say, use meth? No. Okay, thank you.

THE COURT: All right. That's it.

MR. WRIGHT: Meth lab in the house.

THE COURT: Again, I think we've made an adequate record on this point. I don't find that the dates are contemporaneous with anything to indicate a motivation here. So I don't --

MR. WRIGHT: Okay.

THE COURT: -- I don't think there's any motive, any suggestion that would have influenced his testimony here three years later.

Oh, Mr. Staudaher, would you bring Mr. Chaffee back in for me, please.

Sir, come on back up here and have a seat.

(In the presence of the jury.)

THE COURT: All right. Court is now back in session.

And, Mr. Wright, you may resume your cross-examination of the witness.

BY MR. WRIGHT:

Q Mr. Chaffee, do you use methamphetamine?

A I do not.

Q You ever smoke it?
A No.
Q Any other controlled substance?
A Only by prescription.
Q Do you abuse prescription drugs?
A No.
Q When you testified on direct examination on Friday about times in the procedure room when you're the nurse, you would take a blank rhythm strip and fill it out?
A There was times that we would do that, yes.
Q Okay. We? Would you?
A I would, yes.
Q Okay. And so if I'm understanding right, this -- this is the rhythm strip, blood pressure, EKG, all of the equipment that was hooked up on the patient to monitor the patient throughout the procedure; correct?
A Correct.
Q And you're stating that there were times where you would just take a blank one and fill it out?
A If the procedure went too quick and we didn't have time to generate a legitimate strip, we would fabricate one, yes.
Q Okay. When you say we, is that you, or are you including others as helped you do it?
A Myself.

Q Okay. And so you told the police about that; correct?

A Correct.

Q Okay. And so these -- these would be then stapled into the chart, the patient chart; correct?

A Correct.

Q Because there were EKG strips stapled onto these patient charts we have seen.

A Correct.

Q Okay. And did -- did the police ever show you any patient charts or take you to look at them to locate these handwritten rhythm strips --

A No.

Q -- that you contend were stapled on?

A No.

Q Now, one final question. Did you explain to the FBI that Mr. -- Mr. Krueger told you or explained to you to make sure all of the anesthesia time was captured?

A Correct.

Q Is that correct?

A Correct.

Q And -- and do you stated that when you were first hired, anesthesia billing was explained to you by Jeffrey Krueger; correct?

A Correct.

Q And is that correct?

A That's correct.

Q And that Krueger advised that all of the time associated with anesthesia should be captured; correct?

A Correct.

Q And you stated that the anesthesia times, as explained by Mr. Krueger, were counted when patients were in the recovery room; correct?

A Correct.

Q There was no CNA -- CRNA monitoring or attending to the patients, but due to the proximity of the recovery room and the procedure rooms, the CRNAs were right there; correct?

A Correct.

Q The CRNAs could quickly reach patients if there was a problem, so all of this was counted within the anesthesia time; correct?

A Correct.

Q Thank you.

MR. WRIGHT: No further questions.

THE COURT: All right. Thank you.

Mr. Santacroce, are you ready to proceed?

MR. SANTACROCE: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. SANTACROCE:

Q Good morning, Mr. Chaffee. How are you?

A Good morning. Good, thank you.

Q I represent Ronald Lakeman. You know Mr. Lakeman. You testified that you knew him both professionally and socially; is that correct?

A Correct.

Q And when your wife passed away he reached out to you?

A He did.

Q Took you to dinner, you guys went to dinner?

A Correct.

Q We'll get into that a little bit later. I want to first start out by asking you about your testimony that you changed today and the testimony you gave on Friday, okay.

A Okay.

Q On Friday, as I understand it, you testified that you witnessed Mr. Lakeman reusing needle and syringes on multiple patients.

A Correct.

Q That wasn't true?

A That was not my intention.

Q But it wasn't true; correct?

A Oh, no, it was not true. No.

Q The fact of the matter is you never witnessed

Mr. Lakeman reuse needles and syringes on multiple patients; correct?

A Correct.

Q And I believe that you came to this realization, realizing you had testified wrongly, by reading some newspaper accounts as to statements that were attributed to you; correct?

A Correct.

Q And you also reviewed some of your prior testimony that you had given to Metro and the FBI, perhaps, and you realized that --

A No, I -- I -- I knew my statements, my prior statements --

Q Were inconsistent?

A -- were inconsistent with my Friday statement, yes.

Q Prior to testifying on Friday, did you have any interviews with the District Attorney's office?

A Like --

Q Like a pretrial interview where they went over certain things with you?

A No.

Q Okay.

A Oh, well, yes.

Q Where was that done?

A That -- down the street in --

Q The Clark building?

A The Clark building, yes.

Q And when was that done?

A Maybe two weeks ago.

Q In that interview did you tell the District Attorney's office that Mr. Lakeman had never reused syringes or needles on multiple patients?

A No.

Q Was that question ever asked of you by them at that pretrial interview?

A That question was asked of me, yes.

Q And how did you answer them when they asked you in the pretrial interview?

A That I saw him accessing vials of propofol, but had no -- no knowledge of if they were being reused or not.

Q So you told the District Attorney's office at the pretrial interview that you had no knowledge of Mr. Lakeman reusing needles and syringes on multiple patients?

A Yes.

Q I want to talk to you about the time you were employed at the endoscopy center. And I believe you left in April of 2007; is that correct?

A Correct.

Q You testified here on Friday, I believe, that you were terminated; is that also correct?

A Correct.

Q Do you remember telling the FBI that you had resigned?

A I asked -- I asked Tonya Rushing if I could resign in lieu of termination, and she said yes. But as far as I understand it, she never granted me that, so it was a termination.

Q Okay. So when you testified in front of the FBI, when you said that you had resigned, that was incorrect?

A I thought that was to be true at the time.

Q Okay. And that termination has already been discussed by Mr. Wright, so I'm not really going to get into that. After you left in April of 2007, you testified that you never returned to the clinic, is that true?

A That's true.

Q So you have no knowledge as to what occurred at the clinic on July 25, 2007; correct?

A Correct.

Q And you have no knowledge of what occurred at the clinic on September 21, 2007; correct?

A Correct.

Q Now, at the time that you were employed at the clinic, you were employed as an RN?

A I was.

Q And you worked at various aspects of the clinic. You worked in pre-opinion, procedure room, and discharge?

A Correct.

Q And then in the pre-op area you talked about saline -- or actually heplocks being administered, and you did that; right?

A Correct.

Q And you testified that it wasn't your practice to flush the heplocks with saline.

A Correct.

Q But that's not true for all of the RNs, is it?

A No.

Q In fact, you are aware that saline bottles were used on multiple patients to flush heplocks; correct?

A Correct.

Q And, in fact, you have a very strong opinion as to how the infection was transmitted at one time, and you believe that was from the saline being flushed through the heplocks; isn't that correct?

A I thought that was a possibility.

Q And, in fact, you told Metro that it was one nurse who you believe did that; isn't that correct?

A That is correct.

Q As part of your duties and as a nurse, were you aware of how propofol was checked out in the morning by the CRNAs?

A There was a little sign out log --

Q And --

A -- I believe.

Q I'm sorry?

A I believe there was a sign out log, yeah. So they would like -- if they took a flat of propofol, they would sign for a flat of propofol.

Q I don't want you to testify as to what you believe or what you assumed or what you speculated. I only want to know what you saw.

A There was a log and they would initial log off, yes.

Q And they would take the flat of propofol; correct?

A Yes.

Q And they would divide that between the two CRNAs, or they would each take a flat?

A That I don't recall.

Q But you knew or at least you testified to Metro that they had a flat in each procedure room; correct?

A Correct.

Q And you also told Metro that those propofol

bottles stayed in those rooms; isn't that correct?

A That's correct.

Q And you also told Metro that, and I believe this is contrary to your testimony on Friday, where you said that you saw Mr. Lakeman taking half filled bottles of propofol back and forth. You never saw that, did you?

A You know, I -- I do believe I have seen him do that, yes.

Q Okay. You're sure about that?

A I am.

Q I'd ask you to take a look at your Metro statement to refresh your recollection of the statement given on May 28, 2008. I'd ask you to take a look at pages 16 and 17 of that interview, and tell me if what you testified to just now is correct. Do you have that with you?

A I don't know if this is -- I don't know if this is the one or not. What's --

Q May 28th.

A I don't see a date on this.

Q Oh, it's down here.

A Okay.

Q Look at page 16 and 17.

A Okay.

Q Did you ever tell the Metropolitan Police Department that you saw Ronald Lakeman taking unused portions

of propofol from room to room?

A Not him specifically, no.

Q In fact, you were asked did you ever see propofol go from room to room, and you said only in the possession of the person that popped the bottle open; correct?

A Correct.

Q You were asked how many times did you see it? You answered, I couldn't tell; correct?

A Correct.

Q You were asked do you remember any specific instances. You said no; correct?

A Correct.

Q You were asked can you give us any names, any names pop up in your head? And you said no; correct?

A Correct, because they all did it.

Q They all did it?

A They all did it, yeah.

Q Didn't you say in that same statement that you don't -- you don't know because for the most part all you can picture is white lab coats?

A Right, which is what the CRNAs wore.

Q And so now contrary to what you just said in your Metro statement where you didn't see the propofol bottles go from room to room --

A That's not true. In my statement -- I did

state in my statement here that I saw them going from room to --

Q Okay.

A -- room to room.

Q And you were asked can you cite any specific instances, and you said no; correct?

A Correct.

Q You were asked for names of people that did it. You said I can't give you any names; correct?

A Correct.

Q You were familiar with the CRNAs that you worked with at the time; correct?

A Correct.

Q And if you said that they all did it, why didn't you spout out their names? Lakeman, Mathahs, Hubbard, Lobiondo. Why didn't you say that?

A Because, I don't know, I didn't want to get anyone in trouble, I guess. I don't know.

Q The fact is you don't know, do you?

A I do know.

Q And they were all people in lab coats; correct?

A Correct.

Q You were asked if the CRNAs switched rooms during the day. And do you remember what you answered?

A I don't.

Q Well, what did you answer on Friday?

A They do switch rooms, yes.

Q When?

A During lunch.

Q Any other times?

A None that I can recall.

Q Then why would they be carrying propofol bottles around with them if they stayed in one room all day except for lunch?

MR. STAUDAHER: Objection. Speculation, Your Honor.

THE WITNESS: I -- I don't know.

BY MR. SANTACROCE:

Q If you know.

THE COURT: Well, he says he doesn't know.

THE WITNESS: I don't -- I don't know.

BY MR. SANTACROCE:

Q So it's your testimony that the CRNAs would stay in the same room they started in until the end of the day except for lunch breaks, is that your testimony?

A No.

Q Okay. What is your testimony?

A I mean, they -- you know, one may start in Room A and finish in Room B. You know, it's not like they're -- they go to Room A and then -- and then stay in Room A for

the entire eight hours. I mean, they may end up in Room B at the end of the -- at the end of the day.

Q Do you remember what you told the Metropolitan Police Department?

A I don't.

Q Take a look at page 12 of your statement from May 28th.

A Okay.

Q Do you remember you told them that for the most part they kind of tried to keep it that way, that is to stay in one room all day. You said they were flexible. Generally, whatever room you started in is where you would work. You said frequently they would change for lunch breaks relieving the other person; correct?

A Correct.

Q But generally they would end up in the same room where they started; is that correct?

A No, I did not say generally they would end up in the same room.

Q Look on page 13?

MR. STAUDAHER: Actually, Your Honor, if he could answer the question and read the transcript to him, the question accurately, so that he doesn't add his commentary into it.

THE COURT: Yeah, if you're going to --

BY MR. SANTACROCE:

Q Look at page 13.

THE COURT: If you're going to read from the transcript, read it verbatim.

MR. SANTACROCE: I will.

MR. STAUDAHER: And I would like him to go back and read that one so it's clear because he wanted to answer the question.

MR. SANTACROCE: Well, you can redirect him on it, okay?

BY MR. SANTACROCE:

Q Page 13.

A Okay.

THE COURT: Tell us what -- well --

BY MR. SANTACROCE:

Q The question was, and usually the standard practice was once you started in one room, that's where you would end up for the rest of the day? Your answer, for the most part, yes.

A Okay. Read --

Q Correct?

A Correct. Usually and for the most part.

Q Okay. And the most part was for the lunch breaks; correct?

A It varied.

Q Give me some other instances.

A I really can't give you instances, but I mean, I -- I -- in my mind's eye, I know that a CRNA would end up in -- in the room they did not start in.

Q But you can't give me any instances as to who, when, where?

A No.

Q Tell me about the procedure room itself as far as what you were concerned with in the procedure room.

A In the -- I was concerned with, of course, my paperwork. I was concerned with the -- the vital sign machine, make sure that it was capturing some -- some vitals, and I would be watching the screen to see where we were in the -- you know, in the colon or in the esophagus.

Q When you were asked questions in the -- about the CRNAs in the procedure room, do you remember telling Metropolitan Police Department on page 16, really, no, what I can tell you is this, I was too busy to really pay attention to what somebody else was doing because I had to keep my own head above water? Detective, right. Your answer, I mean, between all the charting I had to do, the labs I had to do, the wheeling the patients in and out of the room, I had to do when I was in the room, it was too much for me to do. Detective, monitor? Your answer, monitor a CRNA that had 30 years of experience. Correct?

A Correct. Absolutely.

Q Then you said later on in that answer that the procedure started, the lights went out, I'm in the back of the room, you know, and I'm looking at the monitors, you know, and I'm not paying attention to the CRNAs. Is that accurate?

A That's accurate.

Q Mr. Wright asked you about times on the -- for the procedures, and you said that the most accurate time would be the monitor times, blood pressure and all of that; is that correct?

A The -- the start time on the strip, yes.

Q Okay. And that start time was recorded by the machine itself?

A Correct.

Q And you testified that at times you would fill out a strip in your own writing; is that correct?

A Correct.

Q Is that the only times the strips were not accurate, when you -- when someone wrote them by hand?

A To the best of my knowledge, yes.

Q All the other times on those strips would be accurate according to your knowledge?

A Yes.

Q So if you found some handwritten strips we should be leery of that?

A Correct.

Q Okay. You gave two interviews to the Metropolitan Police Department; correct?

A Correct.

Q One in May and one in December of 2007?

A I don't know if it was '07 or '08.

Q Let me check. '08, 2008.

A Correct.

Q Do you remember what you told in the second interview regarding the use of propofol?

A I don't.

Q You were asked if they, the CRNAs, come in and break the other one for lunch would they use their setup or would they bring their setup in. Do you remember what you said?

A No.

Q Take a look at page 54 of your second interview.

A I don't have that.

Q Let me show it to you. Tell me when you're done reading that.

A Okay.

Q You testified that they would use the setup that was already in that room; correct?

A Correct.

Q Now, I want you to tell me about this conversation you allegedly had with Mr. Lakeman regarding PacifiCare. Can you recount that?

A What do you mean this conversation?

Q Well, I believe you testified, and it's my recollection, that you had a conversation with Mr. Lakeman where they scheduled the patients and you had two PacifiCare patients back to back, and you had a conversation with him regarding billing PacifiCare patients.

A I didn't have a conversation with him. I was present as the -- the scheduling was being discussed.

Q So you're telling me that you didn't directly have a conversation with Mr. Lakeman about the PacifiCare billing?

A See -- hold on a second. Let me -- let me think about this before I answer. There were conversations about the PacifiCare billing, yes.

Q With Mr. Lakeman?

A Yes.

Q Do you remember telling the Metropolitan Police Department that you overhead a conversation?

A Well, that's the one I'm talking about at the desk.

Q So you weren't a participant in that conversation. You overheard Mr. Lakeman talking to someone

else?

A He was talking to another CRNA. All three of us were standing right there together.

Q Okay. Who was the other CRNA?

A I believe it was Keith Mathahs.

Q And what do you recall about that conversation?

A He had done two PacifiCare patients back to back and he couldn't do a third because he -- you're going to have to do the third one. I can't make the times work.

Q And that's what you heard him tell Keith Mathahs?

A Something to that effect, yes. I mean, we're talking, you know, almost eight years ago, so --

Q And what -- what year did this occur? In 2002, '03, '04, '05, '06?

A I know it would have happened in 2006, 2007.

Q You also testified to another conversation you had with Mr. Lakeman at dinner time where he said allegedly if shit hits the fan he wasn't going to cover for Dr. Desai.

A Correct.

Q And where was this conversation?

A It was at a restaurant in the -- I think in the Red Rock Casino.

Q And when was this conversation?

A It would have been sometime around late 2006.
Q Late 2006?
A Correct.
Q And what did you interpret that to mean?
A That the billing practice, that he wasn't going to cover him on the billing practices.
Q Okay. And this was in 2006?
A Correct.
Q So there was no issue, there was no hepatitis C outbreak, there was no criminal investigation, there was no CDC involvement, there was no Southern Nevada Health District involvement at this time?
A Correct.
Q Correct?
A Correct.
Q All that came much later.
A Correct.
Q And yet he had this conversation with you. Was it elicited from you, or did he just say it?
A We were just commiserating about work.
Q And he said if the shit hits the fan he wasn't going to cover for Dr. Desai?
A Correct.
Q Even though this had predated by quite a bit of time any of the investigation, the hep outbreak, any of

that; right?

A Yes.

Q With regard to the conversation you had about PacifiCare, do you remember telling the federal investigators in your proffer that you weren't a participant in the conversation, but you only overheard the conversation?

A Yes.

Q Do you remember telling the feds that the CRNAs, with regard to payment, it didn't matter what they billed because they were salaried employees? Do you remember telling the feds that?

A Not really, but I imagine I may have said that.

Q I'm going to show you your federal proffer, page 7. Ask you to take a look at this paragraph.

A Okay.

Q Is that what you told the feds?

A It is.

Q So you specifically said, I believe, that it didn't matter if they saw 1 or 500 patients; correct?

A Correct.

Q The got the same amount of money?

A That's what I believed, yeah.

Q It was a common practice in the nursing profession to reuse multi -- a multiple vial on multiple

patients; correct?

A Correct.

Q And that's even if it was labeled single-use?

A Correct.

Q And you did that practice yourself?

A Yes, I do.

Q You testified that you saw bite blocks reused; is that correct?

A Correct.

Q And how many times did you see that occur?

A Daily.

Q Were they cleaned?

A They were cleaned and then processed, yes.

Q How about biopsy forceps, did you ever see those being reused?

A I did.

Q How much? How many times?

A Daily.

Q Were those cleaned?

A They were cleaned, yes.

Q How about the 60 cc syringes?

A Same.

Q What are those used for?

A Flushing the scopes.

Q And you saw those reused?

A I did.

Q How often?

A Daily.

Q You talked about the -- what you believe the CRNAs -- when you believe the CRNAs' responsibility ended, and I believe you said they were still responsible for the patients in the recovery room; is that correct?

A Correct.

Q So if you have -- if a nurse in the recovery already had a problem, they would call the CRNA; correct?

A Correct.

Q And, in fact, you believe that was part of the billing process for anesthesia time?

A That's what I was instructed, yes.

Q That's what you believed?

A I had no reason to disbelieve.

Q Well, you actually saw some of the CRNAs come out to the recovery room; right?

A Sure.

Q You saw Mr. Lakeman come out to the recovery room and talk to patients, didn't you?

A I did.

Q I think that's all I have. Thank you, sir.

THE COURT: Counsel approach.

(Off-record bench conference.)

THE COURT: All right. Get started, Mr. Staudaher. Everybody okay?

REDIRECT EXAMINATION

BY MR. STAUDAHER:

Q I'd like to start with where we left off with Mr. Santacroce. If there was a patient in the recovery room that required -- what, I mean, were you there when a patient ever needed a CRNA to come out and deal with some issue?

A Yes.

Q Okay. Would that ever be the -- if that CRNA that had just finished that patient was actually working on another patient doing a procedure, would that be the same person that would come out and have to deal with a patient?

A No.

Q Who would deal with them?

A Either another CRNA or maybe one of the docs.

Q Okay. So the CRNA that did the procedure wouldn't be available to do that follow up if they needed to?

MR. SANTACROCE: I'm going to object as to foundation. He's making it sound like it always happened that way. There's been no foundation as to when he saw it.

THE COURT: Well, overruled.

So, I mean, did you ever see that occur where there is a problem and a CRNA is called for and the CRNA is actually in the middle of a procedure or beginning or whatever, you

Lakeman Appeal 04249

know, they've started with another patient?

THE WITNESS: Nothing that comes to mind, no.

THE COURT: Move on, Mr. Staudaher.

BY MR. STAUDAHER:

Q You said you saw Mr. Lakeman come out to the recovery area.

A I have.

Q Is that a regular occurrence?

A Yeah, they would -- they would kind of rotate out there, you know, in between cases. While we were getting the room set up they would come out and -- to see how the patients were doing.

Q So on one of these days that you were complaining about 75-plus patients or whatever, would that happen on those days?

A Not as frequently, no.

Q Now, you were asked some questions specifically. I think you were -- do you have your federal proffer up there?

A I don't, no. I --

Q I can bring it --

A -- just have the first interview.

Q -- to you if you need it. Mr. Santacroce was asking you some questions about page 7 of the proffer.

MR. STAUDAHER: May I approach, Your Honor?

THE COURT: Sure. You may move freely, Mr. Staudaher.

MR. STAUDAHER: Thank you.

BY MR. STAUDAHER:

Q The first paragraph, in there where it's talking about PacifiCare --

THE COURT: Keep your voice up.

BY MR. STAUDAHER:

Q -- do you see that?

A I do.

Q Now, you had mentioned a couple of points where you said -- I guess when you were asked about the conversations with PacifiCare, you said that there was one at the sort of the scheduling desk --

A Right.

Q -- that Mr. Lakeman made some comments about. And others where that was discussed?

A Yeah, the --

Q There's some specifics in this particular paragraph --

A There were -- there were some --

MR. SANTACROCE: Objection. Leading, you know.

THE COURT: I'm sorry. I was conferring with the bailiff on an important matter and I didn't hear the question. So state the question again.

BY MR. STAUDAHER:

Q Were there other questions, because there's some specifics in that paragraph --

THE COURT: Okay. Well, don't -- don't, you know --

MR. STAUDAHER: That's fine.

THE COURT: -- editorialize or explain the reasons for your questions. Just as the question and then if he needs clarification or something like that, the witness can say, you know, I don't understand, I don't know what you mean. So just state the question. We don't need to have a whole justification for the question.

BY MR. STAUDAHER:

Q Were there others beside that conversation regarding the scheduling?

A There were some conversations in a room, in a -- in a procedure room, yes.

Q Okay. Tell us about those.

A When the PacifiCare thing first started happening, they were -- they were really having trouble getting all the time straightened out because of them -- them having to do these --

MR. WRIGHT: Objection to --

THE COURT: Foundation?

MR. WRIGHT: -- foundation.

THE COURT: Yeah. I mean, how do you know all this,

what you're --

THE WITNESS: Well, because --

THE COURT: -- just saying? I mean, you say they were having trouble and when this started. How did you become aware that this --

THE WITNESS: Because they would verbalize -- the CRNA would verbalize their frustrations.

THE COURT: Like right there in the procedure --

THE WITNESS: Right there in --

THE COURT: -- room?

THE WITNESS: -- the procedure room. Yes, ma'am.

THE COURT: Okay.

BY MR. STAUDAHER:

Q Go ahead.

A So they were -- so they were having trouble getting, you know, these 30 minute -- these 30-plus minute blocks of time. And so they would verbalize their frustration about I can't make this work. I just -- I just did one PacifiCare, now I'm doing another one, and -- and I can't get -- you know, they were having trouble getting --

MR. SANTACROCE: I would object as to who he's referring to.

THE COURT: Yeah, I was just going to --

THE WITNESS: Well, that's --

THE COURT: Yeah, that's sustained. Well, I mean,

you say which CRNA and what -- you know, if you saw a CRNA say this or overhead it, then if -- as you near as you can remember, like when did this happen and who -- who said, you know -- who do you recall saying these things?

THE WITNESS: I recall -- I recall Ron Lakeman saying it. I recall -- I recall several of the nurse anesthetists saying it. It was a -- it was a pretty common grudge that they had.

THE COURT: And then they're saying it in the procedure room? Is the doctor just, you know --

THE WITNESS: No --

THE COURT: -- going about --

THE WITNESS: -- the doctor -- no, the doctor wouldn't --

THE COURT: -- ignoring them or --

THE WITNESS: -- be in the room. No, the doctor wouldn't be in the room. It would be -- it would be that little -- that little block of time that we would have between the end of the procedure and the start of a new procedure where they were finishing up their paperwork and they were trying to get their time straight on their -- on their documentation.

THE COURT: Go on, Mr. Staudaher.

BY MR. STAUDAHER:

Q Now, you said that you had two different

interviews with the police?

A I believe so, yes.

Q And one with the federal authorities?

A Correct.

Q And in your first interview with the police, was there any proffer agreement in that one to the best of your --

A No.

Q -- knowledge? Okay. So that one you didn't have a proffer, but the rest -- the other two you did?

A Correct.

Q And the proffer, what did that mean to you when you came in and gave that information to the police and to the FBI?

A It meant that if I -- if I tell the truth and I stay with the truth, then I'm not going to face any type of criminal liability.

Q Okay. So the first one you don't have that, and that's the one that we've been asking questions about, or at least counsel has?

A Correct.

Q Now, in the federal proffer you were obligated to tell the truth as a part of that, were you not?

A I was.

Q Did I understand you correctly that as time

when on you said you had time to reflect and things, so I think your words were solidified at some point?

A Correct.

Q Is it fair to say that you have more detail in -- in some of the subsequent statements than you did in that first one?

A Absolutely.

Q Specifically related to the issue of syringe reuse that you've -- you've sort of corrected the record today; correct?

A Correct.

Q With regard to that, and I'm talking about syringe and needle reuse within a single patient.

A Okay.

Q Ronald Lakeman, okay.

A All right.

Q I want you to read this whole page of the proffer, page 8, especially the last --

MR. SANTACROCE: What page?

MR. STAUDAHER: Page 8.

THE COURT: Page 8.

BY MR. STAUDAHER:

Q And especially the last paragraph of that.

THE COURT: Are you talking about the FBI proffer?

MR. STAUDAHER: Yes.

Lakeman Appeal 04256

THE WITNESS: Okay.

BY MR. STAUDAHER:

Q Okay. So two different things that I want to ask you about. First, syringe reuse and needle reuse within the same patient, and then between patients.

A Okay.

Q Did that refresh your memory on that issue?

A It did, yeah.

Q Okay. So tell us about that.

A On -- I really can't describe how many times, but, I mean, I -- I have seen Ron Lakeman with a -- with a -- with a needle and syringe in his hand, re-access a bottle of propofol to -- to dispense it to the patient.

THE COURT: Do you know if it was a clean needle and syringe or the same needle and syringe that had just been used?

THE WITNESS: You know --

THE COURT: Sorry. I didn't mean to step on --

MR. STAUDAHER: That's fine.

THE COURT: I'm assuming that would be where you'd go with that.

THE WITNESS: I mean, from the statement I made there, it was --

THE COURT: Well, no, we want to know what -- what your testimony is today.

MR. STAUDAHER: Correct.

THE COURT: Go on, Mr. Staudaher. I apologize for --

MR. STAUDAHER: That's fine.

BY MR. STAUDAHER:

Q At least in the proffer did you say Ronald Lakeman you saw reuse needles and syringes, same patient?

A Yes.

Q Never saw the between patients, though?

A No.

Q Now, you were asked a question by Mr. Santacroce. Remember when you read page 16 and 17 -- do you have -- which statement do you have up there?

A Just number one.

Q First one? If you go to page 16 and 17. And this was about -- did you ever tell the police in the first interview that you saw open bottles of propofol going from room to room? Do you remember that?

A I do.

Q Okay. In the bottom part of that, the last about four lines, you actually say that, do you not?

A Yes.

Q It says did you ever see the bottles of -- or vials of propofol go room to room? That was the question.

MR. SANTACROCE: I'm sorry. What page are you on?

MR. STAUDAHER: 16, bottom, fourth line.

BY MR. STAUDAHER:

Q Your answer, only if it was in the possession of the person that popped the -- the bottle open.

A Correct.

Q Okay. Then we go to the next page. I just want to read this -- this one answer here.

MR. STAUDAHER: Well, you objected to me not reading the whole thing. Why don't you read the next two sentences?

THE COURT: Well --

MR. SANTACROCE: You read the whole thing so it's not -- it's not out of context this time.

BY MR. STAUDAHER:

Q On page 17, the top --

THE COURT: Let's be mindful --

MR. SANTACROCE: I would move to strike that.

THE COURT: Okay. Both -- again, both of you there's no need for the editorial comments. Just ask the questions.

And, Mr. Santacroce, you can just make an objection without, you know, saying, oh, it's not fair that he does it if I didn't do it or, you know -- my words, not yours.

BY MR. STAUDAHER:

Q Page 17, top, question, do you remember any specific instances or any? Your answer, no, I mean, I know --

no, I couldn't give you any real specifics. I mean, I just know that generally it might happen around lunch when there's one CRNA and what they would do sometimes is they would, you know, bring a patient into each room, start prepping a patient in this room while he's working on this case. When the case is fully completed and then they would go over and do other cases, and if they did that, then, you know, he might keep a bottle -- a bottle in his hand. But I couldn't give any specifics other than a general -- other than that generalization.

A Correct.

Q Okay. You mentioned this conversation at the Red Rock dinner. Did you discuss anything else about the clinic at that dinner with Mr. Lakeman?

A No, just -- just generally, you know, the -- the unhappiness and the PacifiCare thing.

Q Okay. And that shit hits the fan comment was about anesthesia billing; is that right?

A Correct.

MR. STAUDAHER: Court's indulgence, Your Honor. I'm almost done with that.

BY MR. STAUDAHER:

Q Now, let me go back to a couple things that Mr. Wright said. You said in answer to a question on cross that you believe the five minute colonoscopy required one to

take shortcuts. Are those your -- your words?

A Correct.

Q Did you, in your proffer or your -- your federal proffer, your statements at all, indicate what concerns you had with regard to the speed, why that was a problem?

A I believe so, yes.

Q To the best of your recollection can you tell us what those were?

A Perforations, general patient discomfort. You know, when you -- when you pull the scope out too quick and you're not getting the air out that you've pumped into the colon, then -- then the patient has that air left in their abdomen and they're -- it's pretty uncomfortable. So it was patient discomfort, perforations, things like that.

Q And when you were -- the question about Brian Labus, what you told him, this whole thing -- you told him about the 60 cc syringes and the like, I think; correct?

A Correct.

Q You were asked specifically if Brian Labus -- that you told Brian Labus that you witnessed the reuse of needles and syringes.

A Correct.

Q Okay. Now, did he ask you to break that down? I mean, within a patient or between patients, anything like

that?

A No.

Q Do you recall him even asking you that question?

A He did.

Q Okay. And when you answered the question, what were you answering? Was it both or one of those two things?

A It was -- the general sense I got, I believe, is he was asking if it was between patients.

Q So when you answered the question you thought you were answering between patients?

A That it -- yeah, if they were being reused from patient to patient, yeah.

Q You were asked some questions about, you know, this is when you called -- you actually called the Health District based on, I think, Maggie Murphy?

A I did.

Q When you called them there were some questions about you felt this was an opportunity to get your dignity back, to -- to make a difference. What did you mean by that?

A Just, you know, I -- I knew -- I knew the conditions that we were working in were substandard. And I felt like being able to verbalize some of those issues with the Health Department, you know, to get that off my chest was

beneficial.

Q Beneficial for you or beneficial --

A For me. --

Q -- for whom?

A For me.

Q Okay. Did you think it would help the Health District?

A Well, yeah, absolutely. I mean, that's why I called.

Q Now, did you have an vendetta or anything against the clinic, Desai, Lakeman, anybody?

A None. No.

Q Okay. I mean, clearly things didn't go well with the end of your time working there.

A It didn't.

Q Did you ever do anything to go back to the clinic to sabotage the clinic in any way?

A No.

Q Other than the call to the Health District -- and your -- was your agenda in that call in any way to hurt the clinic?

A No, it was -- it was to assist the investigation on where this transmission may have come from.

MR. STAUDAHER: Pass the witness, Your Honor.

THE COURT: Mr. Wright.

RECROSS-EXAMINATION

BY MR. WRIGHT:

Q When I asked you those questions, you say you just called because it was the investigation about where the transmission had come from. I thought you said you didn't know about the hepatitis C transmission when you called Brian Labus.

A You know what, I didn't.

Q Okay.

A I just -- I just added that because, you know, it's in my head right now, so --

Q You just add things when the prosecutor asks you questions because he's the one that controls the immunity?

A No, that's not true.

MR. STAUDAHER: Objection, Your Honor. And I said he doesn't have immunity.

BY MR. WRIGHT:

Q Do you have immunity?

A I have immunity, but that's not --

Q Explain that to Mr. Staudaher. How did you get it?

A What do you mean how did I get it?

Q He signed the letter, or a deputy district attorney signed the letter you have --

A Okay.

Q -- correct?

A What's your question?

Q You do have immunity; correct?

A I have immunity, yes.

Q Okay. Now --

A And because I'm getting a little flustered right now doesn't mean that I'm -- I'm sitting on the stand lying.

Q Okay. You want to do all you can to help with this case; correct?

A I wish I had nothing to do with this case.

Q What?

A I -- nothing.

THE COURT: He said I wish --

MR. WRIGHT: I didn't hear you.

THE COURT: -- I had nothing to do with this case.

BY MR. WRIGHT:

Q You want to do --

THE COURT: Is that what you said, sir?

THE WITNESS: I did, yes.

THE COURT: Did I hear that correctly?

THE WITNESS: I did. Yes, ma'am.

BY MR. WRIGHT:

Q You want to assist this case as much as you can; correct?

MR. STAUDAHER: Objection. Mischaracterizes his prior statement.

THE COURT: Well, overruled. It's cross.

THE WITNESS: Yes.

BY MR. WRIGHT:

Q I mean, that's what you said when you were interviewed; correct?

A Sure. I mean, you know, to be open and honest as much as I can --

Q Okay.

A -- and assist the investigation, of course.

Q Did you say the only loyalty I have is to myself. I -- you know, I've been dealing with this now for so long it's -- I don't sleep at night. It's crazy.

A Yes.

Q Okay. You don't sleep -- you weren't sleeping at night over these statements?

A No, I got a -- I got a bleeding ulcer from this --

Q Okay.

A -- which required hospitalization.

Q Did you say --

A So, yes, this is --

Q And did you say, I -- I -- I know in talking with Jason I'm here to assist this case as much as I can?

A Sure.

Q Okay. And who is Jason you were talking to about --

A Jason --

Q -- assisting this case as much as you can?

A Jason Weiner, my -- my attorney.

Q Okay. So your job is, as you understood it, is to assist this case as much as you can; correct?

A To assist the investigation.

Q Okay. To assist the investigation and the prosecutors in exchange for your immunity; correct?

A That's -- no.

MR. WRIGHT: No further questions.

THE COURT: Mr. Santacroce?

RECROSS-EXAMINATION

BY MR. SANTACROCE:

Q Mr. Chaffee, you were shown this proffer letter from the feds, page 8, or the District Attorney, talking about reusing needles. This is to refresh your recollection.

A Okay.

Q You said that you saw Mr. Lakeman do this, that is reusing needles on the same patient, but you never saw anyone else do it; correct?

A Correct.

Q And then the District Attorney asked you about your December 15, 2008, interview to Metro where he said things were a little bit clearer because you had been thinking about these events; correct?

A Correct.

Q And do you remember what you told the Metropolitan Police Department about reusing needles at that time?

A No, I don't.

Q I'm going to show you page 39. I want you to read from here to here.

A Okay.

Q You were asked by detectives about reusing needles, needles exchange; correct?

A Correct.

Q Okay. You said I never saw needles being exchanged. Never saw. If I did I'd tell you. I have a proffer letter. I have immunity. I would sit here and I'd tell you. Am I going to lie about it to get you guys off my back? No. Detective, okay, so when you say needle being exchanged, you're talking about the process of using more than one needle for one syringe? You say, correct. He says, that's what that means? And you say, and I never -- I never saw that happen. You didn't say you saw Ron Lakeman and no one else did you?

A No.

Q You said I never saw it happen.

A Correct.

Q Because you had a proffer agreement.

MR. STAUDAHER: Objection. Argumentative.

BY MR. SANTACROCE:

Q You had immunity.

THE COURT: Overruled.

BY MR. SANTACROCE:

Q Correct?

A Correct.

Q And under those conditions of proffer and immunity, you said you weren't going to lie and you never saw it happen.

A That is correct.

MR. SANTACROCE: That's all I have.

THE COURT: Mr. Staudaher, any re-redirect based solely on the recross?

MR. STAUDAHER: No, Your Honor.

THE COURT: Any juror questions for this witness?

All right. Sir, there are no further questions. Do not discuss your testimony with anyone else who may be called as a witness in this matter.

THE WITNESS: Yes, ma'am.

THE COURT: And you are excused at this time.

Ladies and gentlemen, we're going to go ahead now and take our lunch break. We'll take our break for lunch until about 2:00.

During the lunch you are reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on the case, any person or subject matter relating to the case by any medium of information. Don't do any independent research on any subject connected with the trial, and please don't form or express an opinion on the trial.

Why don't we just make it 1:55 which will give you basically an hour for lunch. All right. One hour, 1:55.

(Jury recessed at 12:50 p.m.)

THE COURT: All right. Go to lunch.

MR. WRIGHT: Yep.

(Off-record colloquy.)

THE COURT: I mean, some of the witnesses, I don't know, they may have knowledge of some of those things, but I'm hopeful that maybe, you know, you can get, you know --

MR. STAUDAHER: We're almost through all of those types of witnesses.

THE COURT: You have to, you know -- whatever they know that's new or directly related to, you know, the issue of the needles, the propofol. Obviously, if the defense opens

the door, then, you know, you've got to go back in. But, you know, we -- a few juror issues coming up. The jury was told six weeks or maybe eight weeks.

And, you know, I don't know -- you know, we have very long trial days in here. You know, we're not taking a lot of breaks. You know, Janie can tell you the actual trial time we've spent. It's long days. And so, you know, I don't know how to speed this up anymore. The issues Mr. Wright keeps raising. Now, you know, I wanted to go until 5:30 or 6:00 today. We've got the juror with the back issue, so we've got to break at 4:20.

So, you know, State, I'm not telling you how to put on your case at all, but, you know, a lot of this is cumulative and relating to -- you know, and I get it. You're setting the stage. That's important. The, you know, kind of method of operation of the clinic. But I'm just asking you to -- I'm not giving you direction. I'm not telling you what to do. I'm just asking that you be mindful going forward. That's all I'm asking.

(Court recessed at 12:53 p.m., until 1:54 p.m.)

(Outside the presence of the jury.)

THE COURT: Is everyone ready? The jurors are all back.

Are they all ready?

THE MARSHAL: Yeah.

THE COURT: Everyone ready?

MS. WECKERLY: Yes.

THE COURT: All right. Kenny, bring them in.

(In the presence of the jury.)

THE COURT: All right. Court is now back in session.

And State may call its next witness.

MS. WECKERLY: Ann Marie Lobiondo.

ANN MARIE LOBIONDO, STATE'S WITNESS, SWORN

THE CLERK: Please be seated. Please state and spell your first and last name for the record.

THE WITNESS: Ann Marie Lobiondo; A-N-N M-A-R-I-E L-O-B-I-O-N-D-O.

THE COURT: Thank you.

Ms. Weckerly, you may proceed.

DIRECT EXAMINATION

BY MS. WECKERLY:

Q Ms. Lobiondo, how are you trained?

A I am a master prepared nurse, and I'm trained -- I'm sorry. I'm very nervous.

Q You're a nurse?

A Yeah, I was an RN with a bachelor degree first, and I worked in critical care and various critical care and trauma scenarios. And then I went back to school for a master's degree. And first I was a nurse practitioner. I

received a master's degree in that, and then I went back to school -- work for a while in that area, and then I went back to school and became a nurse anesthetist, which is a master's program.

Q So you are a CRNA?

A Uh-huh.

Q Is that yes?

A Yes.

Q Okay. And we're recording in here, so you can't say uh-huh or huh-uh. You have to say yes or no. Okay?

A Yes.

Q Great. Where did you -- where do you go to school to be a CRNA? A I went to the State University of New York Downstate Medical Center.

Q And did you work in New York as a CRNA before coming out to Las Vegas?

A Yes, I worked at New York University Medical Center in New York. I also worked at several other hospitals in -- in New York.

Q Okay. At some point you come to Las Vegas?

A Yes.

Q Do you remember what year that was?

A I believe it was 1994.

Q Okay. And when you came to Las Vegas, did you work as a CRNA? A Yes.

Q And where was that?

A I worked at Southwest Medical Center -- I mean, Southwest Medical Associates. And I worked -- do you want every -- all the places that I worked?

Q Well, I just need to -- I just am asking, actually, the places you worked in Las Vegas prior to working at the endoscopy center.

A I also worked for a group of orthopedic surgeons doing anesthesia for various orthopedic and spine surgeries at North Vista Hospital, which was Lake Mead Hospital at that time. I worked with several pain management anesthesiologists. I worked in various surgery centers with the pain management group. I worked for a plastic surgeon in Las Vegas.

Q So you have a pretty extensive background working as a CRNA?

A Yes.

Q At some point did you work for Dr. Desai at the Endoscopy Center of Southern Nevada?

A Yes.

Q Do you recall when it was that you first started?

A I started in 2000, September of 2000.

Q And was there a point when you left and then you came back again?

A I left in 2004, and I came back again, I believe, the end of 2005.

Q And did you leave again after that?

A I left again, and I came back again in 2006, and I worked until the end of May of 2007.

Q Okay. So your -- your last month, I mean, there was off and on times, but your absolute last month of working there where you didn't return again was May of 2007?

A Yes.

Q And then the -- the first stint is 2000 to 2004, and then maybe from 2005 to 2006, somewhere in there?

A Yes.

Q When -- when you very first started working in that 2000 to 2004 time period, how many procedure rooms were operating?

A We only had one procedure room.

Q Were you the only CRNA at that time?

A I was the only CRNA at first, and then another CRNA joined, I believe it was in 2002 or 2003.

Q Okay. And then at some point after that do you -- I mean, 2004 is when you leave; correct?

A Yes.

Q And then you come back approximately when?

A I don't remember exactly when. I think I came back in 2005. I had to leave for personal reasons, and then I

came back again in 2006.

Q When you -- when you come back, do you remember if there were two procedure rooms?

A When I came back in 2005/2006 there were two procedure rooms. We had actually moved to another, you know, facility next door.

Q And when you come back were there other CRNAs working?

A Yes.

Q Who -- who were they?

A Keith Mathahs, Ron Lakeman, Linda Hubbard.

Q When you --

A And I think also --

Q I'm sorry?

A I can't remember if --

Q You remember those three?

A Yeah.

Q Now, when you come back were you like in the schedule regular, like a regular employee, or did you have a modified schedule or how would you --

A I was never really a regular employee. When I came back I was a per diem employee, which means I worked anywhere from two to sometimes five days per week, depending on the schedule and where they needed me. And I would come in later in the day and work usually until the end of the day.

Q And per diem would mean that you're paid by the day or how were you --

A By the hour.

Q By the hour. Okay. And so you would maybe be called in for a couple hours and then leave?

A Usually it was, you know, the rest of the day. I would come in maybe at 11:00 and then work until the rest of the day.

Q Now, when you -- when you first started working for Dr. Desai back in 2000, what drugs were used to sedate patients for their procedures?

A We used -- at that time we used Demerol and versed or midazolam.

Q At some point did the sedation medication changed?

A Yes, and we started to use propofol.

Q Do you recall approximately when that was?

A I can't recall the exact dates that we started that.

Q Okay. When you first started using the propofol, do you remember what size the vials were or anything like that?

A They were 20 cc vials at that time.

Q At some point did that change?

A I don't remember when, but when I -- when I

came back and worked in the -- the new facility with two rooms, we -- I think even at first we had 20 cc vials. At some point they -- we had both 50 and 20 cc vials.

Q Okay. So at -- in the later parts of your employment your recollection is there were 20s and 50s?

A Yes, but I don't remember the exact date.

Q Okay. And when you used a 50 cc vial, did you use that on -- on multiple patients?

A If we -- if -- I preferred the 20s, but if we used a 50 cc vial the way I would do it would be to draw up five separate syringes of 10 ccs each and each one --

Q And that's --

A -- on each individual patient.

Q And that's an aseptic method based on your training; correct?

A Yes, it's the way that you can use a 50 cc vial on -- if you have to use -- it's too much for one patient, so that's the way that you can use it on more patients.

Q And did you -- did you ever use a vial of propofol that had been opened and partially used by another CRNA?

A No, I -- if -- unless it was -- were me using it, I would not use something that someone else gave me.

Q Were you ever offered vials of propofol that

had been used or opened by another CRNA?

A I can't remember. If I -- if I were, I don't think I would have used them.

Q Okay. Did you -- did you ever cover for a CRNA during a break?

A Of course.

Q And how -- I mean, how -- would you bring in your own propofol, or would you use the propofol in the room? Describe what would happen in that situation.

A I would use my own propofol.

Q And how -- I mean, how would it get in there if -- if you weren't already in that room and you were covering someone for a break.

A We used to have bottles in the room that were new.

Q Would you ever come in to cover someone and see open bottles left in the room?

A I may have.

Q Okay. Do you recall giving testimony at a Grand Jury proceeding?

A Yes.

MS. WECKERLY: And this is -- is it you?

MR. WRIGHT: Pardon?

MS. WECKERLY: Is it Ms. Stanish or --

MR. WRIGHT: It is I.

MS. WECKERLY: Okay.

MS. STANISH: It's my day off today.

MS. WECKERLY: Hold on one sec. This is page 46.

MR. WRIGHT: Thank you.

MS. WECKERLY: At the bottom of page 46.

May I approach?

THE COURT: Uh-huh.

BY MS. WECKERLY:

Q Ms. Lobiondo, I just want you to -- you can read as much as you want, but I'm kind of focused on the very bottom of page 46. If you could just read through that.

A Okay.

Q Okay. Does that refresh your recollection regarding whether there were ever open bottles of propofol left in a room?

A Yes, that -- that's all that says. There were open bottles there.

Q Okay. And -- and they would have -- they were left in the room, but you, I think, indicated that you wouldn't use one that you hadn't opened.

A Yes.

Q So if there were other bottles, you'd open a new fresh bottle?

A Yes, or one that I knew the integrity of.

Q Okay. And -- and why is that? Why would you

use that practice?

A That's something you always learn in anesthesia from the beginning in any -- you know, unless you know, unless that's your drug, you don't know where else it's been or who else has used it.

Q And when you were working at the --

A And how.

Q When you were working at the clinic, did other CRNAs offer you opened, partially used bottles of propofol?

A As I said, I -- I think that it could have happened, but I wouldn't have used it.

Q Okay.

MS. WECKERLY: And this is, Counsel, the top of page 47.

BY MS. WECKERLY:

Q This is the Grand Jury testimony.

A Okay.

Q And does that refresh your recollection as to what you told the Grand Jury about if that ever did occur?

A Yes.

Q It did occur?

A Yes, and I said I didn't -- did not use it.

Q That you wouldn't use it. And that's because of your training in nursing school and your own method of practice?

A That's the way I practice. That's the way --

Q Now --

A -- I think we all do.

Q -- when -- if you went into a room on a break and there were drawn up syringes of propofol --

MR. WRIGHT: Can I -- I'm sorry.

MR. SANTACROCE: My Grand Jury transcript doesn't match what she's reading.

THE COURT: That's -- I think Mr. Wright's doesn't match, either.

MR. WRIGHT: Look on page 46.

(Pause in the proceedings.)

MR. SANTACROCE: Why is there two different transcripts? Can we approach?

THE COURT: There shouldn't be.

MR. STAUDAHER: There isn't.

THE COURT: I think it's probably the way they block it out to make tiny little pages as opposed to --

(Off-record bench conference.)

THE COURT: Apparently there were two different sessions before the Grand Jury and that's the -- it's not that anybody's transcript is incorrect or there were changes made to the transcript. It's just that there are two different ones.

All right. Ms. Weckerly, you can proceed. And

then, you know, if there's anything that you need to use the transcript for, just save it until that's --

MS. WECKERLY: I'll just come back. I'll come back to that.

THE COURT: -- until that's back.

BY MS. WECKERLY:

Q Ms. Lobiondo, when -- when you were working at the clinic in the last sort of segment of your employment there, explain to us how CRNAs would cover for each other for breaks. Like were you the third CRNA that would come in typically, or what would you see?

A I mean, it -- it varied every day.

Q Okay. Well --

A I'm not sure --

Q -- describe the various --

A -- what you're asking.

Q -- you know, ways that breaks would be covered.

A One person would go on a break or leave, and the other person would take over the next patient. I'm not sure exactly what you're asking.

Q Well, did the CRNAs ever like take a break other than a lunch break?

A Not very many, but I'm not sure what you're asking.

Q Just that. Would they ever take a break other than a lunch break?

A I guess so.

Q In those instances would another CRNA cover that procedure room?

A Yes.

Q Okay. And in the case of a lunch break, was it the same thing that someone would cover the room while the person was on the break?

A Yes, of course.

Q Okay. Now, during the course of your employment at the center, do you ever remember an idea being advanced to use saline with propofol?

A Yes.

Q And approximately when -- when was that in your employment?

A I don't recall. I know that it was when I was there when they had two rooms after 2004.

Q Okay. And you left in May of 2007?

A Yes, but I can say it was probably towards the end of my employment when I remember that.

Q Okay. But obviously not after May 2007 because you were part of that idea?

A Yes.

Q Did you actually try that when that idea was

proposed?

A No, I never would use those syringes.

Q When you were -- when you were working at the clinic, what type of syringes or what size or volume of syringe did you use for administering propofol?

A 10 ccs.

Q Did you ever use anything other than a -- than a 10 cc syringe?

A I don't remember.

Q Okay. Is your only recollection of a 10 cc, or do you think you could have used another one?

A My only recollection is a 10 cc.

Q And during the course of your employment there, did you ever reuse a syringe?

A No.

Q Even on the same patient?

A If -- if it's the same patient and you gave 5 ccs of what you had in the syringe and you wanted to use the other five, you could use the same syringe. That hasn't been used on anyone else.

Q Right. All within one syringe; correct?

A Yes, or if -- if you had a bottle that was open for that patient and you were going to use that bottle only on that patient, then, yes, you could still use the same syringe.

Q Did you ever re-access a vial of medication with a syringe you had used on a patient, and then use that vial on somebody else?

A No.

Q Why wouldn't you do something like that?

A Because there's a possibility of contamination.

Q And where did you -- where did you learn that?

A Nursing 101.

Q Okay. Is that pretty basic?

A Yes.

Q Now, when you were working at the clinic, were you -- did you have to fill out a form or a document to calculate or to document your anesthesia time for a procedure?

A Are you speaking about an anesthesia record?

Q Yes.

A Yes.

Q And how did you fill out the form? How did you calculate your start time and your end time?

A The way I always do it since I've done anesthesia.

Q What is that?

A When I see a patient, when we take a patient into the room, that's your anesthesia start time.

Q And by into the room, you mean the procedure

room?

A Yes.

Q And what -- what is the end time?

A The end time is when you bring the patient to the recovery room.

Q Okay. Now, during the time that you worked at the clinic, did you ever have any conversations with Dr. Desai about anesthesia time?

A I'm not sure what you mean exactly.

Q Did he ever make any comments to you about anesthesia time?

A At one point I heard -- you know, I heard people saying --

Q Not -- not -- just specifically about Dr. Desai.

A Yes.

Q Okay. When in your employment was that?

A Probably towards the end of my employment when I --

Q Sometime in 2007?

A Yes.

Q Okay. And would you have been at the clinic when the comment was made?

A Yes.

Q And what -- what did he say?

A He mentioned to make the time 31 minutes.

Q Okay. Did you know why he wanted that? Did he say why?

A No.

Q Besides him telling you to make the time 31 minutes, did he ever say anything else to you?

A No.

Q Did you ever hear him say anything about 31 minutes or anesthesia time to anybody else?

A I -- I don't recall.

Q Okay. You gave an interview to the -- well, I guess to a federal -- a U.S. Attorney and also the police were present. Do you recall that?

A Yeah, there were about five people in the room asking me questions all at once.

Q Okay. And do you recall any comments you made about Dr. Desai yelling something about the 31 minutes?

A Yes.

Q Okay.

MS. WECKERLY: And, Counsel, this is the second one on page 1.

MR. WRIGHT: Yes.

MS. WECKERLY: Okay. May I approach, Your Honor?

THE COURT: Yes.

BY MS. WECKERLY:

Q Now, just at the top here. If you want to read more, that's fine. Does that refresh your recollection?

A Okay. Well, I didn't say the word yelling.

Q Right.

A Someone else said that. Okay. Yes.

Q Okay. And so in this instance that I just showed you, is that the conversation that Dr. Desai had with you, or is that a different conversation that you heard?

A I would hear him say don't forget 31 minutes.

Q Okay. And when he was saying that, was that something you heard him say like -- like one time or more than one time?

A Probably more than one time.

Q And just for the time frame, are we -- is this still that same time frame towards the end of your employment?

A Yes.

Q And when he was saying it, was it -- where -- where was he located, or where were you? Was it in the procedure rooms or in a meeting or how would you describe the location?

A Maybe in the hallway.

Q And who was he -- who was he talking to as far as you could tell?

A Well, if he was talking to me or -- then he was speaking to me at that time.

Q Did you ever see or hear him say that to anybody else besides yourself?

A I -- I think so. I mean, I can only speak for what I heard from -- I can't really speak about other people and what --

Q Okay.

A -- they heard and --

THE COURT: Yeah, and we don't want you to. I mean, only what you yourself observed, not what somebody may have told you that they think they heard or saw, okay.

BY MS. WECKERLY:

Q Okay. And how did he say it when he said it to you?

A Remember 31 minutes.

Q Okay. And did he say that to you one time or more than one time?

A More than one time.

Q More than one time. And this is all in the last part of your employment?

A Yes.

Q And you -- were you aware of what that was pertaining to, why -- you know, what the 31 minutes was supposed to be?

A Yes.

Q What was it pertaining to?

A To billing time.

MS. WECKERLY: Court's indulgence.

THE COURT: Uh-huh.

MS. WECKERLY: I'll pass the witness, Your Honor.

THE COURT: All right. And I believe we're going to conclude with her testimony today, correct, and go into the other witness?

MR. WRIGHT: Correct.

THE COURT: Okay. Ma'am, you're excused at this point, but you will have to come back for cross-examination, all right, but we're going to interrupt your testimony. So don't discuss your testimony with anyone else. Do you understand that?

THE WITNESS: Yes.

THE COURT: Okay. Thank you.

THE WITNESS: So I'm to wait here?

THE COURT: No, I think --

Mr. Staudaher, the next witness will take the rest of the day, you think?

MR. STAUDAHER: I think that that's a fairly good estimate.

THE COURT: Okay. You're free to leave, and then Ms. Weckerly or Mr. Staudaher will contact you to tell you when you need to come back.

THE WITNESS: Okay.

Lakeman Appeal 04291

THE COURT: All right. And, again, do not discuss your testimony with anyone else during the evening break.

THE WITNESS: Okay.

THE COURT: Okay. Thank you.

And, ladies and gentlemen, as I've told you in the past, the order in which the testimony comes in doesn't matter. You have to keep an open mind until you hear everything. Because we interrupted this witness, obviously, you know, you need to be mindful of that. And so the State will now call their next witness.

MS. WECKERLY: It's Tonya Rushing.

THE COURT: Okay.

MS. WECKERLY: She's out there. I checked.

