

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LAMAR CHAMBERS

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.Ct. No. 73446

D.C. No. C292987-1

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APPELLANT'S APPENDIX

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1 difficult to recover the print or recover a print that we can
2 identify. However, if the latent print was left in say grease
3 from a hamburger that that person had just eaten, that print
4 might last quite a bit longer.

5 Q Thank you.

6 MS. THOMSON: I'll pass the witness.

7 THE COURT: Okay. Cross-exam.

8 MR. YANEZ: I have no questions, Judge.

9 THE COURT: All right. Nothing from the jurors? I
10 don't see anything. All right. You may be excused. Thank
11 you very much. Does the State have another witness?

12 MR. SCHWARTZ: We do, Your Honor. The State's going
13 to call Julie Marschner.

14 JULIE MARSCHNER, STATE'S WITNESS, SWORN

15 THE CLERK: Thank you. Please be seated. Please
16 state your first and last name, spelling for the record.

17 THE WITNESS: My name is Julie Marschner. First
18 name, J-u-l-i-e, last name, M-a-r-s-c-h-n-e-r.

19 THE COURT: You may proceed.

20 MR. SCHWARTZ: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. SCHWARTZ:

23 Q Ms. Marschner, where do you work?

24 A I work for the Las Vegas Metropolitan Police
25 Department forensic laboratory in the biology and DNA detail.

1 Q And how long have you been with that unit?

2 A I've been working for the forensic lab for almost 12
3 years.

4 Q And did you do any type of work similar to this
5 prior to going to Las Vegas Metropolitan Police Department?

6 A No, I didn't. I was just in school prior to that.

7 Q What type of training and experience do you have
8 that qualifies you at the Las Vegas Metropolitan Police
9 Department?

10 A I have a bachelor's degree in biological sciences
11 from Cal Poly San Luis Obispo, and a master's degree in
12 forensic science from Virginia Commonwealth University in
13 Richmond, Virginia. During my graduate school training, all
14 of my laboratory training, including an internship, was done
15 at the Virginia Department of Forensic Science, which is the
16 State crime lab in Richmond, Virginia. After finishing
17 graduate school, I was hired on with Metro's forensic lab
18 where I underwent an additional nine months of training,
19 working, practice samples, practice cases before being signed
20 off to work cases on my own.

21 Q And specifically, could you kind of give us a
22 general idea of what DNA is?

23 A DNA, it's an acronym. It stands for
24 deoxyribonucleic acid, and it's the genetic material that's
25 found in the cells of all living organisms. Now, in humans,

1 most of our DNA is organized into chromosomes, and most of our
2 cells have 46 chromosomes or 23 pairs. And it's a pair
3 because we inherit half of our DNA from our mom and half of
4 our DNA from our dad. It's the unique combination of these
5 two that make us different from one another.

6 Now, between everyone in this room, over 99 percent
7 of our DNA is the same, and that's because we all need the
8 same basic genetic information to make us human. It's less
9 than one percent that makes us different from one another.
10 And it's in this less than one percent of the DNA that we look
11 at in forensic DNA analysis to be able to distinguish one
12 person from another. Now, the only time we can't do that is
13 with identical siblings, because identical siblings have
14 identical DNA.

15 Q So in general, you at the Las Vegas Metropolitan
16 Police Department could look at a sample of DNA and compare it
17 to an item to see if that DNA was on that item?

18 A Correct.

19 Q Generally?

20 A Yes.

21 Q And how is it that you receive a case to start an
22 analysis and then what do you do from there, in general?

23 A So, I'll receive a request either from a detective
24 or maybe the DA's Office asking me to look at specific items
25 of evidence. Once I get that request, I'll call the items to

1 be transferred to the forensic lab for me to take custody of.
2 And then I'll examine each package, making sure -- documenting
3 what it's labeled, making sure that it's properly packaged,
4 and then examining the evidence and looking for possible DNA.
5 It could be something obvious as a body fluid, like blood or
6 semen, but it can also be DNA that you can't see, touch DNA
7 where someone's skin came into contact with a surface. I
8 would swab the area, hoping to collect those cells that
9 contain the DNA.

10 Q Just some minor details about that. When you
11 receive an assignment, does that assignment have a specific
12 case number associated with it?

13 A Yes.

14 Q And I guess there's probably a couple case numbers,
15 but is there a Metro event number?

16 A Yes.

17 Q And that would be the same number that would be
18 associated with the case that the Metro detectives have
19 completed in that event.

20 A Correct.

21 Q Okay. Do you also assign a lab case number to each
22 sort of analysis that you do?

23 A Yes. So, every Metro event number, once the request
24 is submitted to the laboratory it receives a unique case
25 number that we use for tracking that case through the analysis

1 in the laboratory.

2 Q And specifically, I want to talk to you about this
3 case. Did you receive a request to conduct an analysis, a DNA
4 analysis in regards to event number 130709-1392?

5 A Yes, I did.

6 Q And what was generally the request in that event
7 number?

8 A The items of evidence?

9 Q Sure. What items of evidence were you going to be
10 comparing?

11 A So initially, I was asked to collect or examine a
12 bath towel, swabs that were collected from somebody's body.

13 Q I apologize. That was probably a bad -- let me kind
14 of narrow it down a little bit. Were you asked to do an
15 analysis in regards to a fired bullet?

16 A Yes, I was.

17 Q Do you have a copy of your report there that details
18 sort of the examination that you conducted?

19 A Yes, I do.

20 Q And is this something that you conduct in every
21 analysis that you do this type of report?

22 A As far as issuing a report?

23 Q Do you create a report when you do an analysis?

24 A Yes, I do.

25 Q And what is generally detailed in each report that

1 you create?

2 A It's going to list the item of evidence I examined,
3 any testing that I did on that. It's going to list the areas
4 in the DNA that I tested. And then, it's going to have
5 conclusions based on the results that I obtained from that
6 item, and any comparisons I may have made to known
7 individuals.

8 Q And specifically, I want to talk to you about lab
9 case number 13-00519.4 in regards to that fired bullet.

10 A Okay.

11 Q What was the thing you did in that analysis?

12 A So, here I was asked to examine a fired bullet. So
13 I took a swab, a moist swab and swabbed the outer surface of
14 that bullet that I had received. And then, I dabbed it onto a
15 piece of filter paper to test for possible blood using a
16 reagent called phenolphthalein. That particular test was
17 negative. But then, I took on that swab for DNA analysis to
18 be able to develop a DNA profile from that bullet.

19 Q So you used the swab to kind of get any potential
20 DNA from the bullet, and then you used that swab to compare it
21 to something else.

22 A Correct.

23 Q And what was that something else?

24 A It was reference standards that had been submitted
25 in this case from three different individuals.

1 Q Okay. And what is a reference standard?

2 A In this particular instance we call it a buccal
3 swab. It's basically a cotton-tipped swab that you swab on
4 the inside of someone's cheek to collect their DNA. It's a
5 less invasive way to get DNA rather than having to do a blood
6 draw.

7 Q So, is a reference standard DNA where you know who
8 the person is?

9 A Yes.

10 Q So you would use the reference standard to take the
11 known DNA sample to see if it matched, for instance in this
12 case, the fired bullet DNA or swab.

13 A Correct.

14 Q Okay. What were the results of that comparison?

15 A So, the DNA profile that I obtained from the fired
16 bullet was consistent with the reference standard I had
17 obtained from Gary Bly.

18 Q Meaning that you were able to determine that Gary
19 Bly's DNA was on that fired bullet.

20 A Correct.

21 Q Now, just a couple other things about your report.
22 There are different item numbers that are on there. Are there
23 any item numbers that you actually assign to the pieces of
24 evidence?

25 A Yes. The lab item number is something that's

1 assigned when the request comes in to the lab.

2 Q So in this case, lab item 16 is the fired bullet.

3 A Correct.

4 Q And it also has an impound number, and that's the
5 number that is given to it from the detective or whoever
6 impounded the piece of evidence.

7 A Correct.

8 Q And there's also an impound package number with a
9 four to five-digit number. Would that be the P number of the
10 impounding officer?

11 A Correct.

12 Q And is this all sort of just to make sure that
13 everything is matching up and stays in place?

14 A Yes.

15 Q Chain of custody, so to speak.

16 A Correct.

17 Q And just to clarify, the reference standard, the
18 buccal swab from Mr. Bly that you said matched the fired
19 bullet, that was lab item number 13; is that correct?

20 A That's correct.

21 MR. SCHWARTZ: Court's indulgence.

22 BY MR. SCHWARTZ:

23 Q Ms. Marschner, the last thing just to talk about.

24 There's another part in your report where you indicate sort of
25 a -- you gave a probability number. Can you explain that for

1 the jury?

2 A Yes. So any time we make a comparison between an
3 item of evidence and a known reference standard and the DNA
4 profiles are consistent with each other, we calculate a
5 statistic to determine the rarity of that match. For the
6 particular DNA profile that I obtained from the fired bullet,
7 that estimated frequency of that DNA profile among the general
8 population is rarer than one in 700 billion. The number's
9 actually much larger than that, but at the time in our
10 laboratory we cut it off at 700 billion. And the way we came
11 up with that number is that at the time the world's population
12 was seven billion, so we took a hundred times that number.

13 MR. SCHWARTZ: Nothing further, Your Honor. Thank
14 you.

15 THE COURT: All right. We'll turn it over to the
16 defense.

17 MR. YANEZ: I have no questions, Judge.

18 THE COURT: All right. Very good. You are excused.
19 Thank you very much for your time. Watch your step. So that
20 was Ms. Marschner. Now we can call the next witness.

21 MS. THOMSON: We don't have another witness set up
22 for before lunch.

23 THE COURT: All right. Well, we can let the jurors
24 go early for lunch and maybe take a little bit longer lunch.
25 You'll have some witnesses after?

1 MS. THOMSON: Yes, Your Honor. I apologize. The
2 lack of cross-examination --

3 THE COURT: All right. So if I give them an hour
4 and a half --

5 MR. YANEZ: Thank you for blaming me.

6 THE COURT: If I give them an hour and a half, what
7 time would that be? An hour would be 12:20, plus another 30
8 minutes, that's 12:50. Let's say 12:45. Can you have a
9 witness at 12:45?

10 MS. THOMSON: I anticipate so.

11 THE COURT: All right. I'll ask you guys to be back
12 here at 12:45, please. Same admonishment applies. Don't do
13 any research. Don't talk about the case. Don't form any
14 opinions about the case. Don't talk to anybody about the
15 issues in the case or the facts in the case. All right?
16 Leave your notepads and I'll excuse you and see you back here
17 at 12:45. Thank you.

18 (Jury recessed at 11:20 a.m.)

19 THE COURT: All right. So we're outside the
20 presence of the jury. Hopefully, the extra time will give you
21 guys all a chance to take a further look at this video
22 conferencing issue and do whatever research you need to do.
23 If you have more evidence to get me, you can get me evidence.
24 Counsel for the defense raised the issue about whether there's
25 evidence of health problems of the witness that would prevent

1 her from traveling. Some cases suggest that that's something
2 important for the Court to consider. So I'll just look at
3 these issues when we come back.

4 MS. THOMSON: Thank you, Your Honor. In an
5 abundance of caution, do you have a problem with us having the
6 district court test it out with Maricopa County since they
7 have to test it before we --

8 THE COURT: You can test the equipment during lunch,
9 whatever.

10 MS. THOMSON: Perfect. Thank you.

11 THE COURT: Because if I make a ruling I'm going to
12 allow it I want it to flow seamlessly right into that without
13 technical glitches.

14 MS. THOMSON: Thank you.

15 THE COURT: Thank you. Court's adjourned.

16 (Court recessed at 11:22 a.m. until 12:52 p.m.)

17 (Outside the presence of the jury.)

18 THE COURT: So, we need to hear argument on motion
19 to use audio visual testimony. I'll hear from the State
20 first.

21 MS. THOMSON: Your Honor, I reached out to Ms. Lacey
22 via test message, asked her if she had records associated to
23 the heart attack. She indicated that she had looked for those
24 yesterday, but could not find them. But the heart attack had
25 occurred at the end of January. She said she could send me

1 photographs of her prescriptions that are for high blood
2 pressure. I asked her to do that. If I can approach, I have
3 a photograph of each of two bottles and attached I printed out
4 the Web M.D., which I recognize isn't definitive, but it is
5 reliable as to what those are for. Both of them are for high
6 blood pressure.

7 THE COURT: She must have had some records that
8 convinced the magistrate not to allow her to be shipped her,
9 right? What did she show the magistrate?

10 MS. THOMSON: I don't know the answer to that. My
11 guess it was probably sworn testimony.

12 THE COURT: She provided sworn testimony. Let me
13 look at this. Are these two copies of the same thing?

14 MS. THOMSON: No, Your Honor, they're separate.

15 THE COURT: Oh, two different medications. All
16 right. We'll have these marked as State's -- or Court's
17 exhibits A and B. All right. So, go ahead and argue.

18 MS. THOMSON: So, sort of the two areas I see as
19 being relevant at this point are one, whether we have met sort
20 of a basis to have testimony generally, whether she's
21 medically incapable of coming or the State is incapable of
22 getting her here. And at this point, it's the State's
23 position that at least the court in Arizona has found that
24 she's medically incapable of coming. And we have exhausted
25 every avenue that we have to get her here. We did the

1 compelling order, we requested a warrant if she refused to
2 travel. The court there denied that request, and ultimately
3 issued the order that she would in fact be forced to testify
4 via video if this court allowed it.