THE COURT: Ma'am, just follow the bailiff right up here by me, up those couple of stairs. And then please remain standing facing this lady right there who will administer the oath to you.

TONYA RUSHING, STATE'S WITNESS, SWORN

THE CLERK: Thank you. Please be seated. And please state and spell your first and last name for the record.

THE WITNESS: Tonya Rushing; T-O-N-Y-A, Rushing, R-U-S-H-I-N-G.

DIRECT EXAMINATION

BY MR. STAUDAHER:

Lakeman Appeal 04292

Q Ms. Rushing, I'm going to take you back in time a little bit to 2007/2008. Were you an employee or did you work in any capacity at the Endoscopy Center of Southern Nevada?

A Yes, I did.

Q And what was your -- what was your job at that time?

A Practice manager COO.

Q Tell us the kinds of things you did in that regard.

A I assisted with day to day operations with the gastro center, a lot of public relations work, meeting physicians, referring physicians, following Dr. Desai's orders as far as making sure patient schedules are scheduled appropriately, assisting Dr. Herrero with the physician staff and so forth and making sure that all facilities were staffed.

Q As far as your work, were you isolated to one specific location or were you kind of over in different places?

A I was mainly at the Shadow Lane office. Each office had an office manager which I would work with. And then the endoscopies had nurse managers and directors of nurses and so forth.

Q Before I go any further, I -- there's a couple of things I want to -- I want to lay out. Have you ever been

offered immunity by the State in this particular case?

A No, sir.

Q Have you been offered immunity by the federal authorities in this particular case?

A They gave me limited immunity.

Q For what purpose?

A Basically so I could come and testify and assist with the case.

Q And is -- what is your understanding of what that means in this particular instance?

A Limited immunity basically means that I can come and testify and give the information that I have, but anything that I testify may be used against me.

Q Do you have -- are you facing any kind of charges in this particular instance?

A I am. I'm facing federal indictment.

Q So you're under indictment?

A Yes, sir.

Q And is that related to the activities of the clinic?

A Yes.

Q And who is involved with -- with you in that indictment?

A Dr. Desai and myself.

MR. WRIGHT: Can we approach the bench?

THE COURT: Sure.

(Off-record bench conference.)

THE COURT: Ladies and gentlemen, we're going to take another quick break. Ironically, I actually do need a break and I think these ladies might, as well.

During the break you are reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on the case, any person or subject matter relating to the case by any medium of information. Don't do any independent research, and please don't form or express an opinion on the trial.

You know already, but notepads in your chairs and follow the bailiff through the rear door.

(Jury recessed at 2:34 p.m.)

THE COURT: And, ma'am, on this brief break I must instruct you not to discuss your testimony with anyone else. All right? And you're free to exit through the double doors. You can leave your material there if you don't want to lug it back and forth. That's up to you. Lug it if you want, or keep it up there.

All right.

MS. WECKERLY: Ms. Rushing, I think you have to wait outside.

THE COURT: Ms. Rushing, yeah, you need to wait in

the hallway or -- yeah.

(Ms. Rushing exits the courtroom at 2:34 p.m.)

MR. WRIGHT: Your Honor --

THE COURT: Mr. Wright, you had approached the bench with your objection and ask that we take an immediate recess.

MR. WRIGHT: Yeah, I --

THE COURT: And the Court obviously complied with that request. And so now, out of the presence of the jury, go ahead.

MR. WRIGHT: I can't even -- I was in total shock. I mean, I -- I'm not even sure what she said other than she was under federal indictment, I think as it related to this case, this investigation. I -- I can't even -- I don't even remember what said. But then she said Dr. indictments -- Dr. Desai is under indictment in the federal case. And I had no idea this was going to come out.

I mean, I wasn't going to ask her a word about her federal indictment or anything. That -- this does me no good, her being under indictment. And obviously I'm flabbergasted because now the jury knows Dr. Desai is under indictment for federal offenses related to his conduct.

I have made at various times big things of examining witnesses. Someone accused him of bribing on loans and things. Carrera -- I don't want to misstate which doctor it was because they all run together, but I made a various thing

about witnesses making false accusations against Dr. Desai, and -- and then say anything come of it? And now it's left for the jury to think these issues of him like making loans to various doctors, and I wouldn't even bring their names out. And now we learn he's under federal indictment as we sit in this courtroom.

So my motion is for a mistrial. I don't know how to unring the bell. It is absolutely prejudicial and absolutely inadmissible. I mean, you can't ask -- you can't bring out in any case is he presently being charged with other crimes. I just say -- I just --

THE COURT: Yeah, I mean --

MR. WRIGHT: I am shocked.

THE COURT: -- clearly it's inadmissible. I don't remember exactly how it came out. I think -- does anyone remember?

Janie, queue it up?

THE RECORDER: I have a note that says have you ever been offered immunity by the State, have feds offered you immunity, you're under indictment related to activities to the clinic, and then there was the objection.

THE COURT: Yeah, but --

THE RECORDER: I think her answer --

THE COURT: -- she said Dr. Desai. Yeah.

MR. SANTACROCE: Yeah, she did.

THE COURT: I don't remember.

MR. SANTACROCE: It was in response to a question from Staudaher.

THE COURT: What was the question, Mr. Santacroce?

MR. SANTACROCE: Are you under indictment federally.

THE COURT: And then she said yes, and Dr. Desai.

MR. SANTACROCE: And I believe he asked her who with.

THE COURT: That's what I think the question was. That's what I heard. It's important what the question was.

MR. WRIGHT: I agree.

THE COURT: Whether or not --

MR. WRIGHT: I don't remember.

THE COURT: -- it was she --

MR. WRIGHT: I was like, whoa.

THE COURT: -- whether she blurted it out or whether the question was and who with. Because if she blurted it out, then, you know, the prosecution can't be faulted. But if they said and who with, I mean, to me that's just like asking are there other state charges or anything else.

Now, I will say this. I don't -- my impression was that somehow this has already come out. There has been talk about the federal investigation and other things, so my impression was somehow we already knew. It's hard for me, obviously, to separate what I know independently, but my

impression was somehow we already knew that -- certainly we knew there was a federal investigation.

That's been discussed and that evidence is in front of the jury through many witnesses about the fact the FBI was involved, there's been talk about the U.S. Attorney with some of the witnesses, so that's out there and everybody knew it. What I'm not sure is if someone has already said, and I know it wasn't you, Mr. Wright or Ms. Stanish, if somehow it hasn't already come out that there are federal -- there are separate federal charges in connection with this case and this whole investigation.

That was kind of, I don't know, an impression, but it could just be an erroneous impression based on the fact that there has been so much talk already about the FBI aspect, the U.S. Attorney has gotten involved in the discussions of immunity. There was talk, well, the State offered you or the U.S. Attorney offered you immunity. So there's the impression out there that there is some other case, maybe a federal case. I think that that impression is out there based kind of on that. That's the impression. But, no, this is the first time anybody said Dr. Desai is under federal indictment.

Janie, will you queue that up, please.

MR. SANTACROCE: For the record, I join Mr. Wright's motion.

THE COURT: I mean, obviously, if it was federal

Lakeman Appeal 04299

indictment and, you know, he's charged here, let's say, with what he's charged with and then the federal indictment was something totally unrelated, drug trafficking, bank robbery, something like that, clearly there would be no choice at that point but to grant a mistrial.

The only sort of thing possibly saving this is the fact that it's the exact same conduct that is at issue here that has also been charged federally. It's not new conduct. It's not different conduct. It's the same conduct. And basically the feds are in the same position that we were in prior to starting this trial. There has been a probable cause determination and there is -- there is a trial set.

So in that way it's not as prejudicial to me as if, oh, he's pending -- you know, there's, you know, pornography charges against him or bank robbery or federal firearms charges or some unrelated kind of a thing, it's the same thing. So there has been -- you know, in that way there has been sort of no additional findings or conduct or anything like that.

I mean, the State went to the, you know, probable cause determination in front of the Grand Jury. Assuming that was done, you know, federally. They went to a probable cause determination in front of a Federal Grand --

Is that what happened, Mr. Staudaher?

MR. STAUDAHER: Yes.

THE COURT: -- in front of a Federal Grand Jury and so, I mean, it's kind of the same -- the same thing. Like I said, clearly if it was some other charge --

MR. WRIGHT: Well, what am I --

THE COURT: -- you know, firearms, something --

MR. WRIGHT: What are we supposed to do now, introduce the federal indictment and explain it's the same thing?

THE COURT: And say it's the same thing.

MR. WRIGHT: And now a Federal Grand Jury, and now it has the imprimatur of the United States Attorney has seen fit to prosecute for the false billing case? I don't see any way to make this innocuous. This -- not to my knowledge, nothing has come out by which you could imply or infer that he is being prosecuted anywhere else for any other offense. I've been meticulous in my questionings to make sure I don't wander into the -- to the wrong area.

And the fact that there is a multi-jurisdictional investigation, the interviews were being done by Postal, Homeland Security, FBI, BLC, CDC. And just because of a multi-jurisdictional investigation, we're supposed to think, well, they already infer he's already indicted by the feds? I don't get it.

THE COURT: Well, I didn't say they're supposed to infer he's already been indicted. All I said was, you know,

that was kind of an impression I had, but I have other knowledge also. But there has been talk about the U.S. Attorney and the FBI and talk about immunity through the U.S. Attorney and all of that. So why are people getting immunity from the U.S. Attorney unless there was thought in the U.S. Attorney's office of them also prosecuting.

MR. WRIGHT: No.

THE COURT: I mean, I think that --

MR. WRIGHT: No, because statutorily you can't even get it unless the feds approve of it, if you read the actual NRS on it, you have to have confirmed that there is a potential federal violation.

THE COURT: Okay.

MR. WRIGHT: So the federal immunity isn't -- isn't anything remarkable.

THE COURT: Well, they don't know that.

(Pause in the proceedings.)

THE COURT: -- a lot of talk in the trial about the U.S. Attorney and the FBI and, you know, federal authorities and so forth.

MR. SANTACROCE: Your Honor, it puts me in a quandary in a sense that now do I have to cross-examine her and say, well, Mr. Lakeman is not on trial with you federally, is he?

THE COURT: Right. He's not under federal

indictment.

MR. SANTACROCE: It creates the impression, and now I have to reinforce the federal indictment.

THE COURT: Well, we're going to play it back to see what the question was, and then we'll hear from the State with their position.

THE RECORDER: He needs to come down because it won't play.

THE COURT: Well, can we maybe -- I was -- when I said to the jury that I needed a break, I wasn't being insincere, so let's all of us take a couple of minutes and then we'll play that back. And then we'll hear argument from the State as well as any suggestions the State may have, and then we'll go from there.

MR. WRIGHT: Thank you.

(Court recessed at 2:45 p.m., until 2:52 p.m.)

(Testimony of Tonya Rushing played back.)

MR. WRIGHT: Well, it was intentionally elicited that Dr. Desai is under indictment in the federal case. So, I mean, she didn't blurt it out. I don't know how to make it innocuous. It's -- the damage is overwhelming. I mean, I'm -- I'm flabbergasted over it. I mean, if this was a drug case and a witness is cooperating and they're -- the witness and the defendant are both under indictment in a different case, I wasn't even going to ask her about federal immunity, her

indictment, or anything. I mean, our hands are like tied.

I'm not going to bring out she's under indictment as if she'd done something wrong, and so all of that was foregone by me. And then out comes she's under indictment, and it'll be clear what it's for. Billing fraud. I mean, I think, because that's all she's really going to know about. She doesn't really know about the propofol and syringe reuse, so now we have that Dr. Desai is under indictment by the federal government, which is inadmissible and there's no -- and there's no way to -- it didn't pop out of the witness's mouth.

MR. STAUDAHER: I can't disagree with a large portion of that, obviously. It was an inartful question. In the sense that it was even asked in the -- or those questions were even gone into in the first place, it was because we had gone through those things with literally every witness that got on the witness stand with regard to, you know, the immunity and who had been involved and it was with the federal authorities and with the state authorities and so forth, and that was the reason to go down the line of questioning.

And it was -- it was clearly, you know, in retrospect, not -- not the thing to do, at least with that witness. However, I would say that I believe that the Court could issue a curative instruction, and that it can be certainly crafted in whatever way that counsel wishes, but that would be the State's position as to issue some sort of

curative instruction at this point as opposed to other remedies.

THE COURT: I feel like weeping uncontrollably. I mean, here -- as I said, look, you know, clearly if they were unrelated charges --

MR. STAUDAHER: Oh, Your Honor, there -- there was one last thing that I neglected to mention. There -- there was, at least it was my understanding and including Mr. Mathahs, that he was given immunity on billing fraud issues with the federal authorities for his testimony. That came out and has been present in this case, as well.

So, I mean, that -- it was specific as to what the issue was and that he was given immunity by the feds on that issue despite the fact that he was charged in this case on that. So, I mean, I believe that there was some evidence that came out in the case to some degree. It didn't obviously direct tie in Desai directly, but it was related to his activities at the clinic with Desai.

So I think there has been some evidence in the case that this came out in that regard. And that if you match that up with the -- or combine that with the issue of how much the issue of immunity and federal entanglement in this particular case for -- for their investigations, I don't think it's as damaging as -- as what counsel is implying, especially if the Court was to issue a curative instruction.

THE COURT: I don't know what -- I mean, here's the thing. Like I said, clearly, if it was other charges unrelated, you'd have to declare a mistrial. There's no question. We're all on the same page here. You know, it shouldn't have been asked, and I'm troubled that -- you know, everything was fine. She's yes, yes, yes, and then -- and I wrote it down. And who is involved with you in that indictment? Dr. Desai. I mean, there's only one other possible answer.

You know, I don't think Mr. Staudaher was deliberately trying to cause a mistrial or deliberately trying to commit misconduct. I think it was probably you just didn't -- I don't know. I mean, just weren't thinking, I guess. I don't -- I kind of -- I guess just weren't thinking. I mean, I guess that's -- and the totality, you know, I don't know, how damaging is it?

MR. WRIGHT: I mean, there -- I -- I did bring out all -- the inference I was bringing out of witnesses making unfounded accusations against my client, the other doctors and things, and then say did anything come of that or anything?

THE COURT: No, I know.

MS. WECKERLY: And now they know, oh, right, nothing came of that. He's just, as we sit here, he's under federal indictment.

THE COURT: Well, nothing came of any of the other

stuff. The -- I mean, nothing came of the threats or anything else. The only thing is the same exact thing that he's being charged with here, only with the Medicare/Medicaid spin. And they're -- I mean, I am sorry. I have an impression that that was talked about, this spin that it's Medicare, because isn't that the focus of the indictment --

MR. WRIGHT: No.

THE COURT: -- federally, that there is some kind of involving federal monies that it's billing fraud involving federal monies, or is it the exact same charges as what we have here?

MR. WRIGHT: No, it's a -- it's a federal billing fraud case.

THE COURT: Yeah, but isn't it concerning Medicare funds --

MR. WRIGHT: No, all of it.

THE COURT: -- and that -- it's private insurers?

MR. WRIGHT: No, all of it.

MS. STANISH: They have --

MR. WRIGHT: No, all of it.

MS. STANISH: Yeah.

MR. WRIGHT: In fact, it was -- I mean, leave it to the State and the feds. The recall count and the federal count were the same thing. Leave it to them to both indict for the same thing. Hell with the double jeopardy clause and

everything else. And hell with the --

THE COURT: Well, they are separate jurisdictions. I mean --

MR. WRIGHT: Well, why do you think they orchestrated it so that he gets tried here first as opposed to the feds? Because there's a state statute that prevents this if the feds go first.

THE COURT: Well, honestly --

MR. WRIGHT: Don't act like it was --

THE COURT: -- Mr. Wright --

MR. WRIGHT: -- just some innocent little -- oh, golly, two jurisdictions happen to prosecute --

THE COURT: That wasn't the --

MR. WRIGHT: -- at the same time.

THE COURT: -- spin that I thought of. I mean, I think --

MR. WRIGHT: I don't know how --

THE COURT: I -- I spun it a whole new way which wasn't a particularly flat -- I mean, I just think that more cases go forward in state court. The Clark County District Attorney's office prosecutes a lot more cases than the U.S. Attorneys. There's way more of a case load over here, a lot more cases -- many, many more cases get to trial.

So let me just tell you when I read it, but maybe we're all looking at this egocentrically. That was kind of, I

thought, oh, of course, the State, you know, is going to -- is going to go first because there's just -- there's more trials that happen in this building than over in the, you know, Lloyd George Building. It's just the reality of it. And that was kind of how I looked at it.

Now, maybe there was the motivation, but that's not how -- what I thought. I mean, just candidly, you know, it takes them longer to try anybody. The State gets every -- you know, goes forward usually far ahead of the -- of the federal government. There was more cases over here, they don't take as long on them, it's a -- it's a different, you know, it's just a different way of practicing here in state court than it is over in federal court.

And so that's kind of how I looked at. I may have been wrong. Like I said, I think we all kind of look at things egocentrically, and I'm looking at it, oh, state court, our huge workload over here, and -- and like that. So you may be right, but that wasn't -- that wasn't my --

MR. WRIGHT: Okay.

THE COURT: -- initial impression.

MR. WRIGHT: I understand.

THE COURT: But I don't know. We're both speculating.

MR. WRIGHT: The -- just to me, even if she had said I am indicted for billing fraud and so is Dr. Desai. I mean,

Kenny, let the jury know.

(Court recessed at 9:46 a.m. until 9:50 a.m.)

(Outside the presence of the jury.)

THE COURT: Are we doing -- Ms. Weckerly, are we doing the next CDC person today?

MS. WECKERLY: I hope so.

THE COURT: There was talk about Mr. Chaffee, but that's --

MS. WECKERLY: He's tomorrow.

THE COURT: Okay.

MS. WECKERLY: We have another witness ready if we get past the two CDC doctors, or not.

MS. STANISH: Who?

MS. WECKERLY: Nancy.

MS. STANISH: Oh, okay. Yeah, you mentioned that would just be direct, right? Or given where we are, probably not even that.

MS. WECKERLY: I'll be happy if we get through this witness.

MS. STANISH: Yeah, yeah. I hear you.

THE COURT: Today's the last day that we have to end right at 5:00. So other days we can finish with whoever.

Yeah, but she's a Safe Key kid, so maybe they have Safe Key still today, and then she's made other arrangements for the rest of the summer. I don't -- maybe the kid's in

Docket 64609 Document 2014-37741 Lakeman Appeal 03870

camp or -- I don't know.

(Pause in proceeding.)

(Jurors reconvene at 9:53 a.m.)

THE COURT: Court is now back in session, and you can get the last witness, Dr. Schaefer.

MELISSA SCHAEFER, STATE'S WITNESS, SWORN

THE COURT: Mr. Wright, you may continue your cross-examination.

MR. WRIGHT: Thank you.

CROSS-EXAMINATION (Continued)

BY MR. WRIGHT:

Q Good morning.

A Good morning.

Q Let me give you your -- do you have your three reports?

A Yes, sir. I do.

Q Or your three documents?

A Yes, sir.

Q Okay. The trip report, the Exhibit 92 report, we were talking about the trip report when we ended yesterday and were somewhat going through it.

A Okay.

Q Now, the trip report, this is the -- May 15 is the final trip report.

A That's the last version of the trip report, or

the -- yes.

Q Okay. And was the -- you talked about an interim trip report when you -- you all left Las Vegas.

A Yes.

Q Okay. And the -- any major changes?

A Not that I recall. I don't have a copy of that. But as I mentioned yesterday, you know, with this report we have the testing that was completed at CDC, so that would have been an addition.

Q Okay. You were showing the last page.

A Yes, sir.

Q The tree or clusters that we've seen before in the court.

A Yes, sir. So without having the two side by side, I can't --

Q Okay. But your conclusions of what the likely cause was, everything remained the same?

A Correct.

Q Okay. And then at the -- the trip report is normally an internal document of CDC?

A No. It is -- it's a document generated by CDC that we provide to the health department who invited us to come. And then it's essentially theirs to do with what they would like, if they want to disseminate it or not. I believe the health department actually posted it on their website.

And people can get it from us through the Freedom of Information Act. If they send a request to CDC, it would be released under those parameters.

Q Okay. But you all don't release it other than to the agency?

A To the health department.

Q Right. And so --

A That's the typical.

Q -- it's not like posted and available --

A It's not.

Q -- through CDC?

A We don't post it on the web. It's available through CDC if we get a request, as I said, through like a Freedom --

Q Okay.

A -- of Information Act.

Q Because you like at the same time, May 16, 2008, you have the MMWR --

A Yes, sir.

Q -- report. I mean, that's what I call it.

A Yes. That's correct.

Q And if -- this is the publication?

A Is one of the publications.

Q One of the publications.

A Correct.

Lakeman Appeal 03873

Q What other publication goes out of CDC?

A That was the other article that we talked about yesterday from Clinical Infectious Diseases. That is also a publication.

Q Okay. That's that what I called a scholarly article that was published in a journal?

A Correct.

Q But out of CDC, it's these two documents?

A Well, so again, the MMWR has authors on it from Nevada, so it's not just CDC. It's also got authors from Nevada like the scholarly articles you said the Clinical Infectious Diseases article did.

Q Who publishes this MMWR?

A So it's -- it's through CDC. It's a CDC -- but you don't have to be a CDC employee to publish in the MMWR, I guess, is what I'm trying to say.

Q I'm not -- and the scholarly article --

A Yes, sir.

Q -- that's published in -- what journal accepted that?

A Clinical Infectious Diseases accepted that.

Q Okay. And that's a -- who reads that? I've never got a copy.

THE COURT: They don't sell it on the newsstands.

THE WITNESS: I understand. So, you know, I'd have

to look at their website to see, but see what they market themselves as. But it's clinical infectious diseases, so typically ID trained physicians, other physicians.

I mean, it's whoever wants to read it can access it, and if you have a particular topic you're looking for, like I said, you can look, you know, on the Internet for PubMed, find this article and, you know, if it meets whatever parameters you're looking for, read it and use it.

BY MR. WRIGHT:

Q It's like -- tell me if I'm wrong about this -- like when I'm done with this trial, okay, if I want to get together with Mr. Staudaher, Ms. Weckerly, maybe the judge, and we put together an article about this trial and the intricacies of it and submit it through Nevada State Bar Journal?

A I'm not familiar with that journal, but that's right. We -- you know, we went through the authors yesterday, wrote the article together and submitted it to a journal who ultimately was interested in it and published it.

Q Okay. I follow. So the CDC MMWR, May 16, 2008, right?

A Yes. The MMWR is May 16.

Q And the trip report May 15. And the -- the MMWR goes out to whom?

A It's freely accessible on the Internet.

Q Okay.

A So it's typically read by public health people, epidemiologists, health department people, but anybody can Google it and get it on the Internet.

Q Okay. It says weekly. I guess I'm -- I'm old school. I expected this to come out weekly in my mailbox or something. I mean, is it paper or --

A They do paper copies. They also send electronic copies if you're on their mailing list. I can't tell you the distribution or who's on that list. But yes, they do have paper copies and they also have electronic.

Q Okay. And the conclusions and information in MMWR is, the way I see it, the same as the trip report?

A Yeah. The conclusions are the same between the two.

Q Okay. Was there anything else different? This looked like to me it was the public synopsis of the trip report.

A I was just trying to verify if we had the -- because the CID article had more cases in it. I think the MMWR and the trip report have the same number of cases at that point in time, and the conclusions that we came to were the same.

Q Okay. Now, after May, the final trip report, did your individual conclusions ever change?

Lakeman Appeal 03876

A My conclusions about how transmission --

Q Likely cause.

A -- occurred in the facility? No.

Q Okay. And so it wasn't something where a later report came out, this is it?

A This is it.

Q Okay. Now, I want to go back to the trip report. You talked about likely causes of the transmission. Okay. And without focusing on August -- July 25 or September 21, just combining it in general, you're there looking for hepatitis C, okay?

A Okay.

Q Cause of transmission.

A Okay.

Q The -- the likely causes you considered, let's just tick them off.

A So again, you know, confirming the diagnosis in these patients to confirm that transmission likely occurred in the facility, and then we're looking at, you know, the possible ways they could be exposed. So things that I think about are as we talked about before, it's a blood-borne pathogen, so blood to blood. So looking to see, you know, did they have any finger stick testing where you prick the finger to get blood.

Q And that -- the answer to that was no --

Lakeman Appeal 03877

A Correct.

Q -- and that the finger stick testing is where they would prick someone's finger there in the clinic, and that just plain none whatsoever, they don't do that?

A Right. They did not do that testing.

Q Okay. Go ahead.

A So we also look for any medications or injections that they received and the handling of those medications.

Q Okay. And we talked about propofol obviously, because that ended up the method of injection combined with propofol multi vial use ended up the likely cause of transmission, right?

A Right. Correct.

Q But we also had saline we looked at.

A We looked at, we -- go ahead.

Q And what's that other -- lidocaine. And we'll come back to the medications. I mean, any others that were like multi use and injected patient to patient?

A Well, so the other thing we talked about yesterday a little bit for medication handling is healthcare worker to patient transmission through theft of narcotics.

Q Okay.

A And we looked at what meds they use in the facility and the healthcare personnel ended up getting tested.

Q Okay. And so -- and on that, every healthcare person at the facility came in and was voluntarily tested, correct?

A That is my recollection.

Q Okay. And so they provided their blood and they were all tested and no one at the clinic had Hep C?

A None of the healthcare personnel did.

Q So that like -- that ruled out that.

A And also, you know, the patients didn't get fentanyl, and the narcotics that they had and were administered to patients, and they had security measures in place for those.

Q Okay. And go ahead and --

A So then other mechanisms for patient to patient, we looked at equipment use on patients, specifically the scopes and which scopes were used on which patients and how they're handled, and the biopsy equipment, I think, are the main --

Q Okay. And we've heard a lot here in the courtroom over the last few weeks about reuse of bed sheets.

A Okay.

Q Likely cause of transmission of Hep C?

A No.

Q Okay. So I mean, we can -- I mean, that isn't even something you would waste your time on, correct, for a

viral blood to blood infection?

A Right. You know, when we do these investigations, we're looking at the totality of care and trying to correct anything we see regardless of if we think it can result in transmission. That's why we looked at hand hygiene and other things. But you're correct, I'm not concerned about that as transmission in this situation.

Q And I -- a whole list of things I can go through. If the speed in which a colonoscopy is done?

A As far as transmitting and just focusing on the procedure itself, not the turnover time for reprocessing of instruments or the meds or anything?

Q Correct. Just by if I --

A I'm not concerned about that resulting in transmission of hepatitis.

Q Okay. And the issues like did I start -- I'm the physician, did I start to give a procedure before the person was fully asleep?

A Right. I'm not -- that's not going to be a mechanism of transmission.

Q Okay. And --

A Again, barring issues related to --

Q Oh, correct. We're going to get to the scope [inaudible], but I'm just saying --

A Okay. Yes, just focusing just on that, sure.

Q -- [unintelligible] a physician, you know, propofol's given and the person isn't under the influence of it yet and the procedure starts, that's going to have nothing to do with the transmission of hepatitis C?

A Not in isolation.

Q Okay. And the same thing if a patient is coming to at the end of the procedure and the physician says hold off, don't need -- don't need anymore propofol has nothing to do with transmission of hepatitis C?

A Right. You're not going to transmit from patient to patient in that situation.

Q Okay. Bite blocks --

A So --

Q -- reusing them. Taking the bite blocks, assume that they're single use hard plastic bite blocks and that the clinic was putting through the -- treating them just like scopes and recleaning them and reusing them.

A So they're doing some type of cleaning step --

Q Yes.

A -- then that is not -- I'm not concerned about that being a particular mechanism for transmission.

Q Okay. Being a cheapskate on the amount of tape you allow the staff to use in a facility?

A No.

Q Okay. Cutting Chux in half because you're a

cheapskate?

A No.

Q Now, on the equipment use, you'd be looking at the scopes, and you went through all of the proper cleaning, everything else. I mean, you look at all of that and then you looked at which scopes were used and the numbers and all of that was pretty much explained. Because you're doing two things as I follow reading what you all did. Number one, you're looking at all of it, observing it to verify that they are doing what they say they're doing --

A Correct.

Q -- is that fair?

A Correct.

Q I mean, you don't just like take their word for it. I mean, it's actually observation to see like the policies and procedures that are stated by the clinic are actually being implemented?

A That is our goal and intent, yes.

Q Okay. And you learned by talking to the people, whether it's GI techs, nurses, CRNAs, not only observing, but asking them questions, and you rely upon their answers?

A I rely on their answers and my observations and review of the records, yes.

Q Okay. Did you -- did you have any misrepresentations to you that you became aware of while you

were there?

A Can you -- can you specify a little? What do you mean?

Q A lie. They like said --

A Yes.

Q Okay. What was that?

A So I mean, Mr. Lakeman told me that they, you know, reused biopsy equipment, and that was not what was represented while I was in the facility and that was not what I observed while I was in the facility.

Q Okay. So your -- Mr. Lakeman told you biopsy equipment was reused?

A Correct.

Q And your observation when you were there, it wasn't being reused?

A I did not observe reuse of biopsy equipment while I was there, correct.

Q Okay. Who are you saying misrepresented, Mr. Lakeman?

A Well, so --

Q I mean, it could have been previous reuse.

A Right. But so I guess some of your question and information I have is stuff that, you know, I've heard from the health department calling since then, or in the newspaper since then. And so --

Lakeman Appeal 03883

Q Well, I don't want any of that.

A So that's what I'm --

Q Okay.

A I don't know how to answer your question without addressing --

Q Well, you can't go --

A -- some of that.

Q -- there.

A Right. So it's hard --

Q Let me restate it. I mean, that's why I kind of made the parameters of May 15 and 16, you know, and then your conclusions didn't change. So I am dealing with your own personal knowledge, you know, and what happened when you were there. Okay.

A Right. So --

Q And my question was, did -- were you aware when you were there of any misrepresentations to you, you know, like someone said, hey, we do this and then you find out they do that?

A You know, I'm not recalling any specifics. I mean, we may have been looking into some inventory records for biopsy equipment while we were there, but I didn't observe it and I don't believe I was -- I don't recall being told at the time it was being reused. So nothing is jumping out for those nine or ten days that we were there.

Q Okay. Your perception when you left was they had been totally -- they, I'm talking about the clinic personnel you interacted with and Dr. Carrol, Tonya, the charge nurses, they had been fully cooperative --

A Yes.

Q -- in the efforts?

A Yes.

Q And you believed that that cooperation was genuine and sincere?

A Yes.

Q Now, on the equipment use, scopes, the -- your report indicates that the only lingering issue that needed to be corrected was the enzymatic detergent changing.

A Right. Correct.

Q And that's, I think the -- you saw the pictures --

A I did.

Q -- and the evidence has been they used blue buckets --

A Right.

Q -- at an early stage of the washing before going to the MediVator?

A Correct.

Q Okay. And the clinic, as I read your report and correct me if I'm wrong, they -- they stated they were

changing the enzymatic detergent every two scopes.

A Correct.

Q And the detergent said change it every single scope.

A Correct.

Q And this was one of the things that was brought to their attention and corrected?

A Correct.

Q So if -- if that was a -- of course that was their practice, meaning two scopes before changing.

A Right.

Q So we take that as a given that that was -- that practice went unchanged up until you got there, right?

A Sure. I -- I assume so, yes.

Q Okay. Well, I mean, that's the way -- you're there. You figure out what they're doing and then you ask have you changed anything lately.

A Right.

Q And basically they were saying, the they, everyone you talked to, that we're still doing things the way we've been doing things. We didn't change just because you walked in the door.

A Correct.

Q And in fact, when you all were there, they were doing 50 to 60 procedures a day, correct?

A That sounds accurate.

Q Okay. And that's what they said they had been doing in the past. And that was on the days in question it was like 60-something procedures.

A Okay.

Q And on your observation days it was -- they didn't cut their load in half or anything.

A Yeah. I didn't -- I don't -- we didn't -- I didn't count patients that day. But they didn't represent that they were cutting back because we were there, so that sounds right.

Q Okay. So taking it that they had been misusing the enzymatic detergent, that is something that would cause concern of are the scopes being cleaned properly?

A Yes.

Q Okay. And the -- if we like go back to the -- you used the July 25 date, because that's simply a one source patient, one transmission to Mr. Washington. Okay. And each of them, one had an upper and one had a lower.

A Yes.

Q And so those scopes had to have been clean.

A Yes.

Q Okay. And if like those two were in the same blue bucket, you know, or one, the second one, however it works when they didn't change it out right, it -- what could

Lakeman Appeal 03887

happen?

A Well, they're still -- that's the precleaning step. They're still getting rinsed and going through a high level disinfection step, so I wouldn't -- I wouldn't -- wouldn't see that as being a mechanism for transmission.

Two different scopes that are just mixed together in precleaning water or solution and then they still go through high level disinfection, I would not believe that transmission would occur through that.

Q Okay. So that's less likely?

A Yeah. I don't consider that within the realm of likelihood, yes.

Q Okay. Well, what the -- the -- what equipment -- as I read the trip report, you viewed the most likely cause of -- you, I'm meaning the report, the most likely cause of transmission was the propofol multi use coupled with syringe reuse?

A Yes, sir.

Q And then I read that less likely was equip -- equipment cause of transmission.

A Right.

Q Okay. And would that be including like the scopes?

A Yes.

Q Okay. And the cleaning problem, if there was

one?

A Yes.

Q Okay. And the -- if biopsy equipment, whatever you call it, the biopsy equipment was being reused when it's single use, that fell into the less likely?

A Yes.

Q And those are all lumped into the less likely portion of the trip report on equipment reuse?

A Yes. I mean, but again, while we were there and what was told to us is biopsy equipment was not reused and not everybody got biopsies amongst our cases and the source patient -- yes.

Q Okay. I understand. The -- but on July 25, the two patients had biopsies?

A Right. The source and then Mr. Washington, correct.

Q Okay. And then aside from the equipment possibility of transmission being less likely, you also had the -- when we go to the med -- back to the medication, we have saline injection practices being less likely?

A Yes.

Q Okay. And lidocaine injection practices being less likely?

A Yes.

Q Okay. Lidocaine, saline, both multi-use vials?

Lakeman Appeal 03889

A Both labeled as multi use, yes.

Q Right. And being used multi use?

A Yes.

Q And like lidocaine, as I read the report, one multi-use vial like 30 cc brought out in the morning --

A Yes.

Q -- and then used all day and then, as I read it, discarded?

A I'd have to look back at the report to confirm, but I do know, and this would have been in the notes that I had, that they also would have prefilled syringes with 1 cc of lidocaine, and those can be sitting in a drawer overnight and not discarded or not put anywhere if they weren't used.

Q Okay. The lidocaine syringes that were prefilled -- and of course, just to refresh recollections, lidocaine 1 cc is put into the syringe, set aside, and then ultimately they're going to fill it all the way up with propofol.

A Correct.

Q Okay. And if there were any of those left over, it appears they were just left in the drawer --

A That was my understanding.

Q -- syringes with lidocaine only in them, and then like reused the next day -- or used?

A Then used.

Q Dangerous word that, reused.

A Right. Then used the next day.

Q Okay. And so on lidocaine, the -- it being multi-use vial 30 cc, it -- any re-entry of it, reuse of it or something could --

A No. The --

Q How's it work?

A No. The practice was that it was a one-time administration to a patient helps prevent the burning of propofol when it's going in and so there's no need, because then the patient's asleep, to give them more lidocaine. So it would be enter with a new needle and syringe, draw up, no need for re-entry or re-dosing for a patient.

Q Okay. In the ordinary course there wouldn't be, but if a mistake was made there would be?

A If they decided to re-dose and reuse a needle and syringe to enter?

Q Yes.

A And then what was the question?

Q Well, then that could be a possible -- I mean, mistakes are made, correct?

A Mistakes can be made, sure.

Q Okay. And so I'm trying to get to how the transmission could occur, I mean, because that was a -- that's a less likely probability. But there is a way it could occur,

correct?

A Nothing I saw or heard supported that as far as re-administering lidocaine or re-entering vials. But if there was re-entry with a used syringe into a lidocaine vial and that was used for multiple patients, that could be a source of transmission.

Q Okay. And the same with the saline solution or saline flush, whatever you call it?

A Right. So I again, the same with lidocaine, there was not reported or observed any need for reflushing patients' line, we didn't observe that. So we didn't see the potential for reuse of needles and syringes. But if somebody uses a syringe on a patient and uses that to go back into the vial, the vial can become contaminated and a source of transmission.

Q Okay. And if when using like saline vial solution in the preop area, all it would take is one single mistake?

A Yes. It could be a mistake and, you know, again, going back to the why it was less likely, you know, on the July date, the source patient didn't get a saline flush. And so for that to have been the mechanism, he would have had -- he or she would have had to have the saline flush, had the contaminated syringe to go in to then have the flush be used on Mr. Washington.

Lakeman Appeal 03892

Q Okay. And you're concluding that the source patient did not get a saline flush on July 25, because the CRNA started the -- did the heplock?

A My under -- from what was reported to us, when the CRNAs placed IVs, there wasn't a need for a heplock because they were putting it in to start the procedure to use propofol. But you're correct, that's how I'm coming to that conclusion.

Q Okay. When they -- when they started the IV, they didn't flush --

A That was my --

Q -- they being the --

A That was what we were told. That was my understanding.

Q Okay. They being the CRNA?

A Correct.

Q Okay. But if there was evidence that CRNAs on occasion helped when the nurses couldn't get -- couldn't hit the vein right after two or three times, then the CRNA did it to start it?

MR. STAUDAHER: Objection. Foundation as to location where this would happen.

MR. WRIGHT: Well, it was a hypothetical. So I'll say in a preop room or --

MR. STAUDAHER: Say evidence showed or something to

Lakeman Appeal 03893

that effect.

MR. WRIGHT: Well, it's a hypothetical.

THE COURT: Well, state your question.

BY MR. WRIGHT:

Q Okay. If there were evidence that sometimes nurses had difficulty with the [inaudible], or whatever the difficulty is in starting the heplock, and then the CRNA would start it for them.

A Okay.

Q Okay. Then we don't know in those situations whether that would be flushed or not flushed, correct?

A I can't answer -- I can't answer that. But again, in order for the saline flush to have been the source, there would have had to have been contamination of that vial through use of syringes and re-entry.

Q Right. Right. I didn't mean just by starting it.

A So, yeah.

Q I'm just saying there could be situations where the CRNA started the IV, but there was still a saline flush.

A There could be, sure.

Q Okay. And saline, the evidence has been, was used other than just for flushing the IVs, but was also used out of the saline vials for pushing the propofol.

A Okay. I hadn't heard that before.

Q Okay. But if that was taking place at this clinic, I mean, that -- that compounds the opportunity for more use of the saline and more possibility of an accident than you were aware of?

A I don't know that I -- that's not anything that I observed as a practice, and all I can continue to say is if you reuse a syringe from a patient to enter any vial and then use contents from that vial on another patient, that can be a mechanism for transmission.

Q Anything else? I mean, we had the medication other than propofol being a less likely cause, and we had the equipment being less likely.

A Yes, sir.

Q Was there anything I've overlooked --

A I don't think so.

Q -- as a possible?

A I think --

Q I mean, we've excluded others as just not a chance.

A Right.

Q Meaning coming from a healthcare worker.

A Well, there's always a chance. But in this instance, right, we ruled that out.

Q Okay. And the -- did you rule out what we in the courtroom have talked about, a rogue employee? I mean an

intent, someone doing something purposefully bad.

A That was not -- no one -- with intent to harm some --

Q Correct.

THE COURT: An intentional malicious act.

THE WITNESS: I never heard that from -- while we were there.

BY MR. WRIGHT:

Q Okay. And you saw no evidence of any such thing?

A No.

Q Okay. Now, your field trip portion of the mission was completed in mid January?

A Yes.

Q And then you all remained available and still assisted by phone?

A By phone and by email, yes.

Q Right. Because you all, the CDC was still doing the -- all of the geno -- all that testing that took place --

A Correct.

Q -- and offering to do any additional testing?

A Correct.

Q Okay. And so that continued to take place, and then ultimately conclusions were reached, and that's the last page of the May 15 trip report, correct?

A [No audible response.]

Q And then I think thereafter --

A Lawsuits. Well, sure, yes.

Q Is that right?

A Well, the last page is our quasi species analysis. But I get your intent, which is we had the discussion section here on page 8 and 9, where we're --

Q Oh. My last page of the --

A So this didn't have like our conclusions and summary on it; isn't that what you're saying?

Q I thought this was done after --

A After we -- right. Right. I think it was in progress while we were there, completed after we left, yes.

Q Okay. Now, your -- you were not conducting a criminal investigation?

A No.

Q You had no idea that what you were doing would result in criminal charges, correct?

A No.

Q Yes?

A Oh, I'm sorry. I didn't. I had no idea.

Q Correct, yes?

A Correct, yes. I had no idea.

Q I just want to be sure. It's a double negative.

A I apologize.

Q We go by the record.

A Yes, sir. I had no idea.

Q And you had -- your goals in reaching likely cause of transmission, and I'm speaking you as meaning CDC and your job there --

I love the way you cough. That's a CDC cough, correct, a proper covering?

A Right. Sorry.

Q Now, I read I'm supposed to do that, and you follow the best practices?

A I try to practice what we preach, yeah.

Q The -- your mission is to identify the likely cause of transmission, and then -- and as quickly as possible?

A That's one component of our mission, yes.

Q Right. I mean, as thorough -- quick but thorough, and because you want it to stop --

A Correct.

Q -- the practice?

A Yes.

Q And you're going to additionally use it to educate?

A Sure.

Q Okay. Okay. And does that cover the mission?

A Well, I mean, our -- another, you know, main part of our mission is to get people to identify all the

infections because, you know, the majority of hepatitis C infections are not symptomatic and people may not know they're infected.

So a component of this experience was, through Southern Nevada Health District, notifying patients and getting them tested. And if people were found to be infected with any blood-borne pathogen, getting them referred for appropriate evaluation is also a component.

But yes, you're right. There's that, and then we want to try to figure out how it might have happened so that we can stop it from continuing to happen. And we do have a role of educating other providers in the public, you know, how things can be transmitted and what lapses -- what practices should be followed and how safe care can be given.

Q Okay. And in your -- in the trip report, the -- before I get there, I'm going to have to back up. I saw something else.

The -- on your most likely cause of transmission, multi-use propofol vial and reusing syringe could contaminate the vial.

A Correct.

Q Okay. There's been evidence about a spike being used on the 50 size propofol vial. And the evidence has been what we've called a spike was a device that you've put in top and then you like drew 5, 10 cc syringes of propofol without

using a needle. You simply hooked it onto the spigot, drew 5 of them, then you put on the needles afterwards.

A Okay.

Q Were you aware of that?

A I don't recall that, no.

Q Okay. Does that -- when you were testifying about back flush and pressure and things, because you -- I think you were talking about that someone may believe they are safely reusing a needle and syringe going into a propofol vial by keeping negative pressure to prevent any contamination; is that correct?

A By keeping pressure on the plunger to prevent backflow. Okay.

Q Okay. I mean, that is a common belief out there, correct?

A That is a misperception out there, yes.

Q Right. A widespread misperception?

A I can't -- I can't say with certainty. I hope not.

Q Okay. Well, it's -- remarkably, it's keep --

A It's something that we comment on so that it won't perpetuate.

Q Well, remarkably, it keeps coming up, correct?

A Coming up where?

Q In your -- in the articles I read and some of

the articles that you're an author on, the percentage of people that still persist believing this myth.

MR. STAUDAHER: Objection. Which myth are we specifically talking about?

THE COURT: You're talking about the negative --

MR. WRIGHT: I'm talking about the negative pressure --

THE COURT: -- pressure plunger idea?

MR. WRIGHT: But believing it's safe to re-enter, reuse needle and syringe. I can safely re-enter a vial by what I've called negative pressure, whatever it is.

THE WITNESS: Well, that is one of the misperceptions that we address on the CDC website and would bring up in publication so that it doesn't perpetuate. There are others we can go through, but you're not asking about those, so.

BY MR. WRIGHT:

Q The -- how does that fit in? Because I don't understand negative pressure, you know, and the pressure in the vial versus the syringe and plunger or something. But what if I'm using a spike on the propofol vial?

A I can't -- I can't answer that. You know, I don't know what the spike is or what the manufacturer's, you know, claims about it are. I would not consider a spike being a protective mechanism to prevent contamination of a vial if you're reusing a syringe.

Q Okay. But you don't even know how it works.

A But I can -- no, I am familiar with the concept that you're talking about. I would not consider that a protective mechanism, but, you know, I don't know what the manufacturer claims are and if FDA approved or any of that, so I can't -- I'm answering that in a bit of a vacuum. I can't --

Q Okay. You didn't factor -- I mean, you weren't even aware of the spike use?

A I don't recall the spike use coming up.

Q Okay. Your presumption was all, all propofol -- all filling of syringes with propofol was done by needle and syringe going through, wiping the little top with alcohol, air dry, and then putting the needle in to draw?

A Correct.

Q Okay. Now, you ended up, your report, or the CDC trip report came up with best practices, right? I'm on page 9.

A So is this under our actions and recommendations, or where are you looking at?

Q Yes. Right at the bottom.

A The bottom of page 9, going on to page 10.

Q Yeah. As we observed -- I'm at the very bottom of page 9. "As we observed and interviewed individual staff members, we pointed out our best practices in infection

control." Okay. And is that -- and I thought that's what you all called your recommendations at the CDC, best practices. I saw that on a website.

A Right.

Q Okay. So the -- I have a hard time in reading and understanding the terminology of the various agencies when I read about standards, recommendations, best practices, rules, regulations. What are your -- what's your understanding of the CDC's best practices? What does that mean?

A So CDC is not a regulatory agency, so we don't -- we can't -- we don't have an enforcement authority. If you do something wrong, we can't do anything to you. But we come out with, and this is through my division, what we consider evidence based recommendations and what I consider standards of care. But whether that's enforced by the people who do have authority to enforce or not, that's under their jurisdiction. I think that people should be doing these things.

I mean, our recommendations are don't reuse a needle and syringe from patient to patient. I mean, it's basic and falls under what we call standard precautions, which is what we consider the basic expectation to prevent -- protect patients and healthcare workers. But we don't have the regulatory badge to come and do anything to you if you don't

Lakeman Appeal 03903

do that.

Q So I can freely ignore your best practice?

A I think that would be a really stupid thing to do.

Q Or I might be sitting here.

A And I wouldn't want to be your patient if you did that, so.

Q But I cough like this too [indicating].

A And if you do, I can't say that the people who do have a badge and authority like the Centers for Medicare and Medicaid Services or BLC wouldn't, wouldn't do something --

Q I'm not suggesting --

A -- or you wouldn't have something like this happen.

Q I'm not ridiculing or suggesting they shouldn't be followed. But these are -- I mean, because I have seen it written in on different articles, recommendations, standards, regulations. I mean, there is someone, I guess, who -- out there who can order these type of things.

A Right. So again, people like the Centers for Medicare and Medicaid Services, or a joint commission works with them, you know, have some regulatory authority to enforce if you are not doing things correctly. But I think it -- well, I'll stop there.

Q Okay. And sometimes like the -- what you just said, was that -- what did you just say, what center?

A Centers for Medicare and Medicaid Services, so Medicare.

Q Okay. What's their initials?

A CMS.

Q CMS. Okay. CMS can like order things because they're the federal government, and the way the federal government always does anything, if you want to deal with Medicaid, Medicare, then here's the rules.

A Right. If you want to get paid --

Q Right.

A -- here's the rules.

Q If you don't want to get paid, then don't follow them.

A Right.

Q Okay. So they have the ability. And sometimes those regulatory rules don't mirror CDC's best practices?

A I'm not aware of examples. We actually work pretty closely with CMS, and have worked on checklists and training of their surveyors to make sure that they are enforcing the best practices and the safe practices for patients and healthcare workers, but --

Q Okay. Let's go through the best practices that you pointed out to the clinic.

A Okay.

Q And these, you already said as these came up, the moment a worst practice was observed, you pointed out best practices --

A We --

Q -- during the visit?

A Yeah. Sometimes not --

Q Like don't do this --

A -- right at that second. For the egregious things, yes. But some of the other stuff, you know, I'm not going to stop the procedure and say, you know, if it's something that's more minor. But we pointed them out as we were going along, yes.

Q Okay. So this was like a recap?

A Yes.

Q Okay. Number 1, I'm on page 10 now --

A Yes, sir.

Q -- of Exhibit 92. "Injection safety. We reviewed with the Clinic A staff the following: Never reuse needles or syringes when drawing medication," correct?

A Correct.

Q "Never pool medications from individual vial." And that's the using the leftovers, pooling into one, correct?

A Correct.

Q "Never use single use vials for multiple

patients."

A Correct.

Q "Never recap needles," right?

A Yes.

Q "And immediately dispose of sharps in appropriate containers."

A Yes.

Q And the -- then hand hygiene, you explained they weren't doing as well as they should, so you told them how to do it properly?

A Correct.

Q And then patient care equipment, that was the enzymatic detergent issue?

A Yes, sir.

Q Okay. Now, on injection safety, never use single use vials for multiple patients.

A Yes.

Q Right. The -- you're aware, I presume, that if I have a 50 propofol vial, okay?

A Okay.

Q If I use safe practices, using a new needle and syringe every single time I go into it and wipe it. Well, I either have a spike or I wipe the top. I do everything best practices, I can use it on multiple patients safely, correct?

A We don't recommend that at CDC.

Q I understand your best practices, and we'll get to whether they're followed or not.

A And I think by doing that you're taking a risk with patients, to reuse a single dose vial.

Q Right. You work for the CDC and you're going to stick with your best practices.

A I am.

Q I understand. My question is, is it -- if I take that 50 -- I mean, we had a witness testify here in this courtroom who's a CRNA who presently works at two big clinics in California, and they to this day multi use single use vials of propofol because they use a new needle and syringe every single time they enter it. Are you surprised at that?

A I'm disappointed.

Q Okay. But you're not surprised, are you?

A I'm not surprised, but I'm disappointed.

Q Because you know the statistics out there in the real world, correct?

A Yes.

Q And what is it, like 28 percent --

A So --

Q -- are still multi-dosing safely despite best practices recommendations?

A So again, I don't know that it's safely. I don't -- it's labeled for single patient use for a reason, for

patient safety. And so when you don't do that, I don't think you're doing the safest thing for patients. That's why we don't recommend doing it. That's why it's not labeled for multi-patient use. That's why FDA didn't approve it for multi-patient use.

Q I thought it was labeled single patient use -- I mean, like this fellow, his name is Mr. Sagendorf. I don't want to tattle him out. But now that I know that you don't have regulatory authority, I'll disclose it.

A I have friends who do though.

Q I'll bet.

THE COURT: Well, we won't tell you where he works.

BY MR. WRIGHT:

Q They believe that they are acting safely and economically in their practice. I mean, let me put it that way. I mean, because the CDC way would be if I have a 50 and use 10, I'm tossing out four-fifths of the product which is still good if I'm using it within an hour or two.

A So to respond to that, it's not just the CDC recommendation. The American Society for Anesthesiology has the same recommendation. The Association for Professionals in Infection Control have the same recommendation. So it's not just the CDC recommendation.

And I guess to the point that you're saying is, you know, why -- why not buy the right size vial for the patient

so that you don't have to do that and you can do things more safely for them.

Q I don't know, because I don't think --

A Why buy a 50 cc if you --

Q -- every patient is exactly a 10. I don't think they're a 15. I don't think they're a 23. They aren't. I mean, the evidence we've heard in this courtroom is it's for an upper it may take 100 whatevers, 10, and for the colonoscopy it's between 100 and 220 milliliters or whatever. And so there isn't an array of propofol vials. Let's see, I'm going to do an 18 on this patient, it just doesn't work.

A But if you're --

MR. STAUDAHER: Objection, Your Honor. That mischaracterizes prior testimony, as well as the state of the vials that are out there and available for use.

MR. WRIGHT: I didn't --

MR. STAUDAHER: We have ranges of 10, 20, 50, 100.

THE COURT: Okay.

MR. WRIGHT: Okay. I said an 18 or a 23.

THE COURT: And again, ladies and gentlemen, it's your recollection of what people have testified to --

MR. WRIGHT: Okay. What size --

THE COURT: -- what the past testimony has been.

Go ahead.

BY MR. WRIGHT:

Q What size do you think propofol comes in?

A I'd have to look on their website to see what the array is. But if I know that my facility typically gives between 100 and 200 milligrams, then why do I need to buy a 50 cc vial if I can get the smaller and do more safe care for my patient?

Q I don't know. But I think there's -- all I know is from your studies, one-fourth of the population still multi-doses safely, in their view, propofol.

A What study are you referring to? Can we hone in on which study it is?

Q You tell me if I'm wrong.

A So the only --

Q No, I mean, I -- no, I don't have all of them at my fingertips. That is --

MR. STAUDAHER: Well, then I'm going to object to assuming facts not in evidence, Your Honor.

MR. WRIGHT: You tell --

THE COURT: Okay.

BY MR. WRIGHT:

Q You tell me the current, the most recent number of -- well, let's just start right in Nevada. Didn't CDC come out here after this event and check our all 53 ambulatory surgical centers in Nevada?

A So CDC didn't check all 53. CDC came out to do some training and work with the inspectors so that they could inspect all 53.

Q Okay. And what were the results of that?

A I don't recall.

Q Other clinics were doing the same thing, correct?

A I -- I don't recall the specifics of Nevada, of what was found in those clinics.

Q Other -- you --

A I'm willing --

Q You tell me the results of the other studies. My understanding from reading the journals I've never read before in my life and will never read again, those journals I was reading, that there was ongoing people like Vincent Sagendorf and the two clinics he worked at that continues to multi use, to use propofol vials for --

A So I'm willing to agree with you that there are providers that are using single use vials for multiple patients contrary to recommendations, but I can't give you a number nationally of how many people are doing that.

Q Okay. It's a -- it's a large -- I mean, it's not 1 percent, right?

MR. STAUDAHER: Objection. Assumes facts not in evidence.

THE COURT: Well --

MR. WRIGHT: I'm asking.

THE COURT: -- she can -- he asked it as a question, it's not 1 percent, right. And of course, the jury is reminded that the questions are not evidence. The evidence comes from the witness stand.

MR. WRIGHT: You can answer.

THE WITNESS: Oh. So I can't give you a national number. I don't know what the percent is.

BY MR. WRIGHT:

Q Can you give me an educated guess?

A I mean, I can --

MR. STAUDAHER: Objection. Speculation.

THE COURT: Well, overruled. If she -- you know, if she doesn't feel that she can answer the question, she can certainly respond that way.

THE WITNESS: So I don't have a national estimate for you. The only study I can think of is the one that we did looking at a small sample of ambulatory surgery centers in other states back --

MR. WRIGHT: 2000 --

THE WITNESS: '10 maybe.

MR. WRIGHT: '10.

THE WITNESS: And found, I think, in that one that 28 percent of the facilities were using single dose vials for

multiple patients.

MR. WRIGHT: That was the one you were --

THE WITNESS: But that's not --

MR. WRIGHT: You were the author.

THE WITNESS: Well, you said multiple articles. I didn't know which one you were talking about. That's what I'm asking.

MR. WRIGHT: You knew.

MR. STAUDAHER: Objection. Argumentative.

THE COURT: How many states -- okay. How many states -- I think he was --

MR. WRIGHT: I knew I got that number somewhere.

THE COURT: How many states did you look at in order to prepare that study or to author that article?

THE WITNESS: So that was a study that we did with the CMS and surveyors. It was a pilot of a tool that we developed with them in three states.

(Pause in proceeding.)

THE WITNESS: That's it.

MR. WRIGHT: That's it.

BY MR. WRIGHT:

Q Who's the lead author?

A I am.

Q And did -- this study, I may be wrong because all I've done is read them, but it almost looks like it was

somewhat prompted by what happened here.

A True.

Q Okay. And after what happened here, meaning with this Clinic A, you're aware that there was a look at all of the ambulatory surgical centers in Nevada?

A Yes.

Q Okay. And concerns were raised?

A Yes.

Q And concerns arose because it seemed that ambulatory surgical centers kind of went under the radar while hospitals were being more observed and surveilled; is that fair?

A That's fair.

Q Okay. And it seemed like a lot of medical treatment had moved out of hospitals for little surgeries, little procedures into ambulatory surgical centers.

A Yes.

Q And the surveillance and education and monitoring and like having an on site health control officer didn't keep up in ASCs the same way it did in hospitals.

A That is -- that was a concern, yes.

Q Okay. And did those things prompt this study?

A It prompted our work with CMS on helping surveyors be more systematic about the infection control practices that they're observing. And so this study was us

piloting a tool that we developed for surveyors to use to see how that worked in the survey process and to determine, you know, what was what's going to be found with practices.

Q Okay. And you all -- and when I say you all, I'm talking about that study. With this study, it was put out to all the states calling for volunteers to go through this testing?

A So CMS reached out to their state survey agencies to ask if any -- who wanted to participate in the pilot, yes.

Q Okay. And the four states agreed?

A It was three states in this.

Q Three?

A Yes, sir.

Q You -- and generally what did they -- how did this work? We have the three states, we agree, and you had set up -- you, CDC, you assisted in setting up like a surveillance form, a method of going in and checking best practices?

A Right. So we developed essentially an infection control worksheet is what we called it, that would allow the surveyors, regardless of the states or the facility, to be looking at the same things ideally in the same way so that we could capture information systematically.

Q Okay. And they went out and did that, correct?

Lakeman Appeal 03916

A We went with them in the beginning, representation from CDC. But yes, they continued doing it independently as well.

Q I had asked you about the bad -- the BLC going out and looking at all the ASCs in Nevada took place before this.

A Yes. That's correct.

Q Look at page -- I'll call it page 2 of --

A Okay.

MR. STAUDAHER: What are we referring to, Mr. --

MR. WRIGHT: I'm just trying to refresh her recollection.

MR. STAUDAHER: On what? What are you showing her?

BY MR. WRIGHT:

Q Did that refresh your recollection about the results of the Nevada survey?

A Yes. So this would be information from CMS, not that -- right. So do you want me to go through this, or --

Q Well, I don't want -- want you to read it. Just I'm asking does that refresh your recollection?

A Yeah.

Q Okay. And the -- of the 51 ASCs surveyed in Nevada, 28 had infection control issues?

A Right. So this isn't limited to the use of single dose vials. This is some type of infection control

lapse was noted.

Q Okay. And do we know what -- do you happen to recall -- I mean, this is simply mentioned in here. This isn't the Nevada study.

A Right. So this is information that came from the Centers for Medicare and Medicaid Services, so I don't have -- I don't know the breakdown of single dose vial use. And to be clear, when we're talking about single dose vial reuse here, we're not talking about reuse of syringes to go into those vials. We're just talking about straight use, right, that's how you're--

Q But you all were looking for both, correct?

A Correct. Yep.

Q And like in your survey, you found both?

A In this pilot?

Q No, no. I'm talking about the -- your -- the one you participated in.

A The one here at the clinic in Las Vegas? What --

Q No.

A I don't understand.

THE COURT: Isn't that the article she wrote with the three other --

MR. WRIGHT: It's the article you wrote.

THE COURT: -- states that were studied?

THE WITNESS: Right. So did I observe reuse of syringes, or did we observe reuse of syringes to go into medication vials, no, or for more than one patient, no. If you go to Table 2. Table 2 under injection safety and medication.

MR. WRIGHT: What I read on page 1, 2, 3, 4 --

THE WITNESS: So 2276? Okay.

MR. WRIGHT: Yes. I'm looking at the very top paragraph. I can't figure out the [inaudible].

THE WITNESS: Okay. Right. So we didn't have any instances of syringe or needle reuse.

MR. WRIGHT: Okay. That -- I'm going to go through them.

THE WITNESS: Okay. Sorry.

BY MR. WRIGHT:

Q First, that's 28 percent of all the -- 28 percent of the four pilot states were reusing -- were using single dose vials as multi-dose vials, correct?

A So I'm looking at the table which has the percentages, and 28.1 percent of the facilities including the pilot were reusing single dose vials for more than one patient, correct.

Q Okay. So more than one out of four were reusing --

A Correct.

Q -- multi-dose vials the same way Clinic A here was?

A Multiple reusing single dose vials the same -- and not the same way Clinic A was, because there wasn't reuse of needles and syringes in this instance.

Q Okay. I'm talking multi-dose vials. I'll get to the other components. Okay. They were still, even after Las Vegas happened, all the news, everything else, 28 percent of the clinics persisted violating your best practices, correct?

A Correct.

THE COURT: Mr. Wright, I think we're going to take our morning recess now.

MR. WRIGHT: Okay.

THE COURT: Ladies and gentlemen, we're just going to take a quick recess. Before I excuse you, I must remind you that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on the case, person or subject matter relating to the case, and please don't form or express an opinion on the trial.

Notepads in your chairs, and please exit through the rear doors.

And ma'am, of course, don't discuss your testimony.

THE WITNESS: Thank you.

Lakeman Appeal 03920

(Jurors recessed at 11:04 a.m.)

THE COURT: Yeah, you go this way.

We can take our break too. There are five juror questions up here. The pile of three, I think, are appropriate juror questions. The two I don't think are appropriate questions, but I'll ask them if there's no objections or you want me to ask them. So here's the three and here's the two.

(Court recessed at 11:05 a.m. until 11:18 a.m.)

(Outside the presence of the jury.)

THE COURT: Bring them in.

MR. SANTACROCE: As to the questions, I'm going to object to the two questions. The other three from the jury I have no objection to.

THE COURT: Okay. So the two I didn't like you don't like either?

MR. SANTACROCE: No.

THE COURT: Okay. That's -- all right.

MR. STAUDAHER: I like them. [Inaudible] and I think they actually go to what the last question is.

THE COURT: Well, I think one's argument. One to me is argument like, well, just because everybody's doing it does that mean it's okay. And the other one is to me calls for a legal civil conclusion whether or not there would be liability.

So to me this is -- the first one I didn't like is more of a legal conclusion, and the second one is really, you know, does it make it any more safe. Of course it doesn't. That's more argumentative. I mean, if you want to spin from those questions in some way, you're fine to do that. But, you know, the one calls for a legal conclusion and to me is more like a civil liability issue. But if everybody agreed to them, I'll ask them.

MR. WRIGHT: No. We don't even agree to Your Honor's three. They've been -- the Linda Hubbard one has been asked and answered [inaudible] on cross. And then they bellyache that we keep going over the same stuff.

THE COURT: We can't all agree on what the testimony was. We're supposed to expect that they remember every single thing and wrote it down? I mean, sometimes they might realize, oh, I didn't catch that, I want to ask it. That's acceptable.

MR. WRIGHT: Okay. Whining that we keep repeating the same stuff, that's what I -- we ought to answer. [Inaudible.]

THE COURT: Well, we don't get to object to asked and answered to the juror questions, because that means that they didn't catch it and we're not catching everything. So, you know, I'm amazed that they're still awake frankly. Seriously, I mean, these guys are troopers, and they bring in snacks for

the staff every day.

MS. WECKERLY: That's nice.

MR. SANTACROCE: Not for the lawyers.

THE COURT: I don't think we're supposed to share them with you guys.

MR. STAUDAHER: That's fine.

MS. WECKERLY: That's nice though, that they do that.

THE COURT: Well, you know, we obviously -- the county doesn't pay for anything other than when they're deliberating, so sometimes, you know, Shari will make something and give it to them. I mean, if the county would pay for it, we'd give them breakfast every day, but they won't.

In fact, the county has said that even when they're deliberating we're not allowed to buy them breakfast. We can only buy them lunch and then if it goes past a certain time dinner. But we're not a dinner department. We're not. I don't want to stay.

(Pause in proceeding.)

(Jurors reconvene at 11:21 a.m.)

THE COURT: Court is now back in session. And Mr. Wright, you may resume your cross-examination.

CROSS-EXAMINATION (continued)

BY MR. WRIGHT:

Q The infection control assessment of ambulatory

Lakeman Appeal 03923

surgical centers --

A Yes.

Q -- the nationwide one as opposed to Nevada --

A It's not nationwide. It's just three states.

Q It's pilot -- I mean, they extrapolated from the three states, correct?

A So it's not a nationally -- it's just a small sample in three states. So it's not nationwide.

Q Oh, correct. It was a taking a sample --

A Right.

Q -- and they conclude that it's probably worse than the sample?

A Where --

Q I'll find it.

A Okay. Thank you.

Q Let's go through and ask you just some questions out of the national study. We already covered the 28 percent. These were unannounced surveys, correct?

A Yes. Correct.

Q Just walk in and we're here to survey --

A Yes.

Q -- and then they do their survey?

A Yes.

Q Okay. So 19 percent had hand hygiene problems, we'll skip over that. 28 percent multi-dosing single dose

vials.

A Yes.

Q Then 39 of 68 pilot ASCs were ultimately cited for deficiencies in infection control, and 20 of 68, 29.4 percent were cited for deficiencies related to medication administration, including use of single dose medications for multiple patients.

A Correct.

Q Okay. I was looking at 22, 78, where it said the number of infection control lapses identified is potentially an underestimate.

A Yes.

Q Okay. And why is that?

A It's -- we say before it's not known that if what -- if the observations that were made at the time reflected the routine practices in the facility, so therefore they could -- the observed lapses could be an underestimate.

Q Okay. Nineteen of 67 facilities had deficiencies related to injection practices or medication handling primarily through use of single dose vials for more than one patient, right?

MR. STAUDAHER: Your Honor, I'm going to move to admit this if he's going to go ahead and read from it. I have no problem with that. Let's go ahead and do it.

THE COURT: All right. Do you have any objection to

Lakeman Appeal 03925

admitting the --

MR. WRIGHT: Yes.

THE COURT: Okay. Obviously, Mr. Staudaher, you can also cover what you want out of the study during your redirect examination.

MR. WRIGHT: I gave him a copy. The --

THE COURT: I'm sorry. Was there a question?

MR. WRIGHT: No. I'm looking for something.

BY MR. WRIGHT:

Q Tell me about the evolution of the changing of best practices and standards. What were they in 2000, do you know?

A I need you to be more specific. What best practices are --

Q Well, it seems to me that what was good in like the 1990s by 2005 is no longer good. We've become more safe, more conscious. We're aware of more issues. Am I wrong?

A I don't know how to answer that question without knowing what standards you're referring to before versus now.

Q Okay. Well, do you think the standards today, your best practices have been always the same?

A No. I think -- I think that as you said, you know, we see outbreaks, we learn, and so we make recommendations and as I'm sure that those changed over time. I just can't think of specifics for you.

Lakeman Appeal 03926

Q Okay. Well, was what you call -- or what we call double dipping. Okay.

A Mm-hmm.

Q Double dipping is going back into a vial after I've already used it once on a patient, going back in to re-dose the patient, right?

A Right. And then -- right, and then --

Q Right. Whether it's single dose vial or multi-dose vial, all we're talking now is use of syringe, right?

A Mm-hmm.

Q Going back in --

A Yes.

Q -- using it a second time to use on the same patient.

A Yes.

Q Today best practices are don't do that, correct?

A Correct.

Q Do you recognize that there was a time in the recent past when that was viewed as safe?

A I don't -- I'm -- I've seen articles where reuse of syringes from patient to patient was done in the remote past, but I -- you know, I don't --

Q No, no. Not patient to patient. I mean, in fact, it seems to me there were articles where like in the

'90s, patient to patient were used. I mean places that actually use it on one patient, then they took and changed the needle thinking that that made it sterile and then used on another patient was as high -- was in the --

MR. STAUDAHER: Objection. Assumes facts not in evidence. She's not familiar with this.

MR. WRIGHT: I'm asking [inaudible].

THE COURT: Well, he can ask if that ever occurred in her knowledge, or that was a practice that was --

BY MR. WRIGHT:

Q I mean, do you recognize that was --

THE COURT: I mean, you can probably find one --

BY MR. WRIGHT:

Q -- prevalent in like in the '90s?

A I recognize that that did occur, the prevalence of which I can't speak to. But yes, I recognize that that did occur.

Q Okay. I think they called that overt reuse or something.

A Right.

Q And so that's like using the same needle and syringe all day in a practice and just changing the needle. And then that -- that's not a good practice.

A Correct.

Q And so slowly the incidence of that has become

less and less through education and maybe younger doctors like yourself coming around. Do you recognize that?

A Yes.

Q Okay. And the reuse of the syringe not overt, not patient to patient, but simply I'm going to reuse it on the same patient, we've had doctors in here testify already that that is absolutely 100 percent safe and they would defy anyone to prove how there could be contamination, because I'm using the same needle, same syringe on the same patient.

A So --

Q And that practice was viewed as acceptable, would you agree with that, in the past?

A I can't answer that question. I don't -- I don't know.

Q Okay. And --

A I didn't practice back in the '90s, so.

Q Okay. You were educated in a different time.

A Correct.

Q And these studies that you participate in recognize that somehow there is this lapse, whether it's education, whether it's having an officer on premises or something, but somehow some of these things, best practices just persist not being followed, correct?

A Yes. There are instances where best practices are not followed despite the fact that they should be, yes.

Lakeman Appeal 03929

Q Okay. But a large number of them like in this study, 28 percent reusing multi-use vials?

A Reusing single use vials, correct.

Q Correct. And somehow there is no recognition of the what you see is the risk, correct?

A I can't explain why these people did that, whether it was lack of recognition or other reasons, but that could be one reason.

Q Well, you don't think there's one out of four of those people are criminals just consciously doing something wrong, do you?

A [Inaudible.]

MR. STAUDAHER: Objection. Speculation, Your Honor.

THE COURT: All right. Well, she already said she can't answer.

BY MR. WRIGHT:

Q I mean, who in the CDC -- I mean, maybe I'm talking to the wrong person. Who is it that studies this slow recognition of adopting best practices, the resistance in the healthcare community?

A I don't know as far as a specific study for why certain things are adopted. I know that we have, you know, educational campaigns and do our best to get these recommendations and work with professional organizations into the hands of the providers so that they do follow them.

Q Okay. But you also recognize that there are people out there, healthcare providers that we've heard in this courtroom who insist double dipping is safe?

A I'm aware of that, yes.

Q Okay. And they will argue with you about it and defy you to show how there could be any contamination or any spread of disease.

If we had Ralph McDowell here, a CRNA, he would challenge you and say I take needle and syringe, I wipe off propofol, I air dry it, I go in, I withdraw, I use it on that patient. The patient needs re-dose, I wipe it off, I take the same needle and syringe, I go in, I take it out, I dose that patient again. I then take everything I used on this patient, throw it away. I am absolutely aseptic and safe when I do that is what he says. And is he correct, that he is aseptic and safe?

A So I am not concerned when that practice, if every single one of those steps is followed, resulting in an outbreak of hepatitis C virus infection. What I am concerned is, is when they forget or they skip a step and they don't throw that vial away. That's why it's best practice that you don't re-enter, because mistakes, as you said, happen and you don't throw the vial away, and it's then used on subsequent patients.

So the practice you're describing that he did is

Lakeman Appeal 03931

not -- if they do every single one of those steps routinely, is not going to result in an outbreak of hepatitis.

Q Okay. And so it isn't his practice, it would simply be a mistake or an accident if something happened, that's the risk, correct?

A If his routine knowledgeable practice is that he always does this, you are taking a risk by re-entering that vial even for that patient if you don't discard the vial immediately after the case. So whether accident, intent, distraction, whatever, that's the -- that's the -- what I'm concerned about.

Q Okay.

A And so if I don't re-enter the vial, I've taken that contamination out of the chain and that risk out.

Q Okay. It's just a prophylactic, a preventative type thing to make it less likelihood of an accident, as opposed to it being an improper --

MR. STAUDAHER: I'm going to object to accident. That's not what she's testifying to.

MR. WRIGHT: I wasn't -- I wasn't --

THE COURT: Finish your question.

MR. WRIGHT: I can't remember it. The --

BY MR. WRIGHT:

Q You are -- it isn't the practice if I am doing as I represented to you and I'm wiping the top, doing

everything best practices, and I am simply using one needle and one syringe for one patient, and I can re-dose her, like if it's four doses of propofol and I was using a 20 and it's all done and I'm done with both and I throw it away, that is absolutely safe and aseptic, but your best practices that say I should never do that because I might make a mistake?

A Our recommendation is you don't do that because, yes, if you don't throw that vial away and you use it on other patients, you risk infecting them, yes.

Q Okay. That would be a mistake under my scenario?

A Yes.

Q Okay. And the same thing where we look at propofol, if we use Mr. Sagendorf, who said we in California, in that clinic we use propofol, use it all up, but every single time we go into that 50 or 20 or 10, we use a brand new needle and syringe every single entry, injection, toss it away; that practice is absolutely aseptic, safe and no risk of transmission of hepatitis C?

A I would not see how that would result in hepatitis C transmission.

Q Okay. And it is safe --

A A clean area, new needle and new syringe for each entry into the vial focusing just on hep C, that would not -- I could not see how that would result in viral

hepatitis transmission.

Q Okay. And the once again, best, if these best practices were rules, they would be -- Mr. Sagendorf, the clinics he work at are violating the best practices of the CDC?

A They're violating the labeling on the medication, the best -- the recommendations of CDC, the recommendations of the American Society for Anesthesiology, and the recommendations of varying other professional organizations.

Q Okay. Violation, violating any regulations or laws or statutes you're aware of?

A Through the Centers for Medicare and Medicaid Services, yes. They, when they inspect, would issue a citation if they saw multi-patient use of a single use vial.

Q Okay. On the multi use, it's presently, did that occur in 2009?

A No -- I'm sorry. What?

Q The no -- I'm not talking about syringes now. The multi use, CDC -- not CDC, what's the other one?

A CMS, Medicare.

Q Right. 2009, that was implemented?

A That sounds about right.

Q So that never happened until after this?

A I don't know if it happened prior to this, but

it was on the worksheet that they were supposed to be using systematically to assess that practice. I don't know if they did or didn't cite previous to that, but it was made a systematic thing to actually look at that.

Q Okay. Before recommendations, the teeth were put into it in 2009, correct?

A I'm sorry. Can you repeat?

Q Teeth were put into it, that's the way I call it.

A Sure.

Q So and of course the events here occurred in 2007.

A Yes.

Q Okay. Now, the -- the changing of the needle practice, okay.

A Okay.

Q You're aware of the what do you call it, misbelief, misapprehend -- I mean, what do you call the myth that that is safe, or the miss --

A I'm aware of that.

Q Okay. And what practitioners believe, that putting a new sterile needle on the syringe is -- makes it safe --

A Yes.

Q -- that's a myth out there, right?

A Yes. Yes.

Q And do you know where that came from?

A I don't.

Q Okay. And the -- but there are -- you understand that even today on the various studies, that there are still practitioners believing changing needles makes it a safe unit to use again?

A Yes. I believe there are still practitioners that believe that changing the needle makes it safe for syringe use.

Q Okay. Have you seen that before?

A Yes, I have.

Q Are you familiar with what it is?

A I'm familiar with what it is, but if you're going to ask specifics, I want to -- are you going to put it up here so I can look?

Q Yeah.

A Okay. Thank you.

Q First I need to mark it.

A Okay. Thank you.

MR. WRIGHT: Next in order.

THE COURT: Did you show that to the State?

MR. STAUDAHER: Yes. No objection to its admission.

THE COURT: No objection. All right. We can admit that then.

Lakeman Appeal 03936

(Defendant's Exhibit M-1 admitted.)

MR. WRIGHT: Misperceptions, that was the word I was looking for.

BY MR. WRIGHT:

Q Exhibit M-1, are you able to read that?

A Yes, sir.

Q Is this currently utilized?

A It's from -- it's not from the CDC website. It's from the One and Only Campaign website. I don't know if this is still on there or not.

Q Okay. Are these -- I mean, these myths and truths are still persistent and they're still being taught out there?

A Right. We're still trying to debunk the myths.

Q Okay. And the first myth, it says, "Dangerous misperceptions. Here are some examples of dangerous misperceptions about safe injection practices. Myth, changing the needle makes the syringe safe for reuse. Truth, once they are used, both the needle and syringe are contaminated and must be discarded. A new sterile needle and a new sterile syringe should always be used for each patient and to access medical vials," correct?

A That is what it says.

Q And so this is -- this comports with your CDC best practices?

Lakeman Appeal 03937

A Correct.

Q And next one, "Syringes can be reused as long as an injection is administered through an intervening length of IV tubing."

A That's what it says under the myth, yes.

Q Okay. And it's a myth because we didn't really utilize IV tubings, and in this case --

A Correct.

Q -- it hasn't been discussed that much other than at [inaudible]. But with an IV tubing, is there a myth that if I inject way up high on the tubing there isn't any chance of contamination?

A I think there's a myth if you inject anywhere within the tubing that there -- it prevents contamination.

Q Okay. If you don't see blood in the IV tubing or syringe, it means that those supplies are safe for reuse?

A That is a myth.

Q That's a myth. And the truth is what?

A Do you want me to read it?

Q Or you can just say it, either way.

A Just that you can have viral or bacterial pathogens present even without visible blood in the syringe or the tubing or the needle.

Q Okay. "Single dose vials of large volumes that appear to contain multiple doses can be used for more than one

Lakeman Appeal 03938

patient." And the best practice is it should not be used for more than one patient, correct?

A Correct.

Q And the -- this still -- M-1 still has to be utilized and taught and have webinars, because people still persist that they are acting safely in doing certain things which don't comport with best practices, right?

A Correct.

Q When you went back to Atlanta back in 2008, you CDC, you all were continuing to communicate with the Southern Nevada Health District?

A Yes.

Q Okay. And Southern Nevada Health District and you all were formulating a notification plan because of the unsafe practices that had been observed at the clinic?

A Yes.

Q Okay. Now, you know ultimately it ended up an approximate four year patient notification?

A Yes.

Q Okay. Was there a plan within CDC to make it a lesser six month?

A I don't -- I don't recall.

Q Okay.

A That might have been discussions with supervisors and others. I don't recall.

Lakeman Appeal 03939

Q I'm asking because I saw in your notes --

A Okay. What page? If you show me, I might be able to figure --

Q Can't read the --

A What's the page before, can you read that one?

Q Sixteen, 19, 20.

A So this page. This page?

Q Yes.

A Okay.

Q Just look at that, read it to yourself.

A Okay.

Q Does that refresh your recollection at all?

A Somewhat.

Q Okay. I know. It doesn't make a lot of sense to me either, but it looks like to me there was a proposal for a six month notification, and then depending upon the results it may be expanded. Does that look --

A So again, and I'm limited in my recollection here. I'm -- you know, I think that there was, at least from what the notes here, discussion of focusing on, you know, we had transmission in July and September, so focusing on that period and doing really intense following of all the results to do -- and for CDC to do additional specialized testing to look for other clusters of transmission so that, you know, we could focus on that time period.

Lakeman Appeal 03940

And I don't recall if -- if at this point in time there was uncertainty about the duration that syringe reuse and the reuse of the vials had been going on, because sometimes that's a factor in. And if, you know, it was just a new employee that started doing it this week and it had never happened before, you don't have to necessarily notify everyone in the history.

It's kind of the duration of how long the unsafe practice had been occurring. And so that's -- I'm wondering if that was part of the discussion there. I can't recall specifically.

Q Okay. You do recall that there was a -- and you don't know who decided like to make the decision to go for four years rather than six months?

A Well, I think -- I think we had information suggesting that the unsafe practices had been going on for that entire span. And we know that that is a practice that can result in transmission, so the right thing to do is to notify all those patients. So I don't --

Q Okay. Well, why -- why would you then be talking about six months? Because this was all -- what you're telling me was all known at that time.

A So I don't -- I don't know -- I don't -- again, you know, this is, you know, 5 1/2 years later. I can't recall the specifics of the conversation that informed these

Lakeman Appeal 03941

notes. But in looking at these notes, it talks about CDC getting samples for all the positives identified during that six-month window, and doing very, you know, active tracking of those patients in that period when we had transmission.

You know, obviously when you're notifying 50,000 patients, keeping your arms around all of them and doing active tracking and getting blood on all of them is just not a feasible thing to do. So, you know, but again, I'm trying to interpret notes from, you know, several years ago.

Q Okay. But they're -- they're yours.

A From 5 1/2 years ago.

Q Okay.

A Right.

Q I mean, I presume you can know better than I, but it looks like from July 1 to present as first possible; is that -- on five days in question?

A So this would have been in -- while we were still in --

Q Potential to expand to years before.

A So this looks like, if the dating on here is correct, this would have been on the 16th, so we would have still been in Las Vegas.

Q Okay.

A So I think, you know, the investigation is still going on as far as the prevalence of this practice. I haven't

Lakeman Appeal 03942

spoken to Mr. Lakeman yet, so.

Q Okay.

A That's the best I can do to interpret.

Q And this is a final, Linda Hubbard, okay?

A Okay.

Q She would be in the multi -- multi patient use of single use vial category of my two hypotheticals, correct?

A Yes.

Q And so she would be not best practices, but totally aseptic and safe?

A Well, she wasn't aseptic. She didn't have --

Q Oh, right. She had --

A -- hand hygiene.

Q She had the glove problem.

A She didn't perform hand hygiene. She had the meds in the patient care area. So she was not aseptic.

Q Yeah, you're right. But I mean, her -- she was not reusing. She was solely multi using the vials, correct?

A She was not reusing needles and syringes to re-enter vials.

Q Right.

A She was reusing vials for multiple patients.

Q So she wasn't double dipping?

A Correct.

Q Okay. Thank you.

THE COURT: All right. Mr. Staudaher, redirect.

MR. STAUDAHER: Yes. And I know it's close to lunch, so I will try to be as brief as possible.

REDIRECT EXAMINATION

BY MR. STAUDAHER:

Q In your -- let's take off with where Mr. Wright just left off, Ms. Hubbard. You were asked about her practices, correct, whether they were aseptic or not, and you said they weren't?

A Correct.

Q And even in your notes, and if you have to refer to those, that's fine too, beside the fact that she was doing the glove thing, was there other thing -- or were there other things that you observed her doing that -- the state of her back table where the medications were being housed, how she handled the syringes in certain situations with the patients that caused you some concern?

A Yes. So, you know, obviously there were, as I've stated previously, multiple open vials of propofol, so she was pooling vials of propofol. And there were instances, and I have to look at the notes, but where she would -- let me refer just to...

I'm sorry. It's going to take one second. Do you have --

Q It's near the back.

A Okay. Right. So multiple -- she also at certain points had multiple syringes of propofol left on the table between cases, during cases. So if -- and I never saw this happen, but if, you know, you gave some propofol to a patient and set the syringe down next to other clean syringes that you had pre-drawn and weren't paying attention and grabbed the wrong one, there's the potential, you know, for using a used syringe on a patient. I didn't see that happen with her.

Q So you didn't actually see her grab a used syringe and use it on a new patient, but she was mixing the area where they were with used and new syringes?

A Yes.

Q So we have --

A Or she would set down the used syringe and --

Q That's what I meant.

A Right.

Q Okay. So we got multiple bottles of open propofol, we've got syringes that are filled, we have syringes that have been used dropped near or put near areas where syringes that hadn't been used were being kept; is that fair?

A Correct.

Q And then the general state of clutter or lack thereof of her station or the area that she was working, did that give you any concern?

A Again, just for, you know, for -- yes, for if you grab the wrong thing and get mixed up. And as I said, you know, I had concerns of her coughing into her hands and not doing hand hygiene, doing these prep of meds in a patient care area.

Q So at least the potential, based on what you saw directly in front of you with Ms. Hubbard, of really a breach coming if circumstances arose?

A Right. Correct.

Q Now overlay that, and counsel asked you about specific things where you were, you know, you eliminated the scopes for whatever reason, then you eliminated this and you eliminated that as far as mechanisms of transmission, correct?

A Yes.

Q You were left with the one that you actually observed and saw and had people admit to you that they did it?

A Yes.

Q One of the things you were asked specifically by Mr. Wright was regarding speed, speed and isolation; meaning speed of procedures and isolation, I think you said, didn't necessarily have an impact, correct?

A Yes.

Q Overlay speed of the turnover though, which is what you said it doesn't -- I think you used -- caveated that by saying it wasn't turnover, correct --

Lakeman Appeal 03946

A I don't recall.

Q -- that you were considering?

A Well, I'm sorry. Can you -- I don't --

Q Bad question. The speed of the turnover; meaning patient rolling in, patient rolling out, patient rolling in, patient rolling out.

A Yes.

Q Overlay that with what you saw in Ms. Hubbard's situation.

A I just think it can up the chances of making a mistake, but assuming you don't make -- anyway, yes.

Q Go ahead.

A No, it -- the faster you're doing something, you know, I'd be concerned that you can miss a step or something can happen and you can make a mistake.

Q Okay. So overlay the speed to a degree that it taxes the employee, the person doing the -- the healthcare provider to such a degree that they are having trouble keeping up; would that be also a problem overlaying these other things that you saw?

A Sure, that could be a concern.

Q So when you bring -- when you talked about totality of the circumstances --

MR. WRIGHT: Objection. Objection. We didn't talk about totality of the circumstances. This isn't a tort case.

THE COURT: Well --

MR. STAUDAHER: I think -- did you use that word?

THE WITNESS: I thought I did, but...

THE COURT: I think -- okay. I think she did.

MR. STAUDAHER: That's why I was asking it. It came up on cross.

THE COURT: That's fine. It's overruled.

THE WITNESS: Because we were asking that isolation --

THE COURT: I believe that that was her phrase, so you can ask her what she means or whatever. So Mr. Staudaher, go ahead and state your question.

MR. STAUDAHER: Thank you, Your Honor.

BY MR. STAUDAHER:

Q When you said totality of the circumstances, I mean, were you looking at like speed and isolation, or this in isolation, or were you looking at everything that you investigated?

A We're looking at the totality of care, of all these factors together.

Q Mr. Wright also used the word multiple times absolutely safe, you know, when he was describing those practices. In those settings, overlaying the speed, the clutter, the open bottles, all that kind of stuff, even if you were following those practices, do you think it's absolutely

safe under those conditions to perform the acts like Mr. Wright described?

A Well, I think as I said to Mr. Wright, CDC doesn't recommend those practices for a reason, so I don't think that they're absolutely safe.

Q There is a risk?

A Yeah.

Q Now, in fact, with Mr. Lakeman, he acknowledged, did he not, that there was a risk and that he just took steps to minimize that risk?

A Yes.

Q So this isn't a question about whether or not people perceive or don't perceive something as being risky or not risky, you have admissions to that effect?

MR. WRIGHT: Objection.

THE COURT: Yeah. That's sustained. I'm not sure why either, but --

MR. WRIGHT: And it --

THE COURT: Mr. Wright, I sustained your objection, so that's enough.

MR. WRIGHT: Oh, sorry.

THE COURT: Mr. Staudaher, can you rephrase the question --

MR. STAUDAHER: I'll move on.

THE COURT: -- or move on.

Lakeman Appeal 03949

BY MR. STAUDAHER:

Q And clearly safety and risk are something that you look at every day, correct?

A It's something I consider in these investigations and with the work I do at CDC, yes.

Q And as you said, CDC has the practices in place, the best practices for a reason?

A Right.

Q In a situation -- well, strike that.

I'm going to go to your article for just a minute.

A Which one?

Q Now I'm talking -- and let's get to the right article.

MR. STAUDAHER: And I move for admission -- I didn't hear what the --

THE COURT: And I believe Mr. Wright wants you to have --

MR. WRIGHT: Objection.

THE COURT: -- a chance to read the article. Do you have any objection?

MR. WRIGHT: Yes.

THE COURT: Okay.

MR. STAUDAHER: The article that he questioned? Okay. I'm sorry.

THE COURT: No. I thought you were talking about the

article from yesterday.

MR. STAUDAHER: No. I'm talking about the one today, the --

THE COURT: Oh, I'm sorry.

MR. WRIGHT: Yes. I --

THE COURT: That one was admitted, correct, or no, you didn't want that admitted?

MR. WRIGHT: No.

THE COURT: Okay. That's not admitted and that hasn't been --

MR. WRIGHT: She simply --

THE COURT: It hasn't been marked. That's fine. Okay.

MR. STAUDAHER: Okay. I would like to --

THE COURT: Just so we're clear. I was confused about which article you were asking.

BY MR. STAUDAHER:

Q I'm talking about the one entitled "Infection control assessment of ambulatory surgical centers," and it appears to be published in JAMA, the Journal of the American Medical Association?

A Yes.

MR. STAUDAHER: And I would move for at least it to be a court's exhibit before we're done today, so we have that.

BY MR. STAUDAHER:

Q But in this article, is JAMA a peer reviewed journal?

A Yes.

Q I mean scientifically accepted in the public and the like?

A Yes.

Q The journal you referred to yesterday and somewhat today, the Clinical Infectious Disease journal, is that likewise a peer reviewed journal that's accepted and used and relied upon in the medical community?

A Yes.

Q In this particular instance, is it important when you do studies to -- I mean a sample size, if you are looking at a population study, important?

A Yes.

Q The smaller the sample size or larger the sample size, does it have an effect?

A It can, yes.

Q In this particular case you said that there were three states involved --

A Yes.

Q -- in the pilot study.

And those states were what again?

A It was Maryland, Oklahoma and North Carolina.

Lakeman Appeal 03952

Q And if I see the information here, it says there were 32 centers in Maryland, 16 in North Carolina and 20 in Oklahoma that were reviewed?

A Yes.

Q So of those three states, those 60 -- what is it, 63 centers?

A Sixty-eight.

Q Sixty-eight. Sorry. My math's bad today. Sixty-eight centers is your sample size?

A Yes.

Q Nationwide, correct? I mean, that's how -- I mean, if we talked about all surgical centers across the nation and you only looked at 68 in this particular instance?

A In three states.

Q Right. So you said over and over again this is not -- you can't extrapolate to the nation based on this limited sample size?

A We make a statement in the article that the pilot was conducted in a very -- in a small number, and that the findings may not be generalizable among -- beyond those 68 ambulatory surgical centers that were piloted, yes, we say that.

Q And if you would go to Table 2, the one that you referred to specifically under injection safety, handling of medications, that section.

Lakeman Appeal 03953

A Yes.

Q You said, and I'm looking at the numbers here myself now, that you did not observe the practices that were admitted to or observed by CDC in Nevada; is that correct, at any of those locations, except for the propofol being used from patient to patient?

A So we saw single dose, or the group who did this, so, you know, including the surveyors did see single dose vials being reused, but didn't see the reuse of syringe component that we saw in Las Vegas.

Q Okay. So needles and syringes used, didn't see that -- reused?

A Needles and syringes used for more than one patient, none of the three states reported that.

Q Okay. And then there was also on a section that says, new needle, new syringe not used to enter medication vials for more than one patient?

A Yes. And that was not observed in any of the three pilot states.

Q Now, those are in the three pilot states, and the total number that you saw out of the, and it's got 64 here, 18 of 64 --

A Yeah. So I'm sorry, where -- oh, for the single dose vial?

Q Under where it says single dose medication.

A Yeah. So the denominator, meaning the 64, there may be instances where the surveyor didn't complete that question. So that was why it's not 60. There were probably four instances where, you know, they didn't observe it or didn't, you know, document. They left it blank or something.

Q So of all the centers that we're looking at, 16 of them were reusing propofol or the medication vials from patient to patient?

A So 18 of the facilities were using single dose vials --

Q Eighteen. Sorry.

A -- not necessarily propofol, but single dose vials.

Q Something.

A Something. A medication labeled as single dose for more than one patient.

Q Does that make it okay?

A No.

Q In fact, it goes against the recommendations you've talked about, correct?

A Yes. Which is -- yes.

Q Now, you said the purpose of this study was to develop an infection control sheet for people that went in to look at these clinics, or these ambulatory care centers so that they would know what to look for.

A Right. So we developed it and this was piloting it so that it could be used more widespread beyond these three states.

Q So is it fair to say that prior to that the agencies that did that didn't necessarily have a road map to follow as to what to look for when they went to inspect?

A So I don't want to speak for Medicare's process other than to say I think we both agreed that having a standardized tool focusing on encouraging surveyors to actually do observations of practices in a standardized manner was necessary and important.

Q And that was the purpose of this?

A Yes.

Q Mr. Wright asked you the question about by doing what you're talking about with the patients, or what he was talking about with the patients with, you know, reusing a syringe on one patient with one vial and then throwing the whole set away; do you remember that?

A Mm-hmm.

Q That if you follow that practice, and it's not the recommendation clearly, but if you follow that practice you didn't see how that would create some sort of infection in the next patient, or at least a --

A Well, the vial wouldn't be used on the next patient. Their syringe and needle wouldn't be used on the

Lakeman Appeal 03956

next patient, so there is no next patient, so there can't be transmission because you've thrown it all away for his scenario [indicating].

Q So that's in a setting where you've got the time to do those things appropriately, correct?

A It's -- again, I can't say the setting, but if it's the practice that you are throwing everything away.

Q Would you consider that still acting safely and prudently and economically to do it that way?

A It's not recommended by CDC, so that's all I can say.

Q Now, when you were here in Las Vegas and subsequently going back for the initial part of the sort of communications that Mr. Wright was talking to you about, were you aware of any instances where propofol had been reported as having been moved from room to room by CRNAs?

A So when I was in Las Vegas doing the field investigation, was I aware of reports of propofol moving room to room, no.

Q So if that was information that you had, would that have undermined, made no difference, or supported your ultimate conclusions in this case?

A Well, keeping in mind we didn't have room assignments for patients to know, you know, they could have all been in the same room, but yes, that -- that supports our

conclusions.

Q I mean, if -- and I'm saying when I ask that question, I'm assuming at this point, and we've got actually the evidence now, that there's been a way to determine the rooms of the patients.

A Right.

Q And that there was evidence that propofol moved from room to room.

A And there's evidence, I think, from the exhibit yesterday that there were cases in both rooms; is that --

Q Correct.

A So yes, propofol moving room to room would strengthen our conclusions about propofol, contaminated propofol being the vector.

Q Last question for you. All the pieces of information, things that you've been shown in court, the -- looking back on hindsight, all the experience you have now, everything that you know, is there anything that one would have done differently or that you feel has come to light that would change or alter your ultimate conclusion that this infection outbreak occurred through unsafe injection practices, the types that you observed and heard about and saw here?

A My conclusion is still that I think this outbreak occurred from unsafe injection practices through the

reuse of syringes to enter propofol vials and then using those vials for multiple patients.

MR. STAUDAHER: Pass the witness, Your Honor.

THE COURT: All right. Mr. Santacroce, any recross?

MR. SANTACROCE: Yes. Can you read the juror questions, because I wanted to follow up on one of those?

THE COURT: Oh, okay. All right. We have some juror questions up here, and I'll just ask them at this point. A juror had asked -- and I think you may have already covered this after the question came in, but I'll just ask you anyway. Did you ever witness Linda Hubbard double-dip with the propofol to re-dose a patient while she was pooling the vials?

THE WITNESS: I did not.

THE COURT: All right. Was Dr. Fischer Langley also in training during the time that you were inspecting the Endoscopy Center of Southern Nevada?

THE WITNESS: Yes, she was.

THE COURT: During your inspection of the endoscopy center, you had six months of CDC experience. You now have five additional years of CDC experience. In hindsight, would you have done anything differently during the inspection or looked more deeply into other areas of the clinic now that you're a more experienced investigator?

THE WITNESS: No.

THE COURT: Is it part of the CDC mission to disclose

Lakeman Appeal 03959

unsafe practices to local authorities who have enforcement authority over healthcare facilities that you inspect?

THE WITNESS: So I would need a little bit more context for that. Is that like assuming that a report comes directly to CDC about an unsafe practice, or something that we identify during like an Epi-Aid investigation like this?

THE COURT: Either way.

THE WITNESS: So --

THE COURT: Let's say you learn of an --

THE WITNESS: Do you want me to do --

THE COURT: Yeah, do both, how that works.

THE WITNESS: So if we are in -- so doing this investigation, we're there at the invitation of the health department, right. So we're sharing with them what we're finding, and then the health department has authority to either take whatever action in their jurisdiction. So they're aware.

If CDC gets an independent report coming in through email or something of something unsafe, we're going to connect that reporter with the health department to do appropriate follow up, because again, as I've said, we can't just go into a state on our own and do whatever we want.

So we do our best. If we get a report of an unsafe practice that isn't anonymous, that can be tracked somewhere. If it's anonymous, we'll write back and say you should let the

health department know, this is bad, you should, you know, whatever, do XY or Z. But if we can, you know, make the connection, we try to do that so it can be followed up.

THE COURT: And then if the health department of whatever state wants to invite the CDC to assist the investigation, they can do that, right?

THE WITNESS: They can do that, yes.

THE COURT: And then do you make enforcement recommendations to state authorities such as, you know, close the clinic or, you know, whatever?

THE WITNESS: You know, I don't know how to answer that. You know, we will talk to them and maybe make recommendations about have you engaged the licensing board for the physician or nurse, you know, have you -- have you engaged the regulatory folks to come in and do an assessment. So there is some of that discussion going on depending on the scenario and if it's warranted.

THE COURT: Okay. Mr. Santacroce.

MR. SANTACROCE: Thank you.

RECROSS-EXAMINATION

BY MR. SANTACROCE:

Q I wanted to follow up on that one question that asked you if you would, as you looked back in hindsight, if you would have done anything different. Okay?

A Okay.

Lakeman Appeal 03961

Q As I understand it, you left Nevada, you being the investigative team, left Nevada in mid January 2008, correct?

A Yes.

Q And you left a preliminary findings report when you left, correct?

A Yes.

Q And that finding was what you stated here, that you believed the transmission was through propofol?

A Yes.

Q And that opinion has never changed, correct?

A That is still my opinion, yes.

Q And then when you got back to Atlanta after the middle of January, did you do any follow-up investigation?

A Can you be more specific? Talking to Mr. Lakeman or --

Q Whatever.

A Yeah. I mean, I called Mr. Lakeman as part of that investigation. And then I need you to be more specific, because I --

Q Let's talk about Mr. Lakeman. When you got back to Atlanta, you talked to Mr. Lakeman on the telephone?

A I did.

Q And one of the things he told you which you had not observed was that biopsy equipment was being reused?

A Correct. That's what he stated.

Q Did you follow up on that portion of the investigation?

A So when we left, the investigation is still going on through the Southern Nevada Health District folks, right. So that was communicated to them and they continued to do the ground investigation to look at, I believe, purchase records or whatever else. But going back again, we still -- it ultimately hasn't changed my conclusion because not all of our patients got biopsies.

Q I'm not asking you that, ma'am. I'm asking you if you did a follow-up regarding the reuse of the biopsy equipment.

A So I believe the Southern Nevada Health District was doing that.

Q What did they do?

A I can't speak to -- they'd have to answer that. I think they looked at purchase records, but I'm not --

Q Well, how do you base your opinion that the Southern Nevada Health District followed up on that?

A Because I believe there were conversations and I've seen previously they have a report I haven't -- you know, addressing some of that. I didn't specifically review that whole report for this testimony, and so I -- that's all I can say.

Q When you got back to Atlanta, you knew that the source patient on July 25, 2007 and the infected patient, the only one that day that's been reported to us both had biopsies, correct?

A Correct.

Q And now you had information from Mr. Lakeman that biopsy equipment had been reused, correct?

A Correct.

Q What did you do to follow up on that possible, which you've already indicated was a possible means of transmission? Did you do any further investigation regarding the source patient, Mr. Washington, and the reuse of the biopsy equipment?

A Well, so while we were on site, biopsy equipment was not being reused, so I was not so concerned about going back to them and saying stop doing something I didn't observe you doing in the first place. But Southern -- I did not independently do anything further about the biopsy equipment. That was communicated back to the health department for follow up.

Q Ma'am, by your own admission in your report, you noted that the investigation took place five months after the infection dates, and you had concerns that the practices weren't the same as they occurred on the transmission dates. You noted that in your findings and on the last page of your

report, that it was a concern to you.

A We noted in the --

MR. STAUDAHER: Is there a question?

MR. SANTACROCE: Yes.

THE COURT: True or yes.

MR. SANTACROCE: That is the question.

THE COURT: Okay. Is that correct?

THE WITNESS: So we noted in the limitations of our study that we were not present in July and September to observe the practices, but by our observation or, I'm sorry, Dr. Langley's observation, syringe reuse was happening even while we were there and was not a new practice, and by my interview with Mr. Lakeman the same thing.

BY MR. SANTACROCE:

Q So the fact that you didn't observe it didn't mean that it didn't happen, because you had new evidence, new testimony, new information that biopsy equipment had been reused, and that the two people in question on one of the infection dates both had biopsies, correct?

A Yes.

Q You also became aware that you had some incorrect information on your trip report, specifically the table, specifically that Mr. Lakeman had started both heplocks on July 25, 2007, when that wasn't true?

A I became aware of that yesterday, yes.

Lakeman Appeal 03965

Q That's the first time?

A I believe so, yes.

Q And did you become aware of this fact yesterday, that the one RN had started heplocks on one, two, three, four, five, six, seven of the infected patients on September 21, 2007?

A Yes.

Q Okay. Is that the first time, yesterday?

A That you pointed out that, yes.

Q So there was -- there has been no interview prior to yesterday of Lynette Campbell, who started those heplocks?

A By us? I don't recall who we interviewed at the facility. We may have talked to Ms. Campbell. I don't recall.

Q Do you recall if she was even working there when you were there?

A I don't recall.

Q The interview with Mr. Lakeman, when he talked about double dipping procedure -- or double dipping, he emphatically told you that he never reused the same needle and syringe on multiple patients; isn't that correct?

A From patient to patient, correct, he did say that.

Q Now, Mr. Wright had asked you about the changing

procedures over the years of recommendations from CDC. All of the CRNAs that you interviewed were all trained in the '60s and '70s; isn't that true?

A I don't know.

Q Well, they're much older than you are, aren't they?

A They are older than I am, yes.

Q And the testimony has been in this courtroom that most of them were trained in the '60s and '70s. Do you know what the procedures were in the '60s and '70s for the reuse of multiple dose vials of medication?

A I can't answer that. I wasn't practicing in the '60s or '70s.

Q Were you practicing in 1985, when propofol came out?

A No.

Q You don't know what the procedures were for these trained CRNAs in 1985, when propofol came out; isn't that correct?

A I don't know what the procedure for these four were, no.

Q But we do know that all of the CRNAs at the facilities were using the same procedures, weren't they?

A No, that's not correct.

Q Okay. Tell me how they were different.

Lakeman Appeal 03967

A Ms. Hubbard was not reusing needles and syringes to enter the propofol vials, nor was, I believe, one of the Vinnies that you spoke to. Mr. Mathahs and Mr. Lakeman were the only two that I'm aware of that were reusing needles and syringes to go back into the propofol vials for multiple patients.

Q That you were aware of?

A Correct.

Q So if there were other testimony in this courtroom that you weren't aware of, you would have no knowledge of that, correct?

A Correct.

Q And the fact of the matter is --

MR. STAUDAHER: Your Honor, I'm going to object to that. I think it mischaracterizes the testimony that has come in, in this case.

MR. SANTACROCE: The Court has already instructed the jury numerous times about the recollection.

THE COURT: That's sustained. But again, ladies and gentlemen, it's your recollection. I don't recall that, but...

BY MR. SANTACROCE:

Q All of the CRNAs were reusing propofol, correct?

A For multiple patients, yes.

Q So they all had that in common?

A Yes.

Q Now, Mr. Staudaher asked you about propofol moving from room to room and you said, oh, that would support my conclusion, correct?

A If there are cases in separate rooms, yes.

Q Wouldn't there have to be proof that those cases in separate rooms, the propofol had been moved from room to room? Looking at this chart again, remember we went over this yesterday, two rooms?

A Yes.

Q One, two, three people infected in Room 1, one, two, three people infected in Room 2?

A Mm-hmm.

Q Wouldn't there have to be some evidence that propofol actually went from Room 1 to Room 2 at or near the same time that these people were infected?

MR. STAUDAHER: Objection. Calls for a legal conclusion and it belies the testimony and the evidence.

MR. SANTACROCE: It does not.

THE COURT: Well, no, I think it doesn't call for a legal conclusion. You can make a -- she can make a factual conclusion, if that would call for some transfer from one room to the other. Assuming that, you know, the chart indicates that the top people are one room and the bottom people are a second different room.

Lakeman Appeal 03969

THE WITNESS: Okay. So assuming -- assuming that, and that we have this orange is the source patient, then for these green patients in another room to be infected, yes, the propofol, contaminated propofol vial or vector would have at some point prior to these people's procedure have to have gone into another room.

BY MR. SANTACROCE:

Q The infected bottle would have had to go into that room, correct?

A An infected vial, whether it was an original one or whether the contamination was perpetuated to other vials somehow, the virus would have had to go from this room to that other room before these patients' procedures, yes.

Q And when you did your investigation, you didn't even know what room these patients were in, did you?

A No.

Q And in fact, when Mr. Staudaher told you that propofol was moving from room to room, and again, this is my recollection of the testimony, the jury can recollect their own, but the evidence has been that it only moved from room to room in the late afternoon during the last procedures. Okay. Knowing those facts, would it change your opinion?

A Well, we were told that propofol didn't move from room to room. You're saying that it did.

Q No, I'm not saying that. Mr. Staudaher told you

that. And I'm saying that what the evidence suggested so far, that it did move from room to room except in the late afternoon when they were closing down.

MR. STAUDAHER: That actually is incorrect based on Mr. -- that we have a box of stuff that goes from room to room that we had testimony of that had --

THE COURT: All right.

MR. SANTACROCE: And you have not identified that propofol went in this box from room to room.

THE COURT: Okay. Ask them -- okay. Again, obviously it's the jury's recollection. That's disputed, what the evidence and the inferences are. Mr. Santacroce, ask your question is --

MR. SANTACROCE: Would that change --

THE COURT: -- if the evidence were, or if your understanding was that the propofol moved at the end of the day, would that affect your opinion or...

MR. SANTACROCE: What she said.

THE WITNESS: Thank you. So if the vector of transmission, the contaminated vial, whatever, moved to the room after these patients' procedures, that would have an impact on, you know, my conclusion that that's how transmission could have occurred.

MR. SANTACROCE: Very good. Thank you, ma'am.

THE COURT: Mr. Wright.

Lakeman Appeal 03971

MR. WRIGHT: Yep.

THE COURT: Any recross?

MR. WRIGHT: Recross and regular cross. I forgot something.

THE COURT: Oh, okay.

RECROSS-EXAMINATION

BY MR. WRIGHT:

Q On the totality of care, you were out there looking for hygiene problems, any kind of problems you observed that were inconsistent with best practices you would bring to their attention, correct?

A We would try to get addressed, yes.

Q Okay. That's -- that was the totality of the care you were looking at; is that fair?

A I mean, what we're looking at is not limited to just infection control. I mean, we're looking at order of patients. We're looking at --

Q Okay.

A -- you know, all -- so that's the totality of care, the general practices in the facility.

Q Okay. And anywhere in your trip report does it talk about the likelihood of transmission of hepatitis C because of the speed of the procedure?

A It does not.

Q Okay. Because that was not a concern at all,

Lakeman Appeal 03972

correct?

A You know, we noted that they did a high volume of procedures with quick turnover. And so when you do quick turnaround of rooms through procedures, there is a possibility of making mistakes, as opposed to if you're taking a long time.

Q Okay. Where's that noted in there?

A It's not in the report -- well, in the report actually, hold on. I don't think it's explicitly noted in the report. What I was looking for is I think we mentioned the volume of patients seen for a two-room facility, but we did not explicitly --

Q Right. You said they do 50 to 60 procedures a day.

A Yes.

Q That's what they reported and that's what they were doing and that's what they did on the dates in question, correct?

A Yes.

Q And there's nowhere that that raised any concerns about gee, maybe that's why hepatitis C was the method of transmission, correct?

A Yeah. We didn't address that in the report, correct.

Q Okay. Because it wasn't, correct? Do you think

Lakeman Appeal 03973

that was the method of transmission?

A I think the reuse of syringes in the medication vials that they used is the method of transmission, and why that happened is not what you're -- what I'm --

Q Right. And you don't deal with anything at all in your epidemiological study regarding knowledge, intent, risk, the mental component that the criminal law deals with, right?

A We don't do criminal investigation, but obviously we do ask, you know, why was this practice going on. I mean, Mr. Lakeman indicated, you know, that he thought he was being safe by doing it holding the plunger down. So again, it's getting at the mechanism of why would you think this is okay.

Q Okay. But you find -- you're looking for what happened regardless of accident. It makes no difference at all, you want to stop what happened. Whether it's mistaken belief, whether it's misunderstanding, misapprehension, you want to stop it, correct?

A I do, but I also want to try to learn why it happened so that I can -- we can educate others about taking those factors out of play.

Q Okay.

A But yes, you're right. I want to stop it from happening.

Q Okay. But there isn't anything in your report regarding whether it was accidental through misunderstanding, through miseducation, or whether it was intentional or knowing, absolutely knowing exactly what the rules are and turning a blind eye to them, none of that is addressed in your findings and conclusions, correct?

A We do not address the intent in the report. But --

Q Correct.

A Okay. Correct.

Q You don't in any report. You're not a criminal investigator, are you?

A I am not.

Q Okay. Have you seen this before?

A I don't think I have. I don't think so. Oh, yes. I think I have seen this before, but this is from --

Q 2006.

A -- several years ago. Yeah.

Q Okay. And what is that?

A So it's a provider education from California about Medicare Part B.

Q And that's CMS stuff?

A Yes.

Q Okay. And it's talking about what -- as far as CMS arm of the federal government, what a single use vial is,

correct?

A Yes.

Q Okay. And that's in -- the date on it is 2006.

A Okay.

Q And I'd asked you about did they change things in 2009, do you recall?

A Well, so they have issued, you know, a different policy related to this, but I can't tell you the date that policy came about.

Q Okay. This is an old one.

A This is old.

MR. WRIGHT: Okay. I'd move its admission.

MR. STAUDAHER: No objection.

THE COURT: All right. There being no objection, and for the record that's exhibit what, Mr. Wright?

MR. WRIGHT: N-1.

THE COURT: Exhibit N-1 will be admitted.

(Defendant's Exhibit N-1 admitted.)

MR. WRIGHT: You're going to get a clean copy [inaudible].

THE COURT: Okay. Because that's your highlighting. May I see counsel at the bench, please.

(Off-record bench conference.)

THE COURT: I'm told that lunch is not too far off, so. Everybody okay? No?

Lakeman Appeal 03976

JUROR NO. 13: I said okay.

THE COURT: Oh, okay. I was hoping you were saying no, I'm not okay, I'm hungry, we need to go to lunch.

JUROR NO. 14: Well, my stomach's growling.

THE COURT: All right. We'll finish up here soon and that way the witness who's from out of state will be free to leave. Mr. Wright, go ahead.

BY MR. WRIGHT:

Q This N-1 is a provider education bulletin article for wastage of drugs in single dose vials, correct?

A Correct.

Q Article text, I'm looking -- uh-oh. "Questions have arisen regarding Medicare coverage for wastage of drugs from single use vials that contain more medication than the amount required by one or more patients. If a provider must discard the remainder of a single use vial after administering a portion to a Medicare patient or patients, Medicare will cover the discarded drug along with the amount administered."

Single use vial, and this is a bulletin that pertains to billing practices for clinics or CMS qualifying, certifying, whatever, correct?