5 Beyond that, our material witness warrants are not
6 valid in other states, meaning I have material witness warrant
7 here doesn't mean I can send my investigator [indiscernible]
8 and just hook her up. That would be kidnapping. So at this
9 point, we have no other recourse but to have her testify via
10 video because there's nothing else that can be done.

11 THE COURT: Tell us why she's a material witness.

12 MS. THOMSON: She is a material witness because she
13 is the witness who two days before this incident saw the
14 defendant with a gun, told him to get it out of there, to
15 which he responded -- he told her at least that he had gotten
16 rid of it because he was going to do something stupid. And
17 she's also the witness to whom he made statements where he
18 indicated that Lisa had shorted him, that Lisa was an
19 undesirable person, that she had so much money and he was
20 going to rob her.

21 THE COURT: Is this stuff she testified to in her
22 preliminary hearing?

23 MS. THOMSON: We were not able to locate her
24 preliminary hearing, so there is no transcript of her. Well,
25 there's a taped statement, but not an in-court transcript.

1 THE COURT: Okay. So you covered the issue of
2 materiality. You covered the issue of efforts to obtain her.
3 You covered the issue of inability to travel.

4 MS. THOMSON: With regard to --

5 THE COURT: What about the technology that you plan
6 to use for the proceeding by videotape? What technology do
7 you plan to use and how's it going to work?

8 MR. SCHWARTZ: Your Honor, if I could just jump in a
9 little bit because I dealt with IT on this. There's a program
10 that they use, it's attached to our motion. It has the
11 BlueJeans, I believe is the software, the name of the program.
12 It connects to the TV and it connects via, like a webinar is
13 what they send an email to Arizona. It opens the webinar.
14 They join it. I believe --

15 THE COURT: Two-way communication and two-way video?

16 MR. SCHWARTZ: Audio video two-way, and I believe
17 they have already tested it both in our IT department with
18 Arizona and in this courtroom via Arizona to verify that it
19 does work. We could test it out again just so both sides
20 could see the sort of reliability being able to see here, make
21 sure it's not skipping or whatever the terminology is. But
22 that would be the technology that we would be using.

23 THE COURT: What kind of shot do you plan to use of
24 the witness?

25 MR. SCHWARTZ: I would expect to use --

1 THE COURT: Closeup on the face or the whole body or
2 the room? What do you expect?

3 MR. SCHWARTZ: I'd expect a waist up shot, similar
4 to what you would see if they were sitting on the witness
5 stand here. That would be my understanding. So you could see
6 the hands, you could see the face, and she would be in a
7 seated --

8 THE COURT: All right. Have you tested to see if
9 it's clear or grainy?

10 MR. SCHWARTZ: I personally haven't, but we have had
11 it tested by our IT department who says it is -- I'm sorry,
12 the district court IT department has tested it, verified with
13 me that it is working appropriately.

14 THE COURT: Would the clerk here put her under oath
15 or would she be put under oath by somebody there in her own
16 state?

17 MR. SCHWARTZ: My understanding would be that we
18 would put her under oath here. We also have, just to kind of
19 back that up, we have written oath documents that I've
20 submitted with you where she signs, acknowledging her oath,
21 acknowledging she's subject to crimes should she lie under
22 oath in the State of Nevada since she's not physically here.
23 She waives any type of jurisdictional issue.

24 THE COURT: How do we know -- how do we assure
25 ourselves that there's nobody like off the scene, like you see

1 in some movies, like coercing her to testify a certain way?

2 MR. SCHWARTZ: Well, I guess there's a couple
3 avenues. What I requested, which I'm not sure if it's able to
4 be done, but what I requested was that a judicial officer be
5 present in the room with her. It is going to be taking place
6 in a courtroom. Whether or not a judicial officer will be
7 there, I can double check for you.

8 THE COURT: Does she have somebody there to support
9 her there?

10 MR. SCHWARTZ: I know she has a significant other.
11 I don't know if he's going to be in the courtroom specifically
12 with her.

13 THE COURT: But she did sign that waiver, I saw
14 that.

15 MR. SCHWARTZ: She did sign the waiver.

16 THE COURT: All right. Anything else before I turn
17 the floor over to Mr. Yanez?

18 MS. THOMSON: The only thing that I would add is
19 with regard to the previously raised issue by Mr. Yanez of
20 confrontation. During the lunch hour I was able to find and I
21 emailed to you all, and I realize that it was close to the end
22 of the lunch hour, a case from U.S. Supreme Court. It's a
23 1990 case. It was Maryland v. Craig. And the issue there was
24 with regard to a child witness in Maryland who had testified
25 with a screen around her where she could not see --

1 THE COURT: A 1990 case.

2 MS. THOMSON: Correct. What did I say?

3 THE COURT: 1890.

4 MS. THOMSON: Oh, it's a little bit sooner than
5 that.

6 THE COURT: I read Craig. Thank you.

7 MS. THOMSON: And I think that's directly on point
8 here. We're talking about even -- I'm sorry, she didn't have
9 a screen. That's not true. It was on a closed circuit where
10 she couldn't see the courtroom basically while she was
11 testifying. So, I think here what we have is even more
12 indicia of reliability in the feed construct of what the
13 confrontation clause requires because we also have the witness
14 being able to see what's happening in our courtroom.

15 THE COURT: Thank you. All right. Mr. Yanez, you
16 have the floor, sir.

17 MR. YANEZ: That case is on point to the extent that
18 the State must make a showing of necessity and further, an
19 important public policy. However, what that case had and what
20 this case doesn't have is proof that in fact there is a
21 necessity and in fact whether she's even capable of traveling.
22 All we have here is a affidavit from the State of Nevada
23 saying that some court in Arizona -- of course, I wasn't
24 present and Mr. Chambers wasn't present -- made a
25 determination that she should -- she can testify via closed

1 circuit TV or Skype or however you want to call it. There has
2 to be a showing.

3 All the cases, and I reviewed the case, Judge, that
4 you submitted to us, White v. State from Maryland, 116 A3rd
5 520. That case and every single case that's cited in there,
6 there's some type of medical proof, an affidavit from a
7 doctor, medical records.

8 THE COURT: We have indication of the prescriptions.
9 It has her name on it and the name of the prescription and
10 date.

11 MR. YANEZ: A prescription of a high blood pressure
12 pill? Mr. Chambers takes high blood pressure pills. Does
13 that mean he had a heart attack?

14 THE COURT: So you're suggesting we need some proof.
15 Can I allow you to voir dire her by video conference so you
16 can -- so we can assure ourselves that what she apparently
17 told the magistrate out of state is the same thing she's going
18 to tell us?

19 MR. YANEZ: Well, how can I -- she can say I had a
20 heart attack and, you know, I went to Dr. X, Y, and Z, but how
21 do I -- I don't have an opportunity to double check that.
22 This person is not the most truthful person, Judge. She's
23 also been in the meth culture, like all the other witnesses in
24 this case. And it appears, and I think the State made some
25 insinuations to this, that she's been trying to avoid service,

1 coming here to testify. So this is -- could be just a made up
2 excuse.

3 The second point, besides that there's no proof that
4 an actual heart attack or medical condition has occurred, just
5 because you have a heart attack doesn't mean you can't travel.
6 There's people that have heart attacks and the next day
7 they're doing their daily activity. All the cases that are
8 cited here, there's some type of expert saying it is going to
9 be detrimental to the health of that witness to travel. All
10 of them have that. And the case cited, U.S. Supreme case
11 Craig, that regards child testimony --

12 THE COURT: But we have a magistrate who already
13 made that determination, that she can't travel.

14 MR. YANEZ: Based on what, though? We don't know
15 that.

16 THE COURT: I don't know what was presented to that
17 magistrate.

18 MR. YANEZ: Exactly. And that's not sufficient.
19 That's not sufficient under the facts of this case and the
20 importance of the Sixth Amendment. We've got to have a little
21 something more than that. I mean, again, I wasn't there, I
22 didn't have a chance to cross-examine anybody. I don't know
23 what evidence was presented. With such an important witness
24 on such an important case, I don't think we can just rely on
25 well, another judge said it was okay.

1 And besides the fact, Judge, that it's not necessary
2 to the extent that well, they know where the witness is at.
3 They can issue a subpoena here and try to get it domesticated
4 over there through the Uniform Act for out-of-state witnesses.
5 That's what I've done in other cases. If I need to get a
6 witness from another state and need a court order, I get a
7 subpoena from here and I domesticate it. There's a procedure
8 for that.

9 THE COURT: Well, the procedure wouldn't solve the
10 health issue. Apparently, the position now is she would
11 travel, whether it's subpoena, handcuffs, warrant, whatever,
12 but her health condition doesn't allow that.

13 MR. YANEZ: I'm just saying -- my point is if the
14 State hasn't provided evidence besides the witness's claim
15 that she had a heart attack and can't travel and a
16 prescription for the witness for high blood pressure, that
17 does not mean, number one, she had a heart attack. It doesn't
18 mean, most importantly, that she can't travel.

19 THE COURT: Let me hear from the State on whether
20 the evidence is sufficient and what more we could get.

21 MR. SCHWARTZ: Your Honor, the evidence is
22 sufficient. I understand that there are cases where they do
23 present documents to the court. The court ultimately is in a
24 position to make an individualized determination based on each
25 case, based on the facts we present. There's nothing in the

1 case that requires medical documents. I don't have to bring
2 in a doctor to say she can't testify. But, what the courts do
3 suggest is that Your Honor conduct an evidentiary hearing with
4 the witness, we present whatever evidence we have to show that
5 she is unable to testify and that she has a health concern.

6 THE COURT: I can't believe that she'd have a heart
7 attack and not be able to provide any documentation to
8 establish that. That's -- I'm having trouble believing that.

9 MR. SCHWARTZ: And it's not that she hasn't provided
10 any --

11 THE COURT: The fact that she hasn't provided it
12 causes me some concern as to her credibility. Combine that
13 with the fact that she was playing games with making herself
14 available causes me additional concern. You guys are going to
15 have to do better.

16 MR. SCHWARTZ: Well, here's the deal, Your Honor.
17 We did provide you with something, right? We gave you drugs
18 that she's taking that's consistent --

19 THE COURT: Losartan. I take Losartan, I can
20 travel.

21 MR. SCHWARTZ: Okay. But it's consistent --

22 THE COURT: That means nothing to me.

23 MR. SCHWARTZ: It's consistent with her story. You
24 have to agree it's consistent with her story. And evidence
25 that we're asking for would include sworn testimony from her,

1 right. She's sworn to tell the truth under oath. That's
2 evidence if we're going to give it to you. That's the best we
3 can do under the circumstances. We only found her two days
4 ago. So, I mean, for us to have to do something else, we've
5 already tried to localize our warrant in Arizona. We've at
6 least served her with a compelling order in Arizona. We have
7 a material witness warrant here. This has all been done
8 overnight, Your Honor.

9 I mean, there's not -- with the exception that we
10 could potentially get more records to you next week, at this
11 day we've proven to you beyond a reasonable doubt at this
12 point that she's unavailable, which is not the standard. But
13 showing that she's unavailable also shows that she's necessary
14 -- that it's necessary that we do it this way, if you think
15 about it that way.

16 THE COURT: I get --

17 MR. SCHWARTZ: Does that make sense, though, what I
18 just said, that last part about unavailability. That's part
19 of the standard.

20 THE COURT: I'm convinced -- okay, we've got a
21 couple different standards. I'm convinced that you've
22 undertaken reasonable efforts to get her here and she's
23 unavailable. I get that. That's part of the standard. All
24 right? But, you know, I also get that the State has the
25 burden to come forward with some evidence that the witness --

1 that making a personal appearance would cause severe stress or
2 trauma that would be very unhealthful for her. Basically,
3 there has to be some evidence that proves that she can't
4 travel.

5 MR. SCHWARTZ: And I think that --

6 THE COURT: And the fact that she has high blood
7 pressure, that's a piece of evidence. But where you're
8 telling me that she had a heart attack and yet, she can't
9 provide any documentation, that seems inconsistent.

10 MS. THOMSON: Judge, perhaps I misunderstand the
11 case law. The way I understood it was unavailability is
12 unavailable to travel because of medical issues or
13 unavailability as in they cannot be gotten to the place for
14 testimony, whether that means they are perfectly able-bodied
15 and serving in Afghanistan under military orders. We would
16 still -- well, there's no medical records to prove they can't
17 be here, but I think we would all acknowledge that if someone
18 is active duty in Afghanistan they are not able to be here and
19 necessity would still prevail.

20 What we've shown this court is there is support for
21 her assertion that she is medically unable to travel. And the
22 next step, and really the factor that I think the Court is not
23 giving the weight to, is getting stuck on the medical issue,
24 is the actual unavailability. We have done everything as the
25 State that we can do. We have gone to this other jurisdiction

1 and said please put her in custody. If she will not travel,
2 force her to travel and then put her in custody. And they
3 said no, we will not do that.

4 At this point there is literally nothing more the
5 State can do other than go and commit a crime to get her here.

6 MR. YANEZ: Judge, I think, with all due respect,
7 Ms. Thomson does misconstrue the case law. There's a
8 difference between unavailability and, as the case law is
9 crystal clear, an important public policy and adequate finding
10 of necessity to basically go around the Sixth Amendment and
11 prevent Mr. Chambers' right from having his accuser face to
12 face. That's why the standard is so high, because he is
13 giving up a constitutional right in part to face his accusers.
14 So the standard isn't availability, the standard is the
15 important public policy and the finding of necessity.

16 The example that she gave as someone being in
17 Afghanistan, that's fine. Someone brings proof that they're
18 in Afghanistan and can provide that proof, that's fine. Just
19 like in this case. If this witness -- if the State could
20 provide proof that in fact she had a heart attack and a doctor
21 has said it is against her health to travel, it would be a
22 whole different posture of this. But the State hasn't
23 provided that. The simple picture of high blood pressure
24 medication is not enough for Sixth Amendment purposes.

25 THE COURT: So, here's what we know from Craig. So

1 the goal of confrontation, which is assuring the reliability
2 of evidence, can be achieved without an accuser's physical
3 presence in the courtroom if four conditions are met. Number
4 one, the accuser must testify under oath. Number two, the
5 defendant must have the opportunity to cross-examine the
6 accuser. Number three, the jury must be able to observe the
7 demeanor of the accuser while testimony is given. Number
8 four, the accuser must testify in the presence of the accused.
9 That's what Craig established. Craig also said that -- give
10 me a moment here -- the absence of in-person testimony must
11 advance some important public policy. All right.

12 I'm guided in part by this Butterworth case, Harold
13 vs. Butterworth, which is cited in the White case, which I
14 gave you guys. It's Eleventh Circuit, 2001, which held that
15 in the context of a federal habeas petition, the State's
16 conclusion that an important public policy to excuse in-person
17 confrontation was not contrary to federal law where the
18 witness lived beyond the subpoena power of the court, and that
19 it was in the State's interest to expeditiously and justly
20 resolve criminal matters that are pending. That one of the
21 witnesses was in poor health and couldn't travel from -- in
22 this particular case it was Argentina to the United States --
23 and the witnesses were deemed essential to the case.

24 I think our case is very similar to that, with the
25 exception that in that case you had proof of the poor health

1 of the witness. The Supreme Court has held that the Sixth
2 Amendment does not establish a per se rule that in-person
3 appearance is necessary.

4 I believe that if we can establish that the witness
5 is in such poor health that she can't travel, then I'm
6 satisfied that video testimony can be provided. I'm just not
7 sure that I have enough yet of her poor health. I'm not
8 convinced that her health is so poor. And I'm wondering what
9 more we can get because the medication shows she has high
10 blood pressure. If I had a heart attack I'd be able to get
11 some documentation that I had a heart attack.

12 MS. THOMSON: You're a much more organized person
13 that she is.

14 THE COURT: But, then I would be able to remember
15 where I had my heart attack or what hospital treated me. And
16 then, somebody could call up that hospital and get a record.
17 All I need is confirmation that she's had a heart attack.

18 MS. THOMSON: And the problem is HIPAA laws. We can
19 call up and they'll say yeah, we're a hospital.

20 MR. YANEZ: Judge, she can --

21 THE COURT: How do I -- because I don't know that I
22 have enough even to find by a -- I'm not sure that I have
23 enough yet to find by a preponderance of the evidence that she
24 is in such poor health. I know apparently another judge made
25 that determination, but I don't have any written findings on

1 that. I don't know what the judge considered. So I'm
2 struggling with trying to -- if I can be convinced that she's
3 in poor health, then I know that -- there's several cases that
4 have allowed witnesses for the State to testify via video
5 conference. The State versus Rogerson case, is that one I
6 cited? Anyway, there's an Illinois case where a witness lived
7 out of state, had suffered congestive heart failure, rendering
8 him unable to appear personally at trial. The court concluded
9 that permitting the seriously ill witness testimony versus
10 video conference was necessary. Further, the important public
11 policy of preventing further harm to his already serious
12 medical condition.

13 We have a North Carolina case that approved remote
14 testimony of a witness who suffered a severe panic attack
15 before trial and was unable to travel because of a severe
16 panic attack. We have another case out of the Sixth Circuit
17 where a gentleman, elderly and informed, the Sixth Circuit
18 allowed him to testify versus video conference technology.

19 Video conference technology is permitted in
20 recognition of the important public policy of allowing the
21 court case to be expeditiously resolved when you have a
22 witness that's outside the subpoena power of the court and
23 that witness has some health reason preventing travel.

24 So, I need to be convinced that there is a serious
25 enough health reason that prevents travel. So, I've got two

1 issues. One, can I rely upon the determination made by this
2 magistrate where I don't have a transcript, I don't have
3 findings. And number two, even if I can't rely on that, is
4 there enough evidence before me to make that determination.
5 Address that, please.

6 MS. THOMSON: I think the differentiation, forgive
7 me, I forgot the case name that you said and I want to say it
8 was White that talked about the witness who was in Argentina
9 and too sick. The differentiation there is --

10 THE COURT: That was Butterworth, Eleventh Circuit,
11 2001, Federal Circuit Court of Appeals.

12 MS. THOMSON: I was way off.

13 THE COURT: It was cited in the White case.

14 MS. THOMSON: Okay. Where we differ from that is
15 the prong of outside subpoena power. Because at least as far
16 as I'm aware, there's no mechanism for me, the State of
17 Nevada, to say hey, Argentina, force this person to come here.
18 And so, it's outside the reach of an available mechanism to
19 make the person come.

20 But what the Court is saying by saying we have to
21 both have their unavailability because we physically can't get
22 them and they must be medically unable to travel, is that any
23 witness who ever doesn't want to testify, who wants to
24 preclude justice from occurring, can go to another state and
25 if the court there says you don't feel like it, no worries.

1 Then a defendant doesn't have to face the charges.

2 THE COURT: And I think that might be true, because
3 one of the cases I read -- I can't put my finger on it right
4 now -- the mere fact that a witness doesn't want to come
5 testify is not sufficient to throw out the confrontation
6 clause.

7 MS. THOMSON: But it's not the mere fact that they
8 don't want to come testify. If we had called her up and said
9 hey, you'll come tomorrow and she said no, go do things to
10 yourself, and we came in here and said she just said no, then
11 absolutely, I would agree with you completely. But that's not
12 where we are. We have taken the steps to say whether or not
13 you want to be here, we are asking Phoenix to force you to be
14 here. We can't control Phoenix. Obviously, they're a
15 separate jurisdiction and they don't do necessarily what we
16 want them to do. But it's not just a -- she doesn't want to
17 be here. It's she doesn't want to be here, we have exhausted
18 every possible route to get her here.

19 So to say that it's the same as a witness who's in
20 Argentina where there's not a method by which we can force
21 Argentina to give her to us, if in that case the witness had
22 been in Argentina and just find, then maybe it's a different
23 conversation.

24 THE COURT: But the Sixth Amendment doesn't say
25 defendant has the right to confrontation unless the State

1 can't get the witness there, in which case the -- you don't
2 have the right to confrontation.

3 MS. THOMSON: What it says is as long as you support
4 the different prongs underneath the confrontation clause, not
5 all of them is dispositive. And it also says that there must
6 be a public policy. And I would submit to the Court --

7 THE COURT: What's your explanation of the policy
8 then?

9 MS. THOMSON: Is that we don't let witnesses, we
10 don't let defendants control whether or not someone faces
11 trial, whether or not they face the conduct that they
12 committed. And what would happen is we have people who -- and
13 exactly this. A witness, if she is not unhealthy, says I
14 don't want to go, another jurisdiction says we're not going to
15 force her, and that's exactly what happened. Public policy is
16 eviscerated because then now we know that if you don't want
17 your boyfriend, your husband, your child to face the charges,
18 you just go to another state.

19 THE COURT: Public policy then is not to allow a
20 witness who's favorable to the accused to play games with the
21 process to avoid being called into court to testify.

22 MS. THOMSON: And it's the same idea --

23 THE COURT: I just need to know, is that what you're
24 saying?

25 MS. THOMSON: Yes, and whether favorable or not.

1 THE COURT: So you're saying that either the
2 evidence of her heart attack and unavailability to travel is
3 true, in which case that establishes a basis for the Court to
4 allow the videotape, or she's lying, in which case she's
5 further playing games which triggers the public policy not to
6 allow witnesses to do that, which is an important public
7 policy which allows the court to allow videotape deposition or
8 videotaped testimony. Let me hear from the defense on that.

9 MR. YANEZ: Again, we're conflating unavailability
10 with the requirements to allow video testimony in a criminal
11 trial.

12 THE COURT: I'm not conflating, because again, look
13 at --

14 MR. YANEZ: If I could just --

15 THE COURT: Craig says face-to-face confrontation is
16 not absolute. All right. But neither is it easily dispensed
17 with. I hope the State's listening to this too. A
18 defendant's right to confront accusatory witnesses may be
19 satisfied absent a physical face-to-face confrontation at
20 trial only where denial of such confrontation is necessary to
21 further an important public policy, and only where the
22 reliability of the testimony is otherwise assured. I think we
23 can deal with the reliability aspect.

24 We're really talking now about the important public
25 policy. She articulated important public policy of not

1 allowing a witness favorable to the accused to change her
2 story about availability back and forth and change her story
3 to try to escape being forced to testify under oath in the
4 proceeding. That's what she was articulating as the public
5 policy. Why isn't that an important policy?

6 MR. YANEZ: Well, I don't have a single case that
7 says that that is one, number one. So there's no legal
8 precedent for that. Number two, what about the flip side of
9 that coin, Judge? How about a witness who, let's say, has
10 epilepsy and takes medication for epilepsy and says yeah, I
11 can't travel because it's bad for my health. And just based
12 on the fact that that witness says I have epilepsy and I take
13 epileptic seizure medication, I don't have to come. How about
14 someone here in town, it doesn't have to be out of state. You
15 could have someone here in town to say yeah, I just had a
16 heart attack the other day and I take high blood pressure, so
17 I'm not going to go and testify. Under the State's version of
18 how the law's supposed to apply, that person could come and
19 testify video -- come testify via video.

20 In citing the case Butterworth, the fact that the
21 State left out when they just made that argument, is that
22 there was a finding that the person had health conditions.
23 I'm not -- here's the thing.

24 THE COURT: There's a finding here in this case by
25 the magistrate.

1 MR. YANEZ: We don't know that, Judge. We're
2 speculating as to that. Here's -- and I want to make sure --
3 I'm not disagreeing with a lot of the stuff Your Honor's
4 saying. I understand there's exceptions to the Sixth
5 Amendment confrontation. I don't disagree with that. I don't
6 disagree with the fact that under certain circumstances
7 two-way video testimony is allowed. I'm not disagreeing with
8 that. I'm disagreeing, and I think Your Honor pointed it out,
9 they haven't provided the proof sufficient besides a witness's
10 self-serving statement, because that's what it is, it's a
11 self-serving statement so she doesn't have to come here and
12 testify that she had a heart attack. And again, I don't know
13 -- Court's indulgence. Let me look at their affidavit.

14 I mean, there's no medical proof whatsoever that a
15 doctor has recommended she shouldn't travel. We don't even
16 know when this heart attack happened. It just said she
17 recently had a heart attack. What does that mean?

18 THE COURT: I'm picking up on one of your points,
19 that's State versus Rogerson case. In case I didn't cite it,
20 I'll go ahead and cite it now. It's Iowa, 855 NW2d 495.
21 Again, 855 NW2d, 495, 2014 case. It did say -- that was the
22 case I was thinking of. There must be some impediment to
23 testifying beyond mere unwillingness to travel. Because if
24 someone was unwilling to travel, that would pretty much negate
25 the whole confrontation clause if you could just say I'm

1 unwilling to travel and then allow them to do videotape.

2 There's a general consensus among the courts of mere
3 convenience, efficacy and cost savings are not sufficient
4 important public necessities to justify a defendant being
5 deprived to face confrontation. There has to be more than
6 just mere inconvenience. This isn't a case where we just have
7 mere inconvenience, because we do have a defendant that's
8 changed her story. She promised to be here and wasn't here,
9 right? And then, we had to get a court order and then it
10 turns out that now she's claiming health reasons, but you take
11 issue with whether she really has health problems.

12 MR. YANEZ: Correct. And again --

13 MS. THOMSON: And if I could just interject --

14 THE COURT: I'll give you a chance, one second.

15 MR. YANEZ: -- that's also an unavailability issue.
16 The reason -- this whole point is whether we could present to
17 this jury basically Skype testimony and go around in part the
18 Sixth Amendment. And all of the case law has found that there
19 has to be the strong public policy, along with the adequate
20 finding of necessarily, and every single case deals with some
21 type of expert testimony, records, something that shows that
22 witness cannot travel and come here and testify.

23 THE COURT: So, what were you going to say?

24 MS. THOMSON: I was going to note that the Court
25 said this is a witness who promised to appear and then has

1 become difficult. And I think there's a possibility the
2 Court's confusing Bridgett Graham with Cynthia Lacey.