A You produced the bulletin, so I don't know. I mean, I've seen the bulletin before, but I can't -- I didn't -- I haven't looked -- I can't answer that.

Q Well, what are these bulletins generally for?

Lakeman Appeal 03977

A I think they're for -- you said the title is a provider education bulletin, so it's going to their provider group, I guess.

Q And used for what?

A To inform. I mean, it does say below, Billing for drug waste example, so I'm guessing it's for billing.

Q Okay. I don't want you to guess. I mean, you work with --

A It says for billing for -- I don't work for CMS. I didn't generate this document, so I, you know --

Q I understand you don't work --

MR. STAUDAHER: Well, to the extent that he's asking her to interpret the document, I would object to that.

THE COURT: Right. That's fair.

MR. WRIGHT: I'm not asking her to interpret it. It's in evidence and I'm reading it.

MR. STAUDAHER: I believe he asked what it means and what it's for, so.

THE COURT: All right.

MR. WRIGHT: You're right.

THE COURT: If she -- if you don't know --

BY MR. WRIGHT:

Q I'm asking do you have knowledge --

A I've seen the document --

Q -- of what these provider education Medicare

Lakeman Appeal 03978

Part B bulletins are sent out to the providers for?

A No.

Q "Single use vial. Medicare's definition of single use vial is a vial that has a volume suitable for administration to one or more patients. For example, a vial of medication contains enough for three patients, and all three patients are scheduled to come in for administration on the same day, likely for the same reason. The manufacturer states that after opening, the open vial is good for only 12 hours, at which time any remaining medication must be discarded. Administering this medication to all three patients within 12 hours of opening the container fits the definition of single use. Medicare will cover reasonable amounts of wasted drugs from single use."

Did I read that correctly?

A That is what it says.

Q Okay. Medicare is not following best practices, right?

A Correct.

Q Okay. So this arm of the federal government says if you have a 50, and it has a six hour time to use it, and you have patients you can use it on within that period of time, you can -- it is single use by definition, to use it on all three of them, correct?

A That is what this document says.

Q One arm of the federal government doesn't listen to -- are you part of the federal government, CDC?

A Yes.

MR. WRIGHT: No further questions.

THE COURT: All right. We have another juror question up here. A juror wants to know if one time use bite blocks were soaking in the first tub of disinfectant with three to ten scopes being cleaned and soaked in the disinfectant as well, if the tub containing the scopes, the bite blocks and the disinfectant is all full of fecal matter, can the hep C be transferred from one scope to another or from a scope to a bite block or so forth?

THE WITNESS: So that's totally gross. And so I'm just going to acknowledge that, as you all know. I'm just going to put that out there. But that would not be an efficient mechanism of transmission for the virus from one patient to another.

THE COURT: And why? Can you explain for us why that is?

THE WITNESS: So and, you know, I don't work in the division of viral hepatitis. I think you'll be hearing from -- well, I won't go there. But it's a blood-borne virus, so it's really blood to blood. So when we, you know -- so it's, you know, you've got your syringe that has blood that introduces the blood to the vial and it goes directly into the

Lakeman Appeal 03980

IV of the patient. But putting the scopes all into dirty water together but not using that same scope, it's just -- it's not -- it's just not how you're going to see it transmitted.

THE COURT: Now, you could potentially if, you know, have hepatitis virus on a scope from blood of a patient onto the scope, correct?

THE WITNESS: You could have -- yes, you could have virus on the scope following the procedure, yes.

THE COURT: Okay. But it's not likely the -- if I understand you --

THE WITNESS: It's going to -- the virus is going to jump through the water and swim onto another scope and then go to the patient; that just wouldn't be an efficient way for it to transmit.

THE COURT: Is it a possible method, or is that beyond your expertise?

THE WITNESS: I don't -- I think that's -- it's a little bit -- I'm going to say it's beyond my expertise, but I don't -- I don't see that as a way to do it.

THE COURT: Okay. And then the same question -- the next question is sort of related. If let's just -- if a virally infected scope or bite block went from solution to the water, would that potentially then put the virus into the water solution, or the water, the rinse?

THE WITNESS: I mean, so like if you've got virus on a piece of equipment and put it into the water, I mean, theoretically I guess it could, you know.

THE COURT: Okay. Follow up, State?

FURTHER REDIRECT EXAMINATION

BY MR. STAUDAHER:

Q Just on the one diagram or the item that you were shown, the exhibit by defense counsel, that was from California, correct, not Nevada?

A It said California. Well, it was a --

Q And it was from 2006, not 2000 -- late 2007, correct?

A Correct.

Q Is that right?

A That's what -- based on what I saw in the report, yes.

MR. STAUDAHER: Nothing further, Your Honor.

THE COURT: Mr. Santacroce.

MR. SANTACROCE: I just have a follow-up to that juror's question.

FURTHER RECROSS-EXAMINATION

BY MR. SANTACROCE:

Q Do you know how long hep C virus lasts outside of the body?

A So I think there have been studies showing on

Lakeman Appeal 03982

surfaces anywhere from 16 hours, but not beyond four days, I think, is what I'm aware of in the literature.

Q So it's -- and I think that substantiates one of the experts that was here. It can live from 16 hours to days?

A Correct. That is my understanding from the literature.

Q And it could live in that water for that amount of time?

A It can live on surfaces. I don't know if they looked within water or solution, but at least the virus can survive outside of the body for that length of time, yes.

MR. SANTACROCE: Thank you.

THE COURT: Mr. Wright.

MR. WRIGHT: I just want to be clear.

FURTHER RECROSS-EXAMINATION

BY MR. WRIGHT:

Q Medicare is a federal program, correct?

A It is, yes.

Q I mean, this isn't State of California. This is a California provider bulletin --

A Correct.

Q -- for Medicare, the federal program, defining single use as you can use it for more than one patient, correct?

A Yes.

Lakeman Appeal 03983

MR. WRIGHT: Thank you.

THE COURT: Mr. Staudaher.

MR. STAUDAHER: Nothing.

THE COURT: Any additional juror questions for the witness? All right. No additional juror questions. Ladies and gentlemen, we're going to take our lunch break. We'll be in recess for an hour, which puts us at 1:45.

During the lunch break, you're reminded that you're not to discuss the case with each other or anyone else. You're not to read, watch or listen to any reports of or commentaries on the case, person or subject matter relating to the case. Don't do any independent research by way of the Internet or any other medium, and please don't form or express an opinion on the trial.

Notepads in your chairs. Follow the officer through the rear door.

(Jurors recessed at 12:43 p.m.)

THE COURT: And ma'am, don't discuss your testimony with anyone else who may be a witness in this case.

THE WITNESS: Am I excused --

THE COURT: You're excused.

THE WITNESS: -- so I can catch my flight?

THE COURT: Exactly. She's free to leave. You're excused and --

THE WITNESS: And so I can discuss with --

Lakeman Appeal 03984

THE COURT: Well, you can't discuss with like the CDC people who are going to testify --

THE WITNESS: Okay. But if my supervisor asks, you know, did you go --

THE COURT: Yes, that's fine. You can tell them, you know, you testified, you were here for a long time. But what we don't want --

THE WITNESS: I obviously won't talk to other witnesses like --

THE COURT: Right. Like here's what --

THE WITNESS: Okay. Not a problem.

THE COURT: -- they asked me and here's what the jurors wanted to know and here's what I said, that's what we don't want you doing --

THE WITNESS: No, not a problem. Thank you for clarifying.

THE COURT: -- with anybody else who may be a witness.

THE WITNESS: Thank you for clarifying.

THE COURT: Okay. Thank you.

And you all can go to lunch.

(Court recessed at 12:45 p.m. until 1:53 p.m.)

(Jurors reconvene at 1:53 p.m.)

THE COURT: Court is now back in session, and the State may call its next witness.

Lakeman Appeal 03985

MS. WECKERLY: Gayle Fischer Langley.

GAYLE LANGLEY, STATE'S WITNESS, SWORN

THE CLERK: Please state and spell your first and last name for the record.

THE WITNESS: My first name is Gayle, G-a-y-l-e. Last name is Langley, L-a-n-g-l-e-y.

THE COURT: Thank you. Ms. Weckerly.

DIRECT EXAMINATION

BY MS. WECKERLY:

Q How are you employed?

A With the Centers for Disease Control and Prevention in Atlanta.

Q And what is your -- what is your job with the CDC?

A I'm currently a medical epidemiologist.

Q Medical epidemiologist?

A Correct.

Q Can you describe your educational background, please.

A Sure. I received my bachelor's degree in business, and I then went to public health school at the University of Michigan, and then I attended medical school at the University of Rochester in New York. And then I started a -- and then I practiced in pediatrics for four years, and then I joined the CDC through their epidemic intelligence

Lakeman Appeal 03986

service, which is a fellow -- a training fellowship program.

Q And describe the process that you went through to join the CDC in that training fellowship for epidemiology; is that what you said?

A Correct. So it's a fellowship program. You have to apply. You have to write essays and submit your background information, and it's a selective process in that there are applicants and they pick a certain number for interviews and then a certain number receive the fellowship.

Q And hence you were obviously selected. Once you're selected, do you through the CDC get additional training in epidemiology?

A I received training in epidemiology when I was in public health school, but then I received additional training through the program the first two months, or training -- additional training in epidemiology, and then we do applied training through our assignments over the two years.

Q And where were you assigned initially, I guess?

A The division of viral hepatitis.

Q And did that division of viral hepatitis encompass all, like hepatitis A, B and C?

A Correct.

Q And so you have expertise in all of those areas?

A I was trained in all those areas, correct.

Lakeman Appeal 03987

Q Okay. Is that where you were working in January of 2008?

A Yes.

Q And you've since moved to a different division; is that --

A Correct.

Q How long did you stay in that fellowship in the division of the hepatitis?

A I was in the fellowship for two years, and throughout my fellowship I stayed in the division of viral hepatitis. And then I moved to another division after I completed my fellowship, but remained within CDC.

Q In early January of 2008, did you come out to Las Vegas to investigate a hepatitis C outbreak?

A I did.

Q And did you come with your colleague, Dr. Schaefer?

A I did.

Q Can you just describe how it was that you came to be assigned to investigate this outbreak?

A So we received the initial call. The initial call came to the division of viral hepatitis on, I believe it was January 2, 2008, and they were -- the state health department was concerned about two cases of hepatitis, of hepatitis C that occurred in patients who had recently had

procedures done at an endoscopy clinic, and then a third was identified the following day.

And it was a number that was unusually high, and also they had this common -- they had this procedure at a common location, so they were concerned about it. So I was not on that initial call, but my supervisor who is the branch chief of the division of viral hepatitis was concerned about it and started involving me.

We typically -- if there's any type of outbreak investigation, they typically involve EIS officers, and I was the one who was selected for this assignment.

Q And what's EIS?

A I'm sorry. The epidemic intelligence service, which is the fellowship.

Q Okay. And is it typical for the CDC to respond with two investigators, as you did in this particular case?

A It is common and the reason why I went, I was coming again, out of the division of viral hepatitis, and then Dr. Schaefer was coming from the infection control side of CDC, which is the division that she's in. And it is very common to have at least two people come.

Q And were you two selected because of your various specialties, yours in hepatitis C and then hers in the sort of ambulatory care type setting or hospital setting?

A Right. General infection control, yes. That's

Lakeman Appeal 03989

correct.

Q Now, when you arrived in Las Vegas, who did you make contact with?

A I made contact with Brian Labus, who was the senior epidemiologist in the local health department.

Q And after you and I assume Dr. Schaefer was with you, after you met with Mr. Labus, did you all go over to the facility, the endoscopy center?

A That's correct.

Q And do you recall how long you were there on the first, the first day?

A I recall we first had a meeting at the local health department for a couple hours, just an introductory meeting. We went over some issues about -- or some description of what hepatitis is with the local health department, and they provided some information about what they knew so far. And then we walked over to the clinic, as I recall, either late that morning or later that afternoon, and spent a few hours at the clinic that day.

Q Now, between yourself and Dr. Schaefer and the other officials, did you discuss or plan how the investigation was going to work or what steps you were going to take in the investigation?

A Yes, in that initial meeting as well.

Q And what --

A Just general.

Q What were you generally, what was the plan of action?

A Generally, with outbreak investigations in general, the first thing we do is make sure the evidence is there that there is an outbreak, and then we do what's called case findings. So we determine if there were other patients that were potentially infected.

And the reason why we want to know how many or who was infected is because then we start looking for patterns of whether -- of how we can explain why people, if they were infected at a location, why they were infected. And then we have -- we also reviewed what we generally look for in terms of the way that the infection can be transmitted.

So we look at infection control practices in general. So in this case that included injection practices, the colonoscopy practices, and then just general overall cleanliness and the atmosphere in the clinic.

Q So and part of what you did was verify that the cases that they had reported were, in your opinion, acute cases of hepatitis C infection?

A Correct.

Q And then after that, I mean, did you review charts or records at the center to see if you could determine some sort of commonality or some sort of reason why those

Lakeman Appeal 03991

cases presented?

A Are you talking at the endoscopy clinic or at the health -- what records the health department had?

Q At the endoscopy clinic.

A Yes, we did. We just initially -- I mean, that was certainly part of the investigation. Initially we were just looking at their charts in general to get a sense from the patients that we knew were infected, to get a sense of the procedures, of how they were laid out and who had done the procedures. But eventually we did a comprehensive chart review.

Q Now, how long were you at or in Las Vegas doing this investigation?

A We were there for ten days, and we started on January 9, I believe.

Q With your expertise in hepatitis C, when you came to investigate this type of outbreak, did you have ideas in your head based on your training of what possible mechanisms of transmission would exist at this type of a clinic?

A Sure. So hepatitis C is spread through the blood when it gets into skin or other -- or what's called mucosal service -- surfaces. So in this type of clinic, any of the injection practices were our number one concern. That's been in our experience the most likely cause of the --

Lakeman Appeal 03992

of these type of outbreaks or transmissions. And then we did also consider the endoscopic procedure itself or the endoscope itself.

Q In your investigation, did you review or observe the various parts of the clinic; meaning the preop area, the procedure room and the recovery area?

A We did. We did -- we first had a just tour of the general facility. I think that was either the first or second day. But then we spent a great deal of time observing every part of the clinic. We observed the intake area. We observed actually the placement of IVs or intravenous catheters. We observed patients being escorted into the room.

We observed the technicians taking the endoscopes out of the room, or the colonoscopes out of the room or into the room. We observed the actual proceed -- we observed the anesthetists actually administering the anesthesia. We observed the actual endoscopic procedure and everything after the endoscopic procedure, as well as the patients being escorted to the recovery area.

Q When you observed the IVs being placed or the preop area, did you personally observe anything that caused you concern in that part of the facility?

A There was nothing that we observed that was of any concern, no.

Q And as -- well, in your training and as a

Lakeman Appeal 03993

doctor, have you seen IVs placed and then a saline flush put through the IV?

A Yes. That's generally done if they're not going to administer the medication right away.

Q That's the reason for the flush?

A Yes.

Q To keep the line open?

A Make sure it's open and keep it open, yeah.

Q Have you seen lines flushed more than once, or is it typical that it's only flushed one time?

A I guess it depends on the situation. But in this situation they didn't flush it more than once.

Q You only saw it flushed one time?

A Correct.

Q So nothing -- based on your observations of the preop area, did that give you any indication of how the hepatitis transmission took place in this instance?

A We couldn't find reason in this instance. And I guess the other thing I left out we also asked about, which had been implicated in previous outbreaks, was the use of glucose monitors, sharing of glucose monitors. But they don't actually check blood glucose at the clinic, so we ruled that out in the preop and postop area as well.

Q Okay. How about in the procedure rooms, what did you observe in that part of the clinic?

Lakeman Appeal 03994

A So we observed again, when the endoscopes or colonoscopes were brought out, and we observed the anesthetists actually administering the medication.

Q And what were your observations of the methods or the practices of the anesthetists?

A So I observed the anesthetists a couple times, and the first time I observed -- well, actually, I shouldn't -- I don't recall if it was the first time, but the most striking thing was I observed an anesthetist reuse a syringe on a patient.

Q And describe what you saw. What did this anesthetist do?

A So the -- to initiate the anesthesia he had taken out a syringe, put it into -- it was prefilled with, I believe, 1 cc of lidocaine. He put it into a bottle of propofol, which was the anesthesia that they were using. He drew it up, injected it into the IV line.

Then the patient needed additional propofol, so he -- and he had removed the syringe from the line. He took it out and took the needle off the syringe, and then replaced that same syringe with a new needle and went back into the propofol bottle.

Q And why did that catch your attention, or why did that cause you concern?

A Because we know that use of -- reuse of syringes

Lakeman Appeal 03995

can infect the actual bottle of propofol or whatever medication is being used, because if a patient has hepatitis C, the act of putting the needle with the syringe into the IV can cause pushback, and the virus can get in that way, or when you take off the needle it causes negative pressure and it can push back into the syringe.

So if you then have a syringe that's infected, you can then infect a bottle of medication, whatever it is, propofol or whatever.

Q And when you saw this, did this immediately catch your attention?

A Absolutely, yes.

Q Is it a pretty -- I mean, is it a big error?

A Yes.

Q And what did you do when you saw it?

A The procedure ended and then I did speak with the anesthetist after the procedure ended.

Q And why did you feel you had to intervene at that point?

A Because it was such a breach that it had to be -- somebody had to be notified, and so -- I actually did also call my -- we have supervisors who help us through the investigations, and I called him as well.

Q Who was the anesthetist that you observed?

A It was Mr. Mathahs.

Lakeman Appeal 03996

Q And after you -- you discussed the breach with him?

A I did.

Q Okay. Did you -- did you have the opportunity while you were there to observe other CRNAs?

A I did.

Q And did you ever see them engaging in this same practice of removing the needle on a syringe and reusing the syringe?

A I did not.

Q How about the use of propofol vials on multiple patients, did you observe that?

A I did that -- I did observe that, yes.

Q With other CRNAs?

A With other CRNAs.

Q Now, given what you observed with Mr. Mathahs in combination with your observations of the multi-use of the propofol, I mean, what did you -- what conclusions did you draw from those two observations?

A That that can result in the transmission of the virus to other people.

Q And is that because of what you just explained about when you go back in the vial it sucks the --

A Correct. Once you infect the vial and then you use it on another patient, there's a potential for infecting

other patients.

Q When you talked to Mr. Mathahs, did you speak to any other employees at the endoscopy center to explain what you had observed him doing?

A I just spoke to Mr. Mathahs. We interviewed all the CRNAs, and that was part of my interview with him and education, educational exchange, I guess, with him. But then we also spoke with physician and, I believe, other staff members. So a small number of people, each day we informed them what we observed and we of course told them about what happened.

Q Okay. And you -- do you remember how far into your investigation that you saw this breach?

A It was pretty early. I don't recall the exact day, but it was definitely the first week. It was maybe two or three days into the investigation.

Q And although you had seen this, you know, breach where you felt like you had to just step in, in between patients, did you continue to make observations at the clinic to see if there were any other breaches or concerns with regard to a hepatitis C outbreak?

A I mean, we did. We -- I don't recall if it was -- I think it was after the -- we had observed this, because that again, was our primary concern was the injection practices. But we did observe the way they cleaned the

colonoscopies as well as, you know, as I described, we looked at the preop area and the postop area.

Q In terms of cleaning the scopes themselves, did you personally note any deficiencies in the way the clinic was doing that?

A The only deficiency we noted was scopes were generally cleaned -- or dipped in solution and cleaned with a brush, and then they're cleaned through an automated process. And the only thing that we noted was that when they initially cleaned the scopes, they kept the solution for two scopes and they were supposed to change it after every scope.

But really the most important part in terms of disinfection is the automated process, and we didn't find any deficiencies in that. We didn't think the first deficiency was deficient.

Q And based on what you saw with the, you know, that deficiency that you just described with the scope cleaning, in your opinion could that have been a mechanism for this transmission of hepatitis C?

A I don't think so. Very little likelihood, yeah. Again, I think the cleaning after that, the automated cleaning is more important than the initial stuff.

Q Based on -- well, further on in your investigation or at some point in your investigation did yourself and other investigators want to rule out the

Lakeman Appeal 03999

possibility of an employee transfer of the virus to the victims?

A Correct. So we interviewed all the employees that were available, and we also requested that they give a blood specimen to see if they were infected.

Q And was that ruled out as a source?

A It was ruled out a source in combination of two things. First we had -- there was some time until we got those results back, and nobody tested positive for hepatitis C. And the other thing that made it less likely was that we had patients who had different virus types, the different genotypes, two different genotypes.

And it was unlikely or it was not -- not likely at all that if somebody was infected with hepatitis C and then infected patients that you'd have two different viruses, two different clusters of viruses. So it just didn't make sense.

Q And the two genotypes were on July 25 and then September the 21st?

A Correct.

Q At some point maybe -- I don't think you were still at the clinic then, but at some point there was genetic testing or phylogenic testing done from the, I guess, thought to be source patients and the people that got infected on those two days, correct?

A Correct.

Q And can you explain what that is?

A So I'm not a microbiologist or a laboratorian, but basically hepatitis C mutates, or there are errors in the virus that happen pretty frequently. So if viruses are close together, their -- the -- their genetic sequence is very similar. But the fact that it changes so frequently, if it changes so frequently you can tell when they -- they're not the same virus.

So we tested what we thought was a source patient, so somebody who came before those who were infected in the procedure logs as best as we found, and we found one patient who matched the genetic fingerprint of one of the patients that were infected on one of the days of July, the July 25th day. And then for the September 21st date, again we found a patient who we knew had hepatitis C whose -- the genetic fingerprint of the virus matched the other.

Q The other infected people?

A The other seven that we found on that day --

Q Based --

A -- or eight, or seven.

Q I'm sorry. I didn't --

A I'm sorry. Seven, seven patients.

Q So seven. Based on your observations and your knowledge of hepatitis C and your interviews, did yourself and your colleagues reach a conclusion regarding the mechanism of

Lakeman Appeal 04001

transmission in this instance?

A We thought the most likely scenario was the reuse of syringe in combinations with the use of the vials on multiple patients caused the outbreak or the transmission of the virus.

Q And as you sit here now several years later, is your conclusion any different than what you had made back in 2008?

A It is no different.

Q Thank you.

MS. WECKERLY: I'll pass the witness.

THE COURT: All right. Cross.

CROSS-EXAMINATION

BY MR. WRIGHT:

Q Hello.

A Hi.

Q My name is Richard Wright, and I represent Mr. -- Dr. Desai. Your training before your current position, you're a physician?

A Correct.

Q Okay. And you are a pediatrician?

A Correct.

Q Practiced for four years, and then joined the CDC?

A [No audible response.]

Q Okay. And the way you joined, you joined as a -- on a fellowship program?

A Correct.

Q Okay. And how long -- when did you start your program?

A I started the program July 2006.

Q Okay. So you had -- you were 18 months into the program?

A That's correct.

Q Okay. And this -- what do you call this, a field trip, a field investigation, where you're assigned?

A Field investigation, or sometimes we call it an Epi-Aid.

Q Okay.

A Or an epidemiologic aid.

Q And you had done a number of those?

A I had done before that, I had done two others.

Q Okay. And what type were those?

A I did an investigation of hepatitis A in adoptees from foreign countries. And I did one in hepatitis B, or the perinatal, where transmission of hepatitis B from mother to child in a state in the United States.

Q Those two weren't outbreak investigation?

A They were outbreak investigations, yes.

Q They were?

A They were considered outbreak investigations or Epi-Aids.

Q Okay. What's an outbreak?

A So an outbreak basically means there are more cases than you usually have in very --

Q Okay. The A one was investigating transmission from who?

A Hepatitis A in international adoptees.

Q Okay. And how is that transmitted?

A That's transmitted from hand to mouth, so a different -- different from hepatitis C.

Q And then the other, hepatitis B?

A Correct.

Q That's transmitted how?

A That is transmitted in the same way that hepatitis C is, but in this case it was an investigation looking at mother to child transmission, so through the birthing process. So it's again a blood transmission, but it's a different way than what was in this case.

Q Okay. Now, when you came -- I'm going to go to January 2008, and we know you arrived with Melissa. I can't remember her --

A Dr. Schaefer, yes.

Q Dr. Schaefer. Okay. On January 9, okay.

A Correct.

Q And your -- you had been called -- when I'm saying you, I'm talking about CDC had been called to help the Southern Nevada Health District --

A Correct.

Q -- the local agency, health agency, and that was because they had no experience in doing this?

A Correct. I mean, they have a lot of outbreak, general outbreak experience, but specifically with one that includes infection control practices they had limited experience.

Q Okay. And so when you came and you had your first meeting at the Southern Nevada Health District on Wednesday the 9th, what took place at that first meeting? Did you educate them?

A We did a little bit about hepatitis. I mean, we have the luxury of focusing on one type of infection, and they're dealing with multiple, multiple infections. So we just made sure everybody understood a little bit about hepatitis C itself. They were very experienced with outbreak investigations, but again, had limited experience with this type of investigation.

So we went over what you generally look for, as I described before, which was generally the infection control practices, including the injection practices as well as the endoscopes and colonoscopes.

Q Okay. I had access to your notes which you brought, and in the beginning it -- the beginning notes in chronological order, where you are discussing various methods of transmission, et cetera, historically and what to look for, that would have been from the first meeting with the health district?

A I don't recall if that's -- if that was the notes for that particular meeting. I'd have to look at the date, if you -- I mean, the date of that meeting was the 9th.

Q Okay. Well, did you bring them with you?

A I did not.

Q Okay. The -- I'm going to hand you a set of my copy.

A Sure. Okay.

Q I numbered them myself. I mean those weren't your numbers, but I just numbered them all the way through.

A Okay.

Q Okay. And would those -- you tell me, starting with like the beginning just look at them. Would the beginning of the notes be back in Atlanta?

A Yes.

Q Okay. And you were planning your trip --

A Correct.

Q -- is that right?

A Correct.

Lakeman Appeal 04006

Q I mean, the notes represent all you were doing to set up everything, how you were going to get the samples, ship them back, labeling, all the stuff you do in preparation; is that correct?

A I guess it depends on what pages you're referring to, but yes, that's the general --

Q Okay. Well, you tell -- I was trying to just do it a little more quickly, but if you want to go page by page...

A Sure. No, that's the general, right, the first three pages.

Q I don't want to mischaracterize it either. If I'm saying something wrong --

A It's accurate.

Q -- cut me off or correct me.

Tell me -- just go ahead and flip. I'm looking for like the --

A I'm sorry. What are you looking for?

Q -- first meeting with Southern Nevada Health District.

A Oh. Well, that -- well, I can look to see if I have anything.

Q I'm looking -- 1/9/08 looks like page 13.

A Thank you. Yes. I see that.

Q I'm doing this, Dr. Langley, because it was a

number of years ago, so I want you to look at that and refresh your recollection.

A Sure.

Q I hope I don't -- and does that appear to be your notes of the first meeting with the health district?

A It is. I can't say that it's -- I don't know. I mean, it is. It's labeled 1/9 and it has some notes. I can't say that it's comprehensive of what was discussed during that meeting, but...

Q Okay. But it has a whole list, Brian Labus, Patricia --

A Correct.

Q Stephen, do you know what that says?

A I think it's Bethel. Or Stephanie Bethel [phonetic], I think, is the name.

Q And a number of people at the first meeting, correct?

A Correct.

Q And where it has objectives, would that be you explaining the objectives?

A It's just an outline of what -- yes.

Q Okay. Like what are the objectives?

A Notify facility. Investigate. And then it says, Investigation, looking for source, identify people at risk and notify. And then it says in parentheses, Testing.

And then four, it says, Publicize findings.

Q Okay. So that's just a really overall general description, correct?

A Yes. Correct.

Q Okay. Now, do you remember how long that meeting went of you educating them?

A I would -- if I had to guess, it would be a two hour. I mean, that would be typical for those type of meetings, but I don't recall specifically.

Q And then you all went over to the clinic for the first time, correct?

A Correct.

Q And it's your understanding that that was the first time the clinic received notice?

A I believe so. I can't remember if Brian Labus had contacted them just ahead of us coming. But it was shortly -- it was in a very short period of time.

Q Okay. Right. And that's what I meant. I mean, you didn't just walk in the door?

A No, no.

Q You may have called them, but they hadn't known of this --

A Correct.

Q -- from the 2nd of January?

A They had not known, correct.

Q Okay. And when you arrived, do you recall who you met with?

A I believe it was Dr. Carrol, and I believe it was their office manager whose name I don't -- Tonya. I don't remember her last name.

Q Okay.

A I think one of the charge nurses was present, but I don't remember. I believe it was a male. I don't remember his name.

Q Okay. And I presume you -- do you remember who did most of the talking?

A Brian Labus did.

Q Okay. And was that to brief them on the discovery, the suspicions, that's my word, the fact that it's tied to that clinic, and to tell them an investigation is to take place?

A Yes.

Q Okay. So it -- all that you knew, and I think there were three known --

A At that point there were three known cases, correct.

Q Okay. And one was on one date, two were on the same date, all acute hepatitis C, all from that clinic, all of this was disclosed?

A Correct.

Q Okay. There wasn't any like go in and we're not going to tell you why we're here or anything?

A Absolutely not, no.

Q Okay. And so full disclosure on your part, meaning the CDC --

A Correct.

Q -- the authorities there, and then you were seeking their cooperation and full disclosure on their part?

A Correct.

Q Okay. And when -- do you recall the reaction of Dr. Carrol or the charge nurse or Tonya Rushing, the clinic side when it was disclosed to them?

A They were surprised and concerned and wanted to assist trying to figure it out.

Q Okay. And the first -- and I think you indicated and I've looked at your interview with the police and the grand jury testimony. So essentially first day, as best you recall, introductory meeting and a plan to come back and take a brief tour of the facility, get the lay of the land to understood [sic] the procedures in the rooms, correct?

A Correct. Yes.

Q And it seems that the next day, returning would have mainly been devoted to chart review?

A There was chart review and I can't -- as I recall, I cannot remember which day we started the actual

Lakeman Appeal 04011

observations, but yes, I think we started with chart review, correct.

Q Okay. And the chart review, the way you were starting out, you were getting all of the patient charts for both days, the July date and the September date?

A Correct.

Q So we get -- and there was like 126 patients or procedures, and so you have all of the charts and you had your abstraction, your forms pre-prepared to which you could look at everything and as part of your investigation see if anything jumps out?

A Correct.

Q And at some point you start your observations, and this is your -- the way you do this is you're going to on site firsthand personally aside from interviews, you're going to look at everything that's theoretically involved in the procedures and possible transmission?

A Correct.

Q Okay. And look at it more than once?

A Correct.

Q Okay. And you did that over the ten-day period?

A Right. I don't remember how many days we spent on observation.

Q Oh, okay.

A There was more -- there was probably more work

Lakeman Appeal 04012

on the chart review because of the volume of the --

Q Okay. And when -- and going to the observations, the -- you looked at preop area, looked at saline, because it's a multi-use vial or bottle?

A I think, yes.

Q And on those you would observe the practices taking place that day?

A Correct.

Q And you're presuming that the practices would have been the same six months earlier?

A That is correct.

Q And I mean, you can go ahead and fill out any answer. You also asked the people? I mean, is this the way you always do it?

A Yes. That's the way we always do it, and then the other evidence we have is from charts, is looking at charts.

Q Okay. The -- but the -- you don't -- like you're not -- you may or may not be looking at the same nurses on July -- pardon me, January 10 that were working on September 21?

A That's correct.

Q Okay.

A We -- I guess we used, you know, our observations. And then in the chart, one of the patients who

became infected had their IV catheter placed by an anesthetist as opposed to one of the nurses who were doing it in the preop area, so we again thought it was unlikely that it happened in the preop.

Q Okay. And the -- and you didn't see anything in observations like re-dosing, reflushing a heplock?

A Correct. And we asked about that also, whether that was commonly done, and they said it generally doesn't have to be done because they go pretty quickly into the procedure room, which is what we observed.

Q Okay. And if there were times where patients backed up and they were there for like 30 minutes in the preop room and there may have been reflushing?

A That's possible.

Q Okay. And but as far as observations go, you didn't see anything that went, whoops, red flag?

A No. We did not.

Q Okay. In the preop room?

A Correct.

Q Okay. Then you go into the procedure room and how many CRNAs do you believe you observed?

A I believe I observed two.

Q Okay. And we know one's Mr. Mathahs.

A Correct.

Q And do we know the other?

A Mr. -- as I recall, Mr. Mione, I believe his name is, or Mione.

Q Okay. The -- and same day, different days, do you know?

A I don't recall that.

Q Okay. The -- and any other CRNA's observation?

A I don't recall. We had broken up into groups, so Dr. Schaefer and Mr. Labus, we were all observing different people at different times. So if one person observed somebody, we didn't necessarily -- another person didn't necessarily repeat that.

Q Okay. And Mr. Mione, you didn't observe any reuse of syringes by anyone other than Mr. Mathahs?

A Correct.

Q So Mr. Mione obviously didn't reuse syringe?

A Correct. I interviewed him also and asked him about it and he said, I didn't observe it, and he denied ever doing that.

Q Okay. So it was I didn't -- I don't reuse syringes?

A Correct.

Q Okay. But he acknowledged multiple -- using propofol on more than one patient, do you know?

A I don't recall whether he said he did or didn't on that. But I think that was commonly done in the practice,

that they were using it as a multi-use vial, so but I don't know what he said.

Q Okay. And you weren't conducting a criminal investigation, correct?

A No.

Q Okay. And so like when you interviewed Mr. Mione or Mr. Mathahs, you didn't prepare like a report of it or a record -- tape-record it, correct?

A No. Correct. We didn't do that.

Q And so like on Mr. Mione, I mean, do you recall from observation he wasn't reusing, right --

A Correct.

Q -- the syringes?

A Correct.

Q And is it fair to say -- do you like actually remember watching Mr. Mione, or it's just you know you did and you know there was no other reuse of syringes?

A I mean, I just did not see him reuse syringe. I observed him and I did not see him reuse a syringe. I mean, I was looking for that obviously, and so.

Q Okay. But what I'm asking is do you remember Mr. Mione?

A I do, yes.

Q Okay. What's he look like?

A I believe he had gray hair that was pulled back

in a ponytail, as I recall.

Q How old?

A I think maybe in his 50s, 60s. I don't recall exactly.

Q Okay. I was just trying to make sure which Vinnie it was.

A Okay.

Q Did you know Mr. Sagendorf?

A I don't recall that name, no.

Q Okay. Was Mr. Mione clean shaven?

A I don't recall. I think so. I don't think he had a beard.

Q Okay. But in any event, he didn't -- Mr. Mione, as you recall -- and there's no notes or anything of this, correct?

A I don't recall seeing anything in my notes about it.

Q I didn't either, but I --

A I don't recall seeing...

Q Okay. But Mr. Mione, no syringe reuse. We don't know if he acknowledged multiple use of propofol vial, but it was clear to you from the clinic that they were using propofol vials, multi -- with multi patient, correct?

A Correct.

Q Okay. Now, your observation of Mr. Mathahs, as

I understand it, he -- you observed that he initially dosed the patient with lidocaine, propofol first injection. The patient needed an additional dose, and so Mr. Mathahs had the same needle and syringe which he had removed from the IV, and he took off the needle, threw it in the sharps container, I guess, I don't know.

A Correct.

Q Got out a new sterile one, put it on the same syringe, and then went back into the same propofol vial?

A That's correct.

Q And then re-dosed the -- gave another dose to the patient?

A That's correct.

Q Okay. And the -- did he -- did he then reuse that vial? You stepped in?

A That I don't -- no, I didn't step in right -- the procedure ended actually, and I actually don't know if that vial was reused or whether it was finished or not.

Q Okay. So as far as what he did, there would have been no method of transmission unless he was multi-using propofol vials?

A That's correct. It has to be a combination of the syringe and the reuse.

Q So what you saw was one-half of the necessary combination?

A One piece of the puzzle, correct.

Q And so seeing that, procedure over, you interviewed him?

A Correct.

Q Okay. And I think it was like 10 to 20 minute interview was your -- is what I read.

A Correct.

Q And you told -- tell us as best you recall the exchange.

A I told him -- I mean, it was a -- it was a comprehensive interview, but I believe I started with what I had observed, which was the reuse of syringe. And his reaction was that he didn't think that was improper, that he had -- that he thought as long as he didn't reuse the needle, that that was okay to reuse the syringe. And so I explained to him that it wasn't, especially in combination with using the same -- using a single dose vial on multiple patients.

Q Okay. And he -- do you recall that he said, I wouldn't -- I would never reuse a needle?

A Correct. That's what he said.

Q Okay. And he said, I am putting on a new sterile needle?

A Correct.

Q And his misapprehension was that that was safe?

A Correct. That was my -- he didn't say that, but

Lakeman Appeal 04019

he basically said that he thought that it was okay to reuse the syringe as long as the needle was not reused.

Q Okay. And that you were -- you were there engaged in the conversation. Did Mr. Mathahs appear sincere and genuine about it?

A I had no reason to doubt him.

Q Okay. And so as far as he understood he was engaging in a safe practice, but in fact it was not under --

A Correct. That was my -- that was my interpretation. He didn't use the word "safe," but he thought it was okay.

Q Okay. And to put it a different way, he didn't recognize that he was engaged in any risky behavior?

MS. WECKERLY: Objection.

THE COURT: Sustained. Re-ask that question a different way. And that wasn't conveyed to you, correct?

THE WITNESS: I'm sorry?

THE COURT: That wasn't conveyed to you in --

THE WITNESS: That he used that word, risk?

THE COURT: Right.

THE WITNESS: Correct. That was not conveyed.

BY MR. WRIGHT:

Q Okay. He believed -- all through your entire interchange with him, you believed that he simply misunderstood the risks that were involved?

A That was my interpretation, yes.

Q Okay. And he also said, I won't do it anymore?

A He did say that, yes.

Q Okay. And the -- you, knowing this information, then went to, I think you called your supervisor in Atlanta?

A I did.

Q Okay. And then you had a meeting with Dr. Carrol, Tonya Rushing, and do you recall who else?

A Again, it was that charge nurse. I don't recall --

Q Male or a female?

A I think it was a male.

Q Jeff Krueger?

A I really don't recall the name.

Q Okay. Male charge nurse.

A But I believe those were the people who were in the room.

Q Okay. And these meetings, throughout this process you would have summary meetings like daily with the clinic?

A That's correct.

Q Okay. Whatever transgressions were found or corrections, hygiene, anything, whether it's hepatitis C transmission related or not, these things need to be corrected --

A That's correct.

Q -- so they're brought to their attention?

A That's correct.

Q Okay. And so you immediately -- I don't know if it was immediately. But you had such a meeting with Dr. Carrol, male charge nurse and Tonya Rushing, and told them what you had observed and what Keith Mathahs explained to you?

A Correct.

Q Okay. And what was their response?

A As I recall, I think there was surprise that he was reusing the syringes, but...

Q Okay. Let me show you your interview with the police department.

A Okay.

Q This is simply a -- do you happen to have it?

A I don't.

Q Okay. Page 21. Page 21, and more if you need to read it --

A Sure.

Q -- to refresh your recollection.

A So did you want me to --

Q No, no. Read it to yourself.

A Oh, okay. It looks similar to what I just said.

Q Right. Look at page 8, eight. I'm looking at the index here.

A Okay. Again, it looks similar to what I just said, that they were surprised.

Q Okay. Did you state that they were surprised by the syringe reuse?

A Correct.

Q Okay. And they stated --

MS. WECKERLY: Objection. Hearsay.

MR. WRIGHT: Pardon?

MS. WECKERLY: Hearsay.

THE COURT: That's sustained.

MR. WRIGHT: All of these witnesses are going to testify here.

THE COURT: Well, then they can testify.

MR. WRIGHT: Okay.

BY MR. WRIGHT:

Q What was your understanding regarding the use of propofol?

A I'm not sure I understand the question.

Q From the meeting with them.

A What was my understanding of --

Q Right.

A -- of the use of propofol?

Q Right. In the meeting.

THE COURT: Do you mean how it was used?

THE WITNESS: Yeah. I don't know.

MR. WRIGHT: No. She goes to a meeting and the State --

THE COURT: Well, no. I was --

MR. WRIGHT: The State doesn't want it revealed what Dr. Carrol said.

THE COURT: Okay. I think that --

MR. WRIGHT: Even though he's testifying here.

THE COURT: Mr. Wright, I think the witness didn't understand the question. I wasn't sure of the question, so I attempted to clarify it. That's not what you meant, so perhaps you can state your question or ask your question or clarify your question so that the witness knows what you mean.

BY MR. WRIGHT:

Q Did you go to have a meeting with them to report two transgressions?

A Correct.

Q Okay. And it would be syringe reuse Mr. Mathahs?

A Correct.

Q And propofol multi-patient use?

A Correct.

Q Okay. And what was the response?

A My interpretation was that they were surprised, and they said that they would --

MS. WECKERLY: Objection. Hearsay.

Lakeman Appeal 04024

THE WITNESS: -- stop doing it.

MR. WRIGHT: I'm not offering it for the truth of the matter. I'm offering it to show what they then did or what transpired.

THE COURT: All right. Well, then I guess the question's based on their reaction what did you do next, or is that -- is that where you're going?

MR. WRIGHT: Yeah, what did they say.

THE WITNESS: What did they say? They said that they would --

THE COURT: Yeah, that --

MS. WECKERLY: My objection is hearsay again.

THE COURT: I'll see counsel --

MR. WRIGHT: I said I'm not offering it for the truth --

THE COURT: Mr. Wright.

MR. WRIGHT: -- of the matter.

THE COURT: Mr. Wright.

MR. WRIGHT: I learned this --

THE COURT: Mr. Wright, I'll see you at the bench --

MR. WRIGHT: Sorry.

THE COURT: -- because I'm failing to see what the relevance is if you're not offering it for the truth, but you can explain it up here.

(Off-record bench conference.)

THE COURT: Mr. Wright, rephrase your question.

BY MR. WRIGHT:

Q Without revealing what you stated to the grand jury, you tell me, were you -- did you perceive that they, Dr. Carrol, Tonya Rushing and the male charge nurse, did you believe that they were surprised by reuse of syringes?

A Yes.

Q Okay. Did you believe they were -- same people were surprised by reuse of -- multi-patient use of propofol?

A No, I didn't perceive it. They didn't know that -- or they stated they didn't know what was wrong with that.

Q Okay. Now, the propofol that was being used at the clinic was labeled single patient, single use, single patient use, something like that --

A Correct.

Q -- correct?

A That's correct.

Q And this propofol was being the standard of practice in the clinic was multiple patient use of the single use vial, correct?

A That's correct.

Q And do you know why it's single use?

A Some of it is for, what I understand, infection control purposes, and it's also a relatively short half-life,

or the medicine doesn't stay fresh very long.

Q Okay. Meaning propofol doesn't have like a preservative in it --

A Correct, as far as I know.

Q -- to make it last a long time?

A Correct. It only lasts a certain amount of time, correct.

Q And so it's your understanding that part of the multi-use designation of the propofol is because once I open it for the first time, it has a number of hours within which it needs to be used or there's a risk for bacterial growth?

A Correct. And then also the again, not using it on more than one patient. Both those reasons were...

Q Okay. But the not using it on more than one patient becomes a problem only if I'm reusing syringe, correct?

A Correct. In this case, yes. In the transmission of hepatitis C, yes, that's correct, both things have to happen.

Q Because if I am using a 50 c -- a 50 vial of propofol, I can draw it up for five patients with five clean brand new syringes, wipe the top off, I can use that one vial for five different patients and that is totally clean, non-hepatitis C, non-contamination proper behavior?

A From a hepatitis C point of view that's correct.

Lakeman Appeal 04027

You may get high risk of bacterial contamination. But that's correct from a hepatitis C point of view, yes.

Q Okay. But if I -- if they send it to me with a little spike on it, do you know what a spike is on a hepatitis [sic] vial?

A On a propofol --

THE COURT: I mean -- well, that was a Freudian slip.

I guess I have a question though. When you say bacterial contamination, would that be as a result of airborne bacteria that could get on the little rubber stopper thing?

THE WITNESS: Well, I think it's just -- yeah, and some people will wipe it off with an antibacterial. But each time you go into a vial there's a chance of that.

THE COURT: Because of stuff that's in the air and --

THE WITNESS: If the needle isn't clean, for other reasons, yeah. But from a hepatitis point of view, correct.

BY MR. WRIGHT:

Q Okay. But on even the bacterial point of view, I mean, if I'm using the device that comes with it -- instead of putting a needle in you put this device on top. They've called it a spike here in the courtroom. And it's a device you put on top of a propofol vial, then you take the syringe without a needle and fill it up, and you take the next four, one, two, three, four, five, you filled it up completely, no needles whatsoever, then you put a clean needle on each one.

A I'm just not familiar with that. I don't know.

Q Okay. Well, can you -- accepting that scenario, any way that's improper for bacterial --

A I don't know.

Q Okay. It's just basically -- never mind. Strike that.

At the end of that meeting, did the practices -- that meeting with Dr. Carrol, when you brought to their attention the reuse of syringes and multi-patient use of propofol, did the practices then change?

A I believe so.

Q Okay. I mean as you understood?

A As I understood, yes.

Q And from your observations there going forward, there was no more of that?

A I don't recall whether we did more observations or whether we then focused on the charts.

Q Okay.

A But I'm not aware of whether they went back or not.

Q Now, in your observations and interviews, there was no propofol moving room to room, correct?

A Not that we observed, no.

Q Okay. And according to the interview?

A Correct. What they had told us is that people

Lakeman Appeal 04029

may change rooms, but the propofol didn't. That's what they told us.

Q Okay. And the -- when they changed rooms, I mean, you testified as to what they told you, any room change would have been at lunch breaks?

A That's what they had told us.

Q Right. And is that what you observed?

A That's what we observed on the days we were there, correct.

Q While you were there, did they have a Saturday retraining session for everyone in the clinic?

A Yes.

Q And that was a Saturday after these events had come to light and retraining was going on?

A That's correct as I recall, yes.

Q Now, you concluded epidemiologically; is that correct?

A Epidemiologically, yes, that's correct.

Q Okay. That the most likely mode of transmission was reuse of syringe coupled with multiple patient use of propofol vial?

A That's correct.

Q Okay. And you did not rule out scopes as a method of transmission, but believed it was less likely?

A Well, from everything we observed and from our

chart review, we thought it was a very low likelihood.

Q Okay. The -- in the grand jury, did you testify, We thought that was less likely, we didn't rule that out, but we didn't think that was as likely again, because of the way this virus spreads?

A I suppose that's what I said, but I basically said or what I think is it's very low likelihood that it would have been. And part of it was because again, this is a blood-borne infection, and the only really bloody part to the procedure is a biopsy, and there were multiple patients who were infected who did not receive a biopsy.

Q So as soon as you saw Mr. Mathahs, that ended as far as you were concerned?

A No. We still actually -- we still observed the scopes. As I recall, our observation of the scope cleaning happened after our -- since our number one theory was the injection practices, we did that first as I recall. But we definitely still observed the endoscopic procedures and the cleaning, and we questioned them about the biopsy equipment itself and how it was disposed of and whether it was reused and so forth.

Q When you said you couldn't rule it out to the grand jury, what does that mean?

A Well, to me that means couldn't rule it out with 100 percent certainty.

Lakeman Appeal 04031

Q Okay. What about the saline?

A The part of it, you know, in the observation on the days of observations we didn't observe anything irregular, but I think more importantly than that, when we actually went back and looked at the chart reviews, at least one of the patients did not have an IV inserted by a nurse in the preop area, but it was done in the procedure room by a nurse anesthetist.

Q Okay. And so what does that mean?

A So there was no saline flush that was done, so.

Q Okay. Did you observe -- you were there on -- you weren't there on the days of the events, right?

A No, of course not. But we asked them when -- when the anesthetists would put in an IV, then the propofol was administered, there was generally not an IV flush. And that's what we were told anyway. We did not observe that.

Q Okay. Were you told that there were occasions when there was a problem putting the IV in so the CRNAs would do it because the nurse had missed the veins twice or something?

A I don't recall whether they said that. I mean, that would seem reasonable, but I don't recall asking about that or them telling me.

Q Were you told about the saline use in the procedure room to push the propofol and where they drew that

now?

A I don't recall.

Q Okay. So when you said I can't rule out like saline --

A I don't think I said I can't rule out saline. I don't -- I don't know.

Q Did you rule out saline?

A We did -- again, we didn't think that was a likely cause after our observations, and also the fact that one of the IVs were placed by a nurse anesthetist.

Q Okay. The bottom line, the most likely cause is the propofol syringe reuse?

A Correct.

MR. WRIGHT: The Court's indulgence.

THE COURT: Mm-hmm.

MR. WRIGHT: No further questions.

THE COURT: All right. Mr. Santacroce.

CROSS-EXAMINATION

BY MR. SANTACROCE:

Q Good afternoon.

A Good afternoon.

Q I represent Mr. Lakeman in this case. You had testified that your background was as a pediatrician; is that correct?

A That's correct.

Q And then in January of 2008, you had been at the CDC for a year and a half?

A That's correct.

Q And I believe you testified that you had done two other investigations during that time period?

A That's correct.

Q And those investigations were hepatitis B for foreign adoptions and then transfer from mother to baby?

A Of hepatitis B, correct.

Q Since that time how many investigations have you done?

A I am no longer in the hepatitis group. I finished my fellowship and went on to another group. So I've done investigations with respiratory diseases, a non-related area.

Q Okay. So how many hepatitis C investigations have you done while you were at the CDC?

A That was the one. I have done other studies on hepatitis C, but not outbreak investigations. I've done analyses of data.

Q So the only outbreak investigation was the one that we're here for today?

A Correct. And so part of our training, it's not just outbreak investigations. There are other parts of epidemiology that we cover, so that's just a piece of our

training.

Q Okay. But I'm talking about the nuts and bolts of investigating the hep C outbreak, this was it?

A That's correct. That's correct.

Q So it was kind of like on-the-job training?

A I wouldn't call it that per se, but if you want to.

Q No, you didn't. I did.

A Yeah. That's right.

Q Would that be fair or not?

A Sure.

Q I mean, you're learning as you're going, right? I mean, I'm learning today.

A Sure.

Q And I've been doing this for a long time.

A Sure.

Q Okay. When you came here, you had some -- I guess some ideas as to what you thought the method of transmission was?

A Correct.

Q And the ideas you had is that it was through unsafe use of medicine, propofol --

A Correct.

Q -- correct?

A Yes.

Q So you came out here with that idea in your head, not only you, but I mean, I guess your colleague, Dr. Schaefer, too?

A That was our number one concern.

Q Number one concern.

A Yes.

Q So when you set out on your investigation, you specifically set out to sort of validate that theory; isn't that -- wouldn't that be fair?

A I would say we came out to look at that as one piece, but we also looked at other things.

Q And I'm not saying you weren't objective. I'm just saying that you come out with an idea, you seek to validate that idea?

A Correct. But we also looked at other things as well.

Q Now, when you came out here, I believe you testified if not here, in the grand jury, that you started out by doing some chart reviews.

A Correct.

Q And when I say started out, I'm not talking about the meeting. I'm talking about really getting into the facility and -- is that correct?

A That's correct.

Q And how long did you spend on the chart reviews?

A As I recall, it was maybe a half a day or so. We just wanted to see, get some idea of what we would be looking for when we did our observations.

Q And there was around 60 patients on each infected day?

A That's correct.

Q So you looked at 120 patient charts?

A Not on that first day, no.

Q Did you ever look at all the patient charts?

A We looked at all the patient charts from those two days.

Q Okay. At some point during the investigation?

A At some point, correct.

Q But it wasn't the first day?

A No, it was not the first day.

Q So when you say you spent a half a day on chart review, tell me what you did for that half-day.

A We were just looking -- well, we looked first at the patients, I believe, that were infected, and we looked at just the procedure logs to see how they were laid out and get an idea of who was involved with the procedures, how long they lasted, and just to get an understanding of how the procedures were being done.

Q And why was that information important to you?

A It would help us figure out how -- who to talk

to, what to observe. But we were constantly going back and forth between looking at the charts and doing the observations so that we could put the pieces together.

Q Would there be a certain amount of time you spent in observation then come back to the charts, or...

A It depended on what we found.

Q Okay. Can you tell me whether information you gleaned from the patient charts, that was important to you in determining the likelihood of an outbreak or a mechanism for an outbreak?

A We were looking at the amount of -- well, what procedure was done, what anesthesia was used, how much anesthesia was used, who administered the anesthesia. What the procedure was, so was it upper endoscopy, lower endoscopy, whether there was a biopsy done during the procedure, and if there were any complications during the procedure.

Q And you relied on the information in that chart, correct?

A There were, I -- as I recall, there were sort of three -- there was one patient chart, but it had three parts to it. It was the health history, the anesthetist's record, and then the nurses also kept a record.

Q And again, my question is: You relied on the information --

A Oh, I'm sorry. Yes.

Q -- in those charts --

A I did, yes.

Q -- correct?

A Correct. That's correct.

Q And you were asked a question in the grand jury that what if you found out later that some of those things weren't accurate. Do you remember how you answered that?

A I don't recall, no.

Q I'm going to show you grand jury transcript on page 51. See if this refreshes your recollection. And all of the scribbling stuff is mine. It's not yours, so. If you'd just take a look at this part here.

A Yeah. I just replied --

MR. STAUDAHER: Page 51, Counsel?

MR. SANTACROCE: Oh, maybe I gave you the -- I'm sorry. Page 24. A few numbers off.

THE WITNESS: So I'm sorry. Can you ask me my question, the question again?

BY MR. SANTACROCE:

Q Yes. I'm saying the question asked by the grand jury is, What if you found out later that some of this information was not correct, how would it affect your analysis, and what was your reply?

A I replied it would make it -- yes, it would make it sort -- I can't read where the scribbles, but sort out the

line of transmission difficult to figure out.

Q So if the information that you relied on was not accurate or possibly changed subsequently, it would make, in your words, the line of transmission difficult to figure out; is that correct?

A That's correct. That's what I said.

Q Now, one of the areas that you looked at was the saline injections in the preop area, correct?

A That's correct.

Q And I believe you said that you ruled that out because you noticed that one of the heplocks on one of the infection dates was started by a CRNA?

A That's correct.

Q I'm just looking for some evidence when I'm turning my back on you.

(Telephone interruption.)

THE MARSHAL: Everybody just make sure that your phones are off.

BY MR. SANTACROCE:

Q You did a trip report regarding this case, correct?

A That's correct.

Q And you were the lead author of that?

A That is correct.

Q Do you have a copy of that with you?

A I don't.

Q I'm referring to Bates exhibit -- State's Exhibit 92. If you look on your screen, I'm going to put something up there. Can you see that okay?

A I can see that, yes.

Q On the IV start column, do you see that?

A Yes.

Q And I'd ask you to go to 7/25 date.

A Okay.

Q See that, CRNA 4, Case 1 started at; is that correct?

A Yes.

Q And then if you go down to the source patient 7/25, your report says CRNA No. 4 started that?

A That's correct.

Q Did you rely on that information in coming to the conclusion you did that possibly the saline preop area was not an infection concern?

A We relied on that in combination with what we observed and what the nurses told us about the fact that they rarely if ever used the saline flush more than once.

Q Okay. We'll talk about that in a second. I can save a lot of time here by telling you that with your colleague, we showed her the medical records of this Patient No. 1, Michael Washington, and it shows that a nurse with the

initials LC actually started the heplock for that patient, then your colleague acknowledged that it was a mistake.

A Okay.

Q Do you have any reason to doubt that, or do you want me to show you the record?

A No. I have no reason to doubt it.

Q So that was an error?

A Correct.

Q There were some other errors on the report in that you've identified on 7/21, the IV starts for those days with RN 1, 2, 3 and 5, and the records from the evidence shows that there was only two RNs that started those heplocks on those days. Do you have an explanation as to why those errors appeared in there?