3 THE COURT: Oh, I did. I'm sorry.

4 MS. THOMSON: I didn't want it to --

5 THE COURT: I get confused with the two witnesses.
6 Thank you for reminding me of that.

7 MS. THOMSON: My response to, for example --

8 THE COURT: This is not the witness that was under
9 subpoena to show up the first day of trial.

10 MS. THOMSON: Right.

11 THE COURT: Thank you for correcting that.

12 MS. THOMSON: Mr. Yanez said well, this is not
13 different than a witness who would have epilepsy and say that
14 they can't travel. But it is different because that witness
15 who has epilepsy, if we go to that state and say force this
16 person to come, that's the difference. The difference keeps
17 coming back to we have done literally everything we can to get
18 her presence here and we were out of options. The situation
19 where there's a person in state and is too sick, then yes, I
20 absolutely agree because we could go out with our material
21 witness warrant and say it's really nice that you don't want
22 to be here or you think you're too sick, but we'll give you a
23 place to stay.

24 And that's how it's different. Looking at 51055,
25 there's not a requirement of the proof of sickness, it's

1 unavailability. And unavailability means unavailable, and
2 that's what she is. Whether the court out there said, you
3 know, you have a hang nail and we're really -- we feel like
4 that would be just too much to make you travel, she's still
5 outside our ability to appear.

6 MR. YANEZ: As was the case in Butterworth when the
7 witness was in Argentina. But that wasn't the facts. The
8 facts in that case was the witness had poor health and there
9 was proof provided of that.

10 I'm not arguing that this can never occur, I'm
11 arguing that the State -- and I think the State has to even
12 admit in this case -- a picture of a prescription bottle, high
13 blood pressure, is not proof, even close -- it's not even
14 reasonable suspicion that this person had a heart attack --

15 THE COURT: So we need to hear from her.

16 MR. YANEZ: Even that, I mean, we could do that, but
17 even that, Judge, just her word is not good enough. There has
18 to be some kind of -- an objective, non-self-serving proof
19 that she has had a heart attack. And again, most importantly,
20 because the heart attack doesn't end the debate. It's is that
21 person in a condition to travel. Heart attack alone doesn't
22 give you a free pass, I don't have to go and testify anymore,
23 I can testify via Skype because I had a heart attack. That
24 doesn't get you out of it.

25 All of the cases, not a single one, I'll be more

1 than willing to look at a case that says otherwise, but every
2 single case that's been provided that I've read, that Your
3 Honor submitted to us is there is a finding from some type
4 of --

5 THE COURT: You're talking now about the weight of
6 the evidence, all right, and not the form of the evidence,
7 right?

8 MR. YANEZ: Right. And as I indicated --

9 THE COURT: So why can't -- in all these cases, I
10 mean, we could probably make a chart on the type of evidence
11 that came in that guided the court's decision. I'm sure we're
12 not going to find one that says as a matter of law I can't
13 consider the testimony of the person regarding his or her own
14 health condition.

15 MR. YANEZ: I'm not saying that. I'm saying --

16 THE COURT: There's not going to be anything that
17 says we need an expert report. So, I mean --

18 MR. YANEZ: No, I'm not saying --

19 THE COURT: -- there has to be enough to convince me
20 beyond a -- by a preponderance of the evidence is the standard
21 that I believe applies here.

22 MR. YANEZ: I'm not saying that you can't hear that
23 evidence. I'm saying even if you assume that -- even if you
24 assume what she's saying is true, okay, I don't have an
25 opportunity to -- at this moment to see whether she's telling

1 the truth or not. And again, this is a witness who has had
2 problems telling the truth in the past. This is a person who
3 was involved in the meth drug culture when this case happened.
4 So I can't just take her word for it.

5 THE COURT: Presumably she's been on the witness
6 list, so you've had an ability to contact, right?

7 MR. YANEZ: Yeah. That was good luck finding her,
8 she's been living all over the place. And that's not the
9 point. The point is -- this information is new. I had no
10 idea that she had supposedly had a heart attack. But there
11 has to be more proof, Judge, just than her -- in other words,
12 what I'm getting is her statements here in this affidavit,
13 that's all we're going -- if she testifies, that's basically
14 what we're going to have as well. We don't have a transcript
15 from the hearing. And again, it's not my burden to provide
16 that, it's the State's burden to provide that. It's not
17 difficult for her, if she went to the hospital, a discharge
18 record, something. We go to the hospital, we go to a Quick
19 Care Center, we get some type of paperwork. She doesn't have
20 a single document indicating that?

21 THE COURT: Let's find out why she doesn't. I want
22 to hear from her. I'll allow both of you to voir dire her and
23 then I'll make my decision. I want to hear from Ms. Lacey.
24 I'm going to allow her to testify outside the presence of the
25 jury as to her medical condition, why she can't travel, and

1 why she was unable to provide documentation. I may be
2 convinced by her testimony. I'm going to try to assess her
3 credibility and then make a determination here on whether I
4 have enough.

5 MR. YANEZ: Fair enough. And then, one other thing
6 I would just ask the Court to take a look at so it's not
7 overlooked. The fact that she -- if she had a heart attack,
8 if the Court were to believe that, is not enough in itself,
9 it's not any type of proof --

10 THE COURT: Let's hear from her.

11 MR. YANEZ: -- that she can't travel.

12 THE COURT: Well, let's hear at least from her as to
13 why she can't travel. All right? I'm going to leave it up to
14 the State to ask the right questions to get the information
15 that would need to convince me. I'm not going to tell you
16 what to ask. All right? When is she going to be available?

17 MR. SCHWARTZ: Two o'clock.

18 THE COURT: Okay. Can we get started on another
19 witness before two?

20 MS. THOMSON: We do have one witness here.

21 THE COURT: All right. Let's bring the jury in,
22 Marshal.

23 (Jury reconvened at 1:34 p.m.)

24 THE COURT: All right. Welcome back, everybody.

25 Thanks for your patience. We had an issue that we had to deal

1 with outside of your presence. That's why we made you wait
2 after lunch. We started to get it taken care of. At 2:00
3 we're going to have to take a 15-minute break, so just in a
4 half an hour, to continue dealing with an issue. It will take
5 probably 15 minutes, and then we'll bring you back in. All
6 right? Let's continue, all right?

7 MS. THOMSON: Thank you, Your Honor. The State
8 calls Detective Merrick.

9 FRED MERRICK, STATE'S WITNESS, SWORN

10 THE CLERK: Thank you. Please be seated. Will you
11 please state and spell your first and last name for the
12 record?

13 THE WITNESS: Detective Fred Merrick, F-r-e-d,
14 M-e-r-r-i-c-k.

15 MS. THOMSON: May I proceed?

16 THE COURT: Yes.

17 DIRECT EXAMINATION

18 BY MS. THOMSON:

19 Q Good morning, Detective. Afternoon, I suppose.

20 A Afternoon.

21 Q How are you employed?

22 A I am employed with Las Vegas Metropolitan Police
23 Department.

24 Q And for how long have you been with Metro?

25 A Over 15 years.

1 Q And are you currently assigned to a specific
2 division?

3 A Yes, I am.

4 Q And what is that?

5 A Homicide.

6 Q How long have you been with homicide?

7 A Going on seven years.

8 Q So you were with homicide in July of 2013?

9 A Yes, I was.

10 Q And specifically July 9th of 2013, did you assist in
11 an investigation that had started at Van's Trailer Oasis on
12 Las Vegas Boulevard?

13 A Yes, I did.

14 Q And would it be fair to say that your role in the
15 entirety of the investigation was relatively minor?

16 A Yes, it was.

17 Q But you were aware of certain things that were going
18 on outside in the investigation that affected your
19 participation; is that fair?

20 A Correct.

21 Q And as a preliminary kind of a question, are you
22 familiar with the term pen register?

23 A Yes, I am.

24 Q And can you explain generally what a pen register
25 is?

1 A Pen register is data gathering from cell phone
2 carriers. It gathers all the incoming and outgoing phone
3 calls and text messages. It also gives you a tower location
4 where that particular phone is being used.

5 Q When you say the tower location where the phone is
6 being used, it doesn't necessarily tell you like go three
7 steps to the left, correct?

8 A No, it's not that precise.

9 Q So you can use that information and sometimes be
10 able to locate a phone based upon the areas in which it's
11 hitting off of different towers?

12 A Correct.

13 Q Specifically in this case that we're talking about
14 that had started on Las Vegas Boulevard at Van's Trailer Park
15 or Trailer Oasis, are you aware of whether or not there was a
16 pen sought and received?

17 A Yes, there was.

18 Q And was there information received in the
19 investigation that ultimately caused you to go to 4080C East
20 Lake Mead?

21 A Yes, there was.

22 MS. THOMSON: May I approach?

23 BY MS. THOMSON:

24 Q Showing you what's been marked as State's Proposed
25 Exhibits 119, 120, and 121. Do you recognize what's depicted

1 in each of these photographs?

2 A Yes. It's the back of 4080 Number C. Number two is
3 going to be whatever number it was, I'm sorry, is going to be
4 a cell phone and a yellow lighter on the second flight of
5 stairs. And this is an overall of the back of the staircase
6 in 4080C.

7 Q And are these accurate depictions of how this
8 address appeared on the day that you responded to it?

9 A Yes.

10 Q And was that day in fact July 9th?

11 A Yes.

12 MS. THOMSON: Move for admission of State's Proposed
13 Exhibits 119, 120, and 121.

14 THE COURT: Mr. Yanez?

15 MR. YANEZ: Submitted, Judge.

16 THE COURT: All right. They're admitted, 119, 120,
17 and 121.

18 (State's Exhibit 119, 120, and 121 admitted.)

19 MS. THOMSON: Thank you, Your Honor.

20 BY MS. THOMSON:

21 Q Now, you went to this address because you received
22 information that you may be able to find a cell phone in this
23 location?

24 A Yes.

25 Q And showing you Exhibit 121. You said that's the

1 overall of the address; is that correct?

2 A That is correct.

3 Q It appears in this photograph that there aren't many
4 cars in the lot. Is that a fair statement?

5 A There are what?

6 Q Not very many cars in the lot.

7 A Correct.

8 Q We can kind of see -- it appears in this photograph,
9 while we don't have any cars [indiscernible] from behind the
10 cars. In the windows we can see mirrored a truck and what
11 appears to be the back of an SUV. Would you agree with that?

12 A Correct.

13 Q Do you know if either of these vehicles were Metro
14 vehicles that you would either come in or any other personnel
15 had come in, if you're able to remember or tell?

16 A I don't want to speculate.

17 Q When you went to this location, did you go by
18 yourself or were there other individuals with you?

19 A I met a CSA there, Ms. Shawn Fletcher.

20 Q Do you remember how you got to this location?

21 A In a vehicle.

22 Q And showing you what's been marked as State's
23 Exhibit 120, is this the photograph you referred to with the
24 lighter and the cell phone on the steps?

25 A Correct.

1 Q When you arrived at this location, other than the
2 CSA, Ms. Fletcher, were there any other individuals around?

3 A No.

4 Q Were you present when Ms. Fletcher collected the
5 cell phone?

6 A Yes.

7 Q Was there anyone who came up to identify it at that
8 time?

9 A No.

10 Q The cell phone number that the pen register had been
11 sought for, was that a number that through the investigation
12 it had been determined may be linked to the defendant?

13 A Correct.

14 MS. THOMSON: Court's indulgence. I'll pass the
15 witness.

16 THE COURT: All right. Your turn.

17 MR. YANEZ: No questions, Judge.

18 THE COURT: Anything from the jurors? No? All
19 right. Detective Merrick, thank you. You're excused. Thank
20 you for your time.

21 THE WITNESS: Thank you, sir.

22 THE COURT: Do you have another witness?

23 MS. THOMSON: Unfortunately, Your Honor, the lead
24 detective was called out last night and not able to be present
25 at this time. The next witness that we were able to get here

1 to fill the space is at 2:00.

2 THE COURT: All right. Can the one at two, can we
3 deal with that issue that we need to take care of maybe 10 to
4 two? Can the person be available a little sooner? Is that
5 something --

6 MS. THOMSON: Assuming that they're available, we
7 have no problem doing that.

8 THE COURT: All right. So I guess I need to send
9 the jurors on an extended break. All right, guys. But we
10 made good progress today so far, right? WE did Plumlee,
11 Brosnahan, Bunting, Johnson, Marschner and Merrick. So, go
12 ahead and leave your notepads. We'll bring you back when
13 we're ready. It will probably be, my guess, about 2:15.
14 Thank you. Same admonishment applies.

15 (Jury recessed at 1:42 p.m.)

16 THE COURT: All right. We're outside the presence
17 of the jury. So, can you contact them and see if maybe make
18 them available a little bit sooner?

19 MR. SCHWARTZ: I just did, Your Honor. They're
20 going to let me know when they're ready.

21 THE COURT: All right. Well, I guess we can just
22 adjourn and you guys can let my clerk know if there's
23 something we can do before two. All right?

24 MR. SCHWARTZ: That sounds good. We'll contact
25 district court IT and have them come up and get ready as well.

1 THE COURT: All right.

2 MS. THOMSON: Thank you.

3 MR. SCHWARTZ: Thank you, Your Honor.

4 THE COURT: All right. Maybe write out some
5 questions so you know -- it will go faster.

6 (Court recessed at 1:44 p.m. until 2:39 p.m.)

7 (Outside the presence of the jury.)

8 MR. SCHWARTZ: -- in touch with Arizona. They're
9 having Internet connection difficulties. I suggested maybe we
10 put up our next witness that we do have here ready to go.

11 THE COURT: Yeah. Let's try to make some progress.
12 How will we know when things are figured out?

13 MR. SCHWARTZ: They're going to text me.

14 THE COURT: Okay. Let's bring them in. This going
15 to be a quick witness, though?

16 MS. THOMSON: It is.

17 THE COURT: Do you have a witness after that?

18 MS. THOMSON: We don't.

19 THE COURT: So today we just had these two things.

20 MS. THOMSON: Correct. The coroner is unavailable
21 today. The detective was called out last night, so he hasn't
22 slept for --

23 THE COURT: So Monday we have two things left,
24 coroner and detective.

25 MS. THOMSON: And potentially girl if she gets

1 arrested or the determination on the transcript. But that
2 will be quick either way. I anticipate her not to be super
3 lengthy.

4 MR. YANEZ: And, Judge, I told my expert to be
5 available Monday at three p.m.

6 THE COURT: Sounds like a good plan. Thank you,
7 sir. Are they coming in?

8 THE MARSHAL: Are you ready, Judge?

9 THE COURT: Yeah.

10 (Jury reconvened at 2:41 p.m.)

11 THE COURT: All right. Welcome back. You guys can
12 be seated. So we're having an issue, which I'm really not at
13 liberty to tell you what the issue is at this point, but we
14 are dealing with an issue. It does involve also some
15 technical difficulty. But, we do have a witness that we can
16 take out of order, and I think it's going to be a short
17 witness. We're going to take this short witness and then see
18 if our other issue is resolved. All right? So the State can
19 call its next witness.

20 MS. THOMSON: State calls Kristin Grammas.

21 THE COURT: Merrick was number 11, so this is your
22 twelfth witness, right?

23 MS. THOMSON: Sounds correct.

24 KRISTIN GRAMMAS, STATE'S WITNESS, SWORN

25 THE CLERK: Thank you. Please be seated. Will you

1 please state and spell your first and last name for the
2 record.

3 THE WITNESS: Kristin Grammas, K-r-i-s-t-i-n,
4 G-r-a-m-m-a-s.

5 MS. THOMSON: May I proceed?

6 THE COURT: Yes.

7 DIRECT EXAMINATION

8 BY MS. THOMSON:

9 Q Good morning, ma'am. How are you employed?

10 A I am a crime scene analyst supervisor with the Las
11 Vegas Metropolitan Police Department.

12 Q And for how long have you been a -- employed by
13 Metro?

14 A I've been employed by Metro almost 15 years.

15 Q How long have you been a supervisor?

16 A Two years.

17 Q Were you a senior crime scene analyst in July of
18 2013?

19 A Yes, I was.

20 Q And specifically, July 9th of 2013, did you respond
21 to a search warrant being served at 1984 Dwarf Star?

22 A Yes, I did.

23 Q Was that apartment 2038?

24 A I believe so.

25 Q That's located here in Las Vegas, Clark County

1 Nevada or North Las Vegas, Clark County, Nevada?

2 A Yes, ma'am.

3 Q When you respond to a service of a search warrant,
4 do you know about the underlying case that caused the
5 detectives to seek a search warrant?

6 A Not usually. They fill me in on a little bit of the
7 details so that we know what we're looking for, but I didn't
8 work the original scene, so this is just a follow up.

9 Q And so what is your role when you are sort of
10 supporting on a search warrant?

11 A On search warrants we take notes, we take photos
12 showing how the condition of the place is, and then we look
13 for various pieces of evidence that pertain to what's on the
14 warrant.

15 Q When you arrived at 1984 Dwarf Star, who was already
16 there?

17 A Detective Merrick, Detective Gillis, and I believe
18 Sergeant Annette Darr.

19 Q Were you taking commands or do you go through the
20 address and try and find things by yourself or how does that
21 work?

22 A We work as a team. So I take all the photos first
23 and take my notes, and then we start searching room by room.

24 Q And as you went through the address, were you
25 looking for any items of possessory interest or anything that

1 would indicate who was living there?

2 A Yes. On all search warrants we try to show who
3 lives in the residence, so we look for something that shows
4 their name and address.

5 Q And did you find anything to indicate who was
6 potentially living at this address during your search of this
7 location?

8 A We had a wallet in the name of Erika Chambers.

9 MS. THOMSON: May I approach?

10 THE COURT: Yes.

11 BY MS. THOMSON:

12 Q I'm going to show you what's been marked as State's
13 Exhibits 98 through 103. I'm going to have you look at each
14 of these individually and let me know if there's any you don't
15 recognize.

16 A No, I recognize them all.

17 Q And are they all accurate photographs that you took
18 that day in that residence?

19 A Yes, they are.

20 MS. THOMSON: Move for admission of 98 through 103.

21 THE COURT: Have you seen them?

22 MR. YANEZ: Yes. I'll submit it, Judge, on those.

23 THE COURT: All right. Ninety-eight through 103 are
24 admitted.

25 (State's Exhibit 98 through 103 admitted.)

1 BY MS. THOMSON:

2 Q You indicated that you found a wallet in the name of
3 Erika Chambers. Showing you what's been marked as State's
4 Exhibit 98, is this the wallet that you're speaking of?

5 A Yes.

6 Q When you found that wallet, was it inside the purse
7 or was it outside as we see it now?

8 A It was inside of the purse in the closet of the
9 kids' bedroom.

10 Q And so you removed it to be able to document the
11 items inside.

12 A Yes.

13 Q And showing you State's Exhibit 99, a little bit
14 closer up so you can see the name; is that correct?

15 A Yes.

16 Q Obviously, not great on this screen, but better in
17 the photograph?

18 A Yes, ma'am.

19 Q Inside that purse, was there also a second
20 identification?

21 A Yes.

22 Q And that's showing you State's Exhibit 98 again.
23 Showing you what's been marked as State's Exhibit 100, is that
24 a closeup of that identification?

25 A Yes, it is.

1 Q Inside the residence, did you find any other items
2 of evidentiary value that either you or the detectives
3 determined should be documented?

4 A I collected two gun holsters, some cartridges, and a
5 couple other items I think.

6 Q So you had no information about the specific details
7 of the case to know if either or both of the gun holsters were
8 significant?

9 A No, I did not.

10 Q Okay. Showing you what's been marked as State's
11 Exhibit 101. What do we see in this photograph?

12 A In the top left corner or left side of the screen
13 you'll see the black gun holster that I collected. And in the
14 right corner you'll see a container with cartridges, which are
15 bullets.

16 Q And based upon your experience, would it be fair to
17 say that the cartridges, the bullets that you found above the
18 refrigerator in this cabinet were unfired?

19 A Yes, they were unfired.

20 Q When you searched this residence, did you find any
21 weapons that correlated to those cartridges or bullets?

22 A No. We found a gun magazine, you put it in the gun
23 to put the cartridges in, but that was all.

24 Q Showing you what's been marked as State's Exhibit
25 102. Is that the same holster?

1 A Yes. That's a closeup of the holster in the
2 cabinet.

3 Q Can you describe the material of that holster?

4 A It's like a nylon-type material.

5 Q Like a cloth?

6 A Cloth, yeah.

7 Q And State's Exhibit 103. Is that a closeup of those
8 bullets?

9 A Yes, closeup of the plastic container with
10 cartridges, yes.

11 Q When you were finished documenting the residence,
12 did you go down to headquarters?

13 A Yes, I did.

14 Q And while you were at headquarters, did you take
15 what are known as buccal swabs?

16 A Yes, I did.

17 Q And can you explain what a buccal swab is?

18 A A buccal swab is, it's like a cotton swab. You do
19 it on the inside of your cheek and that's where your buccal
20 cells are, which is DNA, so we can get the person's DNA. So
21 we take the swab, they swab the inside of the cheek, we
22 impound those and then those can be used as exemplars as what
23 their DNA is.

24 Q And while you were there, you said you took at least
25 one. How many did you take?

1 A I took two.

2 Q And do you recall from whom you took them?

3 A Yes, Mr. Gary Chambers and Ms. Erika Chambers.

4 Q Showing you what's been marked as State's Exhibit

5 104. Is that the Gary Chambers from whom you took the buccal
6 swab?

7 A Yes, ma'am.

8 Q And in addition to this photograph, did you do an
9 overall observation of his person?

10 A Yes. I took overall photographs of the way he's
11 dressed and without a shirt.

12 Q And when you did so, did you observe any injuries to
13 his person?

14 A I don't recall.

15 Q Would you have specifically documented any injuries
16 you did observe?

17 A Yes, they would be in my report. They're not in my
18 report, but I don't recall seeing any.

19 Q So the lack of any documentation in your report
20 would indicate to you that you did not observe any; is that
21 correct?

22 A Yes.

23 MS. THOMSON: Court's indulgence. Pass the witness.

24 THE COURT: All right. Cross.

25 CROSS-EXAMINATION

1 BY MR. YANEZ:

2 Q Ms. Grammas, correct?

3 A Yes.

4 Q Ms. Grammas, are you aware, did you learn in your
5 investigation who resided at 1984 Dwarf Star number 2038?

6 A I knew Erika Chambers did, but that was it.

7 Q Okay. You also recovered you said a tan gun
8 holster, right?

9 A Yes, I did.

10 Q That wasn't one of the pictures you were shown,
11 right?

12 A No, it was not.

13 Q Okay. There were other pictures that were taken
14 besides the ones the prosecutor just showed you, correct?

15 A Yes.

16 Q And as to either the tan gun holster or the black
17 holster, you didn't request or order or speak to anyone about
18 doing DNA testing or fingerprinting or anything like that?

19 A No, that's the detective's job.

20 Q Thank you, ma'am.

21 A You're welcome.

22 MR. YANEZ: No further questions, Judge.

23 THE COURT: Okay.

24 REDIRECT EXAMINATION

25 BY MS. THOMSON:

1 Q The tan gun holster, what material was that one made
2 out of?

3 A Leather.

4 Q Thank you.

5 THE COURT: Anything else?

6 MR. YANEZ: No, Judge.

7 THE COURT: Those bullets that were in that plastic
8 case, what caliber were they?

9 THE WITNESS: I believe they were .40. I can look at
10 my report.

11 THE COURT: Could you do that?

12 THE WITNESS: Yes.

13 THE COURT: You need to look at the documents to
14 refresh your recollection?

15 THE WITNESS: Yes.

16 THE COURT: All right. Why don't you do that.

17 THE WITNESS: It's .40 caliber.

18 THE COURT: All right. How many were in there?

19 THE WITNESS: There were 13.

20 THE COURT: Okay. Any questions from the jurors?

21 No questions from the jurors. You may be excused. Thank you.

22 THE WITNESS: Thank you.

23 MS. THOMSON: It appears as though the concerns may
24 have been resolved.

25 THE COURT: Okay. So why don't we temporarily

1 excuse the jury to resolve that -- to talk about resolving
2 finally that other issue, which we anticipate it's going to be
3 about 15 minutes. That's my anticipation. All right.

4 Another break. You guys are getting your exercise
5 today. Better than going to the gym, right? Same
6 admonishment applies. Don't talk to anybody about the case,
7 don't do any research, don't form any opinions, don't have any
8 contact with attorneys or witnesses. All the other
9 admonishments apply. Thank you.

10 (Jury recessed at 2:54 p.m.)

11 THE COURT: All right. We're outside the presence
12 of the jury. Can you see, Mr. Schwartz, if we can get this
13 BlueJean thing working?

14 MR. SCHWARTZ: I believe, Your Honor, it is working
15 right now.

16 THE COURT: Very good. So why don't we have --
17 ma'am, can you hear me? What's the witness's name?

18 MS. THOMSON: Cynthia Lacey.

19 THE COURT: Ms. Lacey, can you hear me? This is
20 Judge Scotti here in Las Vegas.

21 THE WITNESS: Yes, I can.

22 THE COURT: Very good. Thank you. So what I'm
23 going to do is have my court clerk here administer an oath to
24 you. So will you please stand and raise your right hand and
25 the court clerk will now administer an oath.

1 CYNTHIA LACEY, STATE'S WITNESS, SWORN

2 THE CLERK: I need you to state and spell your first
3 and last name for the record.

4 THE WITNESS: Cynthia, C-y-n-t-h-i-a, Lacey,
5 L-a-c-e-y.

6 THE COURT: You may be seated, ma'am. So we have a
7 preliminary group of questions that we need to ask you outside
8 the presence of the jury, so I'm going to allow the State to
9 ask you some questions and then I'm going to allow the defense
10 to ask you some questions, and then I need to make a ruling on
11 an evidence issue. All right? So I'll allow the State to
12 proceed first.

13 MS. THOMSON: Your Honor, do you mind if I stay
14 seated?

15 THE COURT: You may stay seated.

16 MS. THOMSON: Thank you.

17 DIRECT EXAMINATION

18 BY MS. THOMSON:

19 Q Can you see us, Cynthia?

20 A Yes.

21 Q So what we're doing is I want to find out some more
22 about the medical condition history. So I wanted to find out
23 from you first of all, how old are you?