A I don't.

Q But this was information you relied upon, correct?

A That's correct.

Q I'm going to show you State's Exhibit No. 166. On September 21 -- can you see that?

A Yes, I can.

Q Do you want me to zoom in, or is that okay?

A No. That's fine.

Q September 21, source patient Kenneth Rubino, heplock was started by Lynette Campbell. Infected patient

Rodolfo Meana, heplock started by Lynette Campbell. Infected patient Sonia Orellano, heplock started by Lynette Campbell. Infected patient Gwendolyn Martin, heplock started by Lynette Campbell. The next patient could not be genetically linked to the cluster, but the heplock was started by Lynette Campbell. Do you see that?

A Yes.

Q That was in Room 1, and I'll represent to you that the CRNA in that room was Keith Mathahs. Room 2, CRNA Mr. Lakeman. Infected patient Patty Aspinwall, heplock started by Lynette Campbell. Carole Grueskin, heplock started by Lynette Campbell. My question to you is: Did you have this information when you ruled out the possibility or likelihood that transmission could have been started by saline?

A We had all the information from whatever was written in the chart.

Q Did you know that there was a commonality in the heplock?

A I gather from the report that we put out, no, there was -- it looked like we put down there were different people who started the saline.

Q So that was a mistake on your part as to the what you relied on, correct?

A I guess you can call it that. I don't know.

I'd have to look at the charts again.

Q Now, also on this chart, the other person who started heplocks on that day who shared the same preop room -- and you noticed, you observed that the saline being used was multi dosed, correct?

A The vials were labeled as multi dose. We never saw them being as multi -- used as multi dose, but they are labeled as multi dose.

Q And if there was testimony, and again, this is my recollection of the testimony, that multi-dose vials of saline were used in the preop area during infection dates, you would have no reason to dispute that, would you?

A I have no reason to dispute they would be used. How they -- whether they would be used on the same patient multiple times, that I don't know. I wasn't there.

Q Okay. Jeff Krueger started the heplock for Stacy Hutchison and another patient who cannot genetically be linked to the cluster, same day, same preop room and same vials of saline. Did you consider this information when you dismissed the likelihood that transmission could have started in the saline preop area?

A Again, we had evidence that there were different people. We didn't -- I don't believe we knew what preop area they were in. And from our observations and the fact that they only usually flush -- in talking to the nurses, that they

only usually flush once, we did not think that was a likely cause.

Q Well, let's talk about that for a moment. You talked about observing the preop area, correct?

A Correct.

Q And you talked about how sometimes patients would wait in the preop area for a little bit of time. They weren't automatically taken into the procedure room, correct?

A I don't recall that. I don't know how long -- I don't know how long they would stay in the preop area.

Q Directing your attention, Counsel, I think it's page 32 of the grand jury transcript.

I'm going to show you this and see if this refreshes your recollection. Page 32, if you'd just read this portion here.

A The patient may stay in the waiting area --

Q You can read it to yourself.

A Oh, I'm sorry.

Q That's okay.

A I just said that they were in the waiting room for some period. I don't know.

Q Okay. And that had to do with the -- after the IV was placed in their arm?

A Correct.

Q So they would be waiting with a heplock placed

in their arm in that preop area, or as you call it, the waiting room for a period of time before going into the procedure room?

A Correct.

Q Now, what happens to an IV that's been sitting for any length of time? What's the possibilities of what could happen?

A It could get clogged for -- if it's sitting for a period of time.

Q Getting clogged, clotted?

A Clotted, yes.

Q Okay. And that clot would have to be re-opened, correct, before the medication of propofol was inserted?

A Correct. It doesn't happen immediately, but it can happen.

Q So there would be a need for reflushing in those instances?

A It would depend on how long they were sitting.

Q Well, how long would it usually require reflushing?

A I don't know what the -- I don't know what the length of time is.

Q So we move now from the preop area into the procedure room, and I want to talk to you a little bit about the propofol and what you observed as to the beginning of the

day. Okay. How did the propofol get from Room 1 to -- in Room 2?

A In the beginning of the day they would -- as I recall, they would open a cabinet and the nurse anesthetist would receive a certain amount of propofol, and they would take it with them into their -- whatever room they were assigned.

Q And that propofol would stay in that individual room; isn't that correct?

A That's what we observed.

Q And you never observed propofol moving from room to room?

A We did not observe that.

Q And you didn't observe that even when they took a lunch break and one of the CRNAs relieved the other one; isn't that correct?

A That's correct.

Q One of the problems I believe that you said you had was that you couldn't identify which room the patients were being treated in; isn't that correct?

A That's correct.

Q So when you left Las Vegas and you had issued your preliminary report as to the mechanism of transmission, you didn't know which room which patient had their procedure done in; isn't that correct?

A That's correct. But we based -- we based some of it on what times we could get from the --

Q Based on what?

A The times we could get from the chart.

Q Okay. I'm going to show you State's Exhibit 156, and I'm going to -- it's not going to all fit in here, so I'm going to kind of move it over so you can see the top columns. Let me know when you've had a chance -- you know, better yet, I'm going to let you look at this.

A Okay.

Q You got it?

A I have a general sense of it. I don't know that --

Q If you have any questions, just let me know.

A Okay.

Q And the jury's heard this a million times, so I'm sorry I have to go back over it, but I do. I'm going to represent to you this is the State's evidence. The State compiled this information. I'm going to go to the big screen. You can look over there, okay?

A Okay.

Q The orange stripe represents source patient. The yellow stripe indicates people that have got hep but can't be genetically linked. The green stripes are people that allegedly got the hepatitis from the source patient. Okay.

Any questions about that?

A No.

Q Okay. So if we start off up here on the first orange line, source patient Kenneth Rubino, correct?

A I can't quite make it out, but --

Q Or do I have that wrong? What's that?

A It's a little -- I can't really see the names. It's a little small, but...

Q Tell me when you can see it.

A Okay. That's better.

Q Got it?

A Yes.

Q Kenneth Rubino source patient, correct?

A Yes.

Q Okay. Do you see the numbers next to the propofol in the second column, where it says propofol?

A Oh, 50, 50, those numbers, I guess?

Q Yeah.

A Yes.

Q What does that indicate to you?

A I gather that's the quantity of propofol they received.

Q Okay. And when you observed the procedures going on, I believe you testified that you never saw more than two patients use one bottle; is that correct?

A That I did not see? Say that again. I'm sorry.

Q That you saw -- you didn't see more than two patients use -- one bottle used on more than two patients?

A No. The vials we saw that were used that day were 20 cc vials, so no, we did not.

Q Okay. Were there any 50s used that day?

A Not the days we observed.

Q So with the 20s you never saw more than two patients used in the same vial, correct?

A That's correct.

Q So the amounts of propofol for Kenneth Rubino are reflected there, and that procedure was done by Mr. Mathahs in Room 1, correct, at least according to the information on the chart?

A Correct.

Q Then he does another procedure with Patient 55C, and then he does Rodolfo Meana. And then he does one, two, three, four, five patients, and then he does another patient who becomes infected. Then he does another patient who hasn't reported infection. Then he does another patient who's infected. This is all in Mathahs's room, correct?

A That's what it indicates, yes.

Q Okay. Now, you didn't have this information when you formulated your opinion, correct?

A We had -- I'm not sure what information

specifically you're referring to.

Q The rooms that the people were in.

A That's correct. We did not have the rooms.

Q Now going down to Room 2, do you see that?

A Yes.

Q Mr. Lakeman's room same day. He starts his procedure at -- with this Patient No. 7, at 7:00 a.m. And then if you look down to this patient here, Stacy Hutchison, see that?

A Yes.

Q She purports to be the first infected patient in Mr. Lakeman's room. Okay?

A Yes.

Q Now I want you to go back up to Kenneth Rubino. What time did Mr. Rubino's procedure start?

A I can't see it on the screen.

THE COURT: You have to move it down so we can see it.

MR. SANTACROCE: Oh, sorry. I always do that.

THE WITNESS: It says 9:45.

BY MR. SANTACROCE:

Q And then Mr. Mathahs did another procedure at what time?

A 10:00 o'clock.

Q And if we go back to Stacy Hutchison, her

procedure started at 9:55, correct?

A That's correct.

Q When you observed the clinic, you testified that you never saw a CRNA leave a room in the middle of a procedure; isn't that correct?

A That was -- we did not observe that, correct.

Q So the CRNA would stay in their room until the procedure was done?

A That's what we observed.

Q And that's what -- when you did your interviews, that was confirmed; isn't that correct?

A That's what was stated.

Q Okay. Now, you didn't have this information about the timing, the rooms, the infections when you concluded the mechanism for transmission, did you?

A We did -- we did have the times. The only thing we didn't have was the room number.

Q And that would be an important factor, wouldn't it?

A It might.

Q Well, in view of this, in view of what you've just seen here, in view of the times that the source patient was started in a different room by a different CRNA and the fact that other procedures were going on at the same time that Ms. Hutchison allegedly got contaminated by the same source

patient, does that not give you pause for concern as to the mechanism for transmission?

A No. I think something else would happen, which would be that the vials would have to be exchanged in some way.

Q So there would have to be an exchange of bottles from room to room; in other words, from --

A Somehow the infected vial would have to be moved, correct.

Q Otherwise it couldn't happen, could it?

A No.

Q And as you testified, you never saw propofol go from room to room?

A Not on the days that we were there. But the other thing we did observe were, you know, multiple vials open at a time.

Q Okay. I'm going --

A But again, it would have to be one vial.

Q I'm sorry. Were you done?

A Now I'm done.

Q No?

A I am done.

Q All right. July 25, 2007, same kind of chart, same color coding if you will. Okay. In this particular case the blue stripe is the source patient. Okay?

A Yes.

Q And this is Mr. Lakeman's room. The only reported infection on that day was Mr. Washington. Mr. Lakeman does the source patient at what time, 7:05?

A Correct.

Q He does one, two, three patients in between, does Mr. Washington. Mr. Washington gets hep C.

A Correct.

Q Did you have this information when you --

A We did.

Q -- made your preliminary determination?

A We did.

Q What other information did you have regarding the source patient, Mr. Washington?

A I'm not sure what specifically you're asking.

Q What procedures did they have?

A I don't recall. I'd have to look at the record. You mean what --

Q What type procedures --

A -- whether they had an endoscopy or a -- an upper endoscopy versus a lower endoscopy; is that what you're asking?

Q [No audible response.]

A I don't know. I'd have to look at the record.

Q Do you know if either one had a biopsy?

A I believe on -- I don't recall, but I mean, we recorded that information, but I don't recall if we --

Q Would it surprise you to learn that both of those individuals had biopsies?

A That wouldn't surprise me, no.

Q What did you learn in your investigation regarding the reuse of biopsy equipment?

A We did not observe that, and when interviewed nobody said that that was done.

Q Did you come to information after you returned to Atlanta that suggested that biopsy equipment was reused?

A Not that I'm aware of.

Q If biopsy equipment had been reused -- well, first of all let me ask you this: Did you observe any cleaning of biopsy equipment when you were there?

A Just disposal of the actual biopsy.

Q So at the time you were there the disposal was -- or it was a one-time use?

A Correct.

Q Had it been a multi use on the infection date of July 25, you would be concerned about the cleaning procedure, would you not?

A I don't know that it was done. I don't know.

Q But biopsy equipment can be a mechanism for transmission of hep C; isn't that correct?

Lakeman Appeal 04055

A I think it could be in theory, but on the other days there were multiple patients that didn't have biopsies.

Q I'm not talking about multiple days.

A Okay.

Q I want to break this down individually, because these infections happened on two days.

A Correct.

Q Months apart.

A Correct.

Q So I want to talk about the 25th. We already talked about the 21st, and you've said that there would have to be an exchange of infected contaminated propofol.

A Correct.

Q So now we're focusing on this day.

A Okay.

Q Biopsy.

A Okay.

Q Biopsy equipment, cleaning of that. In your grand jury testimony you talked about biopsies and the potential for transmission of hep C through that equipment; isn't that correct?

A It's possible and we looked at that, yes.

Q Okay. And that's because that biopsy is a blood to blood pathogen, correct?

A Hepatitis C is a blood -- is a blood pathogen.

Q But I mean the mechanism for transmission in a biopsy is that they take out a piece of what do you call it, mucous membrane or for the lay person like I am?

A Sure. Tissue, sure.

Q And that scope is then potentially contaminated if a person had hep C?

A Sure. Yes.

Q And if that biopsy is used -- equipment is used again on a subsequent patient, it's not out of the realm of possibility that the hep C could spread to the subsequent patient; isn't that correct?

A Correct.

Q In fact, you're a hep C expert; isn't that true?

A I am not an expert. I didn't claim to be an expert.

Q Okay. But in your -- you were assigned to the hep C investigative team.

A Correct.

Q So you have a special knowledge in that area.

A Correct. I do.

Q How long does hep C virus last outside of the body?

A Hours to days.

Q Your colleague testified 16 hours to four days; is that --

A That's correct.

Q -- what you understand?

A Correct.

Q So the mechanism for transmission through uncleaned biopsy equipment is a real possibility?

A It is.

Q I'm going to show you what's been marked as State's Exhibit 165.

A Yes.

Q Do you recognize that?

A I do.

Q What is it?

A It's a paper that we wrote about this outbreak in a journal called CID.

Q And you were the lead author in that?

A I was.

Q I'm going to show you page 272, and I'd ask you just to review that paragraph.

A [Complies.]

Q Do you recall that?

A I do, sure.

Q What did you say regarding your conclusions as to mechanism of transmission in this particular outbreak?

A That it was a combination of reuse of syringes and the use of single use vials on multiple patients.

Q Okay. And did you -- did you talk about a particular caution regarding that conclusion?

A The fact that the investigation occurred several months after the actual transmission date, if that's what you're referring to.

Q Okay. So that was a concern, that was a caution?

A Sure.

Q And you also said the observations and interviews were potentially subjected to changed practices; so that's a caveat with regard to what you concluded, correct?

A That's correct.

MR. SANTACROCE: I'm almost done.

THE COURT: Okay. Some of the jurors need a break, but if you have just one or two more questions.

MR. SANTACROCE: I just have one or two more questions.

BY MR. SANTACROCE:

Q And also you said that it was -- could be diminished because of recall bias; isn't that correct?

A That's correct.

Q So you had all these caveats to your conclusion?

A Right. Correct, which is standard.

Q Now, in all fairness to you guys, at the time you did this investigation, you weren't conducting a criminal

Lakeman Appeal 04059

investigation.

A That's correct.

Q You weren't anticipating that your conclusion or your information were going to be subjected to the scrutiny of the Metropolitan Police Department, the district attorney's office, criminal defense attorneys, judges, juries, that didn't even enter your mind, did it?

A Absolutely not.

Q Had you ever testified in a criminal trial regarding hep C outbreak before?

A I have not.

Q This is your first experience?

A Correct.

Q Hopefully your last.

MR. SANTACROCE: Thank you.

THE COURT: All right. Ladies and gentlemen, we're going to go ahead and take a quick approximately 10 minute break. During the break you're reminded you're not to discuss the case or anything relating to the case with each other or with anyone else, read, watch or listen to any reports of or commentaries on anything relating to the case. Please don't form or express an opinion on the trial.

Notepads in your chairs. Follow the bailiff through the rear door.

(Jurors recessed at 3:41 p.m.)

Lakeman Appeal 04060

THE COURT: And ma'am, during the break, please don't discuss your testimony with anyone.

THE WITNESS: Is it okay if I use --

THE COURT: You can use the restroom. Feel free to go out, but just don't talk about your testimony.

THE WITNESS: Okay. Thank you.

(Court recessed at 3:42 p.m. until 3:56 p.m.)

(Outside the presence of the jury.)

THE COURT: If we finish with this witness before 5:00, do you have somebody else?

MS. WECKERLY: We do.

MR. STAUDAHER: We do, if the Court wants to start. That witness will not finish --

MS. WECKERLY: That's a long witness.

MR. STAUDAHER: -- before 5:00 o'clock. So we just didn't want to have a hole at the end of the day, so whatever the Court wants to do.

THE COURT: We'll see. I mean, we'll probably -- I mean, if it's five minutes, obviously not. But if it's like 15 or so, we'll get started with the preliminary stuff.

MS. STANISH: I do have a motion in limine though, on that upcoming witness.

MS. WECKERLY: That's fine. We just want to finish this witness.

MS. STANISH: But we could -- yeah, I know. Yeah,

sure, absolutely.

THE COURT: I was going to say, then I'm thinking we won't get to the other witness today.

MS. STANISH: Yeah, just for the timing purposes, I understand you want to get this gal on a plane.

MR. WRIGHT: You're not anxious, are you?

MS. STANISH: Yeah.

MS. WECKERLY: She's already been here a day longer than --

THE COURT: I was going to say, you guys thought this was a one-day event?

THE WITNESS: Correct.

MR. WRIGHT: I feel like a voyeur reading your notes. I noticed you're trying to decide which hotel, and it had Summerlin okay and it said, Downtown sketchy.

THE WITNESS: Did I really write that?

THE COURT: Have you been downtown? Do you --

MR. WRIGHT: I wouldn't bring that out --

THE WITNESS: I'll just say improved.

THE COURT: Do you still feel that way about downtown? Actually, downtown isn't bad. I mean, there's --

MS. STANISH: Well, certain parts are.

THE COURT: Well, the Golden --

MS. STANISH: Some parts are sketchy.

THE COURT: Yeah, yeah. No, the Golden Nugget is

nice. That's about it.

(Jurors reconvene at 3:58 p.m.)

THE COURT: All right. Court is now back in session. And Ms. Weckerly, we're ready to proceed with your redirect.

MS. WECKERLY: Yes.

REDIRECT EXAMINATION

BY MS. WECKERLY:

Q Dr. Langley, Mr. Santacroce asked you about the caveats that you noted at the end of your article that concluded what caused the hepatitis outbreak at the clinic, and you said that those caveats were standard. What do you mean by that?

A Whenever you're writing up a manuscript, there's always limitations or caveats to what you're presenting so that people understand you took that into account.

Q And you're rarely, or have you ever been there witnessing a transmission of disease like hepatitis C?

A I'm sorry?

Q I mean, have you ever witnessed it firsthand?

A Not to my knowledge, no.

Q In fact, you had to stop Mr. Mathahs, right, because the practice he was engaging in was so egregious that you couldn't -- you wouldn't have let him use that vial on a subsequent patient, would you?

A Well, the procedure stopped, but that's correct,

Lakeman Appeal 04063

it was --

Q But if there had been another patient, given what you had observed him doing, would you have let him use a vial on another patient?

A No.

Q You were asked about biopsy equipment and whether that could be the cause of the outbreak in this instance. And do you know whether or not the same biopsy equipment is used for an endoscopy versus a colonoscopy?

A There -- I don't -- I don't recall that the biopsy equipment, the scopes themselves are different from an upper and a lower endoscopy, but I'm not sure about the actual needle.

Q I'm putting on the overhead State's 157. Can you see that on your screen --

A Yes, I can.

Q -- or do you want it closer?

Are you good?

A I think that's fine. Yes, thank you.

Q Okay. And so we actually -- we've named the source patient for -- this is July 25, and it's Mr. Ziyad. If you knew that Patient 4 here had a biopsy and isn't one of the reported genetically linked cases, I mean, how would you interpret that as to whether or not biopsy equipment was causing the infection? Because presumably that patient would

have had the equipment used before Mr. Washington, correct?

A That's correct. I don't -- I don't know if I would have an explanation.

Q And this is State's Exhibit 1, Bates No. 1918. This is the medical record of Mr. Ziyad. And this would have been one of the charts that you reviewed, correct, looking at the --

A Correct.

Q -- top here for the endoscopy center?

A Correct. The date -- right.

Q And our date here is July 25, and it's Mr. Ziyad's record, and it says his IV was started by RL, correct?

A Correct.

Q And those are the initials of Ronald Lakeman?

A Correct, as far as I know.

Q Now, you were asked about the trajectory of the disease and you were questioned or shown your grand jury testimony by Mr. Santacroce, where you talked about the times of the procedures and this -- in this instance. And did you notice or when you were doing the charting in this case, did you notice anything unusual about the charts or the records of times?

A Yeah. We noticed there was overlap in some of the times between what was recorded in the anesthetist's record and the nurse's record.

Lakeman Appeal 04065

Q And how would the overlap, I mean, what would it make it look like?

A Well, we couldn't tell which patient came first or second or third or -- so they would have a time that -- times that were inclusive of each other even though the same people were involved in the procedure, so it was hard to tell.

Q So it looks sometimes like someone was in the same place at -- or two places at the same time?

A Correct.

Q When you were -- well, let me ask you this: The two source patients, I believe you said on direct and on cross-examination that both of those individuals received more than one dose of propofol?

A I don't know that I was questioned, but that's correct. Yes.

Q And was that -- I mean, was that a factor that led to your conclusions?

A Yeah. Again, in order to propagate the virus, it has to -- you had to have infected the vial in order for the virus to move to the next patient, so that would require going in more than -- into the vial more than once.

Q And if they hadn't, if they had only received one, one shot or one syringe full of propofol, that would make this mechanism not possible, correct?

A Correct.

Q When you were in the endoscopy center, did you ever see anyone get more than one saline flush?

A No, we did not.

Q And that was like during the whole time you were there?

A Of all the observations that we made in the preop area, and we also asked the nurses who were doing it.

Q Now, because of the timing issues that you noticed with the charts, was it hard for you to delineate an exact order of patients for the day?

A Correct.

Q Mr. Santacroce asked you if you came out with the idea that unsafe injection practices had caused this outbreak, and you said, well, to a certain extent you came out with that idea. Is part of that based on the nature of the infection and how it's transmitted?

A Part of it is that and part of it is previous investigations that people have done, that's been the number one finding that they have had as well.

Q I mean, but it's blood borne, correct?

A Correct. It's blood borne.

Q So you've got to find somewhere where --

A Correct.

Q -- there's a blood transfer?

A Correct.

Q When you were talking to the CRNAs, did any of them say that they were using propofol with a saline push as a practice to enhance the use of propofol?

A I don't recall any of them saying that, no.

Q And do you recall if you observed that at the time you were there in January of 2008?

A No, I don't recall --

Q Did any of them even mention that this was a past practice?

A Not that I recall, no.

Q As you sit here today, do you believe that this outbreak was caused by improper cleaning of scopes?

A No. I don't believe so.

Q Do you believe it was caused by reuse of biopsy equipment?

A No. I don't believe so.

Q Do you believe it was caused by contamination of saline?

A No.

Q What do you believe caused this outbreak?

A I believe it was the reuse of syringes in combination with the use of single use vials on multiple patients.

Q Thank you.

THE COURT: Recross, Mr. Wright?

MR. WRIGHT: Yeah. Did I leave my -- your interview, my copy of your interview?

THE WITNESS: Sure.

RECROSS-EXAMINATION

BY MR. WRIGHT:

Q This practice of Mr. Mathahs that you observed, the -- that was violating the best practices of the CDC, correct?

A Correct.

Q And the -- you being a CDC fellow inspector observer standing there, it was apparent to you, correct?

A Correct.

Q It was not apparent to him, correct?

A Correct.

Q And in fact, you even pointed out to the police when you were interviewed that not only did he state he was surprised and didn't know it, but the very fact that he was doing it right in your presence standing there reinforced to you that he didn't recognize that he couldn't do that, correct?

A Yes.

Q Okay. Because you're an observer from some health agency standing there watching the employers during a hepatitis investigation, and you would anticipate that if someone knows they are doing something wrong, they're not

going to do it in front of you standing there with your badge around your neck, correct?

A I would assume so, yes.

Q Thank you.

THE COURT: Mr. Santacroce.

MR. SANTACROCE: I have nothing further.

THE COURT: Ms. Weckerly, anything else?

MS. WECKERLY: No, Your Honor.

THE COURT: Any juror questions for this witness?

All right. Ma'am, there are no additional questions. Please don't discuss your testimony with anyone else who may be a witness in this case. You are excused.

THE WITNESS: Thank you.

THE COURT: State, call your next witness.

MR. STAUDAHER: The State calls Nancy Sampson to the stage, or -- to the stage -- to the stand, Your Honor.

NANCY SAMPSON, STATE'S WITNESS, SWORN

THE CLERK: Will you please state and spell your first and last name for the record.

THE WITNESS: My name is Nancy, N-a-n-c-y, Sampson, S-a-m-p-s-o-n.

THE COURT: Mr. Staudaher.

DIRECT EXAMINATION

BY MR. STAUDAHER:

Q Ms. Sampson, I'm going to take you back in time

Lakeman Appeal 04070

a little bit to 2007, 2008. Were you working for the Metropolitan Police Department at that time?

A Yes, I was.

Q And what was your duties? What was your job?

A My title was analyst, and I was assigned to the intelligence section at Metro, and I -- I tracked money on financial cases. I did other kinds of analytical work. I prepared charts. I organized documents for cases.

Q Are you a commissioned police officer, or were you at that time?

A I was a civilian employee, but I had been a commissioned officer in Arizona.

Q But here in Las Vegas, for the Las Vegas Metropolitan Police Department you were an analyst; is that right?

A Yes.

Q Now, you mentioned the types of things that you analyzed were what?

A I worked on criminal cases.

Q So criminal cases, but the types of records that you would review, what were those?

A Bank records. Property records. In this case I analyzed the procedure records from the patients. I organized all of the evidence from this case. I would do that on other cases as well.

Q So let's talk about this case. Now, you know why you're here today, it's about the Endoscopy case, correct?

A That's correct.

Q Are you still working for the Las Vegas Metropolitan Police Department?

A No.

Q And when did you separate from the department?

A I retired from Metro in 2010.

Q So that was after the investigation?

A Yes.

Q Now, during the investigation, were you involved in any of the searches or anything like that that took place?

A Yes. I was on the search warrants.

Q When you went to those locations, were you actively involved, or were you a standby person on the sidelines watching? How did it go?

A I was actively involved to the extent that I wrote a general inventory of all the items that were taken in each box. I made sure that the people who had searched the rooms had signed off on the -- on the sheet that was posted on the doors. I did some reviews, you know, cursory reviews of the offices that were searched to make sure that there was nothing that was missed.

Q Once the information is obtained, meaning the search warrant's complete, they recover certain things, did

you then step into a more active role of reviewing and analyzing that information?

A I did.

Q Can you tell us a little bit about your background and training before you got to that point in your career?

A I was a commissioned police officer in Arizona for nine years with the Arizona Attorney General's Office. I have a degree in criminal justice from Arizona State University. I came to Metro in '94. I came to Metro. I was hired as their financial investigator, so I reviewed the financial statements and did the background, the investigations on liquor and gaming applications for special privilege licenses.

So I'm very familiar with records. I've been using Excel for 30 years, so I put every -- all of my work on Excel spreadsheets so I can find the information again, I can sort it, and I can do any analysis based on the Excel.

Q We have some charts here that you may or may not be familiar with. I'm just going to put them up here just generally to give you an idea, but do you see these kinds of records? This is Exhibit 50 -- 156. Do you see this?

A Yes.

Q And the next one is a companion one, but a different color. But do you see that one as well, similar

format?

A Yes.

Q Are you familiar with those records?

A Yes. I prepared those charts.

Q And when you say you prepared the charts, how was it that you did that?

A I had the procedure files from the two days of the infections. So I set up the spreadsheet and I entered the information so that I could sort it. And I took the information from the green procedure files.

Q So when you -- and we'll get to the specifics about that in just a moment. But when you're at the -- I mean, do you take this back to the location where you actually are going to do the analysis to do this work, or do you do it on site where the search warrants took place?

A No. We were busy taking records during the search warrant. So everything was boxed up and it was taken back to the Metropolitan Police Department to the office where I worked. The evidence was put into a room we call the vault, and that is a secure room with only people who work in that section have access to.

So the records were all maintained in there. If I needed to do a spreadsheet, I would either do it on my computer at my desk, or I'd take a laptop into the vault and work in there.

Q Was this the kind of thing where you went through like page by page, paper by paper the things, like that?

A Yes, I did.

Q Okay. And we're going to get into the details of your actual analysis, but as you're going through this, I mean, is anybody helping you with it, or are you primarily doing it yourself?

A I did it myself.

Q So you weren't relying on other people to do some portion of the analysis or some compilation of data kind of thing, you actually put that together?

A I did, but I had people proof my work.

Q Okay. So you did it and then somebody else would look at it to check your work?

A Yes.

Q Okay. So how -- I mean, did it go through that checks and balances kinds of thing on a regular basis for most of what you did?

A When I finished the procedure files and I made those two charts that you showed me, I had one of our secretaries go through the patient records and proof those charts with me.

Q Now, the location where the search warrants occurred that you obtained information that eventually make it

into the charts, and I know I showed you two, but you've made some other charts as well, correct?

A That's correct.

Q And you see all of this box -- or these boxes of material that are actually in the courtroom today; is that right?

A Yes.

Q Did they form, at least those, are those some of the source documents for by which you made some of these records?

A Yes, those are the source documents.

Q And when I say the records, I'm talking about the charts that we're going to see.

A Yes.

Q So those are the hard records that you put into those summary documents, being the graphs and the charts that you made; is that correct?

A That's correct.

Q When you are in the process of putting those together, you said that they came from these various searches. Where were the locations?

A There was an office and a clinic on Shadow. There was Shadow Lane.

Q That's 700 Shadow Lane?

A 700 Shadow Lane. There was another one on

Burnham. There was an office on Tenaya. There was one, I believe, on Horizon Ridge. There was one on West Lake Mead. I believe there were seven locations, but I don't remember all of them individually right now.

Q Were there endoscopy clinics in that group?

A There were three clinics. One was located at Burnham and one was at Shadow, and the third one was on -- in the southwest part of the city.

Q Was -- is it fair to say rather, that the records that you put in table form and the like came from the endoscopy clinics?

A That's correct.

Q So even though the records were gleaned from other sources, those were the focus of your sort of compilation of data?

A That's where I started with, yes.

Q So let's talk about that. How did you get involved in this case in the first place?

A The health district did a presentation to Metro on a Monday, and I had Mondays off, so I was not at that presentation. But when I came to work on Tuesday, I found out that I was going to be assigned to it because the section that I worked in had the case and I was the only analyst in that section.

Q When you say a Monday, do you recall the actual

day, or was it --

A I don't.

Q Do you know the month at least?

A I don't. It was at the beginning of -- of the year, of 2008.

Q So let's walk through that. You get that information. When in relation to that sort of initial you're going to be assigned this matter do you actually start coming into contact with records, how long thereafter?

A When we did the search warrant is when I got the records.

Q Do you know when that was?

A That was in March.

Q So the search warrants weren't until March?

A I believe.

Q Once you actually do the -- get the records, you've got them all back in your place, tell me how you decide -- I assume it's a lot of stuff; is that correct?

A It was a lot of stuff, yes.

Q More than what's in the court today?

A Oh, yes.

Q So this is the basis of what the charts are, but there's actually much more than just that?

A That's correct.

Q When you went through that material, I mean, how

did you decide what to start with, I mean, what were you looking at?

A When the records were taken, they were put into three storage units to remove them from the search warrant sites and to gather them in one place. And from those three storage units, then the patient files were turned over to a company that was hired to alphabetize the patient files to respond to the patient requests that we'd been getting.

Once those records were taken out and segregated, I had boxes of other records. I went through each box. I set up an Excel spreadsheet to inventory the information in the boxes. So for example, I would -- if they were employee files, I would just type in the name of the employee, and I did that so that we could go back and find the specific box that those records were located in.

I went through all of the boxes. I determined which ones were going to be pertinent to my analysis. I had Detective Whitely, who was the lead detective on the case, and another detective, Levy Hancock, go through the boxes that I determined could go into evidence, be stored in evidence. If they agreed, they got shipped over to evidence. If we kept them, we kept them in the vault.

I kept boxes that had sample equipment. I kept boxes that had employee files. I kept boxes that had vendor information, bank information. So I kept a number of boxes in

the vault, but the rest of them went to the evidence vault. And the ones that had the patient files were -- they were -- the patient files were removed and stored in a location in the same building I worked at, and they were alphabetized.

Q Now, you knew, I assume, at some point that there were a couple of incident days that you were focusing on?

A That's correct.

Q Did you limit your investigation to just those two days?

A Yes.

Q Did you look at records, financial, medical supplies, things like that beyond those two days?

A Yes.

Q Now, you mentioned two different areas. You mentioned you looked at bank records and also vendor files; is that correct?

A That's correct.

Q And I know you looked at patient files too, but we're going to get to those a little bit later. But tell us what it was about -- or what you did related to the banking records first of all. What was the purpose of that, what did you do?

A The banking records I looked at to determine the three doctors who had worked on those two days that we were

focusing on, how much they made from their employment at the endoscopy center.

Q Okay. So you looked at that part, sort of the flow of money?

A Yes.

Q When you were doing your investigation, was there some time that you came across a file or files that piqued your attention?

A The bank -- the bank records were in files that were labeled. There was one file that was labeled CRNA that turned out to have bank records also.

Q When you saw that CRNA file, what did you do?

A Well, I thought it would pertain to the -- when I saw it was bank records in the file labeled CRNA, I thought it pertained to the money that was paid to the CRNAs. But none of the CRNAs were paid out of that bank account. Just doctors were paid out of that bank account.

Q Who was the signatory on the bank account?

A Dr. Desai.

Q Anybody else?

A I don't believe so.

Q Now, the bank records that you had that you looked at that were from the clinic itself, or the clinics and this one that was from the CRNA account, were they different banks?

A Yes.

Q So different bank, sole signatory; did it indicate to you that there was any kind of authority granted or given to anybody else to run that account beside Dr. Desai?

A Not from those records, no.

Q Did you see where if there were disbursements out of that account?

A I did.

Q And where did those disbursements go?

A They went to three -- well, I only looked at the three doctors that were working that day, so those were the only amounts that I focused on.

Q Now, there's an actually admitted exhibit. It was a financial losses.

MR. STAUDAHER: May I approach, Your Honor?

THE COURT: You may.

MR. STAUDAHER: I'm showing you, it's a large set of documents here. If you would, just glance through that and tell me if that -- if you're familiar with that document.

MR. SANTACROCE: What's the exhibit number?

MR. STAUDAHER: Oh, I'm sorry.

THE WITNESS: It's 158.

MR. STAUDAHER: One fifty-eight.

BY MR. STAUDAHER:

Q And if you could just generally flip through it

just to see if you're familiar with it is all I'm really asking about right now.

A [Complies.]

Q Does that look familiar to you?

A Yes.

Q What is that?

A This is the financial analysis I prepared on -- I used eight bank accounts to analyze, and it was for 2007. I took the checks that were paid out of these bank accounts to Dr. Desai, Dr. Carrol and Dr. Carrera. I scheduled them on schedules, and those are attached in here.

I added them up and I determined that two of the bank accounts received money from the other bank account, so I didn't count those as -- when the money was withdrawn from that, I didn't count that as extra money because it was the same money that I had counted before. And I added up the amounts that each doctor was paid.

Q And just to -- but in general, is that the analysis, at least the financial analysis that you did in the case?

A Yes.

Q And it's a combination of bank records and the like; is that correct?

A It's just bank records.

Q Just bank records. Now, did you use any of

those records in relation to the other part that you mentioned, which was the vendor side of things?

A I didn't use any of the records in this financial analysis in the vendor side, no.

Q So this is completely separate from the vendor analysis that you did?

A That's correct.

Q Can you go ahead and put that back together again, so we don't get it lost or mixed up. But if you need to look at this during your testimony at any time, just let me know and I'll bring it back to you, okay?

A Okay.

Q Now, beside this analysis, the vendor analysis, talk to us about that.

A Vendor analysis?

Q Yes.

A I call that a medical supply analysis.

Q Oh, medical supply analysis.

A Right.

Q Okay. Sorry about that.

A That's okay. When I was going through all of the documents that we took, I made a note of the vendor files and then I went back to do my analysis. And I pulled the vendor files and I inventoried those, and I paid attention to what supplies the vendor files contained.

THE COURT: -- yes?

MR. WRIGHT: -- I just want to complete the record. I view it more damaging than the Court does. This is a case against two defendants. This -- it is now out through Mr. Lakeman, interview, who I don't get to cross-examine and don't get to call to the stand. My co-defendant is now -- did what he did because the owner is a cheapskate. He -- this is -- this is the defense -- part of the defense Mr. Santacroce is going to be using, and now, through the State's effort, me without an opportunity of confrontation of Mr. Lakeman, they have closed the circle on it deliberately. I'm not saying willfully, but deliberately it occurred.

That was -- I sat here in a -- I first got concerned and almost rose when the questions came about did he have any other complaints there or something.usable We talked about sheets and things. Well, I -- I -- I thought totally cumulative, and I'm thinking, how does that usable against Lakeman and not my client? But I let it slide, but I -- because I wasn't anticipating this. Which is precisely what should not have happened in the case.

So I just disagree that it is -- it is simply cumulative. It isn't cumulative in that it gives arguments to Mr. Santacroce when we close the case. And it gives the jury pause to think -- sit and think about let's see which guy are we going to convict in this case type of situation.

Electronically Filed
Nov 14 2014 04:12 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

So it is damaging to me in the big picture of the case on the precise issue we're dealing with. Despite all the clutter about bite blocks and all the crap we've heard for days, the real issue is this syringe use, propofol use. And I do see it more damaging the -- to the Court so I -- and the only thing cumulative I see in here on that issue, as far as I'm concerned, is cumulative misconduct. I mean, because this is like the third time I'm standing here talking about a mistrial.

THE COURT: I think it's the second time.

MR. SANTACROCE: Third.

THE COURT: Third, I'm sorry.

MR. WRIGHT: Right. Well, in any event, regarding an instruction --

THE COURT: Right.

MR. WRIGHT: -- yes, I do want an instruction again that all statements of Melissa Schaefer regarding the -- her interview -- telephone -- or her conversation, interview, whatever, of Ronald Lakeman, is admissible solely against Mr. Lakeman, and cannot be considered against Desai. And I request an instruction that the prosecutor, the State improperly elicited and engaged in misconduct.

MR. SANTACROCE: I join in that.

THE COURT: Mr. Staudaher, anything else you want to say?

MR. STAUDAHER: I don't have a problem with the first part of the instruction, but the second part I do. I mean --

THE COURT: Here's what I think the solution is: First of all, I know Mr. Santacroce objected to the instruction. I don't find that the instruction is prejudicial against Mr. Lakeman. Often we give these instructions over and over again. There's an instruction that we'll give as part of the packet at the end of the case. So I don't think that that's really prejudicial or highlighting, oh, Mr. Lakeman, you know, must be guilty or something like that.

I mean, they are Mr. Lakeman's statements. And so to highlight again, or point out again, hey, they're admissible against Mr. Lakeman, I don't -- you know, the jury is going to give whatever weight they give it. And to say, you can only consider this against Mr. Lakeman, oh, the person who is making the statements, I don't see where that is a big prejudice there.

I will tell the jury to disregard the last question-and-answer from the witness. I think -- I don't need to say that the prosecutors committed misconduct. I think that that -- I mean, what does that really mean to a jury? Where does -- where do they go with that? What are -- it doesn't really give them direction as to what to do, and I even found that there was willful misconduct to give the statement.

So I think it's much more effective and really gives the jury more guidance, which is really the point here. To tell them --

MR. WRIGHT: Yes, I -- yes, I do.

THE COURT: -- you're to disregard the last question and the last statement by the witness. And I'm going to remind them that they are only to consider, and I think the jury, you know, I don't really see the -- I guess --

MR. WRIGHT: I think anything -- anything, if I do something obstruction-wise, if I talk to witnesses and tell them they shouldn't talk or things, those things are admissible when one party on one side does something like that. Those are admissible and there are instructions by it, just like flight and other kinds of things.

Misconduct, if I do something wrong that is admissible and the jury has the right to know whether I'm doing it rightfully or wrongfully.

THE COURT: Well, first of all, I guess what you're --

MR. WRIGHT: Because I've heard in this case even -- from the start of the investigation and in all the interviews of Metro, all the things we've been doing wrong to obstruct. And I've seen none of it in the evidence. None of it. And all I see as far as misconduct is on the other side.

THE COURT: Well, first of all, you may need to

Lakeman Appeal 03666

refresh my memory, but the only -- which was a prior request for a mistrial -- misconduct or implication that somehow you or Ms. Stanish were, you know, trying to stop the investigation or mislead the public, was the issue of the meeting where the -- and I think that was Ms. Weckerly who asked the question about, well, who was at the meeting, and they said Mr. Wright. And I don't remember the witness -- which witness that was with. I think it was doctor -- the doctor who wound up making the statement, Dr. Carrera, I believe, Hilario Carrera, who made the statement, well, Mr. Wright, Ms. Stanish were at the meeting.

You know, in terms of hiding the ball or anything like that, I really haven't heard any other testimony against anyone at this point that that's been going on, that there's been hiding the ball, and it's coming also from the other side that, oh, you know, Metro and the State, they seized all of these files and it compromised patient care. And that's really not against Ms. Weckerly or Mr. Staudaher, but, you know, that -- so I -- you know, to -- I kind of misstated or added something that's -- that really isn't so germane.

But to state again, that was the only time I heard anything, which I -- again, I reprimanded the State for that -- which I heard anything suggestive that somehow there was a lack of cooperation or anything like that going on.

So I don't, you know, remember, at least, anything

else. So, you know, I don't know what else you're talking about, that they've made some suggestion of misconduct on the defense's part because, you know, you may need to refresh my memory on that because I'm not remembering it.

MR. WRIGHT: I -- no, I wasn't --

THE COURT: -- and misconduct on Dr. Desai's part certainly is not misconduct on the defense team's part. And the misconduct there, I think, really has focused -- whether it's, you know, cumulative or relevant or whatever -- has focused on what happened prior to this with the exception, again, and we've -- of the one thing with the Dr. Carrera's statement to the media, or the, you know, public announcement.

So anything else you want to say, Mr. Wright?

MR. WRIGHT: No. And I wasn't -- I wasn't saying there was other evidence in the case. I was talking about the Metro interviews, and I reiterated it again because it particularly irritates me and galls me from the inception because I put on the record before because I had spoken with the District Attorney before their crappy search took place and told them absolute cooperation with David Roger, whatever you want. Any records. We'll set it up. Compulsory process, grand jury, no problem. Tells me to call two deputies and work it out because the concern was patient records, patient safety and everything else.

And so what happens? Turn around and like four days

later, massive search took everything and screwed them up for 18 months to unscramble their bogus search. By "bogus" I mean needless. And then when I spoke to them about it, they said it's because there was evidence of obstruction and shredding records. And I said give me the affidavit. Well, I didn't get it, for a couple years, and then when I get it not a thing in there about that.

Misrepresentations were made to me, and so I wait for the discovery. I want to see the evidence of shredding of evidence that prompted that. And to this day I haven't seen it.

THE COURT: Anything the State wants to add?

MR. STAUDAHER: Well, I'm not sure what that last part has to do with what we're here discussing at the very moment, but I mean, clearly that's another issue we could raise at another time as to why Metro went in and what they did and what -- and the process they went through.

THE COURT: All right.

MR. STAUDAHER: So --

THE COURT: Well, just dealing with the issue before the Court right now, what I'm going to do is tell the jury disregard and that Mr. Wright's request -- because the mistrial request wasn't granted, I'm going to give an additional instruction -- remind the jury that they're only to consider it, and that's all I'm going to do. And I think that

that's, in my mind, sufficient.

And, Mr. Staudaher, obviously going forward if there is anything else that could implicate Dr. Desai, you're not to ask her about it. And if there is anything else, then you need to go tell her that she's not to mention any statements that Mr. Lakeman made that concern Dr. Desai or management. Do you understand that?

MR. STAUDAHER: Yes. I can go out and do that right now, Your Honor.

THE COURT: Okay. All right. Go tell her and then we'll bring her back in and resume the questioning.

Yes? Did you want to address the --

MR. SANTACROCE: Well, I --

THE COURT: -- Court, or are you just standing?

MR. SANTACROCE: -- kind of overheard you ask what the other mistrial motion was. It was when Mathahs was testifying contrary to his proffer and the State went out and took his lawyer and said --

THE COURT: Oh, right.

MR. SANTACROCE: -- you're violating the proffer offer.

THE COURT: Well, no -- right. Well -- and then it was found that he never -- that was never communicated to Mr. Mathahs, so where's the harm? I didn't recollect the first motion for a mistrial. Mr. Santacroce reminded the Court.

You can get the witness. And, Kenny, then get the jury.

Ma'am, just come on back up and have a seat.

MS. STANISH: Judge, we got the final version of the next witness's notes. Can we get two copies? One for Mr. Santacroce.

THE COURT: Sure. Wait until the bailiff comes back.

MR. SANTACROCE: I have got one.

THE MARSHAL: I'm right here, Judge.

THE COURT: Oh, bring the jury in and then you can make copies or have Sherrie make copies, okay?

THE MARSHAL: Ladies and gentlemen, please rise for the presence of the jury.

(Jury entering at 11:49 a.m.)

THE COURT: All right. Court is now back in session. Everyone may be seated. And, ladies and gentlemen of the jury, I must admonish you to disregard the last question from the State and the last answer from the witness. You are to disregard that. And I would remind you that any statements made by Mr. Lakeman, or any statements testified about from Mr. Lakeman to this witness are admissible only as to Mr. Lakeman.

And again, I would remind you that the weight or value to be given to any evidence is strictly up to you, the members of the jury. All right.

Mr. Staudaher, you may resume your direct examination.

MR. STAUDAHER: Thank you, Your Honor.

BY MR. STAUDAHER:

Q Before we get -- go any further, I want to go back to your trip report. And I think in the very last portion of that, I believe you said it was page 13, if I'm not mistaken. This is Exhibit No. 92, Bates No. 421, your page 13. And I'll display it -- oh, I guess we've lost our signal?

THE COURT: It's up. Oh, it's on -- I get the monitor regardless of -- whether or not anyone else does -- now it's up.

MR. STAUDAHER: Okay.

BY MR. STAUDAHER:

Q You looked at the report and you mentioned that the source -- the potential source patient in this, the IV was started by CRNA 4; do you see that?

A Yes, I do.

Q And then under here on Case 1, which was on -- on the same date, this July 25 date that the CRNAs listed in your report, anyway, CRNA 4 --

A Correct.

Q -- do you see that? I'm going to show you a copy of something I want to -- wanted to ask you about that. This is State's Exhibit 2, Bates No. 2350.

MR. STAUDAHER: May I step up here?

THE COURT: You may.

BY MR. STAUDAHER:

Q Before I get to that, I want to go back and look at -- show you a couple of things. Now, anesthesia record 2346; do you see that? And this is Mr. Lakeman's anesthesia record.

A Okay.

Q And back side of it as well.

A Okay.

Q And then as we go through the pages, you'll see if we get to Bates No. 2350, under the area here that says, IV -- IV -- the location, it's started by -- it has an LC; do you see that?

A I do.

Q And under here --

MR. WRIGHT: I can't hear them.

THE COURT: Has an LC listed.

THE WITNESS: And I see that, yes.

BY MR. STAUDAHER:

Q Okay. And then up here we have the CRNA, being Lakeman, the nurse being Drury, the technician being Smith and the doctor being -- it looks like Desai, correct?

A Correct.

Q Do you know what LC stands for?

A I do not.

Q Okay. In this instance do you have some recollection as to -- do you recall seeing these records at all, and as to why that was designated as the CRNA 4, which would have been Mr. Lakeman?

A These would have been the records that we reviewed while we were at the facility and were abstracting.

Q Okay. So clearly if LC is not Mr. Lakeman, then that would be something that would be incorrect in your report; is that correct?

A Correct.

Q Okay. Now, with regard to in general your review, I mean, you had this trip report that you filed, the MMWR report gets filed. The CID report later on gets done. In this -- whoops, I'm sorry. In the CID report, that was the culmination of the investigation that you had done along with the genetic analysis from the CDC; is that fair?

A Yes.

Q Looking back and anything that you have reviewed since that time, have you changed your ultimate conclusions as to what the cause of the outbreak was in this particular case?

A No, I have not.

Q And what were those conclusions?

A We felt that --

MR. WRIGHT: Foundation.

THE COURT: Ask her where she's --

MR. WRIGHT: We --

THE COURT: -- oh, okay.

BY MR. STAUDAHER:

Q We? Oh.

A Oh.

THE COURT: Are these just your conclusions?

THE WITNESS: I speak for [inaudible].

THE COURT: Okay.

THE WITNESS: Well, no. So the report is the conclusions of the authors of the report, of which I am one and there are others listed; but I guess I should speak just for myself.

THE COURT: Okay. Well, did you concur with all of the conclusions in the report?

THE WITNESS: Yes, I did.

MR. WRIGHT: And, Your Honor, are we still on the -- number -- the trip report?

THE WITNESS: No. He's asking about the Clinical infectious diseases manuscript.

MR. WRIGHT: Okay. Is that an article?

THE WITNESS: It is. It's published in the peer-review literature.

MR. WRIGHT: Okay.

THE COURT: And is that one of the exhibits --

MS. STANISH: Yes, it is.

THE COURT: -- Mr. Staudaher? And so we're all clear what we're talking about here? Which exhibit is that?

MR. STAUDAHER: Let's just display it, Your Honor. It's 165.

BY MR. STAUDAHER:

Q And your name actually appears as an author in this paper; is that correct?

A Correct.

THE COURT: And, Doctor, again, you're familiar with the conclusions in the report and you concur with it?

MR. WRIGHT: What report? I mean --

THE WITNESS: So -- sorry. Do you -- is -- I think we're saying the same thing but using different terms. This is a publication that we published in the peer review literature that summarizes the investigation. So I mean --

MR. WRIGHT: Okay. But this isn't any official report on this trip. This is an article in a magazine, correct?

THE WITNESS: Well, it's --

MR. STAUDAHER: Well, it's not a magazine specifically.

THE COURT: Okay. Can you kind of tell us, you know, where this is published and if that's something that's done in connection with all investigations or if this was unique or --

so we can kind of put this in some context.

THE WITNESS: Right. So anytime we do an Epi-Aid we generate a report for the State summarizing what CDC did, what conclusions, what recommendations. And then it's at really the discretion of the team if you want -- if we go on to publish the findings from that investigation.

In this circumstance we did, so we put out that MMWR, the morbidity mortality weekly report which is a publication that's available on the Internet. And then we also drafted this manuscript, which is submitted to a journal. So -- you know, New England Journal of Medicine, GEMMA, these are some that you may be familiar with. Clinical infectious diseases is a peer-review publication.

So you submit it to the editor of that journal. It goes out for peer review, so it goes out for blinded review by experts in the field based on the subject. They determine if it is worthy of publication. And if they determine it worthy, it gets published in this scientific journal. And so that's what we mean by peer reviewed.

And so this article summarizes our outbreak investigation -- the testing that was done at CDC, the field work that we did at the clinic -- and puts together the conclusions of how we think transmission occurred at the facility. And so this is also, you know, publicly accessible. You can search on PubMed, which is a search engine for public

Lakeman Appeal 03677

scientific journals, to find it. Is that --

MR. WRIGHT: Okay. May I ask a question?

THE COURT: Sure.

MR. WRIGHT: Is it -- this is an article by the authors for publication?

THE WITNESS: It is an article for publication, yes.

MR. WRIGHT: By the authors?

THE WITNESS: Yes.

MR. WRIGHT: Okay. And not by CDC?

THE WITNESS: No. There are employees from CDC that are authors on this, but it is not a CDC publication. I don't know that I fully understand your question, but --

MR. WRIGHT: Okay. Well --

THE WITNESS: -- it reflects work done -- it reflects a summary of work done as part of our duties at CDC and includes multiple authors from CDC.

THE COURT: So are all of the authors CDC employees?

THE WITNESS: No. No.

THE COURT: Oh, okay.

THE WITNESS: So I can walk --

THE COURT: Okay.

THE WITNESS: So it's up on the screen so --

MR. WRIGHT: Okay. Well, I --

THE COURT: Yeah, why don't you let us know who is from the CDC and who is not.

THE WITNESS: So --

THE COURT: Warren Sands is not.

THE WITNESS: Right.

THE COURT: He's from the Southern Nevada Health District?

THE WITNESS: Correct. So if you look at the superscript, the number, it will tell you the affiliation of the author. So do you want me to go through each person or just tell you who is not from CDC? What's the easiest?

THE COURT: Probably just who is not.

THE WITNESS: Okay. So Brian Labus is not. Lawrence Sands is not. He's also from Southern Nevada Health District. Patricia Rowley [phonetic] is from Nevada. Ison Isam [phonetic] is from Nevada. Patricia Amour [phonetic] is from Nevada. And then the rest of the people on there are from the Centers for Disease Control and Prevention --

THE COURT: Okay.

THE WITNESS: -- and were part of the investigation.

THE COURT: And the two -- and the other ones, Mr. Isam and Ms. Amour, when she -- when you say they're from Nevada, is that from --

THE WITNESS: Sorry, so --

THE COURT: -- the, you know, Bureau of Licensing and Certification or the Health District or do you know?

THE WITNESS: Right. So Brian Labus, Lawrence Sands,

Patricia Rowley are from the Southern Nevada Health District. Ison Isam is from the Nevada State Health Division. I believe he's the State epidemiologist. And Patricia Amour is from the Southern Nevada Public Health Lab in Las Vegas.

So the folks listed as co-authors here were all part of this investigation, whether they were in Las Vegas, or as I mentioned, our home team in Atlanta. They're also on there because they helped generate the conclusions of this.

THE COURT: And let me ask you this: When an article like this is accepted for compensation (sic), is there any kind of monetary compensation or anything like that?

THE WITNESS: No.

THE COURT: Okay.

MR. WRIGHT: Can we approach the bench?

THE COURT: Sure.

(Off-record bench conference.)

BY MR. STAUDAHER:

Q With regard to the report itself --

A Which report?

Q -- and I'm talking -- well, I'm talking about the published article --

A Okay.

Q -- in the peer-review journal that you described --

A Okay.

Lakeman Appeal 03680

Q -- all right?

A Yes.

Q And before I ask you the conclusions, a peer-reviewed journal means what? When something goes out for peer review when it's published for the scientific population to look at or anybody else, what do you have to do?

A So that's what I was talking about. You submit it to the editor, and then they send it out blinded to reviewers so they don't know who wrote the article, and they read the article and determine, you know, was it a well-done study, is it valid, is there -- do they have questions that aren't answered and, you know, need followup.

And so -- and is it appropriate for the journal that you're submitting it to. Is it appropriate for that audience. And then based on the responses from reviewers, it goes back to the editor and they decide, yep, we're going to publish it, yes, we'll publish it but we need you to make some revisions, or you know what, no, we're not publishing it. Sorry.

And so that's kind of how they use the peer review process to inform if it's a well-designed study if it -- an answer is any, you know, appropriate for the journal and the audience is of interest at the time.

THE COURT: Let me ask you this: Was this the only journal you sent this to for peer review -- for publication, or do you send it like to, you know, Journal of the American

Medical Association and other journals; if you know?

THE WITNESS: I don't recall. Since I'm not -- typically, whoever is the first author takes responsibility for submitting and dealing with any editorial comments or responses and revisions. So I honestly don't recall.

THE COURT: Okay. And that was kind of up to that person to determine what journals to send it to and if they --

THE WITNESS: Yeah, I mean, I -- I'm sure our supervisors, you know, had some input because people sometimes want to go to one journal versus the other, but I don't remember.

THE COURT: Okay. Go on, Mr. Staudaher.

BY MR. STAUDAHER:

Q So what were the conclusions?

A So the conclusion was that we had essentially documented two separate dates where transmission of hepatitis C virus occurred at this facility, and we believe that transmission resulted from reuse of syringes to access vials that were then used for multiple patients.

Q So the two different clusters that you looked at on those two different days, did they relate to each other?