24 A Thirty-four.

25 Q And you indicated that you had a heart attack; is

1 that correct?

2 A Yes.

3 Q Can you explain for us sort of the circumstances of
4 when that occurred?

5 A It was when I was at work. And I just had sharp
6 pains in [indiscernible].

7 Q I'm sorry. If you could repeat that. You said it
8 was sharp pains something.

9 A Sharp pains in my chest and my left side went numb.

10 Q And when that occurred, did you report it to your
11 supervisor? Did you call 9-1-1? What happened?

12 A Reported to my supervisor and she called 9-1-1.

13 Q Were you transported to a hospital?

14 A Yes.

15 Q Do you recall how long you were in the hospital?

16 A I don't remember how long it was.

17 Q Did you stay overnight or was it some hours?

18 A It wasn't overnight.

19 Q When you were transported to the hospital, was that
20 by ambulance?

21 A Yes.

22 Q And what hospital was it?

23 A I couldn't tell you [indiscernible].

24 Q When did you move to Phoenix?

25 A In June.

1 Q The hospital that you went to, when you left, did
2 they give you any medication or follow-up treatment?

3 A Yes. I had medication and follow-up treatment and
4 went to see my doctor too since then.

5 Q And who is your follow-up physician?

6 A I don't remember his name. It should be on the
7 prescription I sent earlier.

8 Q So it's the same doctor that was on the
9 prescriptions you said?

10 A Yes, ma'am.

11 Q How many times have you seen him since the heart
12 attack in January?

13 A Three times.

14 Q What is the follow up that you do with him?

15 A He checks my blood pressure [indiscernible] switch
16 my medicine around to make sure, to get it to go down.

17 THE COURT: What was it before she started taking
18 the medication and what is it now?

19 BY MS. THOMSON:

20 Q Do you know what your blood pressure was before the
21 medication and what it is now?

22 A When I seen him a week ago, a week or two ago it was
23 144/101. And before that it was even higher.

24 Q When you were in the hospital having been
25 transported from work, what treatment did you receive there?

1 A I don't remember everything. I just know that they
2 were trying to get my blood pressure down and had me on a
3 heart machine.

4 Q Did you -- were you conscious the whole time you
5 were at the hospital, if you know?

6 A Yes.

7 Q Since this heart attack, have you traveled, like out
8 of state?

9 A No.

10 Q How far do you live from work?

11 A Like 15, 20 minutes.

12 Q Is that walking, driving, or by bus or taxi or
13 something else?

14 A That's [indiscernible] transportation
15 [indiscernible].

16 Q Do you have any lasting effects other than the high
17 blood pressure that you're trying to manage with medication
18 from the heart attack?

19 A I'm just -- I can't do what I used to do. I don't
20 have the energy I used to have. I'm always really tired.

21 Q When -- is your -- are you able to feel when you
22 have a rise in blood pressure?

23 A Yes.

24 Q And what physical effects do you have when that
25 occurs?

1 A Numbing on my face.

2 Q I'm sorry, what was that?

3 A Numbing on my face.

4 Q When you have visited the follow-up physician or
5 when you were released from the hospital, were you given any
6 directives regarding flying or traveling or anything like
7 that?

8 A No. But I never asked about it either because I had
9 no plans to go anywhere.

10 Q Now, you said by driving it's 15, 20 minutes; is
11 that correct?

12 A Yes.

13 Q And do you drive or are you driven by somebody else?

14 A Sometimes I get a ride home and I take the light
15 rail bus too.

16 Q Okay. So fair to say you don't have a driver's
17 license?

18 A No, not right now.

19 Q And probably assumed, but do you have a handicap
20 placard?

21 A No. There's no reason because I don't have a
22 vehicle.

23 Q Are you on any medications other than the two you
24 sent me?

25 A Yes.

1 Q And do you know what those are?

2 A I take things for my congestion, Vitamin D --

3 Q Let me actually ask a different question, a better
4 question. Are you on any medications related to the heart
5 attack other than the two you sent me?

6 A No.

7 Q You were served with papers indicating that you
8 needed to travel here and at least go to court this morning.
9 You were served a couple days ago; is that correct?

10 A Yes.

11 Q Did you have any physical effects when you received
12 that information?

13 A Yes.

14 Q Can you describe what those are?

15 A I was very shaky and I had to sit down. The guy was
16 trying to tell me stand right here, but I had to sit down so I
17 could [indiscernible] breathe some.

18 Q You were short of breath?

19 A Yes.

20 Q Were you short of breath such that you were
21 concerned you may lose consciousness?

22 A No.

23 Q How long did those physical effects last?

24 A Pretty much the whole day.

25 Q What would be your reaction if you were told you had

1 to get on a airplane right now to come here?

2 A My anxiety would go through the roof.

3 Q Would you be concerned about your physical health?

4 A Yes.

5 Q And why is that?

6 A Because I know how my blood pressure is and I know
7 when I get stressed out it goes up. It just went up right
8 now, just being right here.

9 Q Have you been advised by either the releasing
10 physician or the doctor that you've gone to see the three
11 times since you got out of the hospital about anything to do
12 specifically or not do associated to anxiety, stress, for
13 physical activity?

14 A No. He just tells me to take it easy.

15 Q Avoid being stressed?

16 A Yes.

17 MS. THOMSON: I'll pass the witness.

18 THE COURT: Any cross?

19 MR. YANEZ: Yes.

20 CROSS-EXAMINATION

21 BY MR. YANEZ:

22 Q Ms. Lacey, what hospital did you go to when you felt
23 those pains in your chest?

24 A I don't know the name of it.

25 Q Do you have at home or with you any type of record

1 from being at the hospital?

2 A I don't know where it's at.

3 Q I'm sorry, the last part cut out. I heard -- can
4 you repeat your answer, please?

5 A I said if I --

6 Q I'm sorry. I don't -- I'm not trying to be
7 difficult, but you cut out again. Go ahead.

8 A I [indiscernible]

9 Q Okay. I think you said you thought they were at
10 home but you couldn't find them?

11 A Yes.

12 Q And you indicated that you weren't -- you didn't
13 spend a night over at the hospital, right?

14 A No.

15 Q So you went to the hospital. Did you go to the
16 emergency room?

17 A Yes.

18 Q And then they released you?

19 A Yes.

20 Q Did they tell you to follow up with your primary
21 care physician?

22 A Correct.

23 Q The person who prescribed these high blood pressure
24 medication, is that your primary care physician?

25 A Yes.

1 Q He or she is not a cardiologist, correct?

2 A I'm not sure.

3 Q Okay. When you felt these pains you said you were
4 working, correct?

5 A Correct.

6 Q Where were you working at?

7 A My job.

8 Q Where do you work at?

9 A At the airport.

10 Q And what do you do there?

11 A I do janitorial work.

12 Q And you've been back to work since this, correct?

13 A Yes, I had no choice.

14 Q Okay. When did you start going back to work?

15 A It happened on a Wednesday, I had a Thursday, Friday
16 off, and then went back to work that Saturday.

17 Q So the next scheduled time you were scheduled to
18 work you reported to work, correct?

19 A Correct.

20 Q You said you do janitorial work?

21 A Correct.

22 Q So I'm assuming that's -- there's some physical
23 activity with janitorial work, correct?

24 A Yes.

25 Q What are some of those physical activities you have

1 to do?

2 A Cleaning toilets, just walk through the airport, I
3 do a lot of roaming, cleaning windows.

4 Q Ms. Lacey, you indicated there has been no doctor
5 who's told you, given you an order that you can't travel,
6 correct?

7 A I never asked him.

8 Q So the answer is yes, I'm correct, no doctor has
9 told you you cannot travel?

10 A Correct.

11 Q You live in Phoenix; is that accurate?

12 A Correct.

13 Q Besides the doctor that you followed up with who
14 prescribed the medications, was there any other doctor you
15 followed up with?

16 A No.

17 Q The high blood pressure medication, when did you
18 start taking that?

19 A I've been taking high blood pressure medication
20 since 2009 -- no, 2008.

21 Q So you didn't first get put on high blood pressure
22 medication because of the time you went to the hospital,
23 you've been taking that medication even before then; is that
24 correct?

25 A On and off [indiscernible].

1 Q Let me ask you this. What do you see of us? When
2 one of us is talking, is it just the person who's talking do
3 you see, or do you see everyone here in this courtroom?

4 A I see everybody.

5 Q Do you see Mr. Gary Chambers to my left?

6 A Yes.

7 MR. YANEZ: I have nothing further, Judge.

8 THE COURT: Ms. Lacey, this is Judge Scotti. I have
9 a question. So what was reported to you as to the seriousness
10 of the heart attack that you had?

11 THE WITNESS: They told me to take it easy, to keep
12 on my medicine and [indiscernible] apartment. He was going to
13 see how this medicine was going and if it doesn't get better
14 he wants to do a big thing on my heart to see what's going on,
15 an ultrasound.

16 THE COURT: I guess what I was getting at also is I
17 was under the impression that when you have a heart attack
18 some part of your heart dies and sometimes they can tell you
19 what percentage loss of function of your heart you've had.
20 Anybody tell you anything like that?

21 THE WITNESS: No.

22 THE COURT: Any further questions from the State?

23 MS. THOMSON: Just briefly, Your Honor.

24 REDIRECT EXAMINATION

25 BY MS. THOMSON:

1 Q You said you don't know the name of the hospital.
2 Do you know generally where it's located?

3 A I have no idea. I really don't know my way around
4 up here.

5 Q When you left the hospital, did someone pick you up
6 or did you take a bus or did you walk or drive?

7 A I walked and then I got on the light rail.

8 Q And that's like a train?

9 A Yes.

10 Q You were starting to describe the duties of your
11 job. You said that there is cleaning of the bathrooms. Is
12 there anything, like heavy labor?

13 A No.

14 Q And you indicated that your supervisor is who you
15 reported it to and that she called 9-1-1. Would your
16 supervisor confirm that you had reported it to her and she
17 called 9-1-1?

18 A Yes.

19 Q Is there any chance your supervisor is there with
20 you?

21 A No, she's not.

22 Q Okay. Didn't think so, but it was worth asking.
23 Thank you.

24 THE COURT: Anything else?

25 MR. YANEZ: Very quickly.

1 RE CROSS-EXAMINATION

2 BY MR. YANEZ:

3 Q Ms. Lacey, from the time you arrived at the hospital
4 until you left, how long were you there for?

5 A I have no idea.

6 MR. YANEZ: Nothing further, Judge.

7 THE COURT: Ms. Lacey, there was some hearing this
8 morning where it was determined that you couldn't or you
9 weren't -- I think the judge determined that you wouldn't be
10 forcibly sent here to Nevada. Is that your understanding?

11 THE WITNESS: Yes.

12 THE COURT: Did you explain -- did you have an
13 opportunity to present any testimony to the judge about your
14 medical condition?

15 THE WITNESS: Yes.

16 THE COURT: All right. Did you tell the judge a lot
17 of the same things you just told us?

18 THE WITNESS: He just asked me like a few questions,
19 that was it.

20 THE COURT: All right. Thank you. I appreciate
21 that. I guess I'll give you guys each another minute to
22 present argument. Any objection to her just staying on the
23 line and waiting or should we have her not on the line?

24 MS. THOMSON: I have no objection.

25 MR. YANEZ: I have no objection, Judge.

1 THE COURT: All right. Let me hear argument. Just
2 keep it to a minute.

3 MS. THOMSON: Yes, Your Honor. I will note that
4 during the time we were on break we did some further looking.
5 The case that the Court was specifically referencing,
6 Butterworth, I would note that there were two witnesses
7 involved in that case. And looking at the underlying case for
8 a better factual sort of scenario, the underlying being
9 Harrell v. State, the two witnesses, one of them had cancer
10 and the underlying case, the Harrell v. State that we sent
11 back to your chambers, specifically noted that there was no
12 proof provided of that cancer.

13 I would note that within Butterworth that it talked
14 about those two witnesses and how both witnesses testified via
15 audiovisual transmission, which absolutely eviscerates any
16 argument that there must be a physical medical proof of any
17 condition. We've had sworn testimony of her condition. We
18 have the court out of state saying that she will not be forced
19 to travel here. We have necessity because without the
20 audiovisual testimony, her testimony cannot be presented. And
21 she meets the unavailability prong under 51055. The strong
22 public policy is to allow the State to present a case and let
23 a jury make an informed decision rather than a slanted
24 decision without full evidence.

25 THE COURT: Thank you. Mr. Yanez.

1 MR. YANEZ: Here's the critical part that the State
2 just left out in regards to that Florida Court of Appeals
3 case. They found the public policy of -- because the two
4 people in Argentina were tourists in Florida and they were
5 victims of crimes and they went back to Argentina. So one of
6 the public policy that the court found was deterring violence
7 against foreign tourists is promoted by making it easier for
8 tourists to testify. So that was the strong public policy
9 that the court found in that case, which we don't have here.

10 With all due respect to Ms. Lacey, I don't want to
11 minimize her health condition. I'm sure she's had issues with
12 that. Any witness is going to have these exact same things.
13 She went back to work. She wasn't admitted to the hospital.
14 If she in fact had had a heart attack she would have been
15 admitted to the hospital. Ultrasounds, CAT scans, all sorts
16 of things would have been going on. And there's no
17 documentation, there's no proof, there's no confirmation that
18 in fact she is unsafe to travel.