A No.

Q Was that another reason why you believe that the practices that you observed, are in the report, were based on unsafe injection practices?

A Right.

Q And that that's what caused the infection?

A Right. Yes.

MR. STAUDAHER: Pass the witness, Your Honor.

THE COURT: All right. Who would like to begin with cross? I guess, Mr. Santacroce, can you begin?

CROSS-EXAMINATION

BY MR. SANTACROCE:

Q Good morning, Ms. Schaefer. I represent Mr. Lakeman. I want to talk to you about the methodology you -- when I say "you," I mean the CDC -- employed in reaching your conclusion that you just testified to.

I believe you testified that you did a period of record review --

A Correct.

Q -- correct?

A Yes.

Q And then observation?

A Yes.

Q And then interviews?

A Yes.

Q And anything else that the CDC did in its methodology to reach its conclusion?

A Well, there was testing of patients and specialized testing done at CDC. There was also testing of --

blood testing of the healthcare workers and interviews of patients and providers. I assume when you say "interviews" that's what you mean, but --

Q Correct.

A -- that's -- that's the gist of things, yes.

Q And bottom line you mention the word "commonalities" a couple of times in your testimony.

A Correct.

Q Commonalities are important to you in determining how an infection is transmitted; isn't that correct?

A They are a factor that we look at for -- yes, they're a factor that we look at as part of our investigation.

Q When you talk about commonalities, what are you talking about?

A Like I mentioned, looking to see did the source patient in cases all get the same scope used on them, or did they all have biopsies. Did they all get the same type of medication. Things like that.

Q Okay. I want to take you through some of the areas that you looked at in reaching your conclusion. You talked about reviewing the charts, so let's talk about that for a minute. What particular information did you glean from the chart that led you -- or contributed to your conclusion?

A So can I pull up one of the reports to

reference?

Q You can refresh your recollection.

A Okay. So I'm going back to our trip report, that same page 13 --

Q Okay.

A -- we've put up previously.

Q All right. Well, why don't I put that up here. Has that been displayed already?

A Yes, sir.

THE COURT: Yeah, and that's admitted.

MR. SANTACROCE: Okay.

THE COURT: Okay. Was that 164, Mr. Staudaher?

MR. STAUDAHER: No, I believe that 79 is down there.

THE COURT: It's 92 according to the court clerk.

BY MR. SANTACROCE:

Q And what page are you looking at?

A Page 13, sir. So again, the top table here is looking at -- the bottom table is looking at those that were the sources or the people who were known previously infected when they came in and we believe were the source of the virus that was transmitted to patients.

Q And now which date is this, then, both dates?

A Both dates are on here.

Q Okay.

A Was there one date you'd like to focus on?

Lakeman Appeal 03685

Q Well, let's start with the 25th of July.

A So for the 25th of July we documented a single instance of transmission from source patient to one case, so you see case one here and you see potential source one here.

Q Okay.

A And so again, same date of procedure. We look at the start time and we see that the source patient preceded the case patient, which you would expect. They had different types of procedures so one had a colonoscopy, one had an upper endoscopy. So that wasn't the same procedure type. They had different scopes used on them, so there wasn't a shared scope in common. They both did have biopsies. They both had the same nurse anesthetist. And you'll note that the potential source patient had multiple doses of propofol administered. And so as I mentioned, that's important because that would have been reuse of syringes on that patient to contaminate the vial and then that vial being used for the next patient to transmit the infection.

Q Okay.

A So that's what I'm getting at.

Q Well, let's talk about each of these, then.

A Sure. Do you need me to clear it?

Q No. No.

A Okay.

Q Yeah, if you would, please.

A Okay.

Q The endoscope number 155 and 301.

A Correct.

Q Now, how did you arrive at those endoscope numbers?

A So that was -- is what was documented in the record and also through interviews with the facility. And again, I'd have to find it in the report -- I think it's in the trip report. They told us how many scopes, how many colonoscopes they had and how many endoscopes they had, you know, at the facility, and then they had numbers that were recorded, and so that was what was documented in the medical record.

Q And I recall in your grand jury testimony that you said you had some problems documenting the number of the scopes, correct?

A No. The scope was documented consistently. I think we had a couple instances where it looked like the same scope was documented back to back for --

Q In other words, used on two people, one after another?

A Right. Right. And so it looked like there wouldn't have been sufficient time to disinfect, so we asked the facility about that. They went back and looked and said that they had some electronic way to show that it was just

misrecorded.

Q Did you see that electronic way?

A I don't recall. I don't recall if they brought it in or not. I don't remember.

Q So you accepted their explanation. Now, in these commonalities, if there's one predicate that's false, it could change the entire conclusion; isn't that correct?

A Well, can you expand on what you mean?

Q Yeah. In other words -- let's just take the scopes, for example. Let's say that -- you didn't verify that this electronic recording process actually verified that they were different scopes you used on back-to-back patients, correct?

A Well, my understanding is, you know, one of them had a colonoscopy, so it goes up your bottom, and one had the upper endoscopy that goes down your throat, and that they used different types of scopes for those procedures is -- was my understanding.

Q But I'm asking you, did you see documentation to that effect?

A I saw documentation of the scope that was recorded for the -- in the record.

Q And you saw those recordings that showed that a same scope was used back to back, correct?

A I think -- I don't know how many occasions. I

think it was one and it was not this instance.

Q Okay. But my -- my question to you was if there's a break in the link of the chain, the commonalities, it could throw off a conclusion, your conclusion?

A I don't think even if the same scope was used it would change my conclusions. Again, it goes back to, you know, looking at the reprocessing procedures there and then looking at the unsafe injection practices which were observed and reported to us and looking at the literature of where we have seen transmission previously. So --

Q Well, you've seen transmission through endoscopes before, haven't you?

A I haven't linked to the specific scope. I haven't seen it definitively documented, no.

Q At the time that you did this investigation, how long had you been an investigator?

A I had worked at CDC for about six months.

Q Okay. And was this your first investigation?

A This was my second Epi-Aid. This was probably, I think, my first outbreak field investigation.

Q So when you say you haven't seen it, you are aware of literature that indicates that transmission can come from that, correct?

A Well, I'm not so comfortable with that literature, to be honest. I think -- I don't know. I don't

Lakeman Appeal 03689

want to expand on it.

Q Did you see literature or not? Whether you're comfortable or not is not my question. Did you see literature that indicated that the transmission of hepatitis C could come from endoscopes?

A I have seen literature suggesting that, yes.

Q Okay. And the particular -- and it was the area that you looked at specifically and you dismissed --

A Correct. We looked at it and did not think that it was the source of transmission here, correct.

Q Now, another area that you looked at was the preop area, correct?

A Correct.

Q And the commonality would be who started the IV heplocks, correct?

A Well, so we look at the use of saline flush there and the practices of saline flush. And so there was no repeat flushing that was observed or reported. So --

Q On what day?

A While we were doing observations. So whatever day we were there.

Q In January of 2008?

A Correct.

Q You had no way to verify or observe what happened on January -- or September 21, 2007, or July 25th of

2007, in regard to how the heplocks were started and flushed?

A I was not there on those dates, but that's part of why when we do the investigation. We ask, Have practices changed since those times? Are you doing anything differently? And got no indication that that was the case.

Q So if nurses came here and testified that changes were made at that time, that would be contrary to what --

MR. STAUDAHER: Objection, Your Honor. Mischaracterizes the testimony.

THE COURT: Yeah, that's -- that's sustained.

BY MR. SANTACROCE:

Q So on this January date when you observed the installation of the heplocks and the saline flushes, there was no particular concern to you?

A No.

Q Were they using multidose saline bottles?

A Yes, they were.

Q Okay. And that didn't present a concern to you?

A Well, the vials were labeled as multidose, so technically they can be used for multiple patients. And we did not observe any reuse of syringes or needles into those vials, which would be how I would believe that transmission of hepatitis virus would occur, or direct reuse of needles and syringes. I didn't observe that. So I was not concerned.

Q On that particular day you didn't observe that?
A Correct.
Q Okay. Now, you're aware of literature that suggests that there has been hepatitis C infection outbreaks due to reuse of multidose saline bottles, correct?
A Correct. Through reuse of syringes and needles to go into those vials.
Q And the CDC has documented those outbreaks, correct?
A Well, with our Health Department colleagues, yes, we have investigated.
Q Well, in this particular chart it was of concern to you to note who started the IV start; isn't that correct?
A Correct.
Q And on case 1, which you talked about on July 25, CRNA 4, who you've identified as Ron Lakeman, started both on case 1 and the potential source patient, correct?
A That's what we documented, but I think, Mr. Staudaher -- the record he showed contradicted that, if I'm recalling.
Q Showed you an error in that documentation, didn't he?
A Correct.
Q I'll represent to you this is Exhibit -- State's Exhibit 2. This is Michael Washington's patient file. And

I'm going to show you Bates Stamp No. --

MR. SANTACROCE: 2350 for Counsel.

THE WITNESS: And, sir, can you refresh my memory. Is Mr. Washington who we defined as Case 1, or was he the potential source? I don't recall.

MR. SANTACROCE: Okay. I'll be happy to do that right now.

THE WITNESS: Thank you.

BY MR. SANTACROCE:

Q As soon as I find this Bates stamp.

A Sure.

Q Well, let's talk about who Mr. Washington was.

A Thank you.

Q I'll show you State's Exhibit No. 157. Okay. Do you see that?

A Yes, sir.

Q I'm going to step over here so I can see it, but you can look on your monitor.

A Yep.

Q The blue strip there is both the -- well, it was the source patient for Michael Washington. Do you see that?

A Okay. So Mr. Washington was an -- became infected?

Q Became infected by the source patient; we've marked it in blue.

A Okay. And --

Q Go ahead.

A -- is there any possibility to see what -- or you can walk me through what the headers for these different columns are so I know --

Q Oh, sure.

A -- who is --

Q I'll have to move that down --

A -- what -- I'm sorry. Thank you.

Q I can't fit it all on one screen, so we'll have to look at the headers.

A Okay.

Q And tell me when you've -- would you just like to look at the chart instead of being on the screen? Would that help you?

A Well, whatever you all need for them to see --

Q Well, you look at it and then I'll put it back up on the screen, okay?

A Okay. Thank you. I appreciate it. So is it correct to say, then, that this does not list who was the IV start in the headers? It's just who was in the procedure area?

Q That's correct.

A Okay.

Q It does not list who the IV start was.

A Okay.

Q But we'll get to that.

A Okay.

Q Okay?

A Okay.

Q So are you familiar with this chart now, do you think?

A I think so.

Q Okay.

A Let's see.

Q Because I'm going to show you now Mr. Washington's patient chart, which I believe you reviewed in order to get certain information on your Chart 13, okay?

A Somebody from our team would have.

Q Okay.

A I don't know if it was me specifically, but...

Q Okay. But it was information that you relied on in reaching a conclusion, correct?

A It was information we used in our conclusions, correct.

Q So now I'm going to show you Bates Stamp 2350. This tells us -- this is the patient chart for Michael Washington. This tells us who started the IV; do you see that?

A I do.

Q And it wasn't Mr. Lakeman, correct?

A Correct.

Q It was someone by the initials of LC; do you see that?

A I do.

Q Okay. So when we go back to your chart, you have some erroneous information here on which you base some conclusions.

A Well, so I don't -- so you're correct. We have documented incorrectly that Mr. Lakeman started the IV on Mr. Washington, but I don't think that that impacts the conclusions that we make, because assuming that you don't have any information suggesting that we had a documentation error for the potential source patient -- for there to be transmission through a saline vial -- there would have had to have been saline used on the source patient and syringe reuse to get that source patient's blood into the saline to then be used on Mr. Washington.

So if indeed Mr. Lakeman started the source patient's IV and our understanding is that the CRNAs don't use saline, that couldn't have been a source for Mr. Washington because the source patient didn't get saline. Does that make sense?

Q It doesn't to me, but maybe to the jury. So in any event, the fact that I'm bringing this out is that you

have erroneous information on this chart, which you testified to; you relied on this information to reach your conclusion?

A I'm -- I still disagree that -- I will stipulate or I agree that you have demonstrated that we had erroneous information on the IV start for Mr. Washington, our case patient 1, but even with that it doesn't impact my conclusions because our source patient 1, unless you have other information, still had an IV start from CRNA 4.

And our understanding, as I said, is that the nurse anesthetist when they placed the IV didn't use saline flush because they went ahead and gave this sedative. So in order for saline flush to have even been a factor, which I don't think it was regardless because we didn't observe or have reports, the potential source didn't have saline used on them.

So that common source of saline couldn't have become contaminated if -- when the saline was used on Mr. Washington it wouldn't have had this person's blood in it.

So it doesn't change my conclusions even -- even with this information.

Q Okay. I'm going to ask you to take a look at State's Exhibit 156. This is a similar chart from September 21, 2007.

A Thank you. Okay. So same format, just different --

Q Yeah. I just want you to look at it and make

sure that you understand the columns and things of that nature, okay?

A I think so, yep.

Q Okay. Let's talk about this for a minute. Let's start at the top here.

A So can I just orient for a quick second?

Q Absolutely.

A So the top -- well, you orient me. I'm sorry. I'll --

Q Okay. The orange strips are -- is the source patient. Yellow strip is a patient that cannot be genetically linked to the cluster. The green strips are the people that are alleged to have been infected at the clinic, okay?

A Yes.

Q Got it?

A So the yellow is someone who has hepatitis, but genetic testing could not have been performed on them.

Q Couldn't be linked to the clusters.

A Okay.

Q Okay? So now, on this top section you have a source patient who is Kenneth Rubino.

A Yes, sir.

Q And then you have another patient, then you have an infected patient, Rudolfo Meano -- Meana, then you have one, two, three, four, five people who haven't reported it,

having hepatitis.

A Okay.

Q Then you have another infected patient, then you have another patient who hasn't reported, and then you have another infected patient, and --

A So can -- can I ask --

Q -- three clusters of that, okay?

A So can I ask one question, or --

Q No --

A -- okay.

Q -- you can't.

A Okay. I just wanted to clarify --

Q Okay.

A -- something you said.

Q I ask the questions, you answer them, and then we'll get along great, okay?

A I just don't understand when -- when you're talking about the five who are not recorded as being infected, does that mean they were negative or you don't have results on them?

Q You're asking me questions.

THE COURT: Yeah.

THE WITNESS: I'm sorry.

THE COURT: Basically --

THE WITNESS: I'm sorry. I just didn't understand

what he meant.

THE COURT: -- a lot of witnesses like to do that, but the lawyers ask the questions --

THE WITNESS: Okay. I just didn't understand. I'm sorry.

THE COURT: Here's the thing though. If Mr. Santacroce asks you a question and you don't understand the question or you can't answer the question with the information you have or Mr. Santacroce's question, you know, he says something in his question that's wrong or you don't agree with, then of course, you can say I can't answer the question or I don't understand the question or what have you; do you understand?

THE WITNESS: I do.

THE COURT: Okay.

THE WITNESS: So I don't understand --

THE COURT: Okay. Well, wait for his question, and then --

THE WITNESS: Okay.

THE COURT: -- again --

MR. SANTACROCE: Maybe we'll clear it up.

THE WITNESS: Okay.

THE COURT: -- if you can't answer it with the information you have just tell him --

THE WITNESS: Okay.

Lakeman Appeal 03700

THE COURT: -- I can't answer that with the information I have.

THE WITNESS: I'm sorry.

BY MR. SANTACROCE:

Q And I don't mean to be disrespectful --

A No. No, I'm sorry. I'm sorry.

Q -- ordinarily I'd answer anything you had to say but --

A My apologies.

Q -- I can't do it in this forum because --

A I understand.

Q -- the rules don't allow that, okay?

A I understand. I'm sorry.

Q Okay. Again, we're clear on -- now, this is the State's exhibit. The State prepared this documentation purportedly from reviewing the same patient files that you guys all reviewed.

A Okay.

Q Okay?

A Yes, sir.

Q So you see you have three -- three patients in green up there in room 1, and the CRNA was Mr. Mathahs; do you see that?

A So this is by room?

Q Yes.

A Okay. I'm sorry.

Q You're asking questions again.

A I know. I'm sorry. I'm sorry.

MR. STAUDAHER: Your Honor, I'm going to ask that if -- that --

THE COURT: Yeah.

MR. STAUDAHER: -- since he's giving a lot of information, he's got to define things for her so that she understands to even answer the question.

MR. SANTACROCE: Fine. I'll be happy to.

THE COURT: Right. If you don't -- again --

THE WITNESS: I'm sorry.

THE COURT: -- if you don't understand something, that's fine. You can say -- the worst thing to do, or what we don't want you to do is to make assumptions that may be erroneous. So if you don't understand, you know, how the information is broken up or you don't agree with it or something like that, then of course, say that.

Go on, Mr. Santacroce.

BY MR. SANTACROCE:

Q Okay. So these are broken up by room. So this is all one room, correct? I mean -- you wouldn't know, but I'm telling you that's what the State alleges, okay?

A Yes.

Q And you'll see -- if you move over a couple of

column,s, you'll see the CRNA -- see that?

A Can you move it over, please.

Q Oh, I'm sorry.

A I'm sorry. Yes, thank you.

Q Okay. Then we go down to here. It's Room 2, and I'll move it over -- CRNA Lakeman, okay?

A Yes.

Q And in Lakeman's room three people are reported to have hep C allegedly from the source patient in Room 1.

A Okay.

Q Okay? Now, everybody that you talked to or interviewed said that propofol didn't go from room to room, correct?

A Correct.

Q Okay. Now, I want to show you another chart here because what we were talking about when I sort of got sidetracked was these IV saline flushes, okay?

A Yes, sir.

Q And I'm going to show you this document here -- and I'll try to zoom out so we can get most of it in. The top row are the patients in Room 1 that contracted hep C on September 25, 2007. The bottom row are the patients that contracted hep C in Room 2 on the same day; do you see that?

A Yes, sir.

Q Now, the records indicate that one nurse started

the saline -- or started the heplocks and saline flushes for all of the patients except -- all of the infected patients and the source patient in Room 1 and that nurse was Lynette Campbell, initials LC; do you see that?

A Yes, sir.

Q And Lynette Campbell also started the heplock and flushed those heplocks on patients infected in Room 2, Patty Aspinwall and Carole Grueskin. The other person -- nurse who started heplocks on that day, who shared the same saline multidose vials, was Jeff Krueger, and he started --

MR. STAUDAHER: Objection. Assumes facts not in evidence. Not that he shared the same --

MR. SANTACROCE: It does --

MR. STAUDAHER: -- multiuse vials on those patients.

THE COURT: Well, state --

MR. SANTACROCE: I think Lynette Campbell testified to that.

THE COURT: -- state your -- state your question again.

BY MR. SANTACROCE:

Q I said the other RN who started heplocks on that same day for the patients in question was Jeff Krueger, and there was testimony that Jeff Krueger let Lynette Campbell share the same saline vials, okay? My question --

THE COURT: And again, ladies -- as you know, this

Lakeman Appeal 03704

comes up a lot with what the testimony actually was. It's your recollection of the testimony. So if Mr. Santacroce says, oh, this was the testimony and you don't remember it that way, then of course, disregard what Mr. Santacroce or any other lawyer or myself even says what the testimony was. It's what you remember that's important here.

BY MR. SANTACROCE:

Q So this is a commonality that you would be interested in, isn't it?

A I mean, it would be something that we abstracted.

Q Did you recognize and identify this commonality?

A It would be something that we abstracted, so we would have looked at that.

Q I'm asking you if you have an independent recollection of looking at this?

A I don't recall. I don't recall.

Q Is there anywhere in the reports that identify this commonality?

A I mean, we would have documented, again, in that -- the trip report the IV start information. So there would be the only other location that we would have --

Q Okay.

A -- looked at.

Q But you had the wrong information about that?

A We had incorrect information for -- for July 2007, correct.

Q So you don't recall identifying this commonality; is that correct?

A I don't recall -- no.

Q Okay. Would this have affected your conclusion in any way?

A No.

Q Okay. I want to talk to you about your conversations with Mr. Lakeman, okay?

A Yes.

Q What day did that occur?

A I don't recall. I don't have the date documented on my notes, so I don't recall. It was back -- it occurred after I had returned to Atlanta.

Q Okay. Well, let's talk about these notes. These were contemporaneous notes?

A Correct.

Q And you're telling me that you don't have the date on that -- on the notes?

A No, sir.

Q That wouldn't be something that was important?

A No, sir.

Q Tell me how you initiated contact with Mr. Lakeman.

A I looked him up on the Internet and found a number and called it. I think I spoke to his wife once or twice and tried to find him and ultimately got, I think, his cell phone number and then connected with him via cell phone.

Q Okay. And how did you identify yourself?

A That I was a working CDC employee and -- and that we had done an investigation at the clinic where he had worked previously.

Q Okay. Did he express concern as to who you were, why you were calling him out of the blue?

A I mean, I recall that -- again, going back asking if I was recording the call, and I said I wasn't, and I explained, you know, that we wouldn't be using his name in things that we put out. So I don't recall more specifics than that.

Q So in other words, you called him, you said, I'm Melissa Schaefer from the CDC and I want to talk to you about an outbreak of hepatitis C at a previous clinic you worked for --

A Yes.

Q -- and he started talking?

A Ultimately, yes.

Q Okay. Tell me about some of the promises that you made him before questioning or talking to him, asking him questions.

A So again, I told him that I was not tape-recording the call. And again, since I didn't realize this was going to be a criminal investigating, you know, explaining how we typically do things as far as, you know, any reports -- don't list his name; we assign, you know, a number or something else for the information that's provided.

Q And you promised anonymity, correct?

A I don't know if I said I promise that we will never, but I think, you know, I said we -- we would -- wouldn't use his name. I don't know if the words, I promise, were used or not, but I did say, you know, we wouldn't use your name in reports.

Q Well, in your grand jury transcript you talk about how important anonymity is to the CDC in order to gain information for public safety.

A Right.

Q Okay. So tell me about that.

A So, you know, when we do these investigations, we rely on healthcare providers to be transparent with us and to perhaps tell us things that they wouldn't tell their employer or that they don't want others to know, you know; to take us aside and say, you know, I -- please know that -- this -- I don't want my employer to know this, but this is really what's happening here.

And so that's helpful to get honest information for

public safety so that if there's a bad practice identified, we can stop it. And so, yeah, that's --

Q Okay. And you explained that to Mr. Lakeman, correct?

A I don't know if I went into the detail that I am explaining here, but I did communicate that we wouldn't be using his name in any -- anything that we generated.

Q And that, in fact, didn't happen because when you got off the phone you used his name right away, didn't you?

A I didn't use his name in any reports that we generated. I communicated with our team, who has to -- you know, who has to know who the different players are. I mean, we are the ones who assigned CRNA 1 or 4. So it's more of a public thing as opposed to what our team -- the information our team needs.

Q Well, you called the Georgia Public Health Department before you talked to Mr. Lakeman --

A I did --

Q -- correct?

A -- yes.

Q And you knew that Mr. Lakeman was working at a hospital in Columbus, Georgia, correct?

A Yes, I did.

Q Did you call the hospital at Columbus, Georgia?

A I did not.

Q And Mr. Lakeman expressed concern about talking to you for those reasons; isn't that correct?

A I don't know that he gave any reasons. I don't recall that.

Q Well, he made the statement to you to the effect that, well, if -- I'm going to deny talking to you if -- you tell me what he said because I don't remember.

A It was something along the lines of denying that he had said these things to me if it came down to it.

Q And the point in the conversation when he said that was prior to you asking him any questions whatsoever; isn't that correct?

A I don't recall. I know he asked if I -- when we started talking, at some point he asked if I was recording, and -- because it was -- so we stopped and I said no, and then I don't recall at what point that came up, if it was after we had started going through some of this or before.

Q I'm going to show you your grand jury transcript on page 85 and 86.

MR. STAUDAHER: Is there a question?

MR. SANTACROCE: Yes, as to when in the conversation he made the statement as to denying that it ever took place.

THE COURT: Okay. That's the part of the grand jury transcript that you're going to show her?

MR. SANTACROCE: Yes.

THE COURT: All right. Go ahead.

BY MR. SANTACROCE:

Q Page 85 and 86. I'm just asking you to take a look at this portion here. The highlight is my stuff so...

A Okay.

THE COURT: Just read it quietly to yourself, and then let us know if that refreshes --

THE WITNESS: Yes.

THE COURT: -- your recollection.

THE WITNESS: Yes, ma'am. (Witness complied.) Okay.

BY MR. SANTACROCE:

Q Does that indicate to you when in the conversation he said that?

A That indicates it was early, but I think in that transcript I said -- you know, I started asking some questions, and then at that point, you know, we were going back and forth with the questions and he took a pause at that point. But it would have been early.

Q And it would have been before you asked him about any kind of injection practices, correct?

A I don't recall.

Q Okay. And that statement by Mr. Lakeman is fairly common, isn't it, when you interview people?

A I don't know -- I don't know that anyone has

specifically said I'll deny this, but certainly, you know, as I said, healthcare workers share things with us that they don't want their employer to know or others to know.

Q Okay. And, in fact, you made other comments to the grand jury regarding why people have that sort of attitude; do you recall what those were?

A I think it goes back again to, you know, typically in our reports we don't even name the healthcare facility. We say A or B or clinic C, and, you know, when we do healthcare worker stuff, we, in our reports, don't put the names to -- so that down the line healthcare workers will continue to want to communicate with us and talk to us.

Q And didn't you also say that the -- the employee is in fear of retribution from their current employer?

A I don't -- I don't recall that.

Q Okay. Let me show you your grand jury transcript, page 87. I want you to take a look at this portion here.

A Okay. (Witness complied.) Sir, I said that in a generality. I don't know -- I didn't attribute that specifically to Mr. Lakeman or why he -- why he --

Q No, we're talking about the attitude of --

A Oh.

Q -- a lot of people that you interview, when you call them up and say I'm from the CDC, that has a very

powerful effect on people, doesn't it?

A You know, I can't speak to the effect it has on them.

Q Okay. Fair enough. And when you're investigating and talking to these individuals, you said in your grand -- what did you say in your grand jury transcript -- or to the grand jury about that issue?

A That -- again, that we need healthcare workers to be honest with us and to tell us things and to do -- you know, the best we can with -- with any public reports that we generate or put out to not list names.

Q Didn't you say that they don't want retribution from their current employer for reporting someone else's actions, so I guess I wasn't entirely surprised by the statement?

A I did say that, correct.

Q Now, I'm going to ask you to take a look at the -- you felt this statement was important or the DA felt it was important?

A I asked a question that was asked of me, so I can't comment on --

Q Okay. It wasn't such an important statement that you put it in your notes, though, was it?

A No.

Q It's nowhere to be found in your notes, is it?

A Correct.

Q However, there is something in your notes that you did record that you thought was important, and that was the term "double dip," correct?

A Correct.

Q And double dip, is that your term or Mr. Lakeman's term?

A I believe that was Mr. Lakeman's term.

Q Have you heard that term before?

A I have.

Q And how was it used aside from your analogy with the chips?

A It's also used to reuse a syringe, to enter a medication vial for an additional dose -- taking a syringe that's already been used on a patient and going back into a vial to get more medication.

Q And you used that -- you have used that word yourself, haven't you, in seminars that you've given?

A I have.

Q I want to talk about some of the -- at least one of those seminars. Did you give a seminar on infection prevention in outpatient surgery centers on February 22, 2012?

A Where? Can you -- I may have. I --

Q Well, let me just show you this.

MR. STAUDAHER: Actually, would Counsel provide a

copy for the State, please?

MR. SANTACROCE: If you want to make a copy before I ask her, yeah.

MR. STAUDAHER: Can I just see it, what you're showing her.

THE COURT: Are you just showing that to refresh her recollection --

MR. SANTACROCE: Correct.

THE COURT: -- if she did a seminar?

MR. SANTACROCE: Correct. I guess I should mark this before I show her.

THE COURT: Well, if you're just going to use it to refresh her recollection --

MR. SANTACROCE: That's all.

THE COURT: -- then you don't need to.

MR. SANTACROCE: Okay.

THE COURT: Is that, like, some sort of a syllabus or something you're showing her?

MR. SANTACROCE: Actually, it came off of the -- her website.

THE COURT: Okay. Just look at that and see if it refreshes your recollection as to whether you gave a seminar on the date Mr. Santacroce --

THE WITNESS: I gave a webinar, yes.

BY MR. SANTACROCE:

Q A webinar. What's a webinar?

A It is a presentation that I can give from my office, calling in on the phone and other people can call in from wherever they are and log in to look at the slides that get advanced and listen to me by phone as I'm presenting.

Q And in that webinar you identified some common breaches; do you recall what they were?

A I don't.

Q Let me show you -- see if this refreshes your recollection.

A (Witness complied.) Okay.

Q What were some of the common breaches you identified?

A Sir, I think that needs some more context of the common breaches for what?

Q Okay. Tell me.

A So we looked at outbreaks of both bacteria and viruses in healthcare settings, and some of the common breaches were reuse of needles and syringes, either from patient to patient or to go back into shared medication vials. Reuse of single-dose vials for multiple patients regardless of syringe reuse, and I think, you know, poor hand hygiene or lack of aseptic technique was on there. Common saline bags or multidose vials that again -- sorry, it's already left my mind. I'd have to --

Q Okay.

A -- look at it.

Q Well, the viral -- you talked about viral and bacterial outbreaks, correct?

A Correct.

Q And the viral outbreaks was in specific reference to hepatitis, correct?

A Right.

Q And one of the breaches you noted was use of a single-dose vial of saline bags for one patient?

A Well, so the heading for that was viral and bacterial. And so outbreaks and then common breaches, and you're not going to see an outbreak of viral hepatitis just from reuse of a vial or just from reuse of a bag unless you have syringe reuse as part of that.

I typically would think, you know, reuse of a bag or reuse of a vial absent syringe reuse being more of a bacterial concern.

Q The -- when you identified the common breach of single-dose vials of saline bags for one patient, you didn't mention anything about reuse of syringes in that.

A So again, I'd have to look through all of the slides --

Q Okay.

A -- to know what was said when. I can only --

you're just showing me what was a bullet on that slide, so I think that there would have been some more context in my talk. But, yes, when I'm talking about outbreaks in healthcare settings and I believe -- and again, if you put it in front of me, we have how --

I think we said something like 41 outbreaks, how many were viral, how many were bacterial, and then I go on to look at some of the common infection control breaches that have resulted in outbreaks like these in healthcare settings, not making the distinction between viral, bacterial, that kind of thing, on that slide.

Q You also identified instrument reprocessing as a breach.

A Okay.

Q Do you want to see it?

A If -- I'll -- if it's in front of you, then I --

So this slide is actually commenting on the titles on infection control worksheet components.

Q Okay.

A So this is use of a worksheet that's been developed to assess infection control practices in healthcare settings, and so it's focusing on five, you know, major areas of infection control in general for healthcare settings.

Q And one of those was instrument reprocessing?

A Yes.

Q And tell me about that. You specifically say in your example on this webinar, endoscope --

MR. STAUDAHER: Objection, Your Honor. He's reading from it now.

MR. SANTACROCE: I'm asking her.

THE COURT: State your question.

BY MR. SANTACROCE:

Q You identified it, endoscope reprocessing under that instrument reprocessing, correct?

A So that can be a type of breach. Endoscopes are a type of equipment, one of many. So that can be one example. You know, other surgical instruments are also an example. Without going through every slide and --

Q Okay.

A -- and relistening to the talk, I can't put what was said in context.

Q Okay.

A But I agree, equipment reprocessing is on that slide.

Q And important --

A Yes.

Q -- in controlling infections?

A Sure.

Q And you say -- what do you say in regard to endoscope reprocessing?

Lakeman Appeal 03719

A Again, without seeing the slides in their --

Q Well, let me show you --

A -- totality --

Q -- this, maybe it will refresh your recollection.

A So again, this is focusing on an infection control worksheet which is looking at infection-control practices in healthcare settings. And so it's looking at five main areas, hand hygiene -- this is something that we developed with the centers from Medicare and Medicaid services so that when their regulatory folks go into an ambulatory surgery center, they're looking at things systematically.

And so it's looking at -- and the worksheet is available online, but they're looking at things like hand hygiene, use of personal protective equipment, injection safety, medication handling, instrument reprocessing including sterilization of critical devices or high-level disinfection of things like endoscopes, cleaning of the environment, so cleaning of environmental surfaces, and handling of point-of-care devices like the blood-glucose meter.

Q Okay. So the -- the endoscope reprocessing, you mentioned high-level disinfection --

A Yes.

Q -- and sterilization?

A So those were two separate kind of components.

Lakeman Appeal 03720

So endoscopes are something called a semicritical device, meaning that it needs to go at a minimum under high-level disinfection before use on another patient. There are devices called critical devices that are things that you use kind of during a surgery when you cut into someone and it's going into that space, and that needs to undergo, at a minimum, sterilization.

So I was talking about different types of reprocessing.

Q Okay. Well, let's talk about the high-level disinfection.

A Okay.

Q That's for endoscopes, correct?

A At a minimum. You can also --

Q Well, I'm only talking --

A -- sterilize.

Q -- about endoscopes for now.

A Okay.

Q I mean, I -- and I know you can bring in a whole other bunch of equipment that I know nothing about, but at issue in this case are endoscopes. So that's why I'm talking to you about that.

A I understand --

Q Okay?

A -- that, but I'm trying to answer your question,

which is some endoscopes can also be sterilized. But at a minimum, yes, high-level disinfection.

Q And when would it require sterilization for an endoscope?

A It would depend on the manufacturer's instructions. I can't answer that.

Q Okay. In this clinic you looked at endoscopes?

A Yes.

Q And what was the manufacturer's recommendations for cleaning or sterilization?

A So it was a number of steps including a precleaning step and then high-level disinfection.

Q Okay. And how is that accomplished at the clinic?

A So again, it's a number of different steps starting from when the scope comes out of the patient and doing some initial cleaning, and then taking it into the -- a separate room in the facility where they do scope reprocessing and walking through a number of different steps. They check the scope, doing a leak test to make sure that none of the channels were broken during the procedure and that the scope is still functional. They will brush out the channels and actually clean it with a detergent and rinse the detergent out so that you get the initial, you know, debris that's on there, any stool or anything else off.

Lakeman Appeal 03722

And then after it's gone through the initial precleaning and brushing and rinsing, it would go into an automated machine that does high-level disinfection. And so it gets hooked up to that machine to run the high-level disinfectant through it and on it, it alarms so that you do an alcohol, you know, drying step after it's been rinsed and dries, and then it comes out and gets hung now that it's been disinfected for use on the next patient.

THE COURT: You know what? Mr. Santacroce, I'm going to go ahead and interrupt your cross-examination. We're going to take our lunch break.

Ladies and gentlemen, we'll be in recess for the lunch break until 2:30.

During the recess you are reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch, listen to any reports of or commentaries on the case, person, or subject matter relating to the case. Don't do any independent research, and please don't form or express an opinion on the trial.

Notepads in your chairs. And follow Kenny through, I guess, the rear door.

And, ma'am, please don't discuss your testimony with anyone else during lunch break.

(Jury recessed at 12:55 p.m.)

Lakeman Appeal 03723

THE WITNESS: Does that include the prosecution? I guess so.

THE COURT: They probably shouldn't be talking to you about the testimony --

THE WITNESS: Okay.

THE COURT: -- because you're in the middle of it --

THE WITNESS: Okay. I just wanted to make sure.

THE COURT: -- is the idea of -- yeah.

THE WITNESS: So I just have to be back here at 2:30?

THE COURT: Right. Exactly. 2:30 and you're free to go to lunch.

Before we take our lunch break -- is that door shut? Scheduling. Mr. Santacroce, how much more do you anticipate?

MR. SANTACROCE: Oh, probably a half-hour.

THE COURT: Who is doing this one? How long do you anticipate?

MR. WRIGHT: At least through the end of this day.

THE COURT: Okay. So we don't really need to worry, then, about you reviewing the new notes because you'll have all evening to do that?

MR. WRIGHT: Correct.

THE COURT: All right. But you have extra time anyways, so you can start reviewing those, if you want to. All right.

MR. WRIGHT: Extra time.

THE COURT: We do. We have an hour and a half. It's extra time. I mean --

MR. SANTACROCE: What time are you breaking this afternoon? Or was there another conflict?

THE COURT: Oh, yeah. There's another issue so we have to break -- what I said, 4:30?

MS. STANISH: Third-grade graduation?

THE COURT: Well, it's all these graduations and everything. After, what, Wednesday there should be nothing else, and we can stay later after Wednesday. So, you know. I mean, to me -- have to let people go to these graduations, you know, when you're in trial for weeks and weeks. So -- okay. So that's our schedule for today.

(Court recessed at 12:57 p.m. to 2:37 p.m.)

(Outside the presence of the jury.)

THE COURT: They're all back now, so we can get started. Let Kenny know we're ready to start.

(Pause in the proceedings.)

MR. STAUDAHER: Your Honor, would you like me to get the witness?

THE COURT: Oh, would you? Thank you, Mr. Staudaher.

(Jury entering at 2:45 p.m.)

THE MARSHAL: Everybody may be seated.

THE COURT: All right. Court is now back in session. And, Mr. Santacroce, you may resume your cross-examination.

MR. SANTACROCE: Thank you, Your Honor.

CROSS-EXAMINATION (Continued)

BY MR. SANTACROCE:

Q I believe we were talking about high-level disinfection for endoscopes, and you were explaining what that meant.

A Yes, sir.

Q So could you just go ahead and refresh our recollection as to what high-level disinfection means?

A It's multiple steps, a disinfection process for scopes to be used on subsequent patients. Do I need to go through the steps again?

Q I don't think so. Are there manufacturer's guidelines on how to clean these things?

A There are instructions for -- specific for each device, and then, CDC also has general guidelines for reprocessing of medical devices.

Q Did you observe the cleaning process when you were at the clinic --

A Yes --

Q -- all the --

A -- I did.

Q -- soaps?

A Yes, I did.

Q And can you tell me what you observed?

Lakeman Appeal 03726

A So I'd like to refer back to our trip report just to refresh my memory, if that's okay?

THE COURT: That's fine.

BY MR. SANTACROCE:

Q If you can just tell us where you're looking?

A Sure. So I'm looking at the document that we've previously seen, which was the CDC trip report.

Q Okay. I'm having trouble hearing you. Can you speak --

A I'm sorry. I'm looking at the document that we previously reviewed, which is the CDC trip report --

Q Okay.

A -- and I'm looking starting on page 5 of that document.

Q Can you give me the Bates Stamp Number on the bottom? Do you have one of those?

A I do not, no.

Q Okay.

A Not on my copy. I'm sorry. But it's page 5 of our text.

Q Okay. I -- I don't want you to read that --

A Yeah --

Q -- out loud.

A -- I just want to look through it and then --

Q Okay.

Lakeman Appeal 03727

A -- I'll answer. So, you know, what we observed was once the procedure was over, the scope would be handed off to a tech in the room who had some type of cleaner or detergent actually kept at the bedside that was changed between patients and would suck the detergent up through the channels and flush it out just to clear it before carrying it into a separate room that they had that was dedicated for scope reprocessing.

And so they would go into that room and they would do what I mentioned before, a leak test, which is making sure that there wasn't any damage to the -- the scope during the procedure, that none of the channels were damaged, and then if that passed, they would go ahead and do the precleaning, which would again be brushing the -- using a brush to brush through the channels, and then putting it in a bucket that contained detergent and hooking it up to this pump that would pump detergent through the channels, and then that would be for a set length of time and then it would be transferred to a water bucket that would flush the detergent out and rinse it off, and then that would be for a set length of time. And then once that was done, it would go into the machine or the automated endoscope reprocesser that they had, and so you connect it in the machine and that machine is an automated process to put high-level disinfectant through and around the scope for a set period of time.

So that does that. And then I think there's an alarm at some point that they have to push a button that alcohol goes through all the channels to kind of help dry it. It will do some forced-air drying, and then it comes out of the machine. And so now it's been cleaned and disinfected and it gets taken into another room where it's hung with all the other clean scopes.

Q Okay. i want to show you what's been admitted as State's Exhibit 126. Does that look like the reprocessing room?

A Yes.

Q Okay. And you personally observed this cleaning process, correct?

A Yes.

Q Now, do you know what these blue buckets were used for?

A I -- I'm not certain because it's been so long, but I'm guessing those were the buckets for the cleaning, but, you know, it's been so long.

Q Did you interview any GI techs that were employed on July 25, 2007, or September 21, 2007?

A I don't recall if the techs that were working on the days that we were there observing and speaking to were also techs that were working on the days -- those two dates in question. I don't recall.

Q Okay. And how many scopes did you observe them cleaning in a bucket before the solution was changed?

A Two.

Q If there was testimony by GI techs that there were up to 11 scopes cleaned at a time with that solution, would that -- how would you react to that?

A It's inappropriate.

Q I'm going to show you what's been marked as State's Exhibit 149. Do you recognize what this is?

A That looks like the clean supply cabinet, but again --

Q Okay. I'm going to show you 150. Do you recognize that?

A That's another cabinet with scopes hanging. I'm not -- you know, I don't have any context around it, so...

Q And when -- did you witness these scopes hanging?

A I don't recall. Probably. But I can't say with certainty. I think we did look at scopes that were hanging.

Q Did you -- did you notice any feces coming from the clean scopes or on the chux that were below the scopes?

A Not that I recall, no.

Q If you had, would that be a concern?

A Yes.

Q And you'd be concerned about that because that

could be a mode of transmission, correct?

A I'd be concerned because that reflects improper reprocessing. I'd want to know more to determine if that was a mechanism of transmission.

Q Okay. A point to which you addressed in your webinar.

A What point?

Q About the instrument reprocessing and the high-level disinfection?

A So my webinar was about -- in general, not specific to reprocessing for this facility.

Q Oh, I understand that.

A Okay.

Q Okay?

A Sorry.

Q But those sterilization practices apply to every ASC, right?

A All healthcare facilities should be doing appropriate reprocessing of medical equipment, yes.

Q So the practices and points that you put out in your webinar are applicable throughout the United States, if not the world?

A Certainly.

Q Now, in your webinar you talked about, quote, double dipping, a term that you obviously used because it's in

your --

A Yes, it's in my presentation. I did --

Q -- presentation --

A -- use it there.

Q -- correct?

A Correct.

Q And do you remember how you defined double dipping in your webinar presentation?

A I think it's the same way I've defined it here, which is taking a syringe, using it on a patient, and then using that syringe to go back into the medication vial for that patient, and then that vial is then used for subsequent patients.

Q Okay. I'm going to show you a slide from that presentation. See if this refreshes your recollection.

A (Witness complied.) Okay.

Q Okay. And what did -- what did you say in that webinar regarding double dipping?

A So what I just said here, that a syringe is used on a patient and goes back into a medication vial.

Q This specifically addressed IV medication into a patient, did it not?

A I would have -- I don't recall. I'd have to look again. I'm sorry. I didn't focus on that word, but that would make sense, sure.

Yes.

Q And you particularly focused on IV medication because there happened to be an outbreak due to contamination through IV medication, correct?

A So I'd have to look at the headline, I don't know if that was an outbreak or if that was actually a notification event that resulted from that practice. CDC's recommendations are if that practice is identified, it is what we consider a Category A lapse that can and has resulted in disease transmission and patients should be notified and tested.

Q Take a look at the second bullet point.

A (Witness complied.) Correct.

Q Okay. It refers to patient note -- 2,000 patients being notified of a blood-borne pathogen in relation to this double-dipping practice, correct?

A Correct.

Q Where did that occur?

A Whatever it says on there, San Pedro -- I can't read the headline.

Q San Pedro, California?

A I don't know. I can't read the headline that's on there to refresh my memory.

Q Okay. And you recall the result of what happened due to that outbreak due to double dipping for IV

medication?

A So as you said, it resulted in a notification and a recommendation for blood-borne pathogen testing of patients.

Q I'm going to show you another slide from that presentation, and ask you to take a look at it.

A (Witness complied.) Mm-hmm.

Q Can you explain to me what that means?

A So this is a slide that's addressing --

Q Are you done with that?

A -- do you mind, so you don't have to walk back and forth?

Q Okay.

A Do you mind if I just keep it? I'm sorry.

Q I don't mind staying here.

A That's not a problem for me, if you want to share it.

Q Okay. We'll share.

A So it's a slide looking at prior reports of lapses and reprocessing of medical equipment. And so it looks at reports that have been filed at the Food & Drug Administration, and it also looks at a study or pilot that -- that I, the folks at CDC did, along with the centers for Medicare and Medicaid services, looking at infection-control practices and ambulatory -- a sample of ambulatory surgery

Lakeman Appeal 03734

centers, and then also summarizes some publicly available data from the California Department of Health Services about endoscope reprocessing.

Q And tell me what you specifically found.

A So in the pilot for ambulatory surgery centers the surveyors found that about 28 percent of facilities had some type of lapse in reprocessing of medical equipment. It varied across the board, was not just limited to endoscopes or high-level disinfection.

And then what else -- do you want to specify or --

Q No, you can just tell me what else you found in the reports.

A So FDA --

Q What is -- what is this?

A So the Food & Drug Administration over about a three-year period from 2007 to 2010 reported about 80 reports to them of inadequate reprocessing of some type of medical device that was filed with their agency, and they deemed that 28 reports of infection may have occurred from inadequate reprocessing, but I don't know what types of infections those were.

Q Okay. Fair enough. And these reprocessing of these medical devices include endoscopes, correct?

A I can't speak specifically for the FDA because I don't think it specifies on there. On the ambulatory surgery

center one, I think there is mention of high-level disinfection lapses, and I think the California one was focused on endoscopes as well, but you've taken it, so...

Q What other items did you find in the clinic that were being reused?

A We -- we didn't, in the clinic, identify any other items that we observed being reused. The propofol vials, the multidose vials of saline, multidose vials of lidocaine, the scopes. I think those were the only things that I recall seeing that were used for more than one patient in some fashion.

Q In your grand jury transcript, didn't you mention bite blocks?

A We did not observe that while we were there. I think that was identified or reported subsequent to us being there, I think. I don't recall that.

Q Did your report -- or your investigating take into consideration that bite blocks might be being reused when they were single-use items?

A Well, we did but again, when you look at the cases and their source, you only use a bite block if you have an upper endoscopy. You don't use it if you're getting a colonoscopy and not all of the patients had an upper endoscopy. So that, in my mind, was not a potential source of transmission here.

Q Were some of the ones that were infected, did they have any uppers?

A I'd have to look back at our -- the trip report again on that page 13.

Q Okay. Go ahead.

A And so -- do we need to put it up or can I --

Q No, you --

A Okay.

Q -- can just look at it.

A So for July 25, 2007, our potential source patient had an upper endoscopy, but our case patient who became infected had a colonoscopy so wouldn't have had a bite block.

Q Well, the source patient would have.

A Right. But in order for there to be transmission, I would expect that -- some sharing between the source --

Q Okay.

A -- and the -- and the infected patient, and the bite block wouldn't have been shared.

Q Okay.

A And honestly I don't think a bite block would be a source anyway, but -- and then looking at September 21 -- so our potential source patient that day who was the source of virus that went to the other patients, had a colonoscopy so

wouldn't have had a bite block. And then our cases -- again, looking at September 21, only one of them had an upper endoscopy; the rest had colonoscopies.

Q Are you referring to page 13, that table?

A Yes, sir. I am.

Q Okay. Let's put that up here.

A Yes, sir. Do you want me to --

Q No, that's what you're --

A -- okay.

Q -- referring to?

A Yes, sir.

Q I'm going to point this date out to you here.

A Yes.

Q It says, September 20, what -- what is that -- why is that in there?

A That is because one of our patients, Case 2 there, had two separate procedures. One on the 21st was their upper, and one on the 20th was their colonoscopy or lower. So they were listed twice because they had procedures twice at this clinic.

Q Okay. But can you pinpoint what day they were infected?

A The 21st.

Q Okay. And then how about case 4, it says the 19th?

A Yeah. So Case 4had an upper endoscopy on the 19th and then Case 4 had a colonoscopy on the 21st. Sorry. It's not right next to it, but --

Q So the same thing, two procedures --

A Two procedures --

Q -- on different days?

A -- on different days, yes.

Q Okay. Also, while we're on this chart here -- on -- for the September 21st dates --

A Yes.

Q -- do you notice who started the IV's, who you have on here? You have RN 1, 1, 3, 1, 2, and 5.

A Yes.

Q Who is RN 1?

A I don't know.

Q Who is RN 3?

A I don't know.

Q RN 2?

A I don't know.

Q If I were to tell you that the records that were put together by the State only show two nurses giving IV's on that particular day to those infected patients, would you have an explanation for that?

A I would not.

Q Could it be a mistake on your part?

A It could be.

Q I want to talk to you now about some of your conclusions. From looking at exhibit -- State's Exhibit 165, this is your report, I believe?

A So this is the publication in the Clinical Infectious Disease Journal. Okay.

Q Yes. And what was your conclusion that you reached after your -- was it nine-day investigation?

A Nine or ten days.

Q How many days were spent at the clinic?

A Again, I think we were there all days, but I can't say with certainty that on a Sunday if they were open or not, but the majority of the days were there. And then obviously, the investigation continued after we left; but if you're focusing on the field, that was nine or ten days.

Q Okay. So tell me what conclusions you reached after your investigation?

A So we concluded that a transmission of hepatitis C virus occurred at this clinic on two separate dates, and that transmission occurred through unsafe injection practices, meaning reuse of syringes. So drawing up propofol, administering it to a patient, reusing that syringe to go back into a vial, and then using that vial on subsequent patients.

Q And I believe you said -- you used the word "likely" means of transmission?

A Correct.

Q And what did you mean by likely means of transmission?

A I was not present on -- on July 25th or September 21st, so I am relying on the investigating we did several months later and the information that -- of all the totality of potential that we looked at and knowing that that practice has been attributed to a disease transmission previously, and it was witnessed as well as stated that it happened to us; and looking at all the different possibilities that's the one that makes sense.

Q Makes sense?

A Yes.

Q On page -- well, on this it says 272, but it isn't that long. You say that the investigation and conclusions reached are subject to unavoidable limitations?

A Correct.

Q What did you mean by that?

A It goes back to the fact that I was not there on July 25th or September 21st to witness what happened on those dates, and so I'm relying on review of records and the information provided to us several months after the fact.

Q And you state that the investigating occurred over a ten-day period five months after the initial transmission occurred, correct?

A Correct.

Q And you said that the observations and interviews were potentially subject to changed practices and recall bias?

A Sure.

Q So those conclusions you reached are subject to these limitations, correct?

A Correct.

MR. SANTACROCE: I have nothing further. Thank you.

THE COURT: All right. Thank you, Mr. Santacroce. Is it you, Mr. Wright?

MR. WRIGHT: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. WRIGHT:

Q My name is Richard Wright. I represent Dr. Desai.

A Thank you.

Q In preparation for your testimony here in the courtroom, what have you reviewed?

A So I have reviewed the three reports or publications, whatever we're going to call them, that were generated from CDC, the notes that have been provided to you, my grand jury transcript, and my interview with law enforcement before that have been the -- the main documents I have here that I've looked at.

Q Okay. And have you discussed it with anyone, your testimony?

A As far as what I'm planning to say, no. As far as I'm traveling here to testify, yes.

Q Okay. And have you been preinterviewed by the District Attorney's Office?

A Yes.

Q Okay. And preinterviewed -- and I mean in preparation for your testimony?

A Yes, sir.

Q Okay. Prepared by anyone else other than the prosecutor?

A No.

Q Okay. Now, do you -- because you're testifying about a visit to the clinic for about ten days in January 2008, about five and a half years ago, do you have an accurate recollection of the conversations, the people, the places, or are you relying upon your report?

A I think a mixture of both. I think the reports have helped refresh my memory of what I may have previously stated in closer proximity to the investigation. There are certain things that I have independent recollection of, so I'd say it's a combination.

Q Okay. And the, like, on -- if we talk about the placement of IV's with -- we've been calling them heplocks

here in the courtroom --

A Okay.

Q -- on the placement of those, do you have a clear recollection of the days -- or day you spent in observing it?

A Can I ask a -- when you say "placement," do you mean on the body or in the location in the clinic where it was placed? Like --

Q Okay.

A -- I'm sorry.

Q I mean insertion of it.

A So whether it was up here or down here or --

Q Right.

A -- I don't recall where on the body. I could look through my notes and I may have documented that, but just off the top of my head I don't recall if it was in the hand or if it was in the -- the antecubital fossa.

Q Okay. And the -- do you recall, like, I can read the report, you know, and read that a, what I would call a multiuse saline bottle was used in the preop area?

A Yes, that is accurate.

Q Okay. And do you remember that, or are you just reading the report like me?

A I remember that.

Q Okay. Do you remember when you were asked about

it by the police in your interview; that you were unclear on the memory of it when they asked you about prefilled saline syringes, you -- you had trouble recollecting whether it was prefilled saline syringes or a multidose saline bottle that was used for the heplock saline flushes?

A So I know what you're asking about, and I recall that multidose vials of saline were used. When law enforcement asked me about it, I think I somewhat misinterpreted their question in asking if prefilled -- manufactured prefilled syringes of saline flush were also used, and I did not observe that but was trying to remember did they have those as well. But what I observed was the multidose vial side of things.

I didn't -- I was trying to make sure that I wasn't misremembering that there were also prefilled saline flushes, and there weren't.

Q Okay. But you, I mean, you -- the -- so you were -- any confusion that it looked like from just reading the transcript, bear in mind, I wasn't there --

A Right.

Q -- at the interview -- that was simply confusion about were they asking in addition to multidose saline, were there also prefilled saline syringes?

A So in rereading the transcript in preparation for this, that's how I am interpreting --

Q Okay.

A -- that exchange because I know that multidose saline vials were used there.

Q Okay. And on there -- during that exchange and -- did someone say something? Oh.

THE COURT: Bless you.

MR. WRIGHT: Maybe I'm hearing things.

BY MR. WRIGHT:

Q Did you see -- during that exchange -- someone else -- I mean, it just has question marks as that's in the report.

A Question marks where?

Q As to who the speaker is.

A So can -- can we open it up?

Q Sure.

A Is that okay? I'll show you when I find it.

Q I think it's around page 14 --

A Thank you.

Q -- that ought to help you out.

A So it's from page 12 or 13 here, right?

Q Correct.

A So place an IV flush --

Q See -- yeah, on a -- page 13, your -- your recollection is exactly as you're testifying, and then what I was asking about --

A Is here?

Q -- yeah, it says -- someone says, Yeah, our trip report indicates the multidose saline flush --

A So that question mark is from my supervisor Joe Perrs [phonetic], who was also present in the interview. I think the transcriptionist -- since he probably didn't say this is Joe Perrs, but the next statements lead me -- he was -- he was present for the interview with me, and as you'll note later in the document, actually was responding to some of the questions since he supervised, was a co-author, approved our report, talked to him every night, so he answered some questions later.

So these question marks indicate to me that that was Joe's responses.

Q Okay. And so you say, Yeah, and then said -- I mean, he interrupt --

A He did.

Q -- you interrupted him -- multidose saline flush was the norm, and that is correct?

A Right. So --

Q I mean, he -- he's still speaking. That was the norm, at least the terms of what Gayle and Melissa observed and recorded --

A Yes.

Q -- correct?

A And prior to this interview with law enforcement, we had generated an earlier draft of the trip report, which addressed that as well.

Q Okay. I -- I was just confused --

A I understand.

Q -- as to who -- who was prompt -- answering.

A Yes.

Q And so that's -- when you talked about the home team --

A Yes.

Q -- you were the -- the road team --

A We were the --

Q -- is that --

A -- field team.

Q -- field team.

A They were the home team.

Q Okay. And so you would be reporting back -- you and -- was -- and Gayle?