19 And another distinguishing factor between the
20 Butterworth case is we're talking about Argentina, which is
21 about 12 hours away from the United States. Phoenix is 45
22 minutes away, Judge. That's all it is. So I think the case
23 law is abundantly clear that there has to be some type of
24 proof that there is some type of medical condition. That is
25 what the State put in their affidavit that apparently because

1 of her health condition she's unable to travel. But there is
2 no evidence rising to a preponderance of the evidence to match
3 that.

4 THE COURT: Thank you. Another case I looked at was
5 U.S. versus Benson, Sixth Circuit Case. I mentioned it before
6 the last break and I'll give you the cite. U.S. versus
7 Benson, 79 Federal Appendix 813, 2003. It's a Sixth Circuit
8 2003 case. In that case the Sixth Circuit accepted just the
9 testimony of the witness as to the medical condition. They
10 said here that the defendant challenged the sufficiency of the
11 evidence and the witness's name was Gregor. Gregor contended
12 that he and his wife were too ill to travel. And here's what
13 it says in that case, "Gregor testified that she and her
14 husband had extensive health problems, that she was
15 underweight and fatigued due to major stomach surgery the
16 previous year and that she was still under the care of a
17 gastrologist. And the district court did not commit clear
18 error in finding that Gregor was too ill to travel."

19 I think that a witness's testimony as to their own
20 health condition is sufficient. Obviously, it's a balancing
21 test the court has to weigh. The court has to assess the
22 credibility of the witness and weigh the sufficiency of the
23 evidence. But there's no per se rule saying that I need
24 documentary corroborating evidence here. So I'm challenged
25 with the task of weighing the witness's testimony here and

1 considering the relevance of -- we do have some documentary
2 evidence of taking blood pressure medication, which I know she
3 did take before the heart incident.

4 But it seems to me that there is at least probable
5 cause and I'm convinced a preponderance of the evidence that
6 the defendant -- I'm sorry, the witness's health would be
7 unduly jeopardized if forced to travel. So I'm going to find
8 here that there are strong public policy reasons to allow the
9 witness to testify by videotape.

10 The public policy reasons, number one, we have to
11 protect the health of a witness where there is probable cause
12 to believe the witness's health would be unduly jeopardized if
13 forced to travel. I also believe, more than that, that
14 there's a public policy to present -- to allow the State to
15 present material, relevant evidence through virtual
16 face-to-face confrontation, which is what we have here under
17 these circumstances, as I'm witnessing the presentation of the
18 testimony now. We have virtual face-to-face confrontation,
19 which should be allowed here where the State has undertaken
20 reasonable efforts to secure the personal attendance of the
21 witness. And through no fault of the State, there's been a
22 determination that the witness is not going to be forcibly
23 brought to the State.

24 So for those two public policy reasons, I think that
25 there is justification for allowing the videotape testimony,

1 particularly here where we have strong indicia of the
2 reliability of the process and the testimony where we're going
3 to have the witness under oath. We have virtual presence, her
4 view is not blocked. We have clear audio and visual clarify.
5 We have an ability to judge the demeanor of the witness
6 through this process. She can be clearly heard and seen. So
7 I think for all those reasons this is virtual presence and I
8 find that there's no undue prejudice to the defendant and no
9 violation of the Sixth Amendment confrontation clause.

10 So with that, your objections are noted on the
11 record. I'm going to allow the jury back in, and then we can
12 continue with the examination.

13 MS. THOMSON: Before we allow the jury back in, Your
14 Honor, I want to, because I haven't had an opportunity with
15 Ms. Lacey, to instruct you, Ms. Lacey, that when you're
16 testifying I know that you may know some of the history of the
17 defendant with regard to criminal conduct. You cannot refer
18 to any history of robberies or violence, anything like that
19 when you're testifying. Okay?

20 THE WITNESS: Okay.

21 MS. THOMSON: Thank you.

22 MR. YANEZ: And, Judge, I would ask that she be
23 reminded of her oath when the jury takes their seats, please.

24 THE COURT: Yes, I'll do that. All right. We'll
25 bring the jury in now.

1 (Jury reconvened at 3:20 p.m.)

2 THE COURT: Thank you. You may be seated, counsel
3 and everybody. Welcome back, ladies and gentlemen of the
4 jury. This is State of Nevada versus Gary Chambers, Case
5 Number C-13-292987. I appreciate your patience. We are
6 calling the State's next witness, which they've indicated is
7 Cynthia Lacey. Cynthia Lacey is available by videotape. She
8 is in Arizona and she's going to testify by videotape.

9 Ms. Lacey, I'm going to have you resworn in front of
10 the jury, so will you please state and raise your right hand.

11 CYNTHIA LACEY, STATE'S WITNESS, SWORN

12 THE CLERK: Thank you. Please state your name for
13 the record.

14 THE WITNESS: Cynthia Lacey, C-y-n-t-h-i-a,
15 L-a-c-e-y.

16 THE COURT: You may be seated, Ms. Lacey. All
17 right. Ms. Lacey, just so you know, there is a video monitor
18 in front of the jury so they can view you while you're
19 testifying. All right?

20 THE WITNESS: Okay.

21 THE COURT: State, you may proceed.

22 MS. THOMSON: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MS. THOMSON:

25 Q Ms. Lacey, I know we've had a little bit of trouble

1 with the audiovisual equipment. If at any time you can't hear
2 me or see me, will you -- or us, will you let me know?

3 A Yes.

4 Q Thank you. I want to direct your attention back to
5 July of 2013. At that time, were you living in Las Vegas?

6 A Yes.

7 Q And do you remember the address at which you were
8 living?

9 A No, I don't.

10 Q If I told you an address of 2229 Carroll Street,
11 would that sound correct to you?

12 A Yes.

13 Q Do you recall what your phone number was at that
14 time?

15 A No, I don't.

16 Q At some point, did you speak with detectives?

17 A Yes.

18 Q And do you remember giving them both your home
19 address and your cell phone address at that time?

20 A I'm pretty sure I did.

21 Q You do not think that you gave them your phone
22 numbers?

23 A No, I'm pretty sure I did.

24 Q Okay. I'm sorry. I heard you wrong. Would a home
25 phone number of 776-8067 sound correct to you?

1 A I have no idea.

2 Q Okay.

3 A I don't remember.

4 Q And do you remember if the cell phone number may
5 have been 619-8505?

6 A I don't remember.

7 Q Okay. On July 9th of 2013, did you know an
8 individual by the name of Gary Chambers?

9 A Yes.

10 Q And did you know him by a different name also?

11 A Yes.

12 Q Was that different name Money?

13 A Correct.

14 Q What was your relationship to him in July of 2013?

15 A We were boyfriend/girlfriend.

16 Q Was he living with you at that time?

17 A Yes.

18 Q And in July of 2013, did you have a vehicle?

19 A Yes, I did.

20 Q Was it owned by you or owned by a relative?

21 A By my great-aunt.

22 Q Were you allowed to possess it, drive it, use it?

23 A Yes, I was power of attorney.

24 Q Okay. And do you recall what kind of vehicle that
25 was?

1 A It was a Saturn Vue.

2 Q What is your great-aunt's name?

3 A [indiscernible] Henderson.

4 Q Thank you. Do you recall what the license plate on
5 that vehicle was?

6 A I just know it was a handicap, I don't remember.

7 Q You indicated previously that you did talk to
8 detectives. Do you remember if you told the detectives what
9 that license plate number was?

10 A I don't remember.

11 Q Does a handicap plate 96679 sound correct?

12 A I don't remember.

13 Q On July 9th, 2013, that morning, do you remember if
14 Gary Chambers had stayed with you the night before and left
15 from your home?

16 A I think he stayed -- I think he was there the night
17 before.

18 Q And when he left that morning, that evening
19 detectives came to talk to you, correct?

20 A Yes.

21 Q When the detectives came to talk to you, did they
22 also take your vehicle?

23 A Yes.

24 Q Did you later get that vehicle back?

25 A Yes.

1 Q Do you remember about what time Gary had left that
2 morning?

3 A I have no idea.

4 Q And do you remember if he had come back at all
5 during the day before the detectives came to your house?

6 A No, he did not.

7 Q Do you remember if his daughter came to your house
8 during the day?

9 A I don't remember.

10 Q And do you remember what his daughter's name was or
11 is?

12 A Yes.

13 Q And what is that?

14 A Erika Chambers.

15 Q Do you remember if at any time during that day he
16 called you at the house?

17 A I don't remember.

18 Q Do you remember telling detectives that he called
19 you between 10:30 and 11 a.m. from a number that you
20 recognized as belonging to D-Nuts?

21 A No, I don't remember.

22 Q If you don't recall having that phone call, do you
23 remember if you talked to him at all during that day before
24 the police came to talk to you after he left that morning?

25 A I don't remember.

1 Q Do you remember him telling you that he was in some
2 shit?

3 A No.

4 Q Do you remember him telling you to erase the call
5 log on your home phone number?

6 A No.

7 Q How did you get that -- well, when he left that
8 morning, did he take the vehicle with him?

9 A I think so.

10 Q Do you remember how you got the car back?

11 A I don't remember.

12 Q You said that his daughter Erika came to the house
13 that day. Do you recall approximately what time?

14 A Yeah, she did bring me the car. I don't know --

15 Q Do you remember if it was before or after your son
16 got out of school?

17 A I don't remember.

18 Q Now, talking a little bit before July 9th, and I
19 want to direct you specifically to July 7th or 8th, did you
20 see Mr. Chambers with a gun?

21 A Yes.

22 Q And was that in your home?

23 A It was in our house.

24 Q How did you react to that?

25 A I told him [indiscernible].

1 Q You told him to get it out of the house because you
2 don't like guns?

3 A Correct.

4 Q And did he take it out of the house?

5 A Yes.

6 Q When you saw the gun, was it by itself or was it in
7 a holster?

8 A I don't remember.

9 Q Do you remember if it was a revolver or a
10 semiautomatic?

11 A I don't even know what that is.

12 Q Do you remember telling the detectives that when you
13 saw the gun it was in a black material case?

14 A No, I don't remember.

15 Q When you told him to get rid of it, did he do that,
16 as far as you know?

17 A I think so. I'm not sure.

18 Q Do you remember him telling you that he got rid of
19 the gun?

20 A I don't remember.

21 Q Do you remember him telling you that he was going to
22 do something stupid and that's why he got rid of the gun?

23 A I don't remember.

24 Q Did you know his cousin at that time? And
25 specifically --

1 A [indiscernible]

2 Q I'm sorry, if you could repeat that again. I was
3 talking.

4 A I know a few of his family members.

5 Q Did you know someone who went by the name Bamm?

6 A Yes.

7 Q And do you know if that person worked at Van's
8 Trailer Oasis?

9 A I remember he worked at some trailer park.

10 Q Do you know if that trailer park was on Las Vegas
11 Boulevard?

12 A I think so.

13 Q July 9th, 2013, did you believe that Money or Gary
14 Chambers purchased meth in a short time before that?

15 A I don't know.

16 Q Do you know where he would get his meth from?

17 A I don't remember.

18 Q Do you remember telling detectives that you believed
19 that he bought it from Lisa?

20 A I don't remember [indiscernible]

21 Q Do you remember telling detectives that you had
22 never met Lisa, you couldn't pick her out?

23 A [indiscernible]

24 Q Do you remember whether Gary was unhappy about the
25 product that Lisa had provided?

1 A I don't remember.

2 Q Do you remember telling detectives that a couple
3 weeks before the interview he had talked about robbing Lisa?

4 A I don't remember.

5 Q Do you remember telling detectives that he said that
6 Lisa was a bitch and made all this money and that he was going
7 to rob her one day?

8 A I don't remember.

9 Q Do you remember telling detectives that he told you,
10 being Gary told you, that she has a bunch of money and she
11 rips people off?

12 A I don't remember.

13 Q In July of 2013, and I'll say specifically July 8th
14 and before, how would you have described your relationship
15 with Gary?

16 A I don't remember.

17 Q Would you describe your relationship as -- was the
18 relationship generally good, generally bad or just sort of
19 there?

20 A I don't remember.

21 MS. THOMSON: Court's indulgence. I'll pass the
22 witness.

23 THE COURT: All right. Counsel, it's your
24 opportunity.

25 CROSS-EXAMINATION

1 points that he wants to make.

2 MS. THOMSON: Certainly.

3 THE COURT: All right? We've got to be fair. Go
4 ahead.

5 BY MS. THOMSON:

6 Q Did you know whether Erika Chambers had a friend by
7 the name of Bridgett Graham?

8 A Yes, she did.

9 MS. THOMSON: Thank you.

10 THE COURT: All right. Whatever you want.

11 MR. YANEZ: Court's indulgence. I have nothing
12 further, Judge.

13 THE COURT: Nothing further?

14 MR. YANEZ: Nothing further.

15 THE COURT: Anything from the jurors? Nothing from
16 the jurors? I think we're done here then.

17 MS. THOMSON: Correct.

18 THE COURT: All right. Ms. Lacey, thank you for
19 your time. You're excused. You're free to go and we'll
20 disconnect the audio video feed.