A Yes. So if you look at our -- at the trip report you'll see language that says, Through, and those are the two main supervisors of the investigation. There were others involved, but those were the folks that were speaking -- that were in communication with Southern Nevada Health District before we left, are supervising, have -- you know, the investigation and we're speaking with every day and

sending updates and what we're seeing and finding.

Q Okay.

A And so Joe Perrs was my supervisor in my division, and that's who responded.

Q Okay. Now, when you and -- you and Gayle come out. And you're the field team?

A Correct.

Q And you are the only two members of CDC here?

A Correct.

Q Okay. And you came out on January 9?

A Correct.

Q Report had been received to CDC on January 2?

A That is my understanding, but I didn't receive that --

Q Right.

A -- report.

Q But it was, like, two cases and then jumped to three --

A Yes.

Q -- and the commonality for that was all three of them are -- had a procedure done at the same clinic and two of them on actually the same date --

A Correct.

Q -- correct? And that raises a great big red flag to begin with that -- it would be might coincidental that

three acute hep C cases, all one clinic, two on one day?

A Correct.

Q And so that bears further investigation, right?

A Correct.

Q And the CDC is at the beck and call of the states to come to help?

A They contacted us for assistance, and so we were happy to provide assistance.

Q Okay. But you -- you all don't have jurisdiction. Even though you're the feds, you can't just jump in without an invitation?

A Correct.

Q Okay. And so you were invited by the appropriate authorities --

A Yes.

Q -- to come and participate?

A Yes.

Q And as you understand it when you -- and did -- was Gayle or yourself higher in -- who was the boss between the team?

A Well, so it's very collaborative but Gayle was a second-year officer, I was a first-year officer, and so the Division of Viral Hepatitis was taking the lead in the investigation. So, you know, I think it was -- we worked great together, it was a joint investigation, but I would

consider her the lead author; she's the senior author on our publications --

Q Okay.

A -- et cetera.

Q And she had one more year than -- than you?

A Correct, at CDC and that training program, yes.

Q Okay. And each of you were beyond the fellowship training and are now called what?

A What is my position now?

Q Yeah.

A I'm a medical officer.

Q Okay. And Gayle also?

A Yes.

Q Okay. Now -- as you understood it when you arrived, you already had been doing background investigation and research in preparation?

A I mean, we had been meeting with our supervisors to get ready to travel and that also involved, you know, generating early drafts of abstraction forms that we would use to review medical records and questionnaires that we can modify in the field so that we would have stuff ready to go to hit the ground running.

Q Okay. And you -- you understood that no contact had been made by local -- what I'll call the local health authorities with the clinic?

A That is my understanding.

Q And you arrived and so that the first notice to the clinic of the investigation and the fact of hepatitis C transmission there would have been when you all walked in the door on January 9?

A Right. So at that time it was potential transmission, right --

Q Right.

A -- we hadn't confirmed anything, and the phone call from the health department when we arrived before we got to the clinic, I think was the first notice that the clinic had that we were there doing an investigation.

Q Okay. And the phone call was -- were -- as you understand it, was we're coming over?

A Yes. I don't know what additional information was --

Q Okay.

A -- provided, but yes.

Q And so then the we're coming over, it was you and Gayle, Brian Labus, you recall --

A Yes.

Q -- Southern Nevada Health District --

A Yes.

Q -- and a representative or more from BLC, a state licensing agency?

A I -- I'm certain about Gayle and myself and Brian and I'm fairly certain, but couldn't tell you the name of the BLC person.

Q Okay. And you weren't -- you were doing a, what I'd call a public health investigation?

A Yes, sir.

Q And so you -- you were not keeping reports of who's present at a meeting, who said what, like a law-enforcement investigator might do?

A Correct.

Q Okay. So, like, when -- when you say that first meeting probably late afternoon on Wednesday, that was the 9th --

A Is that the 9th?

Q -- was a Wednesday.

A Okay.

Q You don't have any report you can go to on that to determine who all was present and who said what?

A So I have the notes that I took, which you all have which I think, you know, I wrote, Tonya and, you know, had some question marks of other names; but I didn't write date, time, you know, documenting name and title of everyone present, no.

Q Okay. And is -- and is that -- on those 32 pages of notes is that first 7 pages just typed, right?

A Yes. So -- so page 1 of that --

Q Yes?

A -- is where, I think that reflects on the people that were initially there at that meeting when we walked in. And so, you know, I -- you have my handwritten notes, and then these were notes that I had typed up to help Dr. Fischer and others as she's writing reports, you know, so she can review.

Q Okay.

A So there's overlap and repetition here, but that -- where it says, Roster --

Q Yes?

A -- is the folks who would have been at that first meeting.

Q Okay.

A And where we went over -- well, sorry, I'll let you ask.

Q But the -- and so the -- the first seven pages, the typed --

A Yeah.

Q -- was a later compilation recollection putting into written form using all your notes?

A Yeah. So this typed document is not from that first-day entrance conference, it's, you know, taking stuff that you have that's scribbled and handwritten here, and trying to clean it up a little bit and -- and, you know, to

help us when we're drafting -- we were writing the trip report while we were in the field, so help with that.

Q Okay. And so the -- you all arrive, you're -- you end up in the upstairs office of Tonya Rushing?

A Yes.

Q You knew her to be, like, a chief executive officer?

A I think she was their chief financial officer, I think.

Q Okay.

A Yeah, she was a -- yes, some --

Q Okay. And Dr. Clifford Carrol was there?

A Yes.

Q And we -- Jeff K. -- Krueger -- and Katie, question mark. From being here in the court, we know that's Katie Maley --

A Okay.

Q -- I mean, the charge nurse.

A Okay.

Q And when you all walk in, who mainly does the talking?

A I think Brian did a lot of the talking. I think Gayle also chimed in. I think those were the two folks who were -- who were primarily leading the --

Q Okay. And the -- I presume -- you said -- you

told them why we're here and what we're going to do?

A Correct.

Q And that was a generic description of it. So I'm presuming you told them that there is a -- been a hepatitis C cluster. Is that the word that's used, or?

A I don't know if that word was used then, but that we had these three reports of acute infection --

Q Okay.

A -- in patients who had had procedures within the incubation period at their clinic and that we were concerned about possible transmission in the facility and wanted to do an investigation.

Q Okay. And the -- you tell them it's three patients and it's patients from their clinic and two on the same date?

A I believe so. I don't --

Q Okay.

A -- recall specifically, but yes.

Q Okay. But it was -- I mean, I'm guessing the meeting took hour or something?

A I -- honestly I can't recall the duration of the meeting.

Q Okay. But you need to explain why you all were there, and the fact that this was going forward and to seek their assistance and cooperation?

A Yes.

Q Okay. And what -- what was the reaction of Tonya, the charge nurse -- the two nurses and Dr. Carrol?

A So I can't speak about individual reactions, but my, you know, best recollection is there was surprise and concern on their part.

Q Okay. And did -- did they pledge cooperation? Not in those words --

A Yes --

Q -- but --

A -- they agreed to cooperate with the investigation, yes.

Q Okay. And any -- any questioning that comes to mind about, Are you sure? How could this happen? I mean --

A I think Dr. Carrol had some questions about how we made the diagnosis of acute hepatitis C in these folks. I don't recall other specifics because we hadn't launched the investigation yet, and we didn't go in saying, we're certain transmission happened here, this way, done. You know, it was a, we're looking into this. These are these reports.

Q Okay. And at this stage in the investigation do -- do you have -- and assuming, I mean, part of your investigation is going to be to determine that these three people -- and the number grew --

A Right.

Q -- but those three got their hepatitis C at the clinic, correct?

A Sorry, I missed the beginning part of the question, so --

Q Okay. Part of the investigation is, did they get the hep C --

A Yes.

Q -- at the --

A Yes.

Q -- clinic; and then if they did, how did they get it?

A How did they get it, and how can we keep it from continuing?

Q Right.

A Yes.

Q Okay. So as you went in at the inception, the three patients had already been screened in the sense they didn't have it before and they didn't have any known risk factors?

A So I believe the Health Department had done interviews with each of those three, which is a standardized questionnaire about -- because these folks had acute disease -- so risk factors during that six-month window that we usually consider as the incubation period from exposure to, you know, symptom onset. That's the time period back that we

go. So any risk factors during that time period, any prior positives, yes.

Q Okay. And so the acute -- just because we -- we're not as knowledgeable about this as you are -- and so the -- on the -- the three having acute, I mean, that in layman's terms mean they just got it within six months?

A Well, so acute --

Q Normally?

A -- acute means they are symptomatic --

Q Okay.

A -- so they're showing they have symptoms. And so there is a time period that we usually look at from when we do these investigations where, you know, on this date you have symptom onset, what we consider the likely exposure period of when you are exposed to the virus to become infected. And so the upper range of that is six months.

Q Okay.

A The very upper range.

Q And so -- and just so I'm making sure I understand, I -- just suppose I have hep C and don't know it; you know, I've had it for six years, just one day it doesn't turn acute?

A Right. I mean, these people had a discrete onset of symptoms suggesting acute inflammation for them.

Q Okay. And suggesting that it was newly acquired

because --

A Yes.

Q -- it's acute?

A Yes.

Q Okay. So we -- going in you know they've got hep C recently, they have no risk factors that are known by questioning them within that time frame, so it's a -- you go in already with a pretty good inclination that it may be clinic-related?

A Right. So that's part of the interview that the Health District did, and as part of that interview they asked about, you know, healthcare exposure during that time period. I don't have the questionnaire in front of me --

Q Okay.

A -- but the endoscopy procedure was during that window, and then, you know, they are the people getting these reports and so the same person was, like, wow, I just did an interview with this patient -- oh, this person said the clinic too --

Q Okay.

A -- so that --

Q Okay. Was -- and did you go in with any preconceived inkling, notion, as to method of transmission?

A Well, I mean, so before we went out and obviously our supervisors, you know, in both divisions have,

you know, quite a bit of experience with these types of investigations and the literature are talking about, you know, how transmission has previously been documented in these outbreaks, and so we were going to make sure to look at those things when we went there.

Q Okay. And you know, as you've said, I mean, it's blood-to-blood transmission --

A Right.

Q -- for hepatitis C, and so those are the areas you're going to be focusing on and paying attention to what we've historically learned have been the likely causes in the past?

A Yes.

Q Okay. And so you prepare your abstract, your chart, and you're going to go in, get the patient charts for both days?

A Right.

Q Okay. And the -- I think there were, like, 126 is what I recall from your trip report, or 120, I don't know.

A I can check the report but that sounds -- that sounds about right --

Q Okay.

A -- for those two dates.

Q And so you -- you-all, first day tell them here's what we're going to need, and that, I'm presuming it

was the first day because, as I understand it, you all were back there the next day reviewing all the charts --

A Right. So --

Q -- patient charts?

A -- right. So we, you know, we're telling them this is the investigation we're going to be doing, you know, we're going to need a space to work, we're going to need medical records brought to us, we're going to need access to review procedures and talk to your staff.

Q Okay. And it's going to be -- make staff available to -- for interviews, as needed?

A Right.

Q Make -- make the place available for observations of everything from start to finish?

A Right. We try to be as unobtrusive as possible, but, you know, and watch while they're doing their patient care so that we're not forcing them to stop seeing patients, but yes, that's correct.

Q Okay. And you -- your understanding is that the clinic -- oh, wait, you were there Wednesday the 9th, chart reviews -- all of the charts were presented, meaning all the patient charts for all the patients on the 25th of July and the 21st of September, correct?

A Yeah, so we asked for their medical chart, which is at one side of the clinic, and then the procedure char,t,

which is the other side of the clinic. I don't know if they were all provided that first day, or if they were getting them, but they eventually provided them.

Q Okay. There were no records not made available to your knowledge?

A Not that I recall.

Q Okay. And so when all this is provided you and Gayle and/or others are pouring over them --

A Correct.

Q -- and you do not copy them?

A I don't recall copying or taking any of them with us. No, we -- I think we were, you know, transcribing onto the abstraction form.

Q Okay.

A I don't recall.

Q Because on your abstraction you are going to gather out of the patient charts everything that you believed was significant for those patients?

A For what was documented in the medical records, yes.

Q Right. And so the -- having those -- what you've -- and I don't want to lock you in on time frames or anything, but your first task was to look at all of the charts, abstract them, looking for what we've called commonalities. Gee, was it one -- one doctor on each of these

or was it one this or that?

A Well, so part of what we're doing is not just looking for commonalities, but we're also looking for any other cases. You know, are there any other acute infections that weren't reported to the Health Department that, you know, so getting names to cross-match with their surveillance data and see if anybody pops up. We're looking for potential source patients, people who are known to be hepatitis C positive before they come in for their procedure.

And, you know, I don't think that we abstracted the totality of all those patients before we started doing observations. I think we started with the people that we knew were our case; you know, people who had acute disease, looking at that, and I -- again, I can't --

Q Okay.

A -- tell you when we finished versus that, but I don't think that we finished everybody before we started observing.

Q Okay. And did the -- at some point, and I can't remember the evolution of the other cases coming up --

A Right.

Q -- but as you were there, patients on the 21st of November -- additional patients with hepatitis C were identified, correct?

A So September 21st?

Lakeman Appeal 03764

Q Yes --

A Not November? And yes, so eventually we did find other cases --

Q Okay.

A -- on September 21st.

Q Okay. And while you were there the number grew from three to four to five to six?

A Yes, the number grew. Yes.

Q Okay. And the -- and so knowing -- you were knowing all of that, and so then observations start -- or --

A Yeah, I don't know --

Q -- so --

A -- if we knew about these others before we started observing. I can't tell you in proximity, but observations started in the midst of this, yes.

Q Okay. And are -- how -- are patients -- patients are told. I mean, do they get consents? How does this work?

A Yeah, I don't -- so we typically rely on the clinic to get consent and to tell the patient, you know -- because I want to give them the opportunity to explain who we are and what we're doing there and in whatever terms they want to; and so I don't remember how that happened, but I do know that patients were told that we were there and gave permission, but I don't know how that was recorded or

documented.

Q Okay.

A And we certainly weren't hiding. We were standing in the room as they were wheeled in while they're awake.

Q And the -- do you all -- do you wear uniforms or anything?

A No.

Q Okay.

A I have my, you know, badge around my neck which I think I wore during the time, but I'm in clothes like I am here today.

Q Okay. And you were -- you made various observations over a nine-or ten-day period --

A Yes --

Q -- correct?

A -- we did.

Q Okay. And you, I think from reading everything, each of you, you and Gayle, like, totally observed at least one of everything?

A Yes.

Q Okay. And so you observed in the preop area? You observed procedures in the procedure room, whether it's uppers or colonoscopies?

A Yes.

Q Okay. And you have testified already to observing what we've been calling multi-patient use of propofol vials?

A Yes.

Q Okay. And that was an early-on observation of yourself of Linda Hubbard?

A Yes.

Q Okay. And you observed Linda Hubbard -- and do you recall what size of propofol vials were being used?

A I don't. I -- off the top of my head, I don't know if I've written it down. I -- I don't want to say the wrong thing so I think they were the 20cc, I'm pretty --

Q Okay.

A -- sure about that. But I'd have to --

Q Okay.

A -- dig through notes.

Q But you were aware, I mean, that the clinic was using what we call 20s and 50s?

A Yes.

Q Okay. And Linda Hubbard -- you're observing multiple procedures --

A Yes.

Q -- correct?

A Yes.

Q Do you know who the doctor was during those

procedures?

A I don't recall, no.

Q Okay. And she -- she was taking new propofol vials, drawing up, injecting patient, setting it aside -- it has partial propofol still in it --

A The vial not the --

Q -- yes --

A -- syringe --

Q -- the vial?

A -- yes.

Q Syringe she would use and appropriately discard?

A Yes.

Q Other than maybe -- wasn't there a needle issue or something?

A Yes, so she was observed, you know, walking through the room with an uncapped needle at one point, and I also observed her recapping a needle at one point, which is not safe for her.

Q Okay. If the -- just on the needle thing, recapping a needle?

A Yes.

Q Is that good or bad?

A It's --

Q I mean, I -- I hear you say it was dangerous to walk around the room with a needle and it's also dangerous to

recap the needle?

A So the right thing to do is when you're done, drop it in the Sharps container and not wander through the room with it. So you shouldn't have to recap it, and you shouldn't have to walk through the room with it.

Q Okay. And the recapping it just means she is at risk of sticking herself --

A Correct.

Q -- while trying to put the cap on?

A Correct.

Q So use, drop --

A Yes.

Q -- in Sharps container?

A Yes.

Q Okay. And she was dropping -- she was using clean syringes, what we call clean -- clean needle and syringe every time?

A So she was using a clean needle and syringe each time she went into a vial of propofol. I did not see her reusing needles and syringes to enter propofol or from patient to patient.

Q Okay. So she wasn't what we'd call double dipping?

A No, not that --

Q Okay.

A -- I -- not that I saw.

Q Okay. And you were watching multiple procedures and while others had other tasks to do, your task was to watch and see what she was doing?

A Yes.

Q Okay. And the -- so then after a few patients she has a few -- and it was three or four, whatever you've explained -- you have partially filled propofol vials still remaining?

A Yes.

Q And so then she took new needle, syringe, pooled -- meaning she filled up, like, the 10cc syringe by using the remnants of three or four propofol vials?

A By using remnants of more than one. I don't know how --

Q Okay.

A -- I can't recall if it was two, three, four, yes.

Q Okay. So -- and then -- I mean, and what her -- she was obviously doing was then using all of the propofol, was going to throw them away and use the leftovers in one final syringe?

A Right. So using up all the propofol so that the vials would be empty.

Q Okay.

A Yes.

Q And so her transgression was -- and what she was doing, aside from ignoring the label on the propofol vial, what she was doing was safe?

A Well, I don't consider that practice safe, but as you said, the main transgression there is using these vials for more than one patient. I also have concerns when you start pooling from -- again, from -- it's kind of doing -- saying the same thing. One, you know, you're using these vials for multiple patients, which shouldn't have happened; and then, two, the pooling -- again, it's still using the vial for more than one patient, but if something happens in one vial, you know, you've -- to get the sufficient dose you're, you know, pooling it or potentially -- you know, if this vial is contaminated and I drop some and then I need just a couple more cc from this vial and I go in, I've contaminated that vial and anything left -- potentially contaminated that vial and anything left if I haven't drawn up the whole thing.

Q All right. But, I mean, that would require a mistake on her part? I mean, if she is -- if she is sitting there using new needle, new syringe every single time she entered the vial --

A So focusing just on viral hepatitis transmission, yes, I would not -- I would not -- without syringe reuse or without having those vials in a really bloody

environment where blood is, you know, getting on the top and introduced that way, I'm more concerned with bacteria with --

Q Okay.

A -- with the multi --

Q And on the bacteria, I mean, you've explained these -- these propofol vials are labeled single --

A Patient use.

Q -- patient use?

A Yes.

Q Okay. And you're familiar from your training in the emergency room, propofol use?

A Right. The -- right, it's for a single patient. Each vial is --

Q Okay.

A -- for a single patient.

Q And the -- and for single patient that doesn't mean single use, meaning you can only enter it and use it once?

A Well --

Q It means single-patient use even if I use it four times within the time frame on the same patient, correct?

A Right. So CDC's recommendation about that is that, you know, the best practice is to draw up the entire contents in your syringe from the vial and administer to the patient. And we have some caveat that if you feel like you

have to go -- that that's not safe, that you can't safely titrate the dose, that if you have to reenter a vial it's within -- for that patient, that procedure, with a new needle, with a new syringe, and you -- you recognize the risk/benefit that you're taking with multiple entries into a vial.

Q Okay. But the -- I mean, the actual labeling, see, I just look at these things simplistically --

A Sure.

Q -- and if I see single use, that means I can go in, use it one time, and then throw it away? That to me would mean single use. I can only use it once. But if it's single-patient use --

A So I'd have to look at the label of propofol if it says single patient use, single use, or single dose. I think we at CDC consider those the same, but healthcare personnel may have other interpretations of that. But we consider single patient use, single dose, single use as for that individual patient, for that procedure, draw it up and administer it is the best practice.

Q I'm not sure I'm clear on that. I mean, do you understand what I -- do you see the difference that I do between single use of an item?

A So all I can tell you is we equate those terms as the same thing, single dose, single use, single patient use, to us at CDC means, and to me means the same thing. It's

for that patient and their -- that distinct procedure. And I -- and the best practice is you draw it all up and you give it to the patient in one syringe --

Q Okay.

A -- and that you don't --

Q Well, I've got to --

A -- do reentry.

Q -- I've got a 10cc syringe --

A Right.

Q -- and I've got a 20cc vial, okay? And I -- I've been understanding through five -- four weeks of this trial that I can -- I can draw out two syringes, I can take two separate, clean syringes and draw it out and then use it on a patient, and I'm in heaven with CDC, BLC, every other agency I can think of. Now, you're telling me --

A Well, I'm telling --

Q -- from CDC's perspective --

A -- no, I --

Q -- I can't do that.

A -- sorry. No, I guess I'm -- I'm not saying that. I'm saying that we want you to use the right vial size for your patient and your procedure. So if you typically administer 100 milligrams, I'd want you to get 100-milligram vial and draw it up so that you don't have to take multiple syringes out. But what you're describing would not be a

concern for me for viral hepatitis transmission.

Q Okay. And if -- and what Linda Hubbard was doing, setting aside the bacterial issue on shelf life, my term, for once it's opened she was not administering propofol in any method that would have led to transmission of hepatitis C?

A She was not reusing syringes or needles, which is what would be my predominant concern, and I didn't see blood contamination.

Q Okay. So if -- if all we had was Linda Hubbard's method and that's what she did all of the time, you know, if she -- if her conduct you observed is what her conduct had been the two and a half years over there, she didn't -- any of her patients wouldn't have gotten hepatitis C because --

A Unless a vial she used had been contaminated by someone else, no.

Q Okay.

A Not that I can -- can see.

Q Now, on the contamination -- the bacterial issue of propofol, it's single use -- I'll call it single patient use --

A Okay.

Q -- single patient use vial because it does not have any preservatives, layman's term?

A More or less, yes.

Q Okay. Meaning once I start using it, it has nothing in it by which is going to inhibit bacterial growth or something?

A Correct.

Q So I'm presuming saline and lidocaine multiuse bottles have a preservative that they can -- no bacteria grow.

A If they are truly labeled multidose and not single dose or single use, then they should have some type of bacteriostatic preservative. It has nothing to do with viruses but would prevent or is supposed to prevent the multiplication of bacteria in them.

Q Okay. And so would -- would -- the propofol we've heard here in the courtroom has a use time of a maximum of six hours. Other more safe CRNAs viewed it as one or two hours.

A That's my understanding from the label, yes.

Q Okay. So that means that what Linda Hubbard was doing, all within an hour or so?

A Yeah, I think the procedures were pretty quick --

Q Okay.

A -- for that time period, so...

Q It was a pretty busy place?

A Yeah. So --

Q Okay.

A -- I think that that sounds like it would -- probably within an hour, I think so.

Q Okay. So as far as -- there wasn't a bacterial growth issue or anything? I mean, because it was rampant pooling?

A Well, I mean, every time you reenter a vial you're potentially introducing bacteria and contamination, but no, that wasn't a high concern for me for those particular patients.

Q Okay. And so her -- I mean, just to repeat, her transgression was using a single-use labeled vial as a multiuse vial?

A Yes.

Q Okay. And you observed other CRNAs?

A So I think I observed one procedure with Mr. Mathahs, but it was the last case of the day, so he'd kind of drawn up the meds already, and then I don't recall specifically if I observed others. I don't recall.

Q Okay. The -- in your either -- what we call your Metropolitan Police interview or your grand jury interview, you said you observed other CRNAs and you just can't recall, other than Mathahs, who else it would have been.

A Well, I know there was a CRNA that's first name was Vinny.

Q Vinny?

A I think there were -- I think there were two Vinny's, and --

Q Okay. Vinny Sagendorf?

A I don't recall the last name that -- I will, if that's who was there. So I know there were two Vinny's and I, you know, today I can't recall; I might have observed him, but I don't recall specifics.

Q Okay. And in observing did you -- did you ever see any reuse of syringes?

A I didn't -- as far as from patient to patient or reentering vials, I did not, no.

Q Okay. And first of all, patient to patient, just so we can make sure we're on the same terminology, that would mean somebody used a syringe and vial on the patient that's in there and then in rolls a new patient, you take and use the same one on the next patient?

A Did not observe that --

Q Okay.

A -- at all.

Q And the -- and that happens out there in your CDC world, correct?

A Yeah.

Q I mean, those instances?

A Yes.

Q Okay. And on the other type of reuse we're talking about double dipping, would be reusing the same needle and syringe to go back into the vial a second time.

A After it's been used on the patient, yes.

Q Okay. And to draw up again?

A Yes.

Q And so you saw none of that?

A I saw none of that.

Q Okay. But you -- but you did see -- I mean, you were aware, other than Linda Hubbard, using the propofol vials as multidose?

A Yes.

Q Okay. And you understood that that was the standard practice, the norm, as to what the CRNAs were doing?

A Yes.

Q Okay. And although you didn't see any reuse of syringes you're aware Gayle did?

A Yes.

Q Okay. Because you all would talk about what each other saw?

A Yes.

Q Okay. And the -- you -- and it's in your reports, but I mean, she -- you were in observing in one room and she was in a different room, and was she observing Mr. Mathahs?

Lakeman Appeal 03779

A Yes.

Q Okay. So it was Mr. Mathahs she saw double dipping?

A Yes.

Q Okay. And not the other -- the other type of reuse patient to patient?

A Correct. She did not report --

Q Okay.

A -- seeing that.

Q And this was early on in the ten-day investigation?

A Yes.

Q And that -- that dual observation, I'll call it, I mean, it -- this all happened -- this observation Mathahs reusing by Gayle and of course, Gayle also saw or was aware of propofol vial multi-patient use, right?

A She was aware of propofol being used for multiple patients.

Q Okay. And you were. And so with these two, this was immediately addressed with the clinic?

A Yes.

Q Okay. And that -- was that by yourself?

A No.

Q Okay. By Gayle?

A By Gayle and I believe Brian Labus.

Lakeman Appeal 03780

Q Okay. And it was, as you understand it, it was reporting to the clinic these are single-use propofol vials and there is to be no multiuse whatsoever and there shall be no reuse of syringes?

A That's my understanding, but I was not at that meeting.

Q Okay. And the -- but the -- it was being reported back to your superiors what had been found and what actions you were taking?

A Yes.

Q Okay. And the -- I mean, your goal in the -- in being there is figure out anything unsafe happening, and if it is stop it, right?

A Yes.

Q And prevent it so that if that is causation, it stops?

A Correct.

Q And the -- it -- and thereafter it did stop?

A Yes.

Q Okay. Because you all continued to observe?

A Correct.

Q Okay. And from then on there was no multiuse of propofol vials?

A Correct.

Q And you saw no reuse of syringes in your

observations?

A Correct.

Q Okay. Now, at that time -- now, I want to take it at the time where we are, and you just told them correct this --

A Yes.

Q -- meaning, multidosing propofol and syringe reuse, did you all reach a determination, ah-ha, we've solved it?

A Well, we stayed there for several more days to continue investigating, so I think, you know, we certainly were, like, this could -- this could be it. I mean, this is enough to, you know, test and -- this has been transitioned before, the source of transmission before, so this could be it.

But it required still some chart review to look and see can we find a source on those days, was there, you know, reuse on those days, you know, redosing, and then also continuing to look at these other things just to make sure they weren't also part of the problem.

Q Okay. And -- I mean, is it fair to say you continued to further look at all of the options?

A Yeah, I mean --

Q Okay.

A -- right. Yes.

Q The likely causes, let me put it that way, of the transmission?

A Yeah. I mean, we continued -- we still looked at the endoscope reprocessing -- we were still looking -- I don't remember at what point we looked at the saline flush, whether it was before this or after. But yeah, I mean, I can't -- I don't recall the order in which we identified syringe reuse and propofol reuse versus if we'd already looked at the scopes and the saline. I don't recall the order of that.

Q Okay.

A But we still were reviewing records and, you know --

Q Okay.

A -- additional observations.

Q At the time when you all are still there before you leave and it's grown, I think to, like, six identified hepatitis C cases, you all still don't have the rooms being able to be segregated --

A Correct.

Q -- by patient?

A Correct.

Q And you aren't having to address the -- how the hepatitis C went from room to room and skipped over people?

A So we haven't at this point tested all of the

patients seen on that day, so we don't know how many cases we're going to find. You know, we've abstracted medical records to plug that in later, but, you know, I don't have at this point an order of people; we don't have a room assignment; you know, we're trying to put people in order with times, which is challenging, so yes, we --

Q Right.

A -- we're still missing some of those --

Q So yeah, I mean --

A -- components.

Q -- like, without a doubt -- I mean, it remained one on July 25th?

A Correct.

Q And then, like, five or six on September 21st?

A So I think ultimately we ended up with, I think, seven on September 21st --

Q Okay.

A -- and one on July 21st --

Q Right.

A -- I think is --

Q Okay.

A -- what we --

Q And -- but as of that time -- and I'm still here before your trip report is written or anything, meaning in Las --

A Yes --

Q -- Vegas.

A -- okay. I'm sorry.

Q It has grown, so I mean, now it's way more than coincidental --

A Yes.

Q -- when you have half a dozen acute hepatitis C patients all out of a clinic on the same day?

A Yes.

Q Then you're wanting to know, did they all get it there, you know, is like the first big question. And of course, that ended up -- that's when we got into -- what was your fellow's name that was here, Yuri?

A Yes.

Q Okay. The -- all of that stuff that essentially shows that the cluster -- and I'll talk about September 21st -- the cluster on September 21st of those patients that got hepatitis C, it was determined that their hepatitis C came from source patients' hepatitis C?

A Correct.

Q Okay.

A From a source patient, yes.

Q Correct. And so -- but you didn't know all of that when you were here?

A Right. We didn't have the results of that

quasi-species analysis, I don't believe, at that time because we still had to test patients on that day.

Q Okay. And you all are looking to determine, before you leave, the likely cause of transmission?

A Right. I mean, ultimately before I leave I want to make sure that there's not any unsafe practices that are putting people at risk. Ideally, yes, we, you know, are looking to confirm the outbreak, to try to find all the cases so people can get referred for care appropriately and to identify how it might have occurred so we can stop it from continuing.

Q Okay. And all of this speed is somewhat of the essence because of the nature of the disease? I mean, on getting people help, correct?

A Right. So, you know, we want to identify people who have disease so that they can get referred for care and their clinician can decide what, if any, treatment course they may or may not need. But keeping in mind that we're now in January and we're looking at dates from September and July. So we're already several months past when they were exposed and infected.

Q Okay. And the -- let's see, Gayle's the hepatitis C specialist --

A She was from that division --

Q -- okay.

A -- yes.

Q All right. And the -- okay. Now, on your trip report --

A Yes, sir.

Q -- I call it "your" but who wrote it?

A So we're talking about this, right?

Q Yes.

A Okay. So Gayle is again the lead author, but I contributed to the content with her, and then it goes to our supervisors to review it and edit and help fix or give suggestions, and then it actually goes through a clearance process at CDC where it goes through other people, and then we send it to the Health Department.

Q Okay.

A Is when it's finalized.

Q And the -- on page 2 of objectives, now, this report -- I may be repeating, but this is the report -- at the end of your trip this is what's delivered back to the State -- the authorities that invited you --

A Yes --

Q -- correct?

A -- ultimately we generate a report summarizing what we did while we were there, what still needs to be done, what our recommendations are, and provide that to the Health Department to do with what they'd like.

Q Okay. And on -- this is dated May 15, so you all had left by approximately January 19, if it was a ten -- or January 18 or 19, who has input into this? Does the local Health District of the State or just CDC?

A So this -- I think -- and again, Gayle would potentially recall better than I do, we left -- we drafted an early draft of this that we left behind, I think even before we left in January, and then continued to refine as we had additional information here for this report because at this point, you know, we have some quasi species --

Q Okay.

A -- that we didn't -- so this is the May 18, and so again, this is, you know, Gayle putting the draft together, I'm providing some input, as I said, it goes to our supervisors, it goes through CDC clearance. I don't recall if we sent -- obviously the Health Department had a -- the earlier version we left behind of this. I don't recall if they provided any edits or additional input into this before we sent --

Q Okay.

A -- it back to them.

Q Do you have the initial draft that was left behind?

A I don't. No.

Q On the objectives, I'm looking at page 2.

Lakeman Appeal 03788

Interview and collect specimens from identified hepatitis C patients for phylogenetic analysis at CDC.

A Mm-hmm.

Q Okay. Now, part of you all coming out here was to get those specimens for testing?

A Correct.

Q Okay. And then investigating infection-control procedures at clinic A, that's the clinic here, especially use with multidose vials, reuse of single-use vials, and reprocessing of endoscopes?

A Right.

Q Okay. And was -- was that -- was this, like, written out before you came out? I mean, this is from your historical looking back, knowing what type of clinic it is. This is what you're going to be looking for?

A So there's something called an Epi-1, which is what -- when we're going to do an Epi-Aid or a field investigation gets drafted to get approval at CDC for an Epi-Aid to proceed. And so that gives a brief blurb about, you know, this is the situation, these are the objectives of the investigation, here's the team that's going.

And so typically when we do the trip reports, we move objectives from the Epi-1 to here. I don't have a copy of the Epi-1, and I don't recall what those objectives were in it.

Q Okay. Clinic A generally appeared clean and well organized.

A What page are you --

Q I'm on page 4.

A -- okay.

Q I'm just jumping around to highlight some things.

A Yes.

Q And is that -- that's your opinion --

A Yes.

Q -- also?

A Yes.

Q Okay. There were issues with adequate hand hygiene -- an inadequate hand hygiene, correct?

A Yes.

Q Well, page 5 you already talked about endoscope reprocessing. Where it says, The biopsy equipment was disposable and thrown out at the end of the procedure --

A Yes.

Q -- correct? The --

A That's what we observed, yes.

Q -- those were your observations?

A Yes.

Q And the -- a biopsy equipment is something that, if reused patient to patient could cause blood-borne

transmission? These are my words.

A Right. So theoretically if you're doing a biopsy and get blood from the device and then go and use it on another patient with a blood-generating procedure, I suppose theoretically it could. Not all of our cases had biopsies, so --

Q Right.

A -- and we observed them discarding them.

Q Okay. Yeah, but I was looking at the chart when you were looking at September 25.

A Yes, go ahead. September 21?

Q I'm sorry, these dates kill me.

A But yeah, no, I'm with you.

Q July 25 --

A Yes.

Q -- Mr. Washington --

A Yes.

Q -- with -- and the source patient?

A Yes.

Q Mr. Santacroce took you through hep saline --

A Yes.

Q -- and both patients had biopsies?

A Correct.

Q Okay. And the source patient first had a biopsy and then Mr. Washington had a biopsy on the chart which you

have displayed?

A Yes, correct.

Q Okay.

A At some point after that, yes.

Q All right. You pointed out you -- on the source patient had an upper endoscope. Mr. Washington had a colonoscopy?

A I can -- so Mr. Washington was the case patient, right, who became infected?

Q Yeah.

A Okay. So he had a colonoscopy and then our potential source that day had an upper, yes.

Q Okay. And they both had biopsies?

A Yes.

Q Okay. And there's -- are the biopsies -- biopsy equipment for an upper the same as a lower?

A I believe so, but I --

Q Okay.

A -- am not -- I believe they use the same, but I couldn't say that with 100 percent certainty.

Q Okay. And so if I understand, you-all, meaning the CDC and the Southern Nevada Health District, seem to have married September 21st to July 25th as being some common cause, correct?

A Yes. I mean, we saw a systematic poor practice

that was -- that we were told was routinely done and has been tied to transmission previously. So yes, I think that what caused transmission on the 21st was likely also what caused transmission on the 25th.

Q Okay. But if you take that approach, you're kind of -- you're lumping them together --

A True.

Q -- and ignoring the fact that there may have been a hepatitis transmission in July from the source patient to Mr. Washington that was unrelated to the propofol and the method of injection, correct?

A True, but I'm also looking at the person -- the nurse anesthetist who administered propofol on the 25th who reported routinely reusing syringes to double dip. So that again seems like the most likely source, but yes.

Q Okay. But this is the same -- the same nurse anesthetist who has been working there -- you can find him there every other 300 other days that year too, correct?

MR. STAUDAHER: Your Honor, may we approach?

THE COURT: Sure.

(Off-record bench conference.)

THE COURT: Ladies and gentlemen, we had a request from one of the jurors for a little bit early today, so we're going to go ahead and take our evening recess at this point. We'll reconvene tomorrow morning at 9 a.m.

During the evening recess, you are reminded that you're not to discuss the case or anything relating to the case with each other or with anyone else. You're not to read, watch or listen to any reports of or commentaries on this case, any person or subject matter relating to the case. Don't do any independent research by way of the Internet or any other medium, and please don't form or express an opinion on the trial.

If you'd all place your notepads in your chairs and follow the bailiff through the rear door, we'll see you back tomorrow morning at 9.

(Jury recessed for the evening at 4:15 p.m.)

And, ma'am --

THE WITNESS: Yes, ma'am.

THE COURT: -- during the evening recess, please don't discuss your testimony with anyone else.

THE WITNESS: Okay.

THE COURT: And then if you could be here a little bit before 9 so we can start right at 9.

THE WITNESS: Yes, ma'am. And can -- should I leave --

THE COURT: Yeah, just -- anything that's --

THE WITNESS: These are what I brought with me.

THE COURT: Oh, you keep those.

THE WITNESS: Okay.

Lakeman Appeal 03794

THE COURT: Yeah, just bring them back with you tomorrow.

THE WITNESS: Okay.

THE COURT: Yeah, I mean, if you get here, like, at 8:50 or 8:55 that's fine.

THE WITNESS: Okay.

THE COURT: And, State, may the witness be excused for the day? All right.

All right. Why don't we all take a brief, you know, few -- couple-minute break and then we'll come back and address this issue on the record.

(Court recessed at 4:15 p.m. until 4:22 p.m.)

(Outside the presence of the jury.)

THE COURT: All right. We're on the record out of the presence of the jury. The State had approached during Mr. Wright's questioning with essentially the objection that the question created the false impression that the only days that there was hepatitis transmission appeared to be on the two days that are at issue in this case, as opposed to other days when other people were infected, but that those people have never been linked genetically.

Is that essentially your objection, Mr. Staudaher?

MR. STAUDAHER: Yes, Your Honor.

THE COURT: All right. Mr. Wright?

MR. WRIGHT: Yes. I do -- I am hamstrung by the

State not investigating the case properly for a criminal presentation and just adopting the Southern Nevada Health District's report blindly, and the CDC report and not following through like a normal criminal investigation would do.

And I'm hamstrung by that because on the one hand the inference I want to bring out the State's correct about. I want to bring out that if the investigative transmission was what -- like this witness thinks, and it's because, well, it makes sense, we saw it, and on the 25th and on the 21st it's the same CRNA and so therefore that must be the way it was transmitted.

If in fact, the same CRNA is doing the same thing every single day and there isn't any other transmission on those other days, it makes it less probable that they've identified the right method of transmission. And what the State's saying is if I do that, they're going to want to bring in the balance of the CD -- of the Southern Nevada Health District report, which -- which says 107 other people may have got it at the clinic in four years, but the only way we lumped them in as saying they may have is because they were interviewed and in being interviewed they deny the risk factors. I mean, that's how they are clinic-associated.

And of course, if the State hadn't just stopped with adopting -- by adopting the Southern Nevada Health District

report and just went ahead and investigated it, they would have interviewed all of those people themselves. They would call them as witnesses. They would allow me to confront them, before they start putting in the hearsay-based confrontationless-based, or lacking confrontation, conclusion that they make.

And so because they didn't do that, I -- I'm -- the way I'm hearing it, I'm at peril if I use logic in my cross-examination of their witness -- witnesses; I somehow waive my hearsay objection and my right of confrontation to have those 107 people present. And that's -- I don't think that's a proper dilemma for me.

I don't mind creating what you call a false inference. I create false inferences in courts every day, and they're created because we have rules of evidence. Certain things are admissible and some aren't. And I can sit and tell a jury my client didn't possess a goddamn thing when I know he did and it was suppressed. And I don't care if it's a false inference. We play by the rules and the Constitution and that's how evidence gets in. And that's all we're doing here and I'm trying to do.

THE COURT: State?

MR. STAUDAHER: I mean, it opens the door to rebuttal argument or rebuttal evidence when he prevent -- produces evidence that he knows, in this particular case, there's been

no suppression. I mean, he knows it's a false impression, he knows it's false in the fact that the jury isn't getting the information that it could have, if, just even the Health District report was in, let alone the fact that we know that there were many other cases that were supposedly litigated and all those cases are under some sort of confidentiality agreement.

We were party to that to the degree that we could to get at least some information from the civil defense attorneys so that we could provide that to the Defense and did so. The issue here is that it's not -- it's not just fundamental fairness, it's what's proper. You cannot get up there and argue or present evidence that he knows is false and leave the jury with a false impression when, in fact, he's arguing on the other side that that information shouldn't be coming in at all in the case.

If he can go ahead and ask those questions, the State's position is that if he does so, he does -- he essentially opens the door to that information coming in in rebuttal from the State, either through the documentary evidence that we have, or, you know, through the witnesses that are going to be coming in and testifying, like Brian Labus and others who were actually present for the investigation.

I will note for the record that the reports that

we're talking about in this case, the CDC report -- the trip report came out in May of 2008, and December of 2009 is the report that we wanted to get in which -- I know we still have yet to litigate that, but we are -- that is coming out -- that's the Brian Labus report.

The one that is the culmination of everything, the published paper, came out in March, I think, electronically, and then in August in print the same year, in 2010, by this witness who is currently on the stand right now as being one of the authors.

I mean, that information is available to those individuals and that went into the determination -- also the determination as to whether they believe the transmission mode was the correct one in the first place.

So it's not -- it's not proper for him to be able to give a false impression to this jury and have the State not be able to at least rebut that or bring in evidence then that shows something different.

MR. WRIGHT: Well, I don't -- I don't mind opening the door to rebuttal. I'm just saying we have to apply the rules of evidence. Rebuttal just doesn't mean, oh, okay, there you go, now no more confrontation and I can use hearsay. I -- it isn't -- it -- if they can't rebut it properly by the rules of evidence they can't. They're the ones that chose to not investigate further and put the case together this way.

There's nothing prevented -- I mean, I can't figure this case out at all -- there's nothing prevented the 126 patients from being subpoenaed to the grand jury. There's nothing prevented getting a subpoena duces tecum for their blood draw. There's nothing that's prevented the 107 -- there isn't. It's evidence.

I can acquire it. I could get it.

THE COURT: Well, you'd have to --

MR. WRIGHT: I don't have to.

THE COURT: -- get a Court order and there might be a problem there for people who aren't even named as victims in the case. Getting --

MR. WRIGHT: Hell, you can get a DNA swab for being falsely arrested, I just read this morning. I don't have --

THE COURT: Well --

MR. WRIGHT: -- but they -- they're the ones that did it this way. If they want to bring in the 107 witnesses, and I've taken -- this isn't some new position I've taken. That's why I wouldn't stipulate at the inception to the -- the reports I've stipulated in CDC, trip report, and most probably now, even the journal. It just caught me by surprise. But the way I read it, it doesn't bring in the other 107. But --

MR. STAUDAHER: It does not mention those directly, no.

MR. WRIGHT: Okay. Well, see, I didn't know because

Lakeman Appeal 03800

I didn't know they were going to offer it. But that's what I have been resisting was that evidence improperly coming in. I have no problem if they bring it in the right way. I don't care that it's inconvenient.

THE COURT: Does anyone from the State want to respond?

MR. STAUDAHER: Well, I mean, part of what these people based their opinions on, their conclusions on, relates to exactly what we're talking about. It's not isolated to two incident days at -- along. They -- it's the reason why they went back and said you've got to notify people back to 2004, and why it went to 63,000 people in the Valley who got notified and had to come in for testing.

If they only thought that there was these two incident days and they had no evidence of anything else, that's as far as it would have gotten; but because the practices were prevalent, they talked to the individuals there to talk -- to find out how long they had been going on, they witnessed the practices themselves, they were a known method of transmission, they looked at the other things, and in fact, they had other -- the people on other days that showed up as being positive, they investigated those individuals --

THE COURT: Okay. Let me stop you because it's not clear on the record. I'm still talking to you. All right. These other 109 people, how were they able to identify them as

having been infected? Were they part of the 60,000 people who were notified and then went in and got tested, or had they previously been diagnosed with hepatitis and then were somehow linked to the clinic, or how were these 109 people --

MR. STAUDAHER: No, these --

THE COURT: -- identified? Are they part of the 60,000 --

MR. STAUDAHER: They're part of the --

THE COURT: -- that went in for testing?

MR. STAUDAHER: Yeah, they're part of the notification; however, when the testing went forward, if they came in voluntarily, if they got samples of these people who were -- already had been already, you know, at a blood draw someplace --

THE COURT: Quest or whatever.

MR. STAUDAHER: -- however it went, it was part of the notification. Those came from that -- that portion.

THE COURT: Okay.

MR. STAUDAHER: So --

THE COURT: So let's just say some of them went into the Health Department and some of them may have given their blood at Quest on a prior occasion, whatever. They are all tested --

MR. STAUDAHER: Yes, and it's actually a much larger number, but after they culled out the ones that they believed

they could not link to the clinic, we were left with the subset --

THE COURT: Right.

MR. STAUDAHER: -- of the 109 or 6 or 7 or whatever.

THE COURT: Okay. And so these people test positive for hepatitis and then through the investigation they say, oh, yeah, I got, you know, and I had a colonoscopy in 2005 or whatever, and then do they try to genetically link their infection or do they just say -- Yuri or Igor or whatever say, oh, no, you know, it's been too long. There's no way. It would have mutated because the infection is at this point over X number of years, so we're not even going to bother to try to genetically link i,t, or what happens at that point?

MR. STAUDAHER: I think it's a combination of those. It's too remote in time once you get past a certain point --

THE COURT: Okay.

MR. STAUDAHER: -- and I think that by -- because they had gone through and seen what they saw, did the genetic testing, and they had the mechanism that they believed was accurate which was confirmed by the testing results that they got later on, that I'm not sure that they would have gone back and tested these people had they been -- had they been able to do so.

So I don't know the exact answer to that question from Brian Labus; we'd have to ask him that.

Lakeman Appeal 03803

THE COURT: And then someone from the Health District would have interviewed these people, and with the exception of a few who weren't tested or didn't get interviewed, they would have said, you know, no, I didn't have risky sex and no I wasn't an IV drug user and no, I didn't snort cocaine or whatever the questions may be, and then based on those answers they said, okay, well, these people were likely infected through the clinic?

MR. STAUDAHER: Essentially, yes. That --

THE COURT: Okay.

MR. STAUDAHER: -- was their one --

THE COURT: And my understanding --

MR. STAUDAHER: -- common risk factor.

THE COURT: -- is you have the names of most or all of these people?

MR. STAUDAHER: No, we do not. We asked -- that's part of what we --

THE COURT: Right.

MR. STAUDAHER: -- asked for.

THE COURT: Well, there was a lot of discussion that you already had the names or you didn't already have the names or the names where you were missing were the names of the people who had never been tested for whatever reason, either because they had moved or they died or --

MR. STAUDAHER: No. Your Honor, those were -- names

we actually had were on just the two incident days. The 126-odd -- or 109 people are from the investigation from the notification. We don't have any of those names.

THE COURT: You have -- as you stand here today as an officer of the court, you say you have none of the names? You don't know any of these 109 people?

MR. STAUDAHER: Well, with the exception of, I think, Chanin [phonetic] who was a civil plaintiff that I think was -- was an award. I think everybody is aware of that person's name. Michael Washington, who was also a plaintiff, he's one of our --

THE COURT: Right.

MR. STAUDAHER: -- unnamed victims.

THE COURT: He went to trial, so that was --

MR. STAUDAHER: Right. But --

THE COURT: -- everybody knew him.

MR. STAUDAHER: -- but no, we do not have a list of all of those names from the Health District because that was one of the things that we were litigating --

THE COURT: Okay. Now --

MR. STAUDAHER: -- and they prevent -- we were prevented --

THE COURT: -- one of --

MR. STAUDAHER: -- from getting them.

THE COURT: -- one of the ways to have gotten the

names would have been to just check and see who the plaintiffs were in the infected cases -- the -- in the infected, what we call the infected civil cases, correct?

MR. STAUDAHER: You mean as far as filed cases --

THE COURT: Yeah, filed --

MR. STAUDAHER: -- to maybe go back?

THE COURT: -- cases and what -- what we call the infected group. Did you do that at all?

MR. STAUDAHER: Did we go back and look at the names of those people. No, we did not.

THE COURT: Okay. So that was one source. I'm not sure if all 109 filed suits, worse --

MR. WRIGHT: Class action. That's the biggest motivator for them to say they got it there.

THE COURT: Yeah, but we don't know --

MR. WRIGHT: They were jumping on the money --

THE COURT: -- not all of them --

MR. WRIGHT: -- wagon.

THE COURT: -- well -- I know, but I don't know offhand how many infected plaintiffs there are, and so there could have --

MR. STAUDAHER: There's over 150 cases. That's to my --

THE COURT: Some are uninfected. There's both. So I don't know if they all filed cases or didn't. So there would

have been a source to at least get some of the names; possibly not, you know, all of the names, but some of the names, and that was not done.

So, Mr. Staudaher, do you want to address, or, Ms. Weckerly, do you want to address Mr. Wright's arguments on the confrontation clause and why this evidence should come in?

MR. STAUDAHER: Well, I think that's part of the -- and as far as the Health District report is concerned, which is the basis by which some of the conclusions were made, we have not yet litigated that and I'm not sure that we're prepared to do that at this moment regarding the Health District report which is -- which relies on the studies that were done, the patient notification in its conclusions.

It's didn't -- it didn't come to its conclusions in isolation. It used the entirety of their investigation, which included things that went beyond what was done by the CDC when they came out here. And that included the patient notification, the subsequent testing, and the results of those tests and how those were incorporated into that report, which the State still believes, even though it's a hearsay document technically, comes in under some exceptions.

THE COURT: Yeah, I mean, if they -- here's the deal, Mr. Staudaher. If they have a constitutional confrontation clause right, whether you call it a public record or a business record, you know, I don't think that's going to

obviate, you know, get around that right.

I mean, here's the thing, Mr. Wright. As you know, you know, there are factors that epidemiologists look at to trace the spread of disease, and we've already talked about this, you know. Even taking into account inaccurate reporting and things like that, and I'll give you -- so let's be generous, let's say 50 percent of the people who reported reported inaccurately, meaning, they didn't disclose IV drug use or promiscuous risky sex or whatever the case may be. I think that's high, but I'll give you 50 percent; you still have 50 infected people.

And so, you know, I think that there is a safe number that we can be sure of that were infected on different days through the Health Clinic because I don't think it's believable or realistic to say that all 109 people or 29 or whatever the number is, were all inaccurately reporting, and therefore, there's only those two days.

So I think we know with some certainty that there are other people who would have been infected on other days. And, you know, you say, well, you can create a false impression all the time, well, that's also done within rules. For example, drugs are suppressed.

You stand up there and say the State's given you no evidence of these drugs, we haven't seen this. You don't -- you know, people don't get up on the stand and outright lie

and say, oh, you know, this didn't happen, if we all know it did happen.

So there are rules as to what you can do as a defense attorney when evidence is suppressed or what have you. You know ways you can argue it to the jury that are still ethical and, you know, don't -- don't clearly misstate the situation and, you know, obviously one of the examples I've given.

So, you know, I think that --

MR. WRIGHT: Let me respond to a couple points. You keep presuming that some portion of those 107 actually got hepatitis C at the clinic.

THE COURT: Well, accurately --

MR. WRIGHT: And I don't know --

THE COURT: -- reported no risk factors. That's the issue. The issue is accurately reporting the risk factors. That's what you want to confront them about because anything else --

MR. WRIGHT: Right. And I --

THE COURT: -- is coming --

MR. WRIGHT: -- yeah.

THE COURT: -- from the medical records. So the only thing you could be confronting these people about was, did they accurately recall their risk factors, their drug use, their IV use, their transfusions, their sexual riskiness, all

that stuff that they're asked about. That's the only thing you're really confronting them about because other records show that they were patients and they got a colonoscopy and stuff like that.

So what is it that you want to confront them about?

MR. WRIGHT: I want them --

THE COURT: That's it exactly.

MR. WRIGHT: -- and I want their medical records because I think they got it elsewhere beforehand and they're jumping on the money wagon, and I don't believe any of the 107 got it at the clinic by the practices. And the Court and the State keeps presuming well, some part of them got them because of this, and you're basing it purely on hearsay and no confrontation.

Now I'm hearing for the first time, which is news to me, that if Labus gets on and his report comes in, he gets to hide the identity of the 107 and I can't even use compulsory process to get them here.

THE COURT: Where did you -- I -- no one said that.

MR. WRIGHT: Well, we don't know who they are, and he's not going to reveal it, right?

THE COURT: Well, that was what was litigated with the Health District that they don't have to reveal it, and there's a statute right on point.

MR. WRIGHT: So they're -- you're going to put a

witness on the stand as an --

THE COURT: I'm not putting --

MR. WRIGHT: -- expert --

THE COURT: -- anybody on the stand.

MR. WRIGHT: Okay. I'm just -- I'm not saying you, I'm just speaking generically. The State's going to put a witness on the stand who is an expert who has looked at things that only he can see and I can't. This is preposterous. There's no such thing. There's rules to deal with this. When the State wants to invoke a privilege and doesn't want to disclose something through an informant or something, the remedy is you dismiss the thing. You don't play hide the ball.

THE COURT: Yeah, but see there's two different actors here when you -- the informant is law enforcement and the State's prosecutor's office. Here you have the Health District, and they're charged with a completely different function that's unrelated to law enforcement or criminal -- you know, criminal proceedings. That's not their concern.

Their concern is the spread of disease. And, you know, other -- well, essentially the spread of disease, whether that's through a lack of cleanliness or smoking or infection or whatever. That's what they're charged with doing. So I don't think that's, you know, necessarily the analogy.

MR. WRIGHT: I'm not --

THE COURT: Because you have -- even though it's all the government, their functions are completely different than a police agency whose function is apprehending criminals and getting cases ready for prosecution. I mean, to me the prosecutor's office and the police or the FBI and the US Attorney, they're working together with a shared goal, whereas the Health District does not have a shared goal with law enforcement and the District Attorney's Office. It's completely different functions.

MR. WRIGHT: They should have thought of that before they decided to hook their wagon to the Southern Nevada Health District report and method because it is their case, it is the report they want in. They chose to adopt it and turn it into a criminal case. And you find for me -- let the State find, I don't care if it's a Guantanamo case -- find it with national secrets, find something where a witness can get on the stand and he has knowledge about something which only he can see and I can't and I'm cross-examining him.

There is no such case. The remedy is those cases are dismissed if that's the option of the State to proceed with it. They -- they're the ones that have created this mess. They -- and why didn't -- on the prior question on the 107, was any follow-up done? Were they interviewed? Were they tested? Was genetic testing done? The answer to that,

oh, all will be from Brian Labus, no, because we didn't care anymore because we're not criminal investigators.

Once we saw the unsafe injection practices and saw propofol use, even if there had been no hepatitis C, we were doing the notification because it put people at risk. And so further investigation or verification didn't even matter. That's -- that's why they did nothing. And so there was no further investigation. And that's exactly what he said in his deposition.

And so the State just adopted it and said, oh, okay, we're done too. So I -- my -- I still say if they -- if they can't put it on, I have the right to ask my questions and draw inferences, and I open the door to them using proper rebuttal, lawful with confrontation.