21 THE WITNESS: All right. Thank you.

22 THE COURT: All right. State may call its next
23 witness. Do you have another witness?

24 MS. THOMSON: We do not have another witness today.
25 We anticipate two or three on Monday who were not available

1 today.

2 THE COURT: All right. Do you guys want to go home
3 early or just take a break? I'll let you guys go. Ladies and
4 gentlemen, this is time for your overnight recess. During
5 this recess you're admonished not to do any research about the
6 issues of the case or the subject matter of the case. You're
7 not to talk to anybody about the case or the issues in the
8 case. You're not to form any opinions. You're not to
9 converse with any of the witnesses or the parties. And all
10 the other prior admonishments I have to you apply. Do you
11 understand that?

12 Let's see. Today is Friday. I'll need you back
13 here Monday at nine. We'll make a lot of progress Monday.
14 Sorry about the technical difficulties that we had, but that
15 was a big part of our problem today. Thank you very much.
16 Please gather your belongings and have a safe weekend.

17 (Jurors recessed at 3:36 p.m.)

18 THE COURT: All right. Please be seated. So we're
19 outside the presence of the jury. We've been bouncing around,
20 in and out with all kinds of stuff. I wanted to make sure
21 that everybody has a chance to make whatever record they might
22 want to make. I think you guys are all pretty -- done a
23 pretty good job of putting your positions on everything on the
24 record. Is there anything else that you want to add?

25 MS. THOMSON: Not from the State.

1 MR. YANEZ: No, Judge.

2 THE COURT: Okay. So we'll start at nine. Who's
3 your witness going to be at nine?

4 MS. THOMSON: We will, and it depends on their
5 schedules, but it will either be Detective Gillis or the
6 coroner or Detective Raetz or McCarthy who we need for
7 purposes, who I had forgotten about, impeachment of this
8 witness. Then Bridgett Graham or a reading of the testimony
9 or not at all.

10 THE COURT: Is there anything pending in front of me
11 to be decided still?

12 MS. THOMSON: The only thing that will be pending to
13 be decided is the motion to admit preliminary hearing
14 testimony of Ms. Graham. Based upon the last contact with her
15 that was in response to my telling her when she said that she
16 wasn't coming that she would be here on Sunday she promises, I
17 would rather not have that decided because obviously if she's
18 here the whole thing's moot.

19 THE COURT: All right. So I won't decide that until
20 you squarely present it to me.

21 MS. THOMSON: And I will have an affidavit for the
22 Court on Monday if that's the road we're taking.

23 THE COURT: All right. We should finish your case
24 in chief on Monday then sounds like.

25 MS. THOMSON: Absolutely. And I would actually --

1 if we start at nine I'd be surprised if we're not done by
2 lunch.

3 THE COURT: Good. That's why Mr. Yanez said he's
4 planning to have a witness available at three. Might be
5 optimistic, but let's hope. Thank you, folks. Court's
6 adjourned.

7 MS. THOMSON: Thank you.

8 (Court recessed for the evening at 3:39 p.m.)
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ACKNOWLEDGMENT:

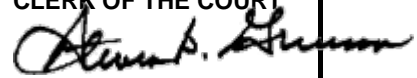
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A handwritten signature in cursive script, reading "Kimberly Lawson", is written over a horizontal line.

KIMBERLY LAWSON
TRANSCRIBER

UNCERTIFIED ROUGH DRAFT

AA990



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C292987-1
)	DEPT NO. II
vs.)	
)	
GARY LAMAR CHAMBERS,)	TRANSCRIPT OF
)	PROCEEDINGS
Defendant.)	

BEFORE THE HONORABLE RICHARD SCOTTI, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

MONDAY, FEBRUARY 27, 2017

APPEARANCES:

For the State:	MEGAN S. THOMSON, ESQ. Chief Deputy District Attorney BRYAN S. SCHWARTZ, ESQ. Deputy District Attorney
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For the Defendant:	ABEL M. YANEZ, ESQ.
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AA991

I N D E X

WITNESSES FOR THE STATE:

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MATTHEW GILLIS

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WITNESSES FOR THE DEFENDANT:

MICHAEL LEVY

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1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 27, 2017, 9:14 A.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: Good morning, folks.

5 MS. THOMSON: Good morning, Your Honor. May I
6 approach your clerk? I have an affidavit to file this
7 morning.

8 THE COURT: Yes.

9 MS. THOMSON: Thank you.

10 (Pause in proceedings)

11 THE COURT: All right. So we're on the record in
12 State versus Chambers, C292987. I see I have proposed jury
13 instructions. Thank you, folks. I'll study these today and
14 tonight and perhaps tomorrow sometime we'll have time to
15 settle instructions then.

16 MR. YANEZ: Sounds like a plan.

17 THE COURT: Anything preliminarily before we bring
18 the jury in?

19 MR. YANEZ: Yes, one thing. My understanding is
20 that, if not the next witness, one of the witnesses today is
21 going to be a detective who's going to impeach the testimony
22 of Cynthia Lacey based on her memory issues that she had. My
23 understanding, the way the State wants to do it is they have
24 -- there was a full-blown interview done of that witness. The
25 transcript is like 40 to 50 pages. The State has provided me,

1 and I listened to it outside, a audio DVD of just select
2 portions of that interview. I think some of the questions
3 that the State asked that witness, Cynthia Lacey last week,
4 are encompassed in some of these responses, but I think
5 there's other stuff in here that perhaps wasn't encompassed in
6 those questions in order to bring it in as a prior
7 inconsistent statement.

8 So my objection is to this audio just being played.
9 I think the more appropriate procedure, so that we're dealing
10 specifically with each prior inconsistent statement, is that
11 the detective is asked the question and responds with what the
12 answer was during that interview. I don't think it's
13 appropriate to just play an entire segment of the interview,
14 edited, because, again, I think there's portions in here that
15 weren't included in questions that were asked the witness. So
16 that's my objection.

17 THE COURT: I understand your position. Response?

18 MS. THOMSON: I disagree with that. I went through
19 this weekend and redacted portions that she remembered or
20 portions that she was --

21 THE COURT: Redacted from the audio?

22 MS. THOMSON: Yes. So the original interview --

23 THE COURT: You would agree -- let me make sure
24 we're on the same page in terms of the law. You would agree
25 that an audio of her prior statement that's consistent with

1 something she said on the stand would not be admissible.

2 MS. THOMSON: Correct.

3 THE COURT: And an audio of a statement, a fact that
4 she made that didn't relate to something you asked her on the
5 stand would not be a prior inconsistent statement because it's
6 a different topic or different fact.

7 MS. THOMSON: Correct.

8 THE COURT: So we're on the same page that the jury
9 should only hear prior inconsistent statements, those that are
10 inconsistent with what she said on the stand.

11 MS. THOMSON: Correct.

12 THE COURT: And that was your understanding when you
13 went and redacted the audio?

14 MS. THOMSON: Yes, Your Honor.

15 THE COURT: All right. So defense counsel says that
16 he has -- not that he doesn't believe you, but he has some
17 concern that you might stray from those guidelines.

18 MS. THOMSON: Well, he's listened to it. He tells
19 the Court that there are things in there that are not
20 supported as a prior inconsistent.

21 THE COURT: Should he give us an example or do you
22 know what he's referring to and you can --

23 MS. THOMSON: I don't know, because when I went
24 through I included only the things that she had indicated she
25 didn't remember or she wasn't sure.

1 THE COURT: Can you give us an example?

2 MR. YANEZ: Well, it's tough to, Judge, because I
3 obviously don't have all of the questions that the State asked
4 the witness. And additionally --

5 THE COURT: They asked her a lot and she pretty much
6 said I don't know or I don't remember to absolutely
7 everything.

8 MR. YANEZ: Right.

9 THE COURT: So pretty much, if there was any fact
10 that she gave that relates to the incident, you know, it's
11 probably inconsistent with an I don't know answer.

12 MR. YANEZ: Right, but I don't think we deal in
13 probabilities. We need to have assurances here. And again, I
14 just listened to it one time outside. I'm just going on kind
15 of my gut feeling on what my memory is versus what I heard one
16 time on the audio. So, I just wanted to make that record.

17 THE COURT: Is there anything prejudicial that she
18 would say? I mean, if it's just something that's nonmaterial
19 that she's going to say on the audiotape, that's neither
20 consistent or inconsistent, it's probably harmless. If you --
21 can you articulate anything that -- I mean, if she said, you
22 know, if she said there something very incriminating against
23 your client that she wasn't asked on the stand, I could see
24 that would be prejudicial. But I don't know if that's the
25 case here.

1 MR. YANEZ: I'm at a disadvantage. I can't just
2 listen to this today and go on this today.

3 THE COURT: When were you first provided with the
4 audiotape?

5 MR. YANEZ: About 10 minutes ago. And I just heard
6 it outside. Oh, are you --

7 THE COURT: Isn't that like an evidence discovery
8 issue?

9 MR. YANEZ: Hold on. Are you talking -- the
10 full-blown audio I had. The redacted -- I've had that. The
11 redacted version about 10 minutes ago.

12 THE COURT: I cut you off. What did you want to
13 say, Ms. Thomson?

14 MS. THOMSON: I don't remember. We think it's
15 admissible.

16 THE COURT: What's your solution?

17 MS. THOMSON: I mean, the reality is if I stand up
18 and ask the same questions that are on the audiotape,
19 counsel's not going to be in any different position he is
20 right now that he doesn't have the list of questions, the
21 inconsistencies. So to say that my presentation via audio is
22 any different than my asking the questions, really he's in no
23 different position. It's not prejudicial. What is on there
24 is inconsistent with what she said because she said, as the
25 Court noted, for most of her answers I don't know, I don't

1 remember. And we know that that is considered to be an
2 inconsistent statement.

3 MR. YANEZ: I think a way to handle it, I'm sure the
4 State has the questions it asked specifically to the witness.
5 It's simple to put the detective on there and say Cynthia
6 Lacey was asked this question, her response was I don't know.

7 THE COURT: That is one way to do it, but another
8 way the rules do permit the proponent of the prior
9 inconsistent statement to put the entire prior inconsistent
10 statement into evidence. You are allowed to do that.

11 MR. YANEZ: The detective can do that.

12 MS. THOMSON: But the same way Mr. Yanez on Friday
13 was like it's my cross-examination, I get to control how I do
14 it. It's the State's presentation of evidence. Just because
15 he would rather the detective testify --

16 THE COURT: I'm just worried, what happens -- you're
17 right about that. I'm just worried -- I mean, I accept your
18 representation. I trust that you do really good work and you
19 don't want a mistrial. I'm just concerned what happens if we
20 -- you miss something and we hear it and then I'm going to
21 have a motion for mistrial. Are you confident that there's
22 nothing on there that is stuff other than prior inconsistent
23 statements?

24 MS. THOMSON: Yes.

25 THE COURT: All right. I'm going to go ahead and

1 allow it. You can reserve your objection if you hear
2 something that you believe is not a prior inconsistent
3 statement and is prejudicial, you can object. I'm not going
4 to require you to object in the presence of the jury, you can
5 object outside the presence when we take a break. This is on
6 the record, so you're protected with that. And then if you
7 think it's so highly prejudicial -- first of all, object if
8 it's prejudicial and then I can decide do we need a mistrial
9 or can we do a cautionary instruction or is there some other
10 way. Hopefully, there's not going to be a problem.

11 MR. YANEZ: And then two other points. I'm assuming
12 we're just playing it --

13 THE COURT: That's how we're going to do it.

14 MR. YANEZ: The State's not seeking to introduce the
15 audio as an exhibit, I'm assuming.

16 THE COURT: Are you going to introduce the audio as
17 an exhibit so that it becomes --

18 MS. THOMSON: Yes.

19 THE COURT: -- listenable to the jury back in the
20 deliberation room?

21 MS. THOMSON: Yes.

22 MR. YANEZ: I'd object to that. I think it's
23 putting undue --

24 THE COURT: Prior inconsistent statements, once
25 they're admitted, they're admitted for all purposes.

1 MR. YANEZ: That's correct, but I think an actual
2 audio is putting undue attention. The jurors are going to
3 think well, we don't have everyone's taped statement, how come
4 we have this person's taped statement. This must be more
5 important than all the other witnesses that testified. I
6 don't think it's appropriate to actually admit it as an
7 exhibit and let the jury have it in the back.

8 THE COURT: Do you have some authority for that? I
9 mean, I've let 9-1-1 calls go back to the jury.

10 MR. YANEZ: Well, I think this is a little
11 different. It's a witness. I'm sure I can find some
12 authority, but that's my understanding is typically --

13 THE COURT: As to the statement, isn't the audio
14 better evidence than just a dry transcript? The jury has,
15 they can better judge the credibility based on inflection,
16 tone, voice, sound.

17 MR. YANEZ: The issue is it's giving it undue or too
18 much attention. Typically, when they introduce a confession
19 of a defendant, typically that doesn't get admitted. It's
20 just played before the jury.

21 THE COURT: See if you can come up with some
22 authority. Right now my [indiscernible] is to allow it to
23 back to the jury at the time of deliberation. If you come up
24 with some authority between now and when the jury starts to
25 deliberate, I'll consider it.