I presumed -- I didn't -- there's so much involved in this. I've -- when I was standing up there saying, you know 107, you know, why didn't you bring them into the grand jury or something, I presumed they knew the 107 people we're talking about that are in -- that are identified in Southern Nevada Health District report.

And so this is the first I'm hearing that they don't even have access to it.

THE COURT: Well, you knew that they didn't have access because that was litigated in here when they subpoenaed the Health --

Lakeman Appeal 03813

MR. WRIGHT: That 107?

THE COURT: -- the Health District --

MR. WRIGHT: I thought we were talking about the two dates.

MR. STAUDAHER: It doesn't -- and as the Court will recall, Counsel for both defendants stood mute about the whole issue. We had litigated it trying to get that information out thinking that it would be important, and they never said, We need it as defense attorneys for our case, not --

MR. WRIGHT: I'm supposed to help --

MR. STAUDAHER: -- a single one --

MR. WRIGHT: -- the State?

MR. STAUDAHER: No, it's for your own defense. That's what you're trying to do now, and that's the issue that they stood mute on, didn't litigate back then when this was brought up. They knew it was going to be an issue. They didn't indicate at all, not one time, that they required or requested or wanted it for confrontation clause purposes for their investigation, for anything. They didn't say anything. They just stood back.

The Court ruled and we abided by that that we could not get that information. If they weren't going to give it to -- give us the information on who was tested and not tested when -- or were lost to follow up on patients that we actually knew the names of on the very days in question, they certainly

were not going to give it to us in any other stance. They've always fought us in finding out identifications of people. Personal identifiers --

MR. WRIGHT: I didn't --

MR. STAUDAHER: -- that's what they use as their basis all the time is they cannot, will not, under statute be able to provide personal identifiers for any patient. I mean, that's their position.

MR. WRIGHT: How I can be accused of sandbagging the State by saying the State has the burden of proof and has to gather and put on all the evidence is beyond me. I was supposed to join in the government's request to gather evidence to prosecute my client? Am I hearing right?

MR. STAUDAHER: No, that's not what was said and what was meant at all. It's that this issue was litigated with them present. There was not a mention that they required the --

MR. WRIGHT: I don't remember --

MR. STAUDAHER: -- information for their own purposes.

MR. WRIGHT: -- filing anything.

MR. STAUDAHER: Now, here we are in the middle of trial and they're claiming they want access to that information. I mean, it's --

THE COURT: Well, no, they -- they're saying that if

you're going to put on the evidence you need to put on the evidence, meaning, the evidence of who had it.

MR. STAUDAHER: But the Court could order Mr. Labus to provide that information.

THE COURT: Well, we litigated that already, Mr. Staudaher, and there's a -- in my view there's a statute right on point that protects the Health District. And frankly, the legitimate concerns of the Health District in preventing the spread of disease and having an open exchange with the Health District are just as significant as the legitimate goals of the Clark County District Attorney's Office in prosecuting offenders.

So I can't say that your goals are superior to the goals of the Health District, which have been recognized and protected by the Nevada legislature. So, you know, I'm not going to reverse my order and order Mr. Labus to do something that he didn't. And as was argued and pointed out by Terry Coffing, the attorney for the Health District, there were other ways for the State to get that information.

And in fact, I could sit here right now and I could pull up Odyssey and I could read to you the names of infected plaintiffs if we were going to go that route, but I'm not going to do that. But if I could sit here and do it, certainly the District Attorney's Office could have investigated the civil lawsuits that were filed.

Look, you had good cooperation, as I understand it, with Ms. Killebrew and Bob Eglet's office, Mr. Ham who has been here and Edward Bernstein's office. And these were the big plaintiff's firms that handled the litigation, and there were some others as well, but there were a lot of plaintiffs' firms involved in most of these cases.

You know, you may have been even able to get them to share, you know, copies of the complaints that were filed in connection with the infected lawsuits. So, you know, to stand there and say, oh, this was our only source of this information, when I could sit here right now and find the information for you, although that's not the Court's role and I'm not going to do it, I'm not, you know, to me that's not very credible. Because like I said, I don't know, did you ask Ms. Killebrew? Did you ask Mr. Ham? Did you ask Ms. Weiss? The lawyers that we've seen here in this courtroom in connection with the plaintiffs in this case, did you ask any of them? Hey, who are your other infected clients? Hey, can you give me copies of the complaints you filed in these cases? Was that done?

MR. STAUDAHER: Ask for complaints for noninfected patients, no, we didn't ask that.

THE COURT: Or in -- other infected patients?

MR. STAUDAHER: Or other infected patients beyond those listed in our case?

THE COURT: Yes.

MR. STAUDAHER: No, we did not.

THE COURT: Well, how hard would that have been? How hard would that have been to say, hey, Ms. Killebrew, you mind helping the State out here? Who else -- you know, who else do you know who is infected?

MR. STAUDAHER: One of the issues --

THE COURT: All I'm saying is for you to stand there and tell this Court, oh, the only way we could get it was from the Southern Nevada Health District, it's not believable to me. Just off the top of my head I came up with two ways for you to get the information. Now, if you said, yes, I asked Ms. Killebrew and she felt it was inappropriate to divulge that, okay, then that's fine. I would respect that representation. But you can't make that representation to me because you didn't even do it.

MR. STAUDAHER: Well, the representation I can make regarding that issue is that we did have conversations with both Ms. Weiss and Ms. Killebrew and the like about divulging information about their clients, the ones who are named in our case. None of that happened or would happen until we agreed that we were on the confidentiality agreement and that that covered them for those cases.

Now, I don't know that the confidentiality agreement that we signed onto in general covered us for every single

case, but we had to be assured by them -- or we had to assure them that it was related to our prosecution, to the individuals that we were naming as victims in this case, and that only then did they provide that information to us.

So it wasn't as though we were -- we even asked for a blanket because they were giving us, essentially, we need confirmation, we need you to show us that you're covered under the confidentiality agreement related to these patients and -- and Your Honor was even part of that, the signing on of us being part of that agreement.

THE COURT: Right. I'm talking about the fact that a complaint -- a civil complaint was filed. That's public record. That's not confidential. That is a matter --

MR. STAUDAHER: But it's medical records.

THE COURT: -- of public record. And it's not the defense's job to go and find those. All I'm saying is don't, you know -- you know, don't stand up there and make arguments that aren't credible because for you to say that the only way to get this information was from the Health District without trying other things is just not believable, okay?

Now, you may disagree with my order that the Health District didn't need to turn it over, but you didn't try. From what I'm hearing here is you didn't try to find it another way. Now, that's not the confrontation clause issue, which no one on your side has bothered to address, in my view.

So, you know, I -- Ms. Weckerly, do you want to take over?

MS. WECKERLY: Well, I mean, I would like to address the confrontation clause issue. I think there is a statute, and I think it's 50.085 that allows an expert to testify regarding matters that would be otherwise inadmissible. I will tell the Court I haven't, like, looked up all the cases associated with that statute, but all the time, I mean, we asked this very expert, hey, wasn't there a case back in whatever San Pedro where, hey, it turned out it was the saline practice; that she's relaying all kinds of hearsay, saying, yes, that was the practice, this, that, and the other.

That happens all the time. Experts testify and rely on hearsay all the time in that type of setting. So I don't -- I guess I'm failing to see what the difference is when -- when Labus does it for our case. I mean, I -- I think that he can talk about studies he knows about that he didn't have anything to do with. Experts have a wide range of what they can testify to.

Now, in terms of the confrontation clause, I think that's what's specifically addressed in the wording of the statute, that it's information that would otherwise be inadmissible. The defense can certainly ask him, well, you don't know, you know, if this person falsely reported, if they're a drug user, or whatever.

So certainly the jury can weigh the weight of what

he's saying, but I -- I guess I'm missing how that statute doesn't directly address this issue. But admittedly, I haven't done all the research on it, but, I mean, in my head this happens all the time.

THE COURT: Yeah. I mean, that's basically what I was saying, Mr. Wright, when epidemiologists -- they rely on this kind of information all the time. That's what they do. That's what they -- that's what they do to determine how has a disease been spread. They have to rely on people's reporting. Oh, wait, you know, I mean let's look at the recent outbreak of Salmonella. I ate at this restaurant. I had the -- you know, I had this, I had that; that's what they study. I mean, that's how they do it.

MR. WRIGHT: I couldn't disagree more. I -- there -- I don't know of the exception to the confrontation clause. They aren't using this as an expert to bolster his opinion. They are wanting Labus to say 107 other people were infected, clinic associated. That isn't an expert opinion or anything else. And experts cannot testify -- if an expert gets on the stand, I've had experts disqualified in IRS cases because the information they looked at was confidential informant information which I -- or was suppressed information.

And so if I cross-examine them to fully get out the basis of their opinion, they'd get to slide in that which is otherwise inadmissible. And when you present that with an

expert witness, then they have to find a different expert --

THE COURT: Yeah, but you're talking about --

MR. WRIGHT: -- because expert witnesses are fungible because you can replace -- if Labus is nothing but an expert coming here to tell us things, get a different one.

THE COURT: Well, first of all, I think there's a difference between evidence that they're not presenting and evidence which has been affirmatively suppressed by the Court or they've said, hey, State, disclose your confidential informant, and the State or the government says, no, we're not going to do it. That's -- or, you know, they didn't use -- have a search warrant. And we -- the Court says you needed a search warrant; this evidence is suppressed.

To me that's different. If they then try to get around a Court order through an expert or something like that, that's a different situation, completely different, and in my view would be completely inappropriate because at that point you're circumventing a Court order through trying to, you know, bootstrap it in through an expert or something like that.

And let's not forget the purpose of the suppression rule. It's to detour unlawful police and State conduct. So that's really offensive if that's what they would do in that situation. This is a different situation.

Look, here's what I'm sort of -- I'll think about it

further. Here's what I'm leaning towards, is allowing whichever expert to say that basically. We were able to identify, you know, 100-plus, or whatever the number is, cases of hepatitis that we could not attribute to another source, but we couldn't link it definitively to the clinic either. Because as I understand it, that's the truth.

Ms. Weckerly, is that the truth according to how you understand the evidence?

MS. WECKERLY: Yeah, I mean, I -- my recollection is he -- not alone, but he put people in different categories, and if they had any of a -- if they reported any of the risk factors, they didn't go into their calculation because they couldn't eliminate that as a possibility.

THE COURT: Right.

MS. WECKERLY: And so of that, you know, I mean, I'm sure they've got hundreds and hundreds of people, but of that where they --

THE COURT: Right. So then you're left with 107 --

MS. WECKERLY: Right.

THE COURT: -- that you couldn't attribute to another -- another cause, but you couldn't decisively attribute it to the clinic either. By "decisively", it's not linked genetically --

MR. STAUDAHER: Right.

THE COURT: -- you can't attribute it to a source

Lakeman Appeal 03823

patient, so you've got this number out there that scientifically hasn't been linked to the clinic but they can attribute it to an outside source. I mean, I -- is that accurate? That sounds --

MR. STAUDAHER: Well, I -- the only problem I have is when you say "scientifically" because they did run through their -- whatever their statistical analyses and whatever based on the results of what they got in their investigation, which did not include, obviously, the genetic link because it wasn't there, or the fact that there was, you know, an observed transmission, you know, an unsafe injection practice on the particular day, that kind of thing.

But with regard to what they did have, they did use some sort of analysis and it was -- it was my understanding they used both a statistical as well as some other computer-based analyses to do some of this work.

THE COURT: Well, maybe I'm going to hear from Mr. Labus, then, out of the presence of the jury, so he can explain to me the statistical analysis and show me he has a basis -- I mean, I'm assuming, based on what he does, he would have the sufficient knowledge to testify regarding statistics and how it works and, you know, et cetera.

But otherwise it's going to be the way I just said it, that they couldn't determine an alternate cause and they couldn't link it absolutely to the clinic. So there is this

number out there that we just don't know for sure. It could be the clinic, and I think that that then -- I think that -- that that's the truth. And I think if it's, you know, if it's not said it's absolutely the clinic, but we can't attribute it to another cause, then that's -- we can't attribute it to another cause because they didn't give us another reason.

MR. STAUDAHER: He will not come in and say that.

THE COURT: Now, were they being inaccurate? Were they forgetting? Were they lying? Okay. Maybe. But you still can attribute it to another cause given all these things.

MR. WRIGHT: But what I --

THE COURT: That's the truth.

MR. WRIGHT: -- but what I am losing there --

THE COURT: It's fine.

MR. WRIGHT: -- is my right to test the evidence when he says that because what I'm understanding is, I just have to accept it as given, and I can't say tell me who they are and show me their medical records --

THE COURT: Yeah, but you can --

MR. WRIGHT: -- because I don't believe any of them got it. That's my position.

THE COURT: Well, you can --

MR. WRIGHT: So how do I challenge it?

THE COURT: Yeah, by cross-examining him. That --

MR. WRIGHT: And he says, I can't tell you.

THE COURT: -- that his statistical model is flawed.

MR. WRIGHT: I'm not talking model, I'm talking about he has a -- he contends there are identified, known people -- I don't even know if he's looked at their medical records. I don't know if he's verified they didn't have it already.

THE COURT: Well, then that's part of your confrontation and your cross-examination of him.

MR. WRIGHT: Okay. As long as he --

THE COURT: You know, look at their medical records.

MR. WRIGHT: -- reveals it.

THE COURT: You don't know if they had surgery. You don't know if they did this, that, or the other thing. You don't know if they ever had drug rehab. You didn't look at that, you didn't look at this, whatever you want to ask him. I mean, that's -- that's right there, that's your cross if you want to go that way.

MR. WRIGHT: I want to cross them.

THE COURT: Well --

MR. WRIGHT: And he's not going to tell me. He's going to say, Mr. Wright, I got 107 and I won't tell you who they are and I won't show you anything about them. I'm just telling you take my word for it because we talked to them and they don't have any other risk factors. That -- I'm -- where is this whole right of confrontation to the information?

That's hearsay what they've told Brian Labus or his employees.

THE COURT: Well, to me you can point it out in your cross-examination that his information is only as good as the information he received, which they could have been underreporting, misreporting, falsifying that some of this behavior is not -- is taboo, is illegal behavior. There's a million reasons why people aren't going to accurately report.

MR. STAUDAHER: And I believe he will acknowledge that. I don't think that there's any surprise there. He's going to get -- if he gets on the stand and is asked those questions, I think he'll say exactly what the Court just said, that they have to rely on --

THE COURT: All right. Going forward --

MR. STAUDAHER: -- those people.

THE COURT: -- Mr. Wright, going forward with this current witness, what is it that -- because we were stopped at your line of questioning. So, you know, when we come back tomorrow where is it that you're going -- going to go?

MR. WRIGHT: Well, I'll tell you where I want to go, but at the same time I'm not sure if the Court is going to tell me if I pursue it, I'm opening the door --

THE COURT: That's why I'm asking --

MR. WRIGHT: -- for hearsay.

THE COURT: -- you -- that's why I'm asking you.

MR. WRIGHT: Oh, okay. What I intend to do, I mean,

I had asked her why she chose the CDC is lumping July and September as a common cause. And I said, Why are you presuming that the method of transmission for these two discrete dates were the same? September date, I can fully understand. The July one I don't. And her --

THE COURT: That's a fine question. That doesn't open the door.

MR. WRIGHT: No, her answer to me then was, Well, because the same CRNA who did the work in September using improper practices was the same CRNA in July. Okay? That was her answer. And then I think I responded that's the same CRNA who was working every other day of the year also. So I don't see the commonality because the commonality would be the same for the whole year.

And I was -- that was perceived that I was leaving the inference that there weren't any others out there. Probably was. But that's how we got to where we were because I don't know why she -- I mean, I started off saying, Look, you had -- both of them had biopsies, and that's a method of transmission, meaning Washington and the source. They both had a biopsy and all it took was for a transmission of hepatitis C where someone reused the biopsy which there has been evidence that that happens here.

And so why did you just blindly presume it's the same as on the 21st of September other than this? And her

answer was because it's the same CRNA was working on that day. And then I said, well, same CRNA worked 300 other days that year too.

THE COURT: Let me ask this: Of the 106 other people did anybody at the Health District try to do -- chart those people out as to who worked on those people? Because they know who they are.

MS. WECKERLY: I mean, I know from reading a deposition that I think Mr. Lakeman is named in other, you know -- just from, like, the text of it that it has to be, but I don't -- I don't think the Health District classified anything by -- I mean, I'm not sure, I could ask them -- by CRNA.

THE COURT: You know what I'm saying? Like, or did they say, okay, we have 109 people who may have been infected or it looks like they were infected at the clinic? Five were infected on the same day, you know, five had their colonoscopies on the same day, or is it 109 different days? I mean, what are we looking at? Didn't they do anything like that? Do you see what I'm saying?

MS. WECKERLY: Yeah.

THE COURT: Because they know who their names are, they have -- they could have had the records, so did they even bother to go through and say there were other cluster days, or is it 109 different days? Is it 50 days? I mean, I don't

know. I'd kind of like to know that.

MS. WECKERLY: We can ask them that. I don't know if they classified it that way, but we can ask.

THE COURT: Wouldn't anybody else be curious about this? Were there cluster days --

MR. WRIGHT: I'm curious.

MR. SANTACROCE: I'm curious.

THE COURT: -- or not cluster days or --

MR. STAUDAHER: Well, the civil --

THE COURT: -- is it --

MR. STAUDAHER: -- on the civil side we've heard that there are identified other cluster days. I'm not sure if the Health District looked at that or if they agreed with it or they tried to do that. That's --

THE COURT: Because that to me would be fairly easy to do. I mean, of all the 109 patients, you know, you basically have two procedures going on, colonoscopies and endoscopies, and it's pretty easy to, you know, say, well, my endoscopy was this day and my colonoscopy was that day, you know, and the other people, what did they have? What days were those? And are there clusters or not clusters?

MS. WECKERLY: We can ask them.

THE COURT: I mean --

MR. SANTACROCE: But from my perspective for my client, the fact that she has linked him to these two days

because he was the same CRNA who had these supposedly unsafe practices puts me in a bind because now they want to bring up 107 other people to infer that somehow my client was involved in their treatment without allowing me to find out if he was doing the treatment.

THE COURT: Well, I --

MS. STANISH: Well, we're going to do it now in the middle of the trial. Good time to investigate the case. Good time.

MR. SANTACROCE: So I have a dilemma there, and just for the record, I'm joining in Mr. Wright's objection. And that's the dilemma. I have to infer now 107 other people have it when she's let the cat out of the bag saying, well, we hooked -- we linked these two dates because Mr. Lakeman was the CRNA, well -- well, what about the other --

THE COURT: Well, it could either be really good for you, Mr. Santacroce --

MR. SANTACROCE: Could be good or it could be bad.

THE COURT: -- or really bad for you.

MR. SANTACROCE: Yeah, it could be very good or bad, you're right. But I don't want to take that chance.

THE COURT: Well, I know you don't want to take that chance, but I don't know, to me what -- I mean, I'm sitting here wondering, it may neither be here nor there, you know, wasn't this all linked? They do this big thing linking these

days, and what about all these other days? What -- who did what when and -- I don't know.

MS. STANISH: Yeah, maybe someone should have investigated that a long time ago if we're going to present it in a criminal trial. You know, we basically have criminalized a malpractice case, criminalized a epidemiology investigation, and as Mr. Wright pointed out, hooked the wagon to that, and it's -- plenty of ways to, as the Court has pointed out, to do this investigation.

They made their bed; they have to lay in it. They shouldn't put -- we shouldn't have to sacrifice our constitutional rights because they elected to proceed this way.

THE COURT: All right. Well, I'm going to think about it. I would suggest at this point, because I'm not sure how we're going to handle this, that the State needs to talk to Mr. Labus or whomever and find out -- there may be exculpatory evidence here is the other problem for Mr. Lakeman. What if --

MS. STANISH: Exactly. And you're --

THE COURT: -- what if they linked all these other days and it's other nurse anesthetists --

MS. STANISH: Right.

THE COURT: -- because now you have this --

MS. STANISH: Right.

THE COURT: -- this person saying to -- when I say exculpatory, it doesn't necessarily exculpate him on those days; but if she's saying, well, it's him and the other days, you know, it's different CRNA's or it's the same, I don't know, there could be something there.

So what I'd like the State to do is to try to find out what they did on -- about these other 109 people. Did they link them on days? Did they -- what investigation? What do we know there? Because there could be something here -- like I said, it could be good information for Mr. Lakeman. I just don't know. But I think at this point --

MS. STANISH: Your Honor, this is --

THE COURT: -- before, you know, we consider introducing it, I think we need to know more. I mean, I know it's in the report and I will say this, you know, Ms. Stanish, you say, Oh, wow, they didn't do their investigation. We've had -- you've had this report, so, I mean, these are questions that would be -- come up.

MS. WECKERLY: I mean, the other thing I would say is, if they thought there was exculpatory information in there, they're all aware of it. I mean, they're aware of the existence.

THE COURT: That's what I just said --

MS. WECKERLY: Like, they could go get it.

THE COURT: -- they're aware of the report. The

report has been -- been here.

MS. STANISH: My -- you know, my issue, you know, Your Honor, if you're saying let's get more information about this, let's bring in additional evidence pertaining to 109 potential other cases, you know, what about our right to discovery of that information? I mean --

THE COURT: Oh, I'm not saying, Ms. Stanish --

MS. STANISH: -- how --

THE COURT: -- you're going to introduce it. I just think at this point in evaluating -- I -- I mean, I just would like to know what did they do, you know? What are the days? Are there clusters or not clusters? You know, I'm assuming it would be in the report if they -- if they had done additional work, but I don't know and I don't want to rely on assumptions.

So I'd at least like to know -- I'm not saying you can present it to the jury --

MS. STANISH: I understand.

THE COURT: -- but at least the other information will be out there. I'll understand and hopefully you can make a better determination on what's going to come in, and it will also be in the record for any potential appellate purpose, you know. Again, as to -- because I'm sitting here left with these questions. You know, I don't think the 109 people are necessarily put in a context unless we know, is it 109

different days? Is it 10 days? What is it?

I think that that -- I think that that could be very important. And, you know, as Mr. Lakeman, if it's Mr. Lakeman on the other, you know, 10 days or whatever, I'm not going to let you introduce that because that wasn't disclosed ahead of time, but Mr. Santacroce certainly would like to know that --

MR. SANTACROCE: Yeah.

THE COURT: -- before he goes, you know, going forward on cross.

MR. SANTACROCE: Exactly.

THE COURT: So okay. That's where we are, and I'll think about it and the more information we have, I think the better.

(Court recessed for the evening at 5:14 p.m.)

CERTIFICATION

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

AFFIRMATION

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

KARR REPORTING, INC.
Aurora, Colorado



KIMBERLY LAWSON

COPY

Electronically Filed
03/11/2014 12:58:23 PM

TRAN

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DIPAK KANTILAL DESAI, RONALD E. LAKEMAN, Defendants.	CASE NO. C265107-1,2 CASE NO. C283381-1,2 DEPT NO. XXI **TRANSCRIPT OF PROCEEDING**

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 29

WEDNESDAY, JUNE 5, 2013

APPEARANCES:

FOR THE STATE:	MICHAEL V. STAUDAHER, ESQ. PAMELA WECKERLY, ESQ. Chief Deputy District Attorneys
FOR DEFENDANT DESAI:	RICHARD A. WRIGHT, ESQ. MARGARET M. STANISH, ESQ.
FOR DEFENDANT LAKEMAN:	FREDERICK A. SANTACROCE, ESQ.

RECORDED BY JANIE OLSEN COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

INDEX

WITNESSES FOR THE STATE:

MELISSA SCHAEFER

Cross-Examination By Mr. Wright - (Continued) 35

Redirect Examination By Mr. Staudaher 108

Recross Examination By Mr. Santacroce 125

Recross Examination By Mr. Wright 136

Further Redirect Examination By Mr. Staudaher 146

Further Recross-Examination By Mr. Santacroce 146

Further Recross-Examination By Mr. Wright 147

GAYLE LANGLEY

Direct Examination By Ms. Weckerly 150

Cross-Examination By Mr. Wright 166

Cross-Examination By Mr. Santacroce 197

Redirect Examination By Ms. Weckerly 227

Recross Examination By Mr. Wright 233

NANCY SAMPSON

Direct Examination By Mr. Staudaher 234

EXHIBITS

DEFENDANT'S EXHIBITS ADMITTED: **PAGE**

M-1 101

N-1 140

Lakeman Appeal 03838

LAS VEGAS, NEVADA, TUESDAY, JUNE 5, 2013, 9:05 A.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: Since we're waiting on the jury, let's begin where we left off last night. Does the State have anything new to report?

MS. WECKERLY: With regard to what issue?

THE COURT: The issue of the 109 people -- 107 people who were infected.

MS. WECKERLY: They didn't -- they -- my understanding, although I haven't completely verified it, is that they didn't look for a cluster because they couldn't do genetic testing on it, so they -- that's what they define as a cluster --

THE COURT: Right. So they didn't do --

MS. WECKERLY: -- and it was too remote in time.

THE COURT: So they didn't do a day analysis or a provider analysis or anything like that?

MS. WECKERLY: No. They may know that there's more than one on that day, but they wouldn't call that a cluster because they couldn't do the source, you know. But they didn't divide -- and I know they didn't divide by CRNA.

THE COURT: Okay. Do you have the information, like how many were on a particular day? Do they do that, or do they just kind of say, well, we think, you know, that some

were on the same day but we don't really remember, or what? What's the gist of the information?

MS. WECKERLY: We're trying to get that. I don't have that information right now.

THE COURT: Okay. Because they didn't compile it in any kind of a format where it could be transmitted to you; is that essentially the situation?

MS. WECKERLY: I think so.

THE COURT: Okay. All right. Anything else -- basically, here's pretty much where we left off Friday. I mean, I think the State can say there were 109 other people who were infected that they -- through their own reporting or interviews with them, they couldn't attribute to another source, but they couldn't scientifically or definitively link it to the center. That's pretty much it.

So they can't say where it -- you know, they -- it's not linked to another source and it's not definitively linked to the center, but there's other people out there.

MR. WRIGHT: I object to it on hearsay and confrontation. I mean, there was no evidence I have available to me to establish the 109. I don't have their medical records. I don't have their interviews. I don't have them saying they weren't -- they're risk free. I'm supposed to take the State's word for it. What do you mean, they just get to say we say 109 people have hep C?

Lakeman Appeal 03840

THE COURT: Well, I think if the door is opened, then --

MR. WRIGHT: The door's open to hearsay?

THE COURT: Then their testing is we tested --

MR. WRIGHT: Why not say 10,000?

THE COURT: Well, because that's not what the evidence is. The evidence --

MR. WRIGHT: What evidence?

THE COURT: -- is 109 people. I mean, they can say we tested -- we sent out 60,000 letters, you know, 45 people -- 45,000 people came in for testing, of those 45,000 people 1,000 people tested positive for hep C or whatever, or AIDS.

Of those 1,000, through self-reporting, 500 were attributed to other sources, 109 we couldn't attribute to other sources, but we didn't scientifically link to the center. And the nine or whatever we have here we were able to link scientifically to the cluster days through the work of the CDC.

MR. WRIGHT: I want the discovery, that summary evidence you're doing. And for summary evidence, I have to have the right to everything that supports it. I don't have the 109 phantom infected people. It's not delivered to me. I don't have their records. I don't have to take their word for it. This is a criminal trial. I have confrontation

rights.

THE COURT: State.

MS. WECKERLY: Well, we've done -- Mr. Staudaher, we've done some research on that, on introducing that type of recording. We can present those cases to the Court. I'm sure you want to review them before you make a decision.

But I just draw a little bit of a distinction here. When we have a case where someone does a bad search and they find a gun, there's no mention of the gun in the trial. And I get that that's a constitutional remedy. But it's a curative. It's a shield. It's not something that then you can get up and say there was no weapon ever found in this case.

THE COURT: I agree. That's why I said to Mr. Wright --

MR. WRIGHT: Can so. I can too.

THE COURT: -- now you can say there was no evidence, the State did not prove their case because they didn't present any evidence of a gun.

MS. WECKERLY: Right.

MR. WRIGHT: I can say that.

MS. WECKERLY: And so I actually look at this sort of different --

MR. WRIGHT: Are you telling me I can't?

THE COURT: You can say just what I said.

MR. WRIGHT: Right.

THE COURT: But you can't put your client up on the stand to say, oh, they didn't find a gun, because then they're going to bring in the fact --

MS. WECKERLY: Well, I think it goes farther. I don't think you can ask a witness -- I mean, these two women know there were other cases, these two doctors, and certainly Labus knows that. You can't not let them answer that.

THE COURT: You can't ask a witness to lie essentially. You can't tell a witness that they can't testify truthfully because they're under oath; is that what you're saying, Ms. Weckerly?

MS. WECKERLY: Well, I see it as twofold. I don't think you can use it as a sword or use it affirmatively. I think, you know, the Court can make whatever ruling the Court wants to on the actual CDC report. But I think it's a different question if they're allowed to create a false impression with witnesses.

And I think when you ask questions like, well, there was no infection in the other 300 days when they believe there was from their testing, that that's -- that's now you've crossed into a different line and opened the door regardless of the ruling.

THE COURT: And you've opened the door.

MR. WRIGHT: Through hearsay. I've opened the door to legally admissible evidence. I haven't opened the door to

say, okay, now we get to throw the rules of evidence out.

THE COURT: No, because --

MR. WRIGHT: This is summary evidence.

THE COURT: -- when you ask a question, the witness is entitled to provide an honest answer as best as they can. And these are scientific people, so when you ask them who rely on hearsay all the time in their studies of the spread of disease --

MR. WRIGHT: Which I am entitled to.

THE COURT: -- that's what -- that's what they do. That's how they study disease.

MR. WRIGHT: Everything --

THE COURT: They have to rely on reporting and things --

MR. WRIGHT: Everything an expert says I have the right to. He can rely on hearsay and he has to deliver to me the articles that he's read. In this case, and it isn't I'm playing unfair, I'm hiding. They have to present the evidence. I'm contesting every fact in the case. I entered a plea of not guilty, and so that's what we're doing.

And just because they presented this case the way they chose to present it and just stayed with CDC and Brian Labus and did nothing else when they had the ability to, that doesn't come back to roost on me to where I'm hearing you opened the door and now hearsay's allowed and you don't have

the right to have the evidence that they are going -- that the witnesses are going to be relying upon.

How do I examine them, cross-examine them on the 106?

THE COURT: Well, if you ask her though, there were only these two days identified and she --

MR. WRIGHT: I didn't ask her that.

THE COURT: -- wants to answer truthfully, then she's going to answer, well, we actually identified other days, or -- because that would be in her -- in the -- as I understand it, in the witness's view, a truthful and complete answer.

Is that essentially what you're saying, Ms. Weckerly?

MS. WECKERLY: Yes. I mean, they couldn't do the testing on that. So from their perspective, if they can't do genetic testing, I mean, you know, it's different to them. And there were two -- I mean, I think a lot of this is, you know, there were 250 or so plaintiff cases, and we don't know necessarily which one of those the health department categorized which way, because some of those people might have had risk factors and wouldn't end up in the 109.

But I mean, I guess we are just asking on cross-examination there shouldn't be a false impression created. We'd like the Court to review the caselaw we found on admitting the report in its entirety. I look at those as two different issues.

THE COURT: Right. I agree they're two different issues.

MS. WECKERLY: So I mean, that, where we're at now is we don't think that's a proper question on cross or the witness gets to answer. And then in terms of the report, we'd like to submit the cases for the Court's review.

THE COURT: I'll look at the cases on the report. I mean, to me looking at the report, it's a 300-page report. It's more of an investigative type report. The report is one thing. The issue is does the information come in about the 109 other people; does it come in because they open the door to it, does it come in because it's in the report? I mean, just because it's in the report, if it's not admissible, then I don't think you can sort of bootstrap it into the report.

So, you know, the issue right now is whether or not it's going to come in through Mr. Wright opening the door to it. I agree with you there. I'm happy to look at the question -- at the caselaw that you found. Again, you know, this is not a simple, you know, you say, well, it's part of the ordinary course of their business. Well, that's somewhat true. They investigate outbreak of disease.

But this is a very comprehensive report. This was an unusual outbreak. It's one of the biggest hepatitis outbreaks in the country ever. It's not?

MS. STANISH: No, ma'am. It's the largest

notification that's --

THE COURT: Oh, I'm sorry. I confused that.

MS. STANISH: -- been sent out. But there are plenty of others that have had more people infected.

THE COURT: In any event, my point was it was an unusual situation. And so, you know, to say, well, this is ordinary, in the ordinary course of their business while they're charged with doing investigations, you know, this report, I'm inclined to say no. But I'm happy, I'm glad you found some caselaw. I'm happy to look at it. Certainly the defense should be provided with whatever it is you found. And if they find other things, I'm happy to read those as well.

So Mr. Wright, you know, here we are going forward now. What is it that you want to ask the witness?

MR. WRIGHT: Well, first I want to object to me being told that I can't fully cross-examine a witness who's testifying because if I do, I'm opening the door to hearsay and evidence that will not be presented to me. This is just like a witness who has state secrets or some privilege, and so I'm supposed to dance around them because the State put us in this box, and tread carefully and not fully cross-examine.

So when this witness says, when I say why do you call July a cluster when it's two and why do you even link it to September, well, because the same CRNA was involved in both days. And so to me that's preposterous, because the same CRNA

was involved not just on those two days, the entire year. And so that's her explanation that she gave me.

So now I'm just supposed to accept it and not say that's preposterous, the CRNA worked all year. What is the real reason you're linking them; that's what I asked her. And so now I'm being told I can't go there because I'm waiving an interest.

THE COURT: That's a different question than what --

MR. WRIGHT: That's what I asked.

THE COURT: Well, you started with the CRNA worked all -- worked other days. Well, yes, but the other days there may or may not have been infection.

So the inference was, well, he worked all these other days and there wasn't infection on those days. And what I'm saying is there may or may not have been infection on those days. We don't know and we don't know what her answer is going to be. And I'm not going to tell her, you know, she -- she's okay, you know.

MR. WRIGHT: Okay. I won't pursue it.

THE COURT: No, pursue it.

MR. WRIGHT: On the Court's instructions --

THE COURT: Pursue --

MR. WRIGHT: -- I won't pursue this --

THE COURT: No, no. Wait a minute.

MR. WRIGHT: -- further.

THE COURT: Wait a minute. I never told you, you can't pursue it. So don't stand there and say, oh, I'm not going to pursue it on the Court's instruction and that -- try to make that the record.

MR. WRIGHT: I'm not -- okay. What can I ask?

THE COURT: Pursue it if you will. Here's the deal. The question you just said is fine. But she's --

MR. WRIGHT: That's what I asked already.

THE COURT: -- going to answer -- she's going to answer the questions truthfully and I'm not going to, you know, limit that. And she can explain why she linked Mr. Lakeman on those days.

MR. WRIGHT: Okay.

THE COURT: And if your point is to point out, well, there's other people that were working that same day, the nurse --

MR. WRIGHT: That wasn't my point.

THE COURT: Okay. I don't know what your point is then.

MR. WRIGHT: My point was she gave a ridiculous answer. I said, What is it about July 25 and September 21, why you even make this a big cluster as opposed it was two separate incidents. Maybe one was propofol, maybe one was reuse of scopes improperly washed.

I mean, I have no idea why they linked the two, so I

asked her, Why do you think because it happened on this day and this day, why do you conclude it's likely the same cause? And her answer to me -- I didn't know what she was going to say to this. Her answer to me was, Because the same CRNA worked on both days.

I said, Well, that would be a good answer if that was the only two days the CRNA worked, but he also happened to have worked all the other days in between and before and since, so that isn't a distinguishing characteristic causing those two to be lumped. But if I pursue it and accept that nonsense, I'm opening the door --

THE COURT: State.

MR. WRIGHT: -- to hearsay.

MS. WECKERLY: The -- I don't -- I mean, her answer to me was -- my understanding of her answer was the CRNA who admitted to unsafe practices was the one who was working on both days. Now, their -- part of the reason why they -- part of the reason why it's an injection and the -- and the injection practices and the notification was as long as it was, or as widespread as it was is because those practices existed for that amount of time. That's why they made that distinction.

If they thought it was a nurse, they would have done it from the employment date of that nurse forward. And so, I mean, their answers are -- they're intertwined with what they

Lakeman Appeal 03850

know from their investigation, and I don't -- I just -- I just can't wrap my mind around why it would be okay to suggest that she can't fully answer based on her range of knowledge.

THE COURT: I think she can answer truthfully. Basically, I'm not going to tell you what to ask her. Ask her whatever you want. And I'm not going to limit her ability to answer truthfully and I'm not, you know, if she needs to provide a complete answer to answer truthfully, then she can. I don't know what her answer would be.

I mean, as you stand here and you say, well, that's just preposterous that they would link it to Mr. Lakeman, I don't think it's preposterous. I mean, he's told her that he's engaged in unsafe practices and he's the common denominator on the two days. To me it's more likely that you have a single same cause on two different days than that one day it's a dirty scope and then the other day it's --

MR. WRIGHT: Why is that?

THE COURT: Because it's just more likely that it's -- to me that makes -- to me that makes intuitive sense. Intuitively that makes sense to me. So when you say, oh, it's ridiculous, it's preposterous, I don't hear the evidence that way frankly. Now, you may hear it as preposterous.

But, you know, to me, I don't see what's so preposterous about her saying that, well, it's the same guy on two days that we got these who's admitted to unsafe and --

because is it more likely a single cause, or is it more likely that, okay, you've got unsafe injection practices and you've got dirty scopes.

And for various reasons, I mean, it's probably less like -- as we know, it's not likely to be transmitted through the scope, because let's face it, you're eating tons of dirty stuff all the time and not, you know, necessarily getting infected. So I mean, she's analyzing it according to what's going directly into your bloodstream and other things, what's likely to be a direct blood exposure.

So there's other factors that she's, you know, she's looking in. Is it a dirty sheet? No, because how is that going to touch your blood and spread a blood-borne infection. So she's not just looking at that. She's looking at, okay, we know that the infection is going to be entering the bloodstream directly, which would make sense then why people are getting infected, as opposed to some of these other things, like a dirty bite block, which necessarily isn't going to be entering the bloodstream.

So we know if you're injecting something it's entering the bloodstream. So to me, I don't find her reasoning, her rationale at all preposterous and I think she's entitled to explain that. And I want the record to be clear, I'm not limiting your questions and I think she needs to be --

MR. WRIGHT: You're telling me that she's going to be

allowed --

THE COURT: I don't know what she's going to say.

MR. WRIGHT: You're telling me that she is going to be allowed to answer by using evidence I do not have access to.

THE COURT: Mr. Wright, I am --

MR. WRIGHT: And that violates the confrontation clause and I want it -- I don't care about sheets and bite blocks. Obviously I'm not making myself clear. A witness has information, who's on the stand, that she is going to utilize to form her opinions and give answers that I am denied access to. I don't have the 106. I don't have their medical records. I dispute it and the witness cannot rely upon that.

She should be instructed you cannot rely upon evidence that is not made available. It wasn't in the discovery. I don't care if we call her a summary witness or an expert witness. Either way, under 1000 -- 1008, whatever the equivalent Nevada rule is, I have the right to it. And it's Davis vs. Alaska or whatever --

THE COURT: No, I --

MR. WRIGHT: -- in the confrontation clause case where a statute tried to limit my access to it and it was unconstitutional, and that's exactly what's happening here.

THE COURT: State.

MS. WECKERLY: Your Honor, well, I mean, I'm sure the

Court wants to review the cases we found, but I mean, some of the cases we found were on like toxic shock, where there was a bunch of victims and that type of thing and it was this exact issue. And the courts reasoned that people have every reason to candidly report.

And so to a certain extent that type of information being reported to an agency or to scientists who then use that information in formulating their conclusions, there isn't going to be a confrontation clause violation. Now, we'd like the Court to review it --

THE COURT: I would just note, you know, intuitively again, people who suffered from toxic shock, I'm assuming that was like a tampon-based thing that came out in the mid '80s. The big thing there, that isn't socially taboo.

MR. WRIGHT: It's a civil case.

THE COURT: Well, not only that, but --

MR. WRIGHT: There's no confrontation clause.

THE COURT: -- the other thing is with hepatitis C involving say IV drug use and other things, there are social and legal taboos to some of the conduct. So I think people are more motivated to not accurately report than they would in the toxic shock cases, as I understood that outbreak and how that was investigated.

Because I -- I mean, I was in college when that whole big thing happened, and it was huge news and it was, you know,

the New York Times had a magazine article and, you know, so I just kind of remember it just from the media and how that went.

But all I'm saying is I'm happy to look at the cases. Obviously a civil case is very different from a criminal prosecution --

MS. WECKERLY: Sure.

THE COURT: -- and I think some of the reasoning, as I said, as to motivation of the victims and the infected people, is going to be a little bit different in the toxic shock cases.

MS. WECKERLY: I agree with that, but I mean, we have experts that have cumulative knowledge of different studies and different reports. And all -- and the doctors who have testified -- or the doctor who testified yesterday was aware of other outbreaks and other instances and what happened with, you know, nurses that she's never had contact with not even involved in those outbreak investigations. But because she's an expert, she has this range of knowledge and --

Well, I mean, I understand -- I understand that the admissibility of the other people may be a decision the Court's yet to make, but I just go back to you still cannot have -- instruct a witness that they can't testify to what they know.

THE COURT: That they can't testify truthfully.

Lakeman Appeal 03855

Here's the thing, Mr. Wright. I'm just going to sum it up this way. You can ask whatever questions you want. And maybe I'm not understanding you correctly, but it sounds to me like what you want to question is her methods or her reasoning or something like that.

And if you attack the witness's reasoning, then I think she's entitled to speak truthfully as to why she performed the linkage that she did. Because I don't think it's fair for you to attack her reasoning like, oh, why did she isolate these two days or something like that, without allowing her to sort of, if you will, defend herself and speak truthfully about what her reasoning was.

Now, I don't know what she's going to say. It's possible all she will say is because Mr. Lakeman was the common denominator, it's a blood-borne illness, it's direct transfusion into the bloodstream and why look anywhere else when it appeared obvious. That may be all she will say.

Obviously I don't know what she's going to say, but all I'm saying is if that's where you're going with this and that's what I'm hearing from you, that it was preposterous that she would just isolate and link these two days like that and you're going to somehow challenge her reasoning, then I think she's entitled to explain her reasoning, whatever that may be, and I don't know what the answer is.

MR. WRIGHT: Okay.

Lakeman Appeal 03856

THE COURT: And I'm certainly not going to limit her and tell her no, you can't explain your reasoning as a CDC official and as a medical expert.

MR. WRIGHT: Okay. I just want to comment on what the State said and the Court's ruling. The -- first of all, I'm familiar with the civil cases in which there isn't a confrontation clause issue.

THE COURT: I agree.

MR. WRIGHT: It has nothing to do with this case. And secondly, experts do talk about the New York outbreak, this outbreak, that outbreak. But I have the right to ask them and challenge them on every one of them. I can say give me the article, give me -- because there is nothing with an expert that is off limits and it's all producible.

I have no problem with them talking about the New York one or the New Mexico one, and them using their historical knowledge as to what's probable and likely. Fully understood. But that isn't this situation. She's -- your -- the ruling is I can go ahead and she is allowed to explain her answer truthfully, which includes utilizing information I do not have that the State has -- the State of Nevada has precluded me from receiving.

THE COURT: First of all --

MR. WRIGHT: So if I cross --

THE COURT: -- that's not true. It's not -- well --

MR. WRIGHT: It's the state statute.

THE COURT: Okay. It is a --

MR. WRIGHT: It's the State of Nevada --

THE COURT: It's a state statute and it's --

MR. WRIGHT: -- created a privilege --

THE COURT: -- the Clark County Health District that was ruled on by a state court judge.

MR. WRIGHT: Right. Correct. So the State has said I don't get it. So your ruling, you won't restrict her, you won't instruct her that if I ask her questions she's at liberty to use the privileged secret information I can't have despite my confrontation rights. So with that ruling, I won't ask her.

THE COURT: Well, all I'm saying is if you're challenging her reasoning, then to me, I don't think she can be limited in trying to explain her reasoning in linking it. I mean, that's what I understand that you're saying. You want to challenge her reasoning, but she can't say what her reasoning was. So --

MR. WRIGHT: Correct. If it -- if she's -- absolutely, if she's relying --

THE COURT: Well, then to me, Mr. Wright --

MR. WRIGHT: -- on information I can't have because the State of Nevada chose to do that. They have remedies for these. It isn't unusual. It happens in informant cases and

everything else.

If they want to put up a shield that interferes with my confrontation rights, there are remedies to how to deal with it other than telling me I have to dance around it and give up my confrontation rights. That's what's happening here. But with that ruling that she's allowed to bring in that evidence because it's part of her logic, I'm not going to cross-examine her on it.

THE COURT: I don't know what the -- well, then let's bring her in here and see what her answer to the question was. Because now you've tried to create the record that, oh, well, she would have said this and I can't answer the question. I don't know what she would say or not say. I don't know what her answer is.

All I'm saying is I'm not going to instruct a witness that they have to lie or mislead the jury about what their reasoning was. They're allowed to testify truthfully as a scientist. She's allowed to say, no, that wasn't my reasoning, that's not why I did it. To me, I mean, if you want to make argument and say this doesn't make any sense with the evidence that we've heard, then that's argument and that's fine.

But I don't think it's right to tell a witness that if they ask for your reasoning you can't give it, or if someone says, well, you didn't follow scientific models, which

essentially sounds to me like, you know, you're making arbitrary -- arbitrary calls here, that she can't defend herself and explain her reasoning, if that's how I understand you want to proceed.

MR. WRIGHT: It is.

THE COURT: Ms. Weckerly, what do you recommend at this point?

MR. WRIGHT: That's the law. I mean, it's the same problem when the witness gets on that has informant information that's not admissible because the State won't disclose it. The remedy is the witness can't testify. It isn't a question of the witness has to lie or anything else. The State made their bed and they have to live in it. It's not at the expense of my confrontation rights.

I didn't create this mess that they did. It's their obligation to play by the rules and do it right. Labus and the two CDC witnesses know things that they used to reach their conclusions that are being concealed from me by statute. And so I'm supposed to just accept what they say, but if I challenge them on it, then I'm waiving confrontation rights and it comes in. That isn't the remedy in a situation like this.

The remedy is they either turn it over because of my rights trump their secrecy or the witnesses don't testify. That's the way it's addressed. I've disqualified expert in an

IRS case because I couldn't cross-examine him, because his conclusions were polluted by inadmissible evidence. So how do I cross-examine him and say, what do you mean you reached this? His true answer would be because I know your client said, nyeh, nyeh, nyeh, nyeh.

THE COURT: Well, Mr. --

MR. WRIGHT: In that situation they couldn't put him on. It's not --

THE COURT: I want to make it -- I think an important distinction --

MR. WRIGHT: -- mine -- my rights are waived.

THE COURT: -- has to be drawn here between inadmissible evidence or evidence that has been ordered stricken by the court or suppressed because of a constitutional violation, which is what you're talking about, and evidence that would be admissible but wasn't disclosed because of important state interests, which in my mind are different but equal to the interests of a different agency of the state or the county, the Clark County District Attorney's Office.

MR. WRIGHT: It's like Guantanamo, the state secrets.

THE COURT: Well, no.

MR. WRIGHT: In the state secret cases the government makes an option, are we going to turn over to this supposed terrorist this information he has a right to, or are we going

to forego prosecution. And they make those decisions. We're not treading new grounds on this.

It isn't they say, okay, Mr. Terrorist, we're putting you on trial but we're not going to show you the stuff, and don't you go near challenging anything or you're going to open the door to things.

THE COURT: Does anyone from the State want to respond to this? I feel like it's a dialogue between me and Mr. Wright.

MS. WECKERLY: I mean, I don't know -- I just view them as different -- as different issues conceptually, but --

THE COURT: Well, we're talking only about cross-examination and this --

MS. WECKERLY: Okay. But if it's cross-examination, I mean, to me that happens all the time in trial. You'll have a detective go, well, you know, I've seen this in a hundred other cases and this is why I drew this conclusion.

I mean, she's allowed to draw from her range of knowledge in the case or her range of knowledge scientifically. I mean, he can attack like why that may or may not be valid, or the strength of the information or what weight to give it, or why she gave it the weight she did. But she still knows why she relied on certain things.

And I really don't know what her answer's going to be, because the CDC left the investigation pretty early on.

So I mean, I don't -- I -- and we haven't talked to her obviously, so --

THE COURT: Right.

MS. WECKERLY: -- I have no idea what she's going to say.

THE COURT: I mean, all I'm saying, Mr. Wright, is if you ask the question about her reasoning or her rationale, you know, she can testify truthfully to that as a scientist what she relied on. So, you know, I don't know what the answer is going to be either.

MR. WRIGHT: I'm just telling you if -- I mean, on the example of a detective on the witness stand and if there's a statement my client gave him and it is not admissible, and there isn't a distinction between was it suppressed or is it a privilege, I mean, there isn't -- either way it's not admissible. The detective doesn't get to say, yeah, I know, Mr. Wright, because your client confessed when I talked to him. I don't care how I examine him, that doesn't come out.

And I can leave -- I had this issue in front of Judge Wendell. I sat there and examined -- polygraph couldn't come in, and so the guy's talk -- the polygraph examiner is -- the fact that it was a polygraph --

THE COURT: Right. Of course.

MR. WRIGHT: -- you know, isn't admissible or anything.

Lakeman Appeal 03863

Yet he interviewed my client, and so I was allowed to sit there and make the polygraph operator look like a goofball because I said, Wait, you're telling me you interviewed my client, yeah; you didn't record it, yeah; who else was there, just me and him. Now, every other interview we've heard about in this whole case, there were others there and they recorded it. You're telling me you just had this conversation, you and him, nobody else present sitting in a room, yes.

And what was the explanation for it? Because there was a polygraph going on and that's the way we do it. They weren't allowed to bring that out. And was I drawing a false inference? You're damn right, because those are the rules of what's admissible and what isn't.

THE COURT: Well, to me, I mean, I think you've made your record. I don't know what she's going to say, but if you ask her, you know, what -- you may -- you know, you're obviously a very experienced excellent lawyer. You can probably come up with a way to ask her questions that she's not going to say, you know, my reasoning was based on these other things. All I'm -- I don't know what her answer is.

All I'm telling you is if you challenge her reasoning, I think, as, you know, a scientist, she's going to be able to testify or I'm going to allow her to testify as to what her reasoning was. I don't know what her reasoning is, but, you know, to me she's relying on various things.

And, you know, I do draw a distinction between conduct of law enforcement or the prosecutors that was -- resulted in suppression and, you know, something here where you have two competing and significant State interests; again, the control of the spread of disease and the prosecution of criminals. And they're both being, you know, the one is protected and --

MR. WRIGHT: And my rights take the back seat and I'm just saying you've got it backwards. Davis vs. Alaska, I think, is the case that the State's super privilege folds under confrontation clause. I understand.

THE COURT: I mean, all I'm saying is, you know, ask your questions. But if she tries to answer, you know, truthfully as to, you know, her reasoning -- if you open the door to her reasoning, which it sounds like it's what you're trying to do, then I think she can tell you what her reasoning was.

Now, there are other ways for you to get that information, or rely on argument and things like that, inferences and evidence that didn't come in if it doesn't come in. But when you start attacking, you know, a scientific official's reasoning, I think they're allowed to say what their reasoning was if that's the line you're going to go down. And so because, you know, again, I think that that would call for a complete -- a complete answer if that's where

Lakeman Appeal 03865

you're going.

Now, I don't know what her reasoning -- to me it's again, just to reiterate, it's not preposterous to draw the conclusion she did just based on the data we have in front of us right now. Two days, Ron Lakeman admitting to dangerous injection practices, and the spread of hepatitis on those days through transmission that would occur directly into the bloodstream, I don't think that that sounds preposterous to me.

I don't think we need to go and think about dirty scopes and other things on those particular days. And obvicusly saline would also go directly into the bloodstream.

MR. WRIGHT: Why for three weeks have we listened to all this other crap? I mean, you're voicing my objections from the beginning of the case.

I agree with you completely that we've sat here for a month almost hearing about Chux cut in half, bite blocks, all this other stuff which has nothing to do with the case other than to dirty it up, and make the doctor a despicable person worthy of conviction whether or not the transmission was what they alleged. And so we just keep hearing it over and over and over, and now the Court's agreeing with me it has nothing to do with the case.

THE COURT: Well, it does -- I mean, as to Mr. Lakeman, no. But as to your client, you know, I don't

Lakeman Appeal 03866

believe the State has -- maybe they do have direct evidence of Dr. Desai telling, hey, reuse the syringes, reuse -- well, they do have direct evidence reuse the propofol. I don't know about the syringes but, you know, maybe there was something and I missed it. Maybe that's coming down the road.

But, you know, to the -- they're trying to show the culture of the center. I think, yes, has it been redundant, have we needed to hear from every nurse that ever worked there and every GI tech saying exactly the same thing? I agree it's been redundant.

But, you know, where are they going with this? I get the relevancy. They're trying to show it's a culture of cutting costs and micromanagement, and that he was in charge of everything down to, you know, how much -- how big the Chux is you're using. And that's, you know, that's their theory here. And so are they allowed to present their theory? Yes.

Is it -- somewhat has it been redundant? Yes. Do I think we needed to hear from all the GI techs coming in? No. I think, you know, that I don't personally find that that added anything, or all the, you know, various nurses that who all said essentially the same thing, you know, I think we could have, you know, done with fewer of them.

But it's their case and how they choose to put it on and, you know, again, they're trying to show the culture that pervaded the center and that your client micromanaged

everything and they need to show that, that it wasn't just Mr. Lakeman or the nurse anesthetists acting on sort of their own to say these things. So yeah, I get the relevance whether it's redundant or not.

Let's take two minutes and then bring --

MR. WRIGHT: Could I add -- not -- this is just an old thing. I want to offer today's Review-Journal story. I will bring it as a bystanders bill in evidence for the record.

THE COURT: Okay. What was in today's Review-Journal?

MR. WRIGHT: Mr. German reported what he understood the witness testimony to be yesterday.

THE COURT: Oh, that it was a culture -- or that --

MR. WRIGHT: No. What --

THE COURT: -- the owner didn't want waste; is that the quote, your interest?

MR. WRIGHT: Correct. But he tied it -- he said that when asked, he tied it exactly to reuse of syringes. And exactly the inference I complained about and moved for a mistrial is exactly the way it's written in the newspaper.

THE COURT: Well, and as I remember the article, it also noted that you'd moved for a mistrial and that the Court denied the request and gave the instruction to the jury.

MR. WRIGHT: Well, I'm just offering it --

THE COURT: I don't have a problem, Mr. Wright,

Lakeman Appeal 03868

making it a court's exhibit. I would just note -- you know, make whatever you want a court's exhibit.

I would just note that how a Review-Journal reporter chooses to spin the testimony really isn't that relevant, because the transcript's going to stand alone. And if it ever comes to a review in court, I think they're going to rely on the transcript and their own interpretation of it. But I'm happy to make it an exhibit.

MR. WRIGHT: Okay.

THE COURT: You know, there's been a lot of other interesting things in the media. I don't know if anybody read the letters to the editor yesterday. Did you read that about the lady who --

MR. WRIGHT: Yeah. Was that a witness?

THE COURT: -- didn't get anesthesia and struggled and...

MR. STAUDAHER: I haven't read any of [inaudible].

THE COURT: I was expecting you to add her as a last minute witness.

MS. WECKERLY: We can endorse her today.

MR. WRIGHT: I didn't know if that was -- if she was already a witness. I can't keep them straight now.

MR. STAUDAHER: We'll have to look.

THE COURT: If anyone needs to use the restroom, do it now, please, so that we can go through and not